

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

Death Reference No.1 of 2017

STATE OF WEST BENGAL

...APPELLANT

Vs.

SUJIT DHALI AND OTHERS

...RESPONDENTS

With

C.R.A. No.97 of 2017

SAMIR MONDAL

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

With

C.R.A. No.117 of 2017

SUJIT DHALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

With

C.R.A. No.140 of 2017**PROVASH DHALI****...APPELLANT****Vs.****STATE OF WEST BENGAL AND OTHERS****...RESPONDENTS**For the Appellant
[In CRA 140 of 2017]: Mr. Krishnendu Bhattacharya, Adv.
Mr. Debdas Khanna, Adv.
Mr. Priyankar Ganguly, Adv.
Ms. Shalini Bairagi, Adv.For the Appellant
[In CRA 117 of 2017 &
In CRA 140 of 2017]: Mr. Sandipan Ganguly, Sr. Adv.
Mr. Dipanjan Dutt, Adv.
Ms. Manaswita Mukherjee, Adv.

For the State

: Mr. Noguive Ahmed, A.P.P.
Ms. Trina Mitra, Adv.
Ms. Amrita Gaur, Adv.

Heard on

: 04.07.2022, 08.07.2022, 11.07.2022,
12.07.2022, 14.07.2022

Judgment on

: 02.08.2022

Joymalya Bagchi, J.:

The death reference and the criminal appeals have arisen out of the impugned judgment and order dated 08.12.2016, 09.12.2016 and 12.12.2016 passed by learned Additional Sessions Judge, 7th Court, Barasat, North 24 Parganas in Session Trial No.04(01) 2013 arising out of Session case No.32(12) 2012 convicting the appellants Provash Dhali, Sujit

Dhali and Samir Mondal for the commission of offences punishable under sections 449, 120B and 302 IPC in addition to conviction of Provash Dhali under section 25 of the Arms Act and sentencing them to suffer rigorous imprisonment for 10 years and pay a fine of Rs.10,000/- each, in default, to suffer rigorous imprisonment for one year for the offence punishable under section 449 IPC, rigorous imprisonment for life and pay a fine of Rs.10,000/- each, in default, to suffer rigorous imprisonment for one year for the offence punishable under section 120B IPC, sentence of death as well as fine of Rs.50,000/- each, in default, to suffer rigorous imprisonment for three years for the offence punishable under section 302 IPC and to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for one year for the offence punishable under section 25 of the Arms Act so far as Provash Dhali is concerned. Fine amount, if realised, was directed to be awarded to the minor sons of the deceased Avijit Biswas and Biswajit Biswas, P.Ws. 2 and 3 respectively.

Prosecution case:-

Prosecution case, as alleged against the appellants is to the effect on 10.04.2012 Benoy Biswas along with his wife Sheuli Biswas and two minor children Avijit Biswas and Biswajit Biswas had retired to bed after dinner. Amrita Biswas and Kagoti Biswas, parents of Benoy Biswas were also asleep in an adjoining room. Around 10.30 p.m. the appellants and others entered the room and started assaulting Benoy. Sheuli Biswas (P.W. 1) tried to save her husband. She requested them not to kill her husband.

Provash Dhali fired at her right hand. Her husband begged for mercy. Provash Dhali fired at the chest of Benoy Biswas. Hearing the noise, Benoy's sons woke up. His parents also came to the spot. Provash Dhali threw down Kagoti Biswas, mother of Benoy Biswas, and fired on her cheek. Kagoti suffered injury and died at the spot. Provash Dhali also threw down Amrita, father of Benoy, and fired at his cheek. Thereafter, the appellants dragged Benoy towards the field. Sheuli Biswas and her sons followed and saw the appellants mercilessly stab Benoy and fire at him. Sheuli and her sons fled from the spot and went to Adivasi Para. On the next day Sheuli and her father-in-law were removed to hospital. Her father-in-law was declared died at the hospital. Sheuli made statement before A.S.I. Biswajit Patra (P.W. 8), a police officer attached to Barasat Police Station. Her statement was reduced into writing and treated as FIR in the case. She was shifted to R.G Kar Medical College and Hospital and was finally discharged on 20.04.2012.

In the meantime, pursuant to a telephonic intimation received in the morning of 11.04.2012, P.W. 36, I.O., went to the place of occurrence. Another police officer S.I. Sushil Mallick (P.W. 10) conducted inquest over the bodies of Benoy Biswas and Kagoti Biswas resulting in registration of Barasat P.S. U.D. Case No. 154/2012 and 155/2012 respectively. Inquest over the dead body of Amrita Biswas was conducted by S.I. Mantu Mondal being U.D. Case No. 153/2012 dated 04.11.2012. At the place of occurrence P.W. 36 received information that statement of Sheuli Biswas recorded by P.W. 8, Biswajit Patra, has been treated as FIR. He prepared

sketch maps of the two places of occurrence – one where the body of Benoy Biswas was lying and the house of Benoy Biswas in whose verandah dead body of Kagoti Biswas was lying. He seized cartridges and ammunitions from the first place of occurrence and blood from the verandah of Benoy Biswas along with broken door from the room of Benoy. Subsequently, he seized two bullet heads from the verandah on 20.4.2012. He recorded statement of witnesses including that of Avijit Biswas and Biswajit Biswas, sons of Benoy. Their statements were also recorded by the Magistrate. Post-mortem was conducted over the bodies of Benoy, Amrita and Kagoti by P.W. 24, Dr. Supriti Ghoroi. P.W. 24 found 27 injuries on the body of Benoy Biswas. On the body of Kagoti Biswas, he found eight injuries including extensive subdural haemorrhage over both cerebral hemisphere and fracture of both cornua of hyoid bone and thyroid cartilage. With regard to Amrita, he noted eight injuries including heamatoma and extenitive subdural haemorrhage over both cerebral hemisphere and fracture of right cornua of hyoid bone. He opined death was due to effects of injuries, ante-mortem and homicidal in nature. Pursuant to the disclosure statement of Goutam Dhali, he recovered arms and ammunitions in presence of Sukumar Ghosh and Md. Hasanur Zaman, P.Ws 29 and 19 respectively. Pursuant to the disclosure statement of co-accused Manindranath Adhikary, arms and ammunitions were recovered in presence of Bidhan Biswas and Md. Hasanur Zaman, P.Ws. 17 and 19 respectively. He video recorded the confessional statement of Provash Dhali. Subsequently, he submitted charge-sheet against appellants and

one Manindranath Adhikary. Upon receipt of ballistic report and FSL report, supplementary charge-sheet was submitted. Further supplementary charge-sheet was submitted on receipt of sanction under the Arms Act.

Proceedings before the trial Court:-

Pursuant to the submission of charge-sheet, the case was committed to the Court of Sessions and transferred to the Court of Additional Sessions Judge, 7th Court, Barasat for trial and disposal.

Charges were framed against the appellants and one Manindranath Adhikary under section 302, 449, 120B IPC and under sections 25/27 of the Arms Act. Appellants pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined 36 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

In conclusion of trial, trial Judge by impugned judgment convicted the appellants and sentenced them to death for committing murder of Benoy Biswas, Amrita Biswas and Kagoti Biswas.

Appeals and Reference before this Court:-

This has given rise to the present death reference for confirmation of the death sentences imposed by the trial Court. Appellants have also filed appeals against their conviction and sentence. Death reference and the appeals have been heard analogously.

Prosecution Evidence:-

P.W.1, Sheuli Biswas, wife of Benoy Biswas and her two sons Avijit Biswas, P.W. 2 and Biswajit Biswas, P.W. 3 are the eye-witnesses.

P.W. 1 deposed on 10.04.2012 she and her husband went to sleep at night after taking meal. Her two sons were also sleeping with them. At that time appellants and others came to their residence and called her husband. Her husband opened the door. Thereupon, the appellants entered the room and assaulted her husband. They tried to drag him towards the door. She tried to save her husband but Provash Dhali kicked her. She requested the appellants not to kill her husband. Thereupon, Provash Dhali fired at her right hand. Benoy begged for mercy. Provash Dhali fired at the chest of her husband. Hearing her alarm, her two sons woke up and started shouting. Her parents in law came to save her husband. Provash threw down her mother-in-law and fired at her cheek. Her mother-in-law sustained injury and died at the spot. Provash also threw down her father-in-law and fired at the cheek. This occurred in the verandah of their house. Thereafter, the appellants dragged her husband towards the field and shouted "*Kopa, guli kar*". P.W. 1 and her sons followed them and saw the appellants stab and fire at her husband. He fell down. P.W. 1 and her elder son took shelter in a nearby house. On the next day she and her father-in-law were taken to Barasat Hospital in an ambulance. She narrated the incident to Superintendent of hospital in presence of police. Her statement was reduced into writing. She put her LTI. Thereafter, she was shifted to R.G. Kar Medical College and Hospital. She remained in the hospital till

20.04.2012. She deposed there was enmity between the appellants and her husband. Her husband and father-in-law had sold land for a sum of Rs.1,30,000/-. Appellants demanded money which they refused. A girl residing in the locality had been married. Appellants protested against the marriage. Her husband had raised objection to the conduct of the appellants. She stated the miscreants were carrying torches and she could see them in the torch light. She was cross-examined at length. She denied the suggestion she had implicated one Pradip Biswas in the murder.

P.W. 2, Avijit Biswas, was the younger son of the couple. He was 10 years old at the time of occurrence. Upon testing his competence, the Court recorded his deposition. He substantially corroborated his mother's version. He further stated the appellants had stabbed his father with Bhojali and had fired at him. Thereafter, he and his mother fled to Adivasi Para. He made statement before Magistrate.

P.W. 3, Biswajit Biswas, is the elder son of the couple. He was 13 years old at the time of occurrence. He also corroborated the deposition of his mother, P.W. 1 and younger brother, P.W. 2 with regard to the incident. He stated Provash Dhali and Swapan had shot at his father and grandfather. Samir Mondal and Swapan Mondal were carrying Bhojalis. Sujit Dhali, Goutam Dhali and Provash Mondal had pistols with them. He made statement before Magistrate. In cross-examination he stated he had gone to the house of Smritikana Adhikary, P.W. 28 on the next day.

P.W. 4, Rabindra Nath Majumdar, is a neighbor of Benoy. He deposed at 10/10.30 p.m. on 10.04.2012 he heard sound of firing. He

came out from his house. He saw the appellants along with others. Provash kicked on the door and hurled abuses on him. They were drunk and carrying machines like pistol, bombs, etc. On the next day he found Benoy and his parents were dead.

P.W. 5, Sambhunath Ghosh, is a hearsay witness. He stated there was enmity between the appellants and deceased Benoy over brokery of land. He signed on the inquest report of Amrita Biswas.

Similarly P.W. 6, Mukul Ch. Biswas, is another signatory to the inquest of Amrita Biswas.

P.W. 8, Biswajit Patra, is an ASI of Police who was attached to Barasat P.S. On instruction from I.C., he proceeded to Barasat Hospital and in presence of Dr. Manas Chaki he recorded the statement of P.W. 1 (Exhibit 4). P.W. 1 put LTI on her statement. Dr. Chaki put a certificate at the end of the statement. He handed over the statement to the duty officer.

P.W. 9, Lakshman Tripathy, the duty officer received the statement and registered Barasat P.S. Case No. 654 dated 11.04.2012 under sections 449/302/34/120B IPC against the appellants.

P.W. 10, S.I. Sushil Mallick, was posted at Barasat P.S. He held inquest over the bodies of Kagoti Biswas (Exhibit 6) and Benoy Biswas (Exhibit 9). He forwarded their dead bodies for post-mortem examination. After post-mortem he seized the wearing apparels of Kagoti produced by constable Dipak Kr. Nath. He also proved the inquest report prepared by S.I. Mantu Mondal in respect of the dead body of Amrita Biswas at Barasat

Sadar Hospital (Exhibit 14). He deposed blood stained wearing apparels were seized by I.O. from his possession.

P.W. 11, Azad Hossain, is a neighbor of Benoy. He signed on the inquest report of Benoy Biswas. He deposed sons of Benoy informed him about the incident.

P.W. 13, Krishna Chowdhury, is also a neighbour. He witnessed the seizure of empty cartridge and bullets from the place of occurrence where the body of Benoy was recovered. He identified the seized articles in Court. He deposed a Sitala Puja was being held in the neighbourhood on the night of occurrence.

P.W. 14, Jiten Patel, was a signatory to the seizure list prepared in connection with seizure of cartridge, bullets and blood stained earth from the place of occurrence where the body of Benoy was recovered. He also witnessed recovery of blood from the verandah and broken door from the house of Benoy. He also spoke of Sitala Puja in the locality on the night of occurrence. He deposed regarding dispute between Benoy and appellants over brokery of land.

P.W. 15, Bapi Bala, another neighbour, is a post-occurrence witness. He has spoken of motive to commit crime, that is, dispute over brokery of land.

P.W. 17, Bidhan Biswas, is the elder brother of Benoy Biswas. He arrived at the spot on the next day and took his father Amrita Biswas to the hospital. He deposed P.W. 1 had narrated the incident to him on the way to hospital. He witnessed the seizure of Bhojali on the showing statement of

Samir Mondal. He also witnessed recovery of pipegun and ammunitions on the showing of Manindranath Adhikary. He identified the Bhojali, fire arms and ammunitions in Court.

P.W. 18, Nityananda Mondal, is the maternal uncle of Benoy Biswas. He is a witness to the seizure of two bullet heads from the verandah of the house of Benoy by I.O. on 20.04.2012.

P.W. 19, Hashanuzzaman, deposed regarding recovery of fire arms and ammunitions on the showing of Goutam Dhali. He deposed Goutam Dhali brought out two big fire arms (Mat. Exhibit XI and XII), three small fire arms (Mat. Exhibit XIII, XIV and XV) and 16 round of ammunitions (MAT Exhibit XVI). He was also a witness to the recovery of pipe gun and ammunition from co-accused Manindranath Adhikary.

P.Ws. 20, Ratan Kr. Bag, P.W. 22, Majhaul Biswas and P.W. 32, Pradip Kr. Naskar being constables attached to Aminpur Investigation Centre, seized compact discs prepared by P.W. 35 regarding videography of confession of Provash Dhali.

P.W. 21, Sikha Naskar, is the sister of Benoy Biswas. She is a post-occurrence witness.

P.W. 25, Khirode Bairagi, is the signatory to the inquest report of Benoy Biswas.

P.W. 26, Ajit Mondal, is a neighbour of Benoy Biswas. He is a witness to the recovery of empty cartridge, bullet head, blood stained soil from place of occurrence where the body of Benoy was found as well as seizure of broken door from Benoy's residence.

P.W. 27, Sumit Kr. Biswas, is a constable of Aminpur Investigation Centre. He is signatory to the seizure list in connection with recovery of Bhojali on the showing of Samir Mondal.

P.W. 28, Smritikana Adhikary, was the panchayat member of the locality. She stated she heard from one of the sons of Benoy Biswas that his father and grand-parents have been murdered. The said child could not disclose names of the accused persons. She was a witness to recovery of bullet heads from the verandah of Benoy on 20.04.2012.

P.W. 29, Sukumar Ghosh, though admitting his signature on the seizure list (Exhibit 22) relating to recovery of arms and ammunitions on the showing of Goutam Dhali, did not support the prosecution case. He was declared hostile.

P.W. 33, Md. Ariful Islam, prepared CDs and photographs from memory card produced by I.O. regarding videography made by him at the place of occurrence.

P.W. 35, Indrajit Saha, prepared CDs with regard to the videography of the statement made by Provash Dhali to I.O.

Medical witnesses in the instant case are P.Ws. 23 and 24.

P.W. 23, Dr. Nirmal Kr. Giri, is the medical officer attached to R.G. Kar Medical College and Hospital. He deposed he prepared the medical report of Sheuli Biswas (Exhibit 25) at the time of admission. As per statement of patient party, he recorded the history of injury as bullet injury by Sujit Mondal, Goutam Dhali, Provash Dhali, Swapan Mondal and others.

P.W. 24, Dr. Supriti Ghoroi, is the post-mortem doctor. He held post-mortem over the dead bodies of Benoy, Amrita and Kagoti. He found 27 wounds on Benoy out of which 10 were incised chop wounds and 7 were incised wounds. He also noted fracture and dislocation of C5, C6 vertebrae. He opined death was due to effects of injuries, ante-mortem and homicidal in nature. He stated that MAT Exhibit V (Bhojali) may be used to cause the aforesaid injuries. He proved the post-mortem report (Exhibit 27).

He found 9 injuries on the body of Kagoti Biswas. He noted abrasions and bruises on the right side of face and right eye, bruises on left and right orbital area, haematoma on right fronto parieto temporal region of scalp, extensive subdural haemorrhage over both cerebral hemispheres and bruises on anterior aspect of neck with fracture of both cornua of hyoid bone and thyroid cartilage. Fracture showed extensive extravasation of blood around surrounding tissues. He opined death was due to the aforesaid injuries, ante-mortem and homicidal in nature. He proved the post-mortem report (Exhibit 28).

On Amrita, he found 8 injuries including bruises on right lateral aspect of upper part of neck along with fracture of right cornua of hyoid bone, haematoma on left frontal region of scalp and extensive subdural haemorrhage with blood clots over both cerebral hemispheres. Fractures site showed extravasation of blood in the surrounding tissues. He opined death was due to effect of injuries, ante-mortem and homicidal in nature. He proved the injury report (Exhibit 29).

P.W. 30, Ardhendu Senngupta, is the ballistic expert. He deposed he is a Scientific officer in the Ballistic Division, Forensic Science Laboratory, Government of West Bengal. He received six packets marked as A, B, C, D, E and G, three envelopes marked as A(i), F, H and five card board cases containing paper covers marked as a, l, (n+o), and k in sealed condition. He identified the fire arms which had been marked as A, B, C, G D and E in Court. He identified the ammunicions marked as A(i), F, H in Court. He examined fire arms as well as the ammunicions. Remaining exhibits were sent to Biology Division for examination. He opined as follows:-

- “ 1) each of the 5 fire arms Exbt A, C, D, E, G was in working order;*
- 2) the revolver Exbt -B was in working order;*
- 3) each of 6 fire arms Exbt -A, B, C, D, E and G was fired previously;*
- 4) the empty fired case, Exbt-a was fired through the pistol Exbt -a;*
- 5) the fired bullet exbt-o was fired through the pistol Exbt-a;*
- 6) the fired bullet, Exbt-n was fired through the pistol, Exbt-c;*
- 7) the ammunition, Exbt-F and H were live;*
- 8) the ammunition, Exbt-A he was not live;*

The fire arms i.e. Exbt-C, D, E and G and the ammunition, Exbt-F and H were dangerous for the human life, if fired through in cobination amongst them. The auto pistol Exbt-A was also dangerous for human life if fired through with a suitable ammunition.”

He proved his report Exhibit 30.

P.W. 31, Dr. Mrs. Shipra Roy, is the Assistant Director, Biology Division, State Forensic Science Laboratory. She deposed she received four card board boxes marked as k, l, m and (n+o) from Ballistic Division. After examination she found blood in items k, l, m. (n+o) being bullet heads. To determine origin and group of blood, the items were forwarded to serologist. She proved her report (Exhibit 31). Report of serologist stated that the origin and blood group could not be detected as they had disintegrated.

P.W. 34, Arabinda Chatterjee, is the Dealing Assistant to the office of District Magistrate, North 24 Paraganas. He proved the sanction order marked as Exhibit 37.

P.W. 36, Nandan Mondal, is the investigating officer of the case. He was in-charge of Aminpur Investigation Centre. He deposed at 6.00 a.m. he got telephonic message regarding murder of two persons by gunshot injury at Noapara Paschimpara. Upon instruction of I.C. Barasat P.S., he along with force went to the place of occurrence. S.I. Sushil Mallick (P.W. 10) held inquest over the dead bodies of Benoy and Kagoti. Due to commotion in the locality there was delay in holding inquest. He received information Amrita Biswas had died at the hospital. He sent police personnel to Barasat Hospital. Around 01.00 p.m. he received statement of Sheuli Biswas which was treated as FIR. He went through the FIR. He prepared rough sketch map of the two places of occurrence. He proved the sketch maps of the places of occurrence (Exhibit 40 and 40/a). He prepared a detailed sketch map of the house of Benoy Biswas (Exhibit 41). He seized empty cartridge, two live cartridges, one live ammunition and blood stained earth from the land of Krishna Ghosh where the body of Benoy Biswas was found under a seizure list, marked as Exhibit 18. He also seized blood from the verandah and a broken door from the room of Benoy under seizure list, marked as Exhibit 19. He went to Barasat Hospital but found Sheuli Biswas had been shifted to R.G. Kar Medical College and Hospital for better treatment. He returned to place of occurrence and examined witnesses. He collected Surathal reports, post-mortem reports and bed head ticket of Sheuli

Biswas, marked as Exhibit 42. He seized the wearing apparels of deceased Amrita Biswas and Kagoti Biswas. He examined two sons of Benoy. Their statements were recorded before Magistrate. On 20.4.2012 he seized two bullet heads from the house of Benoy, marked as Exhibit 21. He took photographs as well as videography of the place of occurrence where bodies of Benoy and Kagoti were lying. He seized 10 CDs with regard to the said videography and photography. On 16.09.2012 Sujit Dhali surrendered before Magistrate. He interrogated Sujit Dhali and arrested Samir Mondal on 24.09.2012. Samir Mondal made disclosure statement on 29.09.2012 (Exhibit 15). On the basis of his disclosure statement Samir Mondal was taken to his house. Samir brought out a Bhojali from the house which was seized under a seizure list (Exhibit 20). He identified the Bhojali in Court. On 25.09.2012 he arrested Goutam Dhali. Goutam Dhali made disclosure statement on 01.12.2012 (Exhibit 54). Pursuant to disclosure statement Goutam Dhali brought out five pieces of different types of fire arms and ammunitions from a bush on the back side of his house in presence of witnesses. The arms and ammunitions were seized under seizure list (Exhibit 22). On the same day, Manindranath Adhikary was arrested. He made a disclosure statement marked as Exhibit 57. On his showing improvised pipegun and ammunition were recovered under a seizure list marked as Exhibit 23. Subsequently, Provash Dhali was arrested at a place called Panchmile at Alipurdwār, District Jalpaiguri. He was produced before jurisdictional Court on 09.11.2012. He made statement which was videographed and CDs were prepared. He proved the CDs in Court. He

found Provash Dhali had criminal antecedents and had been convicted and sentenced to seven years imprisonment. He submitted charge-sheet. On receipt of FSL report, he submitted supplementary charge-sheet. Another charge-sheet was filed after the receipt of sanction order.

Arguments at the Bar:-

Mr. Bhattacharya for Provash Dhali has assailed the credibility of the prosecution case on various grounds. He contended the ocular evidence of eye-witnesses, P.Ws. 1, 2 and 3 is wholly contradicted by medical evidence. These witnesses unequivocally stated the appellants had fired at the chest of Benoy and on the face of Amrita and Kagoti. But post-mortem doctor, P.W. 24, did not find gunshot injury on any of the victims. This wholly discredits the eye-witnesses with regard to the manner in which the incident occurred. Conduct of the eye-witnesses also throws serious doubt with regard to their credibility. Although the incident occurred in the night of 10.04.2012, none of the witnesses came out with the names of the appellants till P.W. 1 was interrogated at the Barasat Hospital around 11.15 a.m. on 11.04.2012. P.W. 28 stated one of the sons of Benoy could not give out the names of the assailants to her. He submitted incident occurred on a dark night and there was no electricity. Source of light is stated to be torchlight carried by the appellants. This fact is significantly absent in the FIR or earlier statements of the witnesses. No torch light was also recovered. Vital witnesses necessary for unfolding of the prosecution case were not examined. Dilip Biswas who took P.W. 1 to hospital has not been examined. Dr. Manas Chaki who was present when P.W. 1 made

statement was also not examined. S.I. Mantu Mondal who held inquest over the body of Amrita was also not examined. Neighbours of the victim, namely, Krishnapada Ghosh, Subrata Majumder were not examined. Provash Adhikary who brought P.W. 1 at R.G. Kar Medical College and Hospital and signed injury report has also not been examined. It is also argued role of one Pradip Ghosh (who was a suspect and had been arrested during investigation) has been suppressed. His role in the crime was not properly investigated and he was discharged. MAT Exhibit VIII (Bhojali) seized pursuant to disclosure statement of Samir Mondal has been described as an axe in the seizure list (Exhibit 20). The said article had not been sent for FSL examination. Recoveries pursuant to the leading statement of Goutam Dhali and co-accused Manindranath Adhikary are also suspect. P.W. 29 (independent witness to recovery of fire arms from Goutam Dhali) did not support the prosecution case.

Mr. Ganguly, Senior advocate, for the appellants Samir Mondal and Sujit Dhali submitted that the charge in the instant case is defective. It is stated that the murder took place in the house of Sheuli Biswas which is incorrect. No overt act is attributed to Samir and Sujit. Appellants have not been charged under section 34 of the IPC. No evidence of conspiracy is also forthcoming. No gunshot injury was found on the bodies of the deceased as per post-mortem doctor, P.W. 24. This contradicts the ocular version of P.Ws. 1, 2 and 3 rendering the prosecution case vulnerable. No conviction has also been recorded under section 27 of the Arms Act. Conduct of the eye-witnesses is also unnatural. P.Ws. 2 and 3 did not try to save their

father. They did not suffer any injury during the incident. P.W. 1 stated deceased Benoy opened the door and the appellants entered the room. If that is true, it is unclear how the door of the room was broken. No blood stains were found inside the room of Benoy. P.W. 4 did not disclose the names of the appellants to P.W. 36 when the latter arrived at the place of occurrence.

Both the Counsels submitted the conviction is liable to be set aside and the prosecution case, even if believed, does not have merit in position of death sentence.

On the other hand, Mr. Nequive Ahmed with Ms. Trina Mitra argued presence of P.Ws. 1, 2 and 3 at the place of occurrence is most natural. In addition to firing they witnessed Benoy being stabbed by the appellants. Bhojali (MAT Exhibit V) was recovered on the showing of Samir Mondal. P.W. 24 found 27 injuries on the body of Benoy. Most of the injuries were incised wounds which could have been caused by the seized Bhojali (MAT Exhibit V). Prosecution witnesses also deposed Amrita and Kagoti were pushed down and fired. Due to man-handling and pushing they fell on the ground and suffered extensive haemorrhage in the head and fracture of the hyoid bone as noted by post-mortem doctor. Medical evidence, therefore, does not wholly discredit the ocular version rendering the prosecution case vulnerable. Out of fear, P.W. 1 and her sons ran away from the spot and went to Adivasi para. Due to fear of reprisal by the appellants who had unleashed a reign of terror, they remained mum. On the next day, P.W. 1 was admitted in hospital where she divulged the name of the appellants in

presence of police. There is no delay in disclosure of the names of the appellants. Appellants were well-known to the witnesses. In fact, Sujit was a next door neighbour. Appellants had carried torches and the witnesses had seen the appellants in the torch light. Hence, identification of the appellants cannot be doubted. Recoveries on the showing of Samir Mondal, Goutam Dhali and co-accused Manindranath Adhikary have been proved beyond doubt. Ballistic and FSL report also support the prosecution case. Provash Dhali has criminal antecedents and a prior conviction. All the appellants had unleashed terror in the locality and killed three persons including a septuagenarian. Hence, conviction ought to be upheld and the sentence of death confirmed.

Whether charge is defective:-

Mr. Ganguly for Samir Mondal and Sujit Dhali argued that place of occurrence in the charge has been described as house of Sheuli Biswas. Body of Benoy Biswas was found on the land of Krishnapada Ghosh. Hence, charge is defective. I find little substance in the argument. Evidence on record shows the appellants had barged into the room of Benoy and had assaulted him and fired at his chest. Thereafter, they dragged him to the field and stabbed him to death. Appellants were fully aware of the prosecution case regarding the manner and circumstances in which the offence was committed. Reference to the room of Sheuli Biswas in the charge, therefore, has in no way misdirected them in their defence or occasioned failure of justice.

Whether the eye-witnesses P.Ws. 1, 2 and 3 are credible?

P.Ws. 1, 2 and 3 are the wife and sons of Benoy. They were present at the residence when the incident occurred. P.W. 1 also suffered injury and was hospitalised.

Their versions have been severely criticized on various scores which are set out and dealt with in seriatim:-

(i) Variation between ocular and medical evidence:-

All the witnesses have stated in unison that Provash Dhali fired at the chest of Benoy Biswas. They also fired at Amrita and Kagoti. P.W. 1 claimed she suffered gunshot injury. Post-mortem doctor, P.W. 24 did not find any gunshot injury on the bodies of the deceased. Notings in Exhibit 42 (admission register at Barasat District Hospital) shows the medical officer opined injury on Sheuli did not have the classical appearance of gunshot injury.

I have considered the aforesaid issue in the light of the evidence on record. Apart from the gunshot injury, P.Ws. 1, 2 and 3 stated Benoy was stabbed repeatedly. P.W. 24 found large number of incised wounds on the body of Benoy. He also deposed such wounds could have been caused by the seized Bhojali (Mat Exhibit V) which was shown to him in Court. Hence, it cannot be said that the medical evidence completely rules out the ocular versions of P.Ws. 1, 2 and 3.

Learned Lawyers for the appellants strongly criticized the reasoning given by the trial Judge to the effect that the stab wounds had obliterated the gunshot injuries. From the evidence on record it appears that the

appellants being variously armed have rushed into the room of Benoy. They fired and assaulted Benoy and his parents Kagoti and Amrita who rushed to save him. His wife Sheulli (P.W. 1) also suffered injuries. In the melee, gunshots were fired. It is possible P.W. 1 presumed that the shots had hit the victims though they may have missed their targets. Though no gunshot injuries were found, it is undeniable Benoy had been stabbed a number of times by the appellants and the post-mortem doctor found large number of incised wounds on vital parts of his body. With regard to Kagoti and Amrita, P.Ws. 1, 2 and 3 stated they were pushed down and fired at the cheek. Post-mortem doctor found extensive haemorrhage and subdural haematoma beneath the scalp of both the victims. He also found bruise marks on the neck with fracture of hyoid bone. Amrita was a 77 years old man while Kagoti was a helpless lady who had been violently pushed down on the floor by the appellants. As a result of such brutal attack, they suffered severe head injuries and fracture of hyoid bone resulting in their death. Absence of gunshot injury in the post-mortem report, therefore, does not wholly improbabilise the versions of the eye-witnesses with regard to the other forms of assault vis-à-vis the injuries noted by the post-mortem doctor. It is trite law evidence of eye-witnesses stands on a higher pedestal than the medical evidence (see ***Ram Swaroop vs. State of Rajasthan***¹). Only when medical evidence wholly rules out the ocular version would the dichotomy strike at the root of the prosecution case rendering it improbable. In the present case presence of P.Ws. 1, 2 and 3 at the place of

¹ 2008 Cri. L.J. 2259 (paras 8 and 9)

occurrence is undeniable. P.W. 1 is the wife and P.Ws. 2 and 3 are the minor sons of Benoy. They were sleeping with Benoy in the room when the incident occurred. In the factual matrix of the case, absence of gunshot injuries per se does not improbabilise their presence at the place of occurrence or their entire evidence regarding the nature of assault on the deceased.

The cases cited by the appellants are inapposite. In ***Jagga Singh And Another vs. State of Punjab***² none of the witnesses had seen the assault. They merely heard gunshot but only lacerated wounds were found on the deceased. In the present case, all the witnesses stated that Benoy had been stabbed by the appellants and incised wounds were found on his body. Similarly, they stated Kagoti and Amrita were violently pushed down on the ground resulting in severe head injuries and fracture of hyoid bone.

In ***Dinesh And Another vs. State of Haryana***³ the Apex Court acquitted the accused as only two incised wounds were found although three accuseds were alleged to have assaulted the victim. Moreover, no opinion was taken from post-mortem doctor whether the seized weapon could have caused similar injuries. In the present case, post-mortem doctor stated seized Bhojoli could have caused the injuries on Benoy. A large number of injuries were found on him corroborating versions of the eye-witnesses that all the appellants indiscriminately assaulted him.

² (2011) 3 SCC 137

³ (2015) 17 SCC 804

Similarly, in ***State of U.P. vs. Shiv Kumar And Others***⁴ the presence of the eye-witnesses were doubtful and variation with regard to their description of the incident and the nature of injuries found on the deceased entitled the accused to benefit of doubt. In the present case, presence of P.Ws. 1, 2 and 3 at the place of occurrence has not been discredited. Incident occurred while they were sleeping with the deceased at night. Their presence is fully established and the manner in which the assault took place does not wholly rule out the nature of injuries found on the deceased.

P.W. 1 also suffered injury in the course of the incident. Hence, she is an injured eye-witness. She was taken to Barasat District Hospital and in the bed head ticket (Exhibit 42) it is noted she has suffered lacerated injury on her forearm. Learned Counsels for the appellants have referred to the noting of the doctor who observed that the injury did not have classical appearance of gunshot injury. P.W. 1 was thereafter shifted to R.G. Kar Medical College and Hospital where she was admitted till 20.04.2012. Admission report at R.G. Kar Medical College and Hospital (Exhibit 25) noted bullet injury on forearm of the victim. This is corroborated from the fact that P.W. 1 was treated in the hospital for gunshot injury for eight days till her discharge. Thus, it cannot be said that her injury was superficial or minor in nature.

P.W. 36, investigating officer seized empty cartridges and ammunitions from the place where the body of Benoy was recovered. Two

⁴ (2005) 11 SCC 212

bullet heads were also recovered from the verandah of the house on 20.04.2012. P.W. 30, ballistic expert opined that the ammunitions seized at the place of occurrence (Exhibits F and H) were live and the empty cartridge and the fired bullet heads, namely, Exhibit A(i) and Exhibits (n+o) had been fired from firearms seized on the showing of the appellants.

From the aforesaid evidence it is clear there was firing at the place of occurrence. P.W. 1 had suffered gunshot injury as would appear from the notings at the admission register (Exhibit 42) and the treatment given to her as an indoor patient at R.G. Kar Medical College and Hospital (Exhibit 25). Apart from firing, as per eye-witnesses Benoy had been repeatedly stabbed while Kagoti and Amrita had been violently pushed down on the ground resulting in severe head injury and fracture of neck. Post motem doctor found innumerable stab injuries on Benoy and internal haemorrhage in scalp and fracture of hyoid bone of Kagoti and Amrita. Hence, medical evidence substantially corroborates the aforesaid forms of assault which caused the death of the victims. Thus, I am of the view medical evidence on record does not wholly rule out the ocular version of eye-witnesses so as to render the prosecution case improbable.

(ii) Identification of the appellants:-

Learned Counsels have argued that the incident occurred on a dark night. There is no electricity in the locality. There is no reference of the source of light in the FIR. It is also contended that the torch light have not been seized from the appellants.

Evidence of the eye-witnesses show the appellants were carrying torch lights. In the light of their torches, P.Ws. 1, 2 and 3, saw the appellants. Torches are common household articles. Carrying of torches by the appellants at night during commission of offence is, therefore, neither unnatural nor improbable. P.W. 1 was under treatment in the hospital when her statement was recorded. Under such circumstances, failure on her part to mention source of light is a minor omission which does not improbabilise the case. Similarly, non-seizure of torches which are common household articles does not militate against the truthfulness of the prosecution case. On the other hand, it appears that the appellants are the neighbours of the deceased and were well-known to the eye-witnesses. P.Ws. 1, 2 and 3 had the opportunity of seeing and hearing appellants at close range. Hence, their identification by P.Ws. 1, 2 and 3 is convincing and does not suffer from any infirmity.

(iii) Unnatural conduct of the witnesses:-

Appellants contended P.Ws. 1, 2 and 3 did not come out with the names of the assailants immediately after the incident. Prosecution has not examined any witness to show that she narrated the incident to her neighbour. In fact, P.W. 28 who had met one of the sons of the deceased stated he could not name the assailants. Names of the assailants did not transpire in the bedhead ticket of Barasat Hospital marked as Exhibit 42. Hence, implication of the appellants is an afterthought. Incident occurred at night around 10/10:30 p.m.. Appellants and others being variously armed came to the residence of Benoy. They unleashed terror and killed

Benoy and his parents. Out of fear, the surviving family members, that is, P.W. 1 with her minor children ran away from the spot and took refuge in Adivasi para. Appellants were at large in the locality and P.W. 1 and her sons were afraid of their own lives. Harboured under severe trauma and unsure of their own lives, they kept mum during the night and next morning. Only when police arrived, being assured of her safety, P.W. 1 narrated the incident at Barasat Hospital. A closure scrutiny of the bedhead ticket (Exhibit 42) would show even prior to arrival of police she had given indication with regard to the identity of the assailants by stating they were well-known to her. However, in absence of the police, she was afraid to give out their names. The dangerous character of the appellants and widespread violence they had unleashed resulting the death of her husband and in-laws clearly explains why P.W. 1 while indicating that the miscreants were known persons did not come out with their names till police arrived at the hospital. Hence, I am of the opinion the disclosure of names by P.W. 1 at the hospital on 11.04.2012 at 11:15 a.m. in presence of P.W. 8 has been duly explained and does not affect the credibility of the prosecution case. Similarly, P.Ws. 2 and 3 (sons of Benoy) were under severe trauma having witnessed the brutal murder of their father and grandparents at the hands of the appellants. Thereafter, they had run away from the house and taken shelter in Adivasi Para at night. Under such circumstances, fearing reprisal and threat to life they did not disclose names of the appellants till police interrogated them on the next day. I also find little substance in the argument of the appellants that P.Ws. 2 and 3

did not witness the incident as they were not injured. P.Ws. 2 and 3 were 10 and 12 years old respectively at the time of occurrence. Appellants came in a body and indiscriminately assaulted their father and grandparents. They were variously armed. It is absurd to assume being confronted with such brutal violence the little children would muster courage to resist the aggressors.

(iv) Seizure of broken door:-

Learned Lawyers for the appellants contended P.W. 1 had claimed her husband Benoy opened the door and the appellants had entered the room. None of the witnesses stated that the appellants had broken the door. On the other hand, investigating officer seized broken door from the room of Benoy which is improbable. I.O., P.W. 36 deposed on 11.04.2022, he had seized blood on the cemented floor as well as a broken door from the room of Benoy under a seizure list (Exhibit 19). He identified the broken door in Court. His version is corroborated by Jiten Patel and Ajit Mondal, P.Ws. 14 and 26 respectively. From the evidence of the eye-witnesses it appears that the appellants had violently trespassed into the room of Benoy and had indiscriminately fired and assaulted the inmates. In the course of their violent act, it is possible that a portion of the door may have broken. Judged from this perspective, the narration of prosecution witnesses does not militate against the seizure of broken door from the room of Benoy.

Non-examination of vital witnesses and other deficiencies in investigation:-

Appellants have also assailed the prosecution case on the ground of vital witnesses relevant for unfolding the prosecution case have not been examined. It is contented Dilip Biswas and Provash Adhikary who took P.W. 1 to Barasat Hospital and R.G. Kar Medical College and Hospital respectively have not been examined. Dr. Manas Chaki in whose presence P.W. 1 made statement to police officer, P.W. 8, has not been examined. Although Sitala Puja was being held, none of the neighbours or local people have been examined.

P.W. 1 deposed after the incident she had ran away from her house and took shelter at Adivasi para. Thereafter, she was taken to Barasat Hospital by Dilip Biswas. Bedhead ticket of Barasat hospital (Exhibit 42) was produced in Court. Thereafter, she was shifted to R.G. Kar Medical College and Hospital where she was treated for eight days. Admission report of R.G. Kar Medical College and Hospital has also been proved (Exhibit 25). In view of the aforesaid evidence on record, non-examination of Dilip Biswas or Provash Adhikary does not affect the unfolding of the prosecution case. P.W. 8 recorded the statement of P.W. 1 at Barasat Hospital which was certified by Dr. Manas Chaki. P.W. 1 stated her statement was recorded by P.W. 8 in presence of Dr. Manas Chaki who certified the document. Her version is corroborated by P.W. 8 and the FIR has been duly proved. It is nobody's case that P.W. 1 was unconscious or unable to make statement. Under these circumstances, non-examination of Dr. Chaki also does not affect the prosecution case. P.W. 4, a neighbour,

deposed at 10/10:30 p.m. he had seen the appellant with various arms in the locality. Provash Dhali had threatened him. His evidence corroborates the evidence of eye-witnesses, P.Ws. 1, 2 and 3. P.W. 4 remained unshaken in cross-examination. It is not the number of witnesses but quality of evidence which is relevant to prove a fact. P.W.4 is a neighbor of Benoy. He has corroborated the prosecution case. Hence, non-examination of other neighbouring witnesses is not fatal to the prosecution case.

Place of occurrence in the instant case has not seriously been disputed. Dead body of Benoy was found on the land of Krishnapada Ghosh, 100 yards from his house. Body of Kagoti was found in the verandah of the house itself. In view of the aforesaid evidence on record, failure to send blood stained wearing apparels or blood stains found from the place of occurrence for FSL examination does not strike at the root of the prosecution case.

It is also argued that the investigation was a biased one and one Pradip Ghosh whose name had transpired in the course of investigation had been discharged. P.W. 1 in her FIR is silent with regard to role of Pradip Ghosh in the murder. I.O., P.W. 36 stated Pradip Ghosh had been out of suspicion arrested in the course of investigation. Subsequently, due to lack of evidence he was discharged. None of the witnesses during trial deposed against the said Pradip Ghosh. In this backdrop, it cannot be said that the investigation in the case was biased or the appellants have been falsely implicated to screen the real offender.

Recovery of weapon on the showing of the appellants:-

Appellants have argued that the recovery of Bhojali and the arms and ammunitions on the disclosure statements of appellant have not been proved. It is contended as per seizure list Exhibit 20 an axe was recovered on the showing of Samir Mondal. But one Bhojali (Mat Exhibit V) was produced in Court. P.W. 36 deposed Samir made disclosure statement on 29.09.2012 which was marked as Exhibit 50. Pursuant to his disclosure statement Samir Mondal brought out a Bhojali from his house. The seizure has been witnessed by Bidhan Biswas (P.W. 17) and constable Sumit Kumar Biswas (P.W. 27) who proved their signatures on the labels of the seizure list. They also identified the Bhojali in Court. Thus, the seizure of the Bhojlai on the showing of appellant Samir Mondal has been proved beyond doubt. I.O. out of inadvertence may have misdescribed the article as an axe in the seizure list. However, in the light of the unequivocal evidence of the seizure witnesses who identified their signatures on the label on the seized article and seizure list in Court, I have no doubt that the Bhojlai produced in Court had been brought out by Samir Mondal from his residence. It may not be out of place to note post-mortem doctor opined that the said Bhojali may have been used to cause the injuries found on the body of Benoy. Similarly, I.O., P.W. 36 as per leading statement of Goutam Dhali (marked as Exhibit 54) recovered various firearms and ammunitions from a bush behind the house of the said appellant. The recovery was made in the presence of one Md. Hasanur Zaman, P.W. 19 who supported the prosecution case and proved his signatures on the

seizure list and other seized articles. P.W. 29, Sukumar Ghosh turned hostile and did not support the prosecution case. He, however, admitted his signature on the seizure list (Exhibit 22). On the disclosure statement of accused, Manindranath Adhikary (Exhibit 57), I.O. recovered a pipe gun and ammunitions in the presence of P.W. 17 and P.W. 19 who have identified their signatures on the seizure list and labels on the seized articles. P.W. 30, ballistic expert examined the seized firearms and ammunitions. He opined the fire arms were in working condition and had been fired previously and some of the ammunitions were live. He also opined that the fire cartridge and bullets had been fired from semi-automatic improvised pistol (MAT Exhibit XIII) and short improvised pistol (MAT Exhibit XIV) seized from the appellants. In the light of the aforesaid evidence, I am of the view the recoveries the arms and ammunitions as well as the Bhojali on the disclosure statement of the appellants have been duly proved.

Concluding remarks on the guilt of the appellants:-

There are overwhelming evidence on record that the appellants being variously armed assembled together and entered the room of Benoy Biswas in the night of 10.04.2012. Benoy was assaulted and dragged out to a nearby field and murdered. His wife, P.W. 1 was also assaulted. His parents, namely, Amrita and Kagoti tried to intervene. They were violently thrown down on the ground and suffered head injuries and fracture of neck. Miscreants also fired at the place of occurrence. These facts have been proved beyond doubt which clearly establishes the role of the

appellants in the murder of Benoy and his parents Amrita and Kagoti. However, there is no evidence on record that there was prior meeting of minds between the appellants to commit the murder. Conspiracy to commit the murder is independent of the offence of murder itself. It has been argued no overt act was played by Samir Mondal, Sujit Dhali, I am unable to agree with such proposition. All the appellants had come to the spot with arms. They dragged Benoy to the field and mercilessly stabbed him. 27 injuries were found on his body. Hence, it is clear all the appellants being variously armed had come in a body and had mercilessly assaulted Benoy resulting in his death. Kagoti and Amrita were assaulted and violently thrown to the ground. As a result, they suffered head injuries and fracture of neck resulting in death. These circumstances prove beyond doubt that the appellant shared the common intention to murder and pursuant thereto caused the death of Benoy, Kagoti and Amrita. Hence, they are liable to be convicted under section 302 read with section 34 IPC. Non-joinder of section 34 IPC to the charge is of little consequence. Section 34 of IPC speaks of constructive liability. It is not an offence by itself. When charge has been framed under the substantive offence of murder and appellants were fully aware of the roles played by them in the incident and had effectively defended themselves, I am of the opinion convicting them for the offence punishable under section 302 read with section 34 IPC instead of section 302 IPC simpliciter does not either cause prejudice or occasion failure of justice. However, as discussed above, no offence with regard to prior meeting of minds between the appellants to commit the murder is

forthcoming. Hence, charge of conspiracy to commit house trespass and murder has not been proved.

Accordingly, I hold the appellants, namely, Provash Dhali, Samir Mondal and Sujit Dhali are guilty of committing offences punishable under section 449 IPC and under sections 302 read with section 34 IPC. Appellant Provash Dhali is also found guilty of committing offence punishable under section 25 of the Arms Act.

Death Sentence – whether justified:-

Trial Judge has awarded death sentence to all the appellants. In ***Bachan Singh vs. State of Punjab***⁵ the Apex Court held when the offence of murder is proved, life imprisonment is the rule and imposition of death sentence is an exception. To award the maximum and irrevocable sentence of death, the Court must cite “special reasons” as adumbrated in section 354(3) Cr.P.C. Only in rarest of rare cases the Court would be justified to award death sentence.

To determine whether the case falls in the rarest of rare category, the Court must ask itself the following questions:-

- (a) *Is there something uncommon about the crime of this case which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
- (b) *Are the circumstances of the crime of the case such that there is no alternative but to impose death sentence even after according*

⁵ (1980) 2 SCC 684

maximum weight age to the mitigating circumstances which speak in favour of the offender?

In ***Machhi Singh And Others vs. State of Punjab***⁶ the Apex Court referring to ***Bachan Singh*** (supra) reiterated the exceptional nature of death penalty and the procedure to determine the ‘rarest of rare’ cases:-

“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. 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.”

In ***Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra***⁷ the Apex Court emphasized that a case would come within the category of ‘rarest of rare’ cases only when the alternate option of life imprisonment is wholly foreclosed and there is no possibility of rehabilitation and reformation of the convict. The Court held as follows:-

“64. Another aspect of the rarest of rare doctrine which needs serious consideration is interpretation of latter part of the

⁶ (1983) 3 SCC 470

⁷ (2009) 6 SCC 498

dictum— “[t]hat ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed (emphasis supplied)”. suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but sets the bar very high by introduction of the rarest of rare doctrine.”

To arrive at such a conclusion, it is necessary for the Court to advert the mitigating circumstances quoted with approval in **Bachan Singh** (supra) as follows:-

“68. “206. ... ‘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 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.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.’ ”

Only after advertent to the mitigating circumstances appearing from the facts of a particular case and on considering the evidence (if any) led by the prosecution if the Court is satisfied, there is no possibility of rehabilitation and reformation of the convict, it would be justified to impose the extreme penalty.

In the present case, the ‘special reasons’ given by the trial Judge to award death penalty may be enumerated as follows:-

- (a) It is a case of calculated cold-blooded murder of three innocent persons. It was an inhuman brutal act displaying depravity of mind and aggravated battery on the deceased persons. It was committed after previous planning and such brutal murder is uncommon. In such case, not awarding death sentence would give wrong message to the society;
- (b) If the convicts are released from custody, they would threaten the life of witnesses;
- (c) They did not express any repentance in the course of trial, particularly, in their examination under section 313 Cr.P.C.;
- (d) With regard to Provash Dhali it was noted that he had criminal antecedents and had been convicted in an earlier case under sections

447, 307 IPC and 27 of the Arms Act and sentenced to 7 years' imprisonment.

Having analyzed the evidence on record, I find the conclusions of the trial Judge with regard to previous planning and extreme brutality are over exaggerated. No evidence with regard to prior planning or meeting of minds has come on record. Though 27 injuries were found on Benoy, most of the injuries on the body of Kagoti and Amrita were bruises and abrasions. They appeared to have died upon being violently thrown to the ground resulting in brain injury and fracture of hyoid bone. No gunshot injuries were found on the bodies of the deceaseds. It cannot be said that the appellants while committing the act had acted with extreme brutality or depravity.

Evidence has also come on record there was dispute between Provash Dhali and the deceased over land dealings. Owing to such dispute, appellants came to the house of Benoy and murdered him. When his parents intervened, they were violently dashed to the ground resulting in their deaths. Dispute over property or land brokerage resulting in murder is not uncommon so as to qualify the offence within the 'rarest of rare' category to justify death sentence.

The other reasons given by the trial Court are equally unfounded.

Trial Judge held if life imprisonment is imposed, appellants would be released from custody and would threaten witnesses. This finding is wholly incorrect. Life imprisonment continues till the end of life of the convict.

Possibility of premature release of the convicts cannot a justification to impose death penalty. Premature release is within the executive domain

and is circumscribed by statutory restrictions envisaged under section 432/433A Cr.P.C. Opinion of the convicting/confirming court is a relevant consideration before grant of such relief. Clemency jurisdiction in the constitutional scheme is vested in the highest functionaries, namely, the President and the Governor which again is subjected to judicial review. Premature release is discretionary and none of the high functionaries vested with the discretionary jurisdiction would act de hors application of mind to the issue of witness protection. Under such circumstances, trial Court was incorrect to hold in the event of imposition of life imprisonment, release of the appellants was inevitable and would threaten the lives of witnesses.

In the course of trial as well as their examination under section 313 Cr.P.C. appellants denied their culpability. Noting is placed on record to show they behaved in a manner which would give an impression they were not repentant of the crime. On the other hand, they prayed for mercy.

Sentence hearing was reduced to a mere formality where no effort was made on the part of the trial Judge to advert to the mitigating circumstances or call upon the State to lead evidence that there was no possibility of reformation or rehabilitation of the appellants. In this backdrop, conclusion of the trial Court that there was no repentance in the minds of the appellants is a mere speculation on which the extreme penalty of death ought not to have been awarded.

Apart from referring to the brutality of the crime involving murder of three persons, no effort was made by the trial Court to assess the

mitigating circumstances relating to the appellants to come to a conclusion that there was no possibility of their reformation or rehabilitation and the alternate option of life imprisonment was wholly foreclosed.

In ***Panchhi And Others vs. State of U.P.***⁸ the Apex Court while dealing with a case of murder of four persons including a little child, inter alia, held as follows:-

“20. ... Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the “rarest of rare cases” as indicated in Bachan Singh case. In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder.”

In ***Gudda vs. State of M.P.***⁹ the Apex Court was dealing with a case of murder of three persons including murder of a pregnant lady and a young child. It held as follows:-

“27. This Court has consistently held that the number of deaths or the factum of the whole family being wiped off cannot be the sole criteria for determining whether the case falls in the category of “the rarest of the rare”. (See Aqeel Ahmad v. State of U.P. [(2008) 16 SCC 372], Ram Pal v. State of U.P. [(2003) 7 SCC 141]

30. Indeed victims of the crime include an innocent child of 5 years and a pregnant lady who were assaulted by the appellant who was then in a position of trust having invited them to his house for lunch. But this alone would not be sufficient to place the crime in the category of “the rarest of the rare” as the proportion of culpability of the appellant could be separated for the three victims into two parts: the deceased and the pregnant lady and the young child.

31. As stated above, on one hand the crime is premeditated in respect of the deceased husband, while on the other, no motive or pre-orchestration could be culled out for the other two deceased persons. The two murders seem to have translated due to his sudden realisation and extreme fear of being caught

⁸ (1998) 7 SCC 177

⁹ (2013) 16 SCC 596

for the murder of Sunil Gupta and also, to save himself from being shunned by the society. Having said so, the brutality envisaged in the premeditated murder of Sunil Gupta alone, in the light of present facts, does not inspire confidence so as to place it in the category of “the rarest of the rare”. Further, the appellant is a young man of about 35 years and neither does he have any criminal antecedents nor is it stated that he is or has been an anti-social element. The future possibilities of his reform also cannot be ruled out.”

Similarly, in ***Ram Pal vs. State of U.P.***¹⁰, the Apex Court held in all cases multiple murders death penalty need not be imposed. It held as follows:-

“5. ... It is true, the incident in question has prematurely terminated the life of twenty-one people but then the number of deaths cannot be the sole criterion for awarding the maximum punishment of death. While in a given case death penalty may be the appropriate sentence even for a single murder, it would not necessarily mean that in every case of multiple murders death penalty has to be the normal punishment.”

In the present case, the appellants nursed grudge against Benoy and definitely intended to kill him. They struck 27 blows on his body. However, most of the injuries on the bodies of his parents Kagoti and Amrita are bruises and abrasions. Appellants had dashed the elderly couple to the ground resulting in their death. There was no pre-meditation or brutality in these murders.

Mr. Ahmed has argued appellant Provash Dhali has criminal antecedents and was convicted in an earlier case of attempt to murder. This is certainly an aggravating circumstance. However, it must be balanced with the mitigating circumstance, that is, age of the appellant. Provash Dhali is about 70 years old and imposition of the alternative option

¹⁰ (2003) 7 SCC 141

of life imprisonment without remission for 30 years would, in my estimation, be just punishment in the facts of the case.

Other appellants, namely, Samir Mondal and Sujit Dhali have no criminal antecedents and have strong roots in society. Though there is evidence they had participated in the assault of Benoy, there is no clear evidence that they had participated in the assault of his parents, Kagoti and Amrita. In view of the aforesaid mitigating circumstances, they may be imposed imprisonment for life in place of death sentence for the offence punishable under section 302/34 IPC.

In the light of the aforesaid discussion, we modify the sentence imposed on the appellants and direct as follows:-

All the appellants shall suffer rigorous imprisonment for 10 years and pay a fine of Rs. 10,000/- each, in default, to suffer rigorous imprisonment for one year for the offence punishable under section 449 IPC.

Appellants Sujit Dhali and Samir Mondal shall suffer rigorous imprisonment for life and pay a fine of Rs. 50,000/- each, in default, to suffer rigorous imprisonment for three years for the offence punishable under section 302 IPC read with section 34 IPC.

Appellant Provash Dhali shall suffer rigorous imprisonment for life without remission for 30 years and pay a fine of Rs. 50,000/- for the offence punishable under section 302 IPC read with section 34 IPC.

Sentence imposed on Provash Dhali for the offence punishable under section 25 of the Arms Act shall remain unaltered.

All the sentences to run concurrently.

Fine amount, if realised, is directed to be awarded to the minor sons of the deceased Avijit Biswas and Biswajit Biswas, P.Ws. 2 and 3 respectively.

Period of detention suffered by the appellants, namely, Provash Dhali, Sujit Dhali and Samir Mondal during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of section 428 of the Code of Criminal Procedure.

The death reference and the criminal appeals are, accordingly, disposed of.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)