

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

DR 5 of 2020

Palan Ali Naskar & Sabir Ali Laskar

Vs

The State of West Bengal

With

C.R.A 85 of 2020

Palan Ali Laskar & Anr

Vs

The State of West Bengal

For the appellants :Mr. Indrakant Jha, Advocate

For the State :Ms. Anusuya Sinha, Advocate
Mr. Pinak Kr. Mitra, Advocate

Heard on : August 23, 2022

Judgment on : September 09, 2022

Bibhas Ranjan De, J.:-

1. Two appellants were found guilty and convicted on 27.01.2020 under Section 363/302/201/379/411/34 of the Indian Penal Code (for short IPC) and by the order dated 28.01.2020 they

were sentenced to death for the offence punishable under Section 302 of IPC. They are also sentenced for the offences as follows:

Offence Punishable under Section	Sentence
1. 63/34 IPC	Sentence to suffer rigorous imprisonment for a term of ten years each.
2. 379/411/34 of IPC	Sentence to suffer rigorous imprisonment for a term of 3 years each

And the sentences were directed to run concurrently.

2. Ld. Additional Sessions judge 1st Track Baruipur, South 24 Parganas passed the aforesaid order of conviction and sentence giving rise to Death Reference Case No. 5 of 2020 since under Provision of Code of Criminal Procedure (for short Cr.P.C), death sentence recorded by a Judge is subject to confirmation by this Court. Sabir Ali Laskar and Palan Ali Laskar preferred an appeal against that order of conviction and sentence registered as Criminal Appeal No. 85 of 2020. In connection with Sessions Trial Case No. 02 (10) 2012 arising out of Sessions Case No. 39 (2) 2008 corresponding to Sonarpur Police Station Case No. 509 of 2007 dated 27.09.2007.

- 3.** We propose to dispose of both the death reference as well as criminal appeal preferred by the convict appellants by this common judgement.
- 4.** The prosecution case in a nut shell is: On 27.09.2007 one Daulat Ali Mondal of village Joykrishnapur, Chiary Post Office, Banhoogly in the District of South 24 Parganas, lodged a written compliant before the officer in charge Sonarpur Police Station South 24 Parganas alleging inter alia that his daughter aged about 12 years was found missing on and from 22.09.2007 at about 12 to 12.30 pm and on 23.09.2007 at about 3.00 p.m. her dead body was found in a nearby canal inside a guava garden situated at Joykrishnapur. Written complaint further shows that Polan Ali Laskar (for short 'A1'), Sabir Ali Laskar (for short 'A2') and one of their associate kidnapped his minor daughter and after outraging her modesty threw her dead body inside the canal after snatching her ear rings. It is further alleged that few days ago A1 and one of their associate threatened to abduct her and murder after outraging her modesty.
- 5.** On receipt of the said complaint the Sonarpur Police Station case no. 509 of 2007 dated 27.09.2007 was started under Section 363/376(g)/302/201/34 of Indian Penal Code (for short IPC) and one Sub Inspector (for short S.I), Somnath Dey

attached to Sonarpur Police Station was entrusted with the investigate this case.

6. During investigation S.I Somnath Dey, (PW-14) visited the place of occurrence and prepared rough sketch map with index (Exhibit 10). He examined available witnesses and recorded their statement under Section 161 of Criminal Procedure Code (for short 'Cr.P.C') and collected papers in respect of U.D. (unnatural Death) case being no. 176 dated 23.09.2007. He arrested A1, A2 and Bulu Sarkar @ Sardar during police custody a pair of ear rings of deceased was recovered by a seizure list (Exhibit 4/4) following statement of A1 (exhibit 17). He also collected the Post Mortem Report (exhibit 11). On his prayer Test Identification Parade (for short T.I. Parade) was held in respect of seized ear rings of the deceased.
7. On completion of Investigation, he submitted charge sheet against all three accused/A1, A2 and one Bulu Sarkar @ Bulu Sardar under Section 363/367(g)/302/201/34 of IPC with adding sections 379/411 of IPC. Ld. Additional Chief Judicial Magistrate, Baruipur, South 24 Paragans, took cognizance of the offence and committed the case in respect of A1 and A2 to the Session Judge, at Alipur who then transfer the case to the Court of Ld. Additional Sessions Judge, Fast Track Court, Baruipur,

South 24 Parganas for trial. It is pertinent to mention here Ld. Additional chief judicial Magistrate Baripur, inquired about the claim of juvenility of Bulu Sarkar by his order dated 27.12.2007 and he found Bulu sarkar as a juvenile and passed an order directing juvenile Bulu Sarakar to be produced before juvenile justice Board at Salt Lake, Kolkata, on 02.01.2208. Accordingly, Bulu Sarkar was produced before Juvenile Justice Board for trial.

- 8.** On receipt of the record Ld. Trial Judge, framed charges against two accused persons (appellants of this case) under Section 363//34/376(F)/34/ 302/34/379/411/34 of IPC and contends of the charge were read over and explained to the accused/ appellants who pleaded not guilty and claimed to be tried. Hence the trial.
- 9.** Prosecution examined 18 witnesses and proved a good number of documents marked as exhibit 1 to 21. One pair of ear ring was admitted in evidence as Mat exhibit I and appellants were examined under section 313 of Cr.P.C at the end of trial. No evidence was adduced on behalf of the appellants.
- 10.** Upon consideration of the evidence on record and the submissions made by the parties, Ld. Judge has observed that nothing improvement and/or embellishment and/or major

contradictions coming out from the statement recorded under Section 161 of Cr.P.C did not make any difference to the prosecution case by virtue of explanation to Section 162 of Cr.P.C as there was sufficient corroborating evidence. Thereby, the Trial Court has reached the conclusion that the appellants are guilty of the offence and has convicted them and sentenced to death by the order of conviction dated 27.01.2020 and 28.01.2020 and also ordered sentence in respect of other offences charged against the accused.

Argument Advanced:

11. Ld. Advocate, Mr. Indrakanta Jha appearing on behalf of the appellants drew our attention to the evidence of witness who are interested and cannot be relied upon in a case of circumstantial evidence. Assailing the evidence of Prosecution Witness no.-1 and prosecution Witness (for short PW) -2 Mr. Jha has contended that they did not know how her daughter was missing or how she died and PW-3 was not present at the time of recovery of the dead body. PW-4 could not say the place where from dead body was recovered.

12. Mr. Jha has referred to the evidence of PW-5 and submitted that according to his evidence the dead body was identified by PW-1 and PW-2 (Parents of the deceased) but these

two witnesses clearly deposed that they did not visit the place of recovery of dead body. At the same time PW-6 was also not present at the time of recovery of dead body.

13. Mr. Jha further took us to the evidence of PW-11 together with PW-1 and PW-2 and tried to establish a contradiction regarding presence of PW-1 and PW-2 either at the time of inquest report or seizure of earring.

14. Mr. Jha strenuously contended about laches on the part of PW-14 (Investigating Officer) who did not examine the autopsy Doctor and failed to recover ligature by which death was caused and thereby Mr. Jha has tried to create a doubt regarding homicidal death.

15. Mr. Jha has further submitted that prosecution failed to prove the 'last seen' theory in respect of offence of kidnapping as PW-1 (mother of the deceased) testified that her deceased daughter was with her till 11.30 a.m. and thereafter she left for playing in the neighbour's house.

16. In support of his contention Mr. Jha has relied on following authorities:-

- ***(2018) 3 C. Cr. LR (CAL) 541 (Tarak Dey v. State of west Bengal)***

- ***(2015) 3 C. Cr. LR (SC) 34 (Tomaso Bruno & anr. v. State of U.P)***
- ***(2019) 2 C. Cr. LR (SC) 8 (Prakash Chand v. State of Himachal Pradesh).***

17. Per contra, Ld. Advocate Ms. Anusuya Sinha appearing on the behalf of the State has referred to the evidence on record particularly evidence of parents (PW-1 & PW-2) of the deceased, and maternal uncle (PW-5) of deceased as well as evidence of other witnesses and submitted that all the circumstances appearing in the evidence including the recovery of earring following a statement of accused/A1 are sufficient to prove the guilt of the appellants leaving no doubt.

18. That apart, Ms. Sinha supporting the impugned judgement submitted that the conviction of the accused persons/appellants is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.

Analysis of Evidence

19. In this case prosecution examined as many as 18 witnesses as follows:-

Prosecution witness no.	Name & Identification of the witness
PW-1	Farida Bibi, mother of the deceased
PW-2	Daulat Ali Mandal father of the

	deceased who lodged complain
PW-3	Amirul @ Babu Mandal, cousin brother of deceased
PW-4	Badsha Ali Mandal (Neighbour of the deceased)
PW-5	Ramjan Molla, another cousin brother of decease
PW-6	Hider Ali Gharami, uncle of deceased
PW-7	Omed Ali Gharami, another uncle of deceased
PW-8	Mahibul Hossain, The then Assistant sub Inspector attached Sonarpur PS, who prepared inquest report
PW-9	Sk. Barhan, neighbour of deceased
PW-10	Nasir Molla, neighbour of deceased
PW-11	Abdulla Mondal, Uncle of deceased
PW-12	Ananda Gopal Sannal, The then assistant Sub inspector of Police Soanrpur PS, who receipt the complaint and registered the case after preparing formal FIR (exhibit-8)
PW-13	Bikash Mandal, Home Gurad, who accompanied the dead body to Mominpur morgue in connection UD Case No. 176 dated 23.09.2007
PW-14	The then sub inspector of Police who investigated this case
PW-15	Dr. D. Sarkar, the then A.C.M.O.H Medico Legal, South 24 parganas at Alipur who performed Post Mortem on the dead body of the deceased
PW-16	Swapan Mukherjee, the then Constable attached to Sonarpur PS
PW-17	Mrs. Supra Rai, the then Senior Scientific Officer attached to forensic Science Laboratory Biological Division

PW-18	Noor Ali Laskar, another uncle of deceased
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20. We have carefully examined the entire facts and evidence on record. From the evidence on record we find that in this case to bring home the charges framed against the appellants, the prosecution side has fully relied on the evidence of PW-1 to 7, PW-9 to 11 and PW-18 and so far as the charge of murder is concerned and so far as the other charges are concerned prosecution relied on the evidence of rest witnesses including PW-1, PW-9 and PW-10.

21. There is no denying of the fact that the victim was found missing from her house on 22.09.2007 and her dead body was found floating in a canal beside Guava Garden on 23.09.2007. That the place of recovery of the dead body has been duly corroborated by the sketch map (exhibit -10) with index (exhibit 10/1) which was prepared by Investigating Officer (for short I.O) (PW-14). On careful scrutiny of the evidence of I.O (PW-14) we do not find any single question contradicting or denying the preparation of sketch map with index.

22. From the evidence of parents (PW-1 & PW-2) and maternal uncle (PW-7) of the deceased we find that on 22.09.2007 their daughter was found missing. They started searching their

daughter along with the neighbours. They saw the shoe of their daughter at the pond. They casted net at the pond but their daughter was not found. On the next day appellants as well as one Bulu Sarkar @ Sardar called PW-7 and took him to the Guava Garden. After reaching there the appellants and Bulu Sarkar showed PW-7 the dead body of the victim floating in the canal near Guava Garden. At that time A2 told PW-7 regarding colour of wearing apparel of victim also. PW-7 returned home and informed other people then PW-2 along with other neighbours' went to Guava Garden. Police was informed and police took away the dead body of victim. Both the witnesses i.e PW-1 and PW-2 have testified that one day before her death deceased told them that appellants pulled her hands and threatened. In cross-examination of these two witnesses, we find that nothing contradictory has been elicited from their cross-examination regarding the fact of missing and recovery of the dead body. Both the witnesses deny all suggestions put to them.

23. From the evidence of I.O (PW-14) it is found that he collected relevant papers in connection with unnatural death case being no. 176 dated 23.09.2007 which was recorded in connection with this case.

24. PW-8, Assistance Sub Inspector of Police attached to Sonarpur PS performed inquest (exhibit -5) at the place where dead body was recovered in connection with UD Sonarpur PS Case No. 176 of 2007 dated 23.09.2007. On 27.09.2007 the written complaint was lodged by PW -2 (father of the deceased). It is true that written complaint was filed after four days from the date of recovery of the dead body. Written complaint (exhibit-3/1) shows the explanation of delay due to busy in last rites of his daughter and also due to their mental shocked for death of his minor daughter. The reason explained in the written complaint is found acceptable as that was never challenged either in course of his cross examination or at the time of argument.

25. Mr. Jha, referring a case of **Prakash Chand** (supra), tried to make this Court understand that delay of four days in lodging F.I.R is fatal to prosecution case.

26. In **Prakash Chand** (supra) Hon'ble Apex Court dealt with a case of 376/506 of IPC where FIR was lodged after 7 months of alleged incident and such huge delay has not been explained satisfactorily unlike our case where a dejected and shocked father lodged a written complaint only after four days after completing last rites of his minor daughter.

- 27.** From the evidence of PW-1 to PW-7 and prosecution witness no. 9 to 11 & 18 we find that it is an admitted position that victim i.e. minor daughter of PW-1 and PW-2 was found missing on an form 22.09.2007 and was found dead lying in a Kennel within a Guava Garden which has been duly corroborated by sketch map with index (exhibit 10 & 10/1).
- 28.** From the evidence of witnesses it is also not disputed from the evidence of PW- 1 to PW-7 and also from the evidence of PW- 9 to PW-11 and 18 that after missing of victim on 22.09.2007 all this witnesses started searing for her and even they casted net in a nearby pond where shoe of victim was found but in spite of thorough search victim was not found.
- 29.** From the evidence of PW-7 (Maternal uncle of the deceased) has specifically stated that on the next day i.e on Sunday in the morning they again stared searching his niece and at about 3/3.30 p.m. he was sitting in the bank of pond while appellants along with Bulu came to him and asked him to go with them. He was taken to a place inside the Guava Garden beside Suti Khal. Thereafter, those three persons showed PW-7the dead body of the deceased wearing black colour frock. Then he returned home and informed others. He also narrated the same incident to the Ld. Magistrate who recorded his statement

under Section 164 Cr.P.C (exhibit-15). We found no single contradiction between his evidence recorded before the Court and the statement (exhibit-15) recorded by Ld. Magistrate under Section 164 Cr.P.C. PW 1 and 2 also corroborated the fact that the appellants and Bulu showed the dead body of deceased to PW-7.

30. From the careful scrutiny of the cross examination of PW-7 we do not find any material discrepancies regarding the fact of showing dead body of victim in a canal of a Guava Garden at the instance of the appellants and one Bulu (juvenile).

31. Such fact of showing dead body of victim in a Canal of Guava Garden as per sketch map with index (exhibit 10 & 10/1) has been further ratified by A1 in reply to question nos. 18, 23 & 25 in course of his examination by the Ld. Judge under Section 313 of Cr. P.C. Again, A2 ratified the said fact of showing dead body of the victim in reply to question nos. 12, 18, 22 & 25. This fact was corroborated by other witnesses examined in this case as well.

32. From the evidence of PW-1 & PW-2 it appears that prior to death of their daughter once their daughter told them that appellants pulled their daughter's hand and also threatened. PW-1 in her evidence particularly in cross-examination has

deposed that houses of appellants are situated in the southern side of their house intervening only two houses. During cross-examination following questions were put to PW-1 as follows:-

“ It is fact that there is only the said one road to go to the house of Sabir or Palan from my house by the side of the pond.

It is not a fact that if any persons walk through the said road or talk on that road, that could be audible or visible from the house situated at the side of the said road.”

- 33.** The questions and answers tendered by the PW-1 in her cross-examination it almost clear that on the alleged date of missing the victim went to the neighbouring house i.e houses of appellants for playing and by putting the aforesaid question to the witnesses from the side of the defence it appears that defence took an effort to prove that at the time of going to the neighbouring houses of appellants victim slipped into the pond. We are not dealing with any case of recovery of dead body of the victim from the pond near the house of complainant and the appellants. Therefore, by putting the aforesaid questions during cross-examination defence side virtually added a support to the prosecution case.

34. Now we propose to come to the evidence of doctor. PW-15 who performed the Post Mortem examination and during examination he found the following injuries:-

“1. One ligature mark encircling the neck measuring 12” X 1” X no gap. The skin over the ligature mark was brownish abraded and punchmentised. The sub tissue under the ligature was whiten and hardened with 3” X 3” bruise in the neck muscle. The ligature mark was transversed circular continuous and at the lower border of the thyroid cartilage. Fracture of the greater carnal hyroid seen. Bruise over first to sixth tracheal region.

2. 4” X 6” bruise over the left chest to Palm.

3. 4” X 5” bruise over the middle of arterial chest wall

4. Bruise over the rectal mucus membrane.

5. Bruise over the vaginal wall and cervix. The injuries showed the vital reaction.

In my opinion the death was due to the effects of strangulation by ligature antemortem and homicidal in nature. This is the Post Mortem Report which was written by me under my own hand writing and signature. Let the Post Mortem Report in original be marked as Ext. 11.”

35. From the evidence of PW-15 it is found that death was due to effect of strangulation by ligature ante mortem and homicidal

in nature. Post Mortem report was admitted in evidence (as exhibit -11). Mr. Jha in course of his argument pointed out that Investigating Officer PW-14 did not take any effort to recover ligature and that is why evidence of doctor cannot be taken into account. In support of his contention, he referred to the ratio of ***Tomaso Bruno*** (supra) wherein Hon'ble Apex Court dealt with the incident of murder which took place in a hotel room having CCTV facilities and in that case neither any CCTV footage was recovered nor any blunt substance was recovered though cause of death was due to strangulation by the support of blunt and hard substance.

36. We are sorry not to subscribe to the argument advanced by Mr. Jha on the issue of no recovery of ligature in our case. In the case at our hand dead body of the victim was recovered from a canal in a Guava Garden and far away from the house of the victim unlike the case dealt with by the Hon'ble Supreme Court in ***Tomasho Bruno*** (supra). Therefore, we cannot overlook the evidence of doctor who found several injuries and ligature mark on the body of the victim only because of no recovery of ligature by the I.O. That apart, we cannot over look the entire evidence and record supported by evidence of doctor even if there was any laches on the part of Investigating Officer.

Therefore, there is no doubt of the fact that victim was murdered and thrown away in a canal near Guava Garden.

37. Next, we propose to discuss evidence on the issue of recovery of ear rings. From the evidence of PW-5, PW-9, PW-10 & PW-11 we find that after 2/3 days of arrest of appellants Police came to the house of Palan and seized one pair of gold ear rings from the bed of Polan in presence of those witnesses. The seizure list including signature of witness were admitted in evidence as exhibit 4 series. Those witnesses also identified that earrings (Mat exhibit-1) in Court also. During investigation Police recorded statement of A1 and relevant portion of that statement leading to discovery of earrings was admitted in evidence as exhibit 17. It is fact that statement of accused before Police bears no value in the eye of law but the fact stated in the statement leading to discovery of any incriminating article is very much admissible under Section 27 of the Evidence Act as an exception. From the cross-examination of the aforesaid witnesses we find hardly any infirmity or contradictions with regard to recovery of earrings from the house of A1 following a leading statement (exhibit-17) of Palan.

38. After scanning of entire evidence available on record we find the following chain of circumstances as proved against the appellants:-

- On 22.09.2007 the victim was found missing.
- Victim was playing in the neighbouring houses of the appellants.
- All the neighbouring people started searching the entire area till 3.00/3.30 p.m. on the next day i.e 23.09.2007.
- On 23.09.2007 appellants and one Bulu Sarkar (who was forwarded Juvenile Justice Board for trial) at about 3.30 p.m. informed about dead body of the minor victim to her maternal uncle (PW-7) who was sitting beside a pond.
- Appellants and Bulu Sarkar took PW-7 to a Guava Garden beside Suti Khal far away from the residence of victim.
- Appellants and Bulu Sarkar showed PW-7 the dead body of victim lying in Suti Khal.
- After arrest of appellants police recorded statement of both the appellants and appellant Palan made a statement leading to recovery of ear rings of victim, during their Police custody.
- Investigating Officer (PW-14) seized a pair of earrings of victim following that statement (exhibit-17) of appellant Palan and

seized in presence of witnesses (PW-5, PW-9, PW-10 & PW-11), under a seizure list (exhibit 4 series).

39. The aforesaid chain of circumstances against the appellants, in our view, is of conclusive nature. There is a complete chain of circumstances which show that in all human probabilities, the offence has been committed by the appellants furtherance of their common intention. Therefore, having regard to the entire evidence on record we concur with the order of conviction of appellants under Section 302/363/379/411/34 of IPC.

Sentence:-

40. The reasons given by the Ld. Trial Judge at the time of passing order of sentence we find hardly any balance sheet of aggravating and mitigating circumstances drawn up by the Ld. Trial Judge before passing order of sentence to death. Ld. Judge only focused on the effect of the crime on the society at large.

41. It is worthy to mention here that Mr. Jha did not argue on the point of sentence presumably for the presumably reason that he strenuously contended in favour of the acquittal of the accused. So, it is our duty to draw up a balance sheet of aggravating and mitigating circumstances in view of guideline

envisaged in a case of ***Manoj and others Vs. State of Madhya Pradesh, 2022 SCC Online SC 677 as follows:-***

“200. *In Macchi Singh, this court extrapolated the principles from Bachhan Singh, and merit repetition:*

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

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

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

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

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

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

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

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

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

40. *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death*

sentence is warranted, the court would proceed to do so.

206. *In Shankar Kisanrao Khade⁹⁸ this court developed yet another framework of the ‘crime test’, ‘criminal test’ and ‘rarest of rare test’ (which, was held to be distinct from the ‘balance test’ that was discouraged in Santosh Bariyar and subsequently, in Sangeet as well):*

52. *In my considered view, the tests that we have to apply, while awarding death sentence are “crime test”, “criminal test” and the “R-R test” and not the “balancing test”. To award death sentence, the “crime test” has to be fully satisfied, that is, 100% and “criminal test” 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the “criminal test” may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the 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 intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.

216. Mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstances of the criminal to enable the judge to decide between the death penalty or life imprisonment. An illustrative list of indicators first recognised in *Bachan Singh*¹¹⁰ itself:

“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.

227. *To do this, the trial court must elicit information from the accused and the state, both. The state, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh. Even for the*

other factors of (3) and (4) - an onus placed squarely on the state - conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

228. *Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:*

- a) Age*
- b) Early family background (siblings, protection of parents, any history of violence or neglect)*
- c) Present family background (surviving family members, whether married, has children, etc.)*
- d) Type and level of education*
- e) Socio-economic background (including conditions of poverty or deprivation, if any)*
- f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)*
- g) Income and the kind of employment (whether none, or temporary or permanent etc);*
- h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s),*

alienation of the individual (with reasons, if any) etc.”

42. It is needless to mention that in this case Trial Court could not elicit any information either from the accused or from the State regarding psychological and psychiatric evaluation of the accused which can help establishing proximity (in terms of timeline), to the accused's frame of mind (or mental illness, if any) at the time of committing crime and offer guidance on mitigating factors spelled out in ***Bachan Singh v. State of Punjab (1980) 2 SCC 684.***

43. However, on requisition of this Court vide order dated 11.08.2022 State has also submitted a report on 19.08.2022 divulging the conduct of the convict as follows:-

“His behavior inside this Correctional Home is good and I have not receipt any adverse report against him.”

44. In this particular case we find from the record that the appellants committed the crime along with another associate who was adjudged as juvenile and that associate faced his trial under Provision of the Juvenile Justice Act. We further find from the evidence that at the time of incident in the year of 2007 age of A1 was 21 years and A2 was 23 years of age and there is no record of any previous heinous crime committed by the

appellants and there is also no evidence that they will be danger to the society if death sentence is not awarded. Of course, we are convinced that offence committed by the appellants deserves severe condemnation but, on cumulative fact and circumstances of this case we do not think that this case falls within the category of '**rarest of rare cases**'.

Conclusion

- 45.** We find it appropriate to modify the sentence of death to that imprisonment for life for the offence punishable under Section 302 IPC.
- 46.** Criminal Appeal No. 85 of 2020 stands dismissed and Death Reference Being No. 5 of 2020 is refused.
- 47.** The order of conviction recorded by Ld. Trial Judge against the appellants under Section 302/363/379/411/34 of IPC in C.R.A No. 85 of 2020 is hereby confirmed subject to following modifications.
- 48.** Both the Appellants are sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each in default further rigorous imprisonment for five years each for the offence punishable under Section 302 of Indian Penal Code.
- 49.** Both the appellants are sentenced to suffer rigorous imprisonment for seven (7) years each and also to pay a fine of

Rs. 5,000/- each in default further to suffer rigorous imprisonment for one (1) year each for the offence punishable under Section 363/34 of the Indian Penal Code.

50. Both the Appellants are sentenced to suffer rigorous imprisonment for three (3) years each for the offence punishable under Section 379/411/344 of the Indian Penal Code.

51. All the aforesaid sentences shall run concurrently.

52. Issue modified jail warrant against appellant at once in the name of the Superintendant of Correctional Home where the appellants are lodged.

53. Let a copy of this judgment and order be communicated to the Ld. Trial Judge, forthwith. Trial Court records be submitted forthwith.

54. All pending applications, if any, stand disposed of accordingly.

55. All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.

56. Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[BIBHAS RANJAN DE, J.]

57. I Agree.

[DEBANGSU BASAK, J.]