

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

**C.R.A 123 of 2021
With
DR 1 of 2021
Saju Sk @ Sahajur
Vs
The State of West Bengal
With
CRA 197 of 2021
Alauddin Sk
Vs
The State of West Bengal**

For the appellant
in CRA 123 of 2021
with DR 1 of 2021

:Mr. Arnab Chatterjee, Advocate
Mr. Anisur Rahaman, Advocate
Ms. Dhanasree Biswas, Advocate

For the appellant
in CRA 197 of 2021

:Mr. Tapan Datta Gupta, Advocate
Mr. Partha Sarathi Ghosh, Advocate
Mr. Parvej Anam, Advocate

For the State

:Mr. Neguive Ahmed, Advocate
Ms. Amita Gaur, Advocate

Heard on

: August 16, 2022

Judgment on

: August 25, 2022

Bibhas Ranjan De, J.:-

Brief facts/ Background:

1. Learned Additional Sessions Judge, 4th Court, Beherumpore in the District of Murshidabad conducted Sessions Trial No. 19/08/2005 and convicted one Alauddin Sekh under Section 212 of the Indian Penal Code (for short IPC) and sentence to suffer imprisonment for five (5) years and to pay a fine of Rs. 10,000/- with default sentence to suffer imprisonment for five (5) years. Learned Judge further convicted Saju Sekh @ Sahajur and sentenced him to death for the offence punishable under Section 302 IPC. An order of death sentence of Saju Sekh which gave rise to death reference case no. 1 of 2021 since under provision of Code of Criminal Procedure Code (for short Cr.P.C), death sentence recorded by a Judge is subject to confirmation by this Court. Saju Sekh @ Sahajur and Alauddin Sekh also preferred two separate appeal against their respective order of conviction and sentence as Criminal Appeal No. 123 of 2021 and Criminal Appeal No. 197 of 2021.
2. By this judgment we propose to dispose of the death reference as well as two criminal appeals preferred by the appellants. In

the Sessions Trial No. 19/2008/2005 the law was put into motion by a written complaint lodged by one Foreman, Hari Prasad Singh, attached to Hajarduwari, Murshidabad (PW-1) complaining inter alia that on 09.07.2002 appellant Saju Sekh, one casual labour, came to their office at 08:00 a.m. to 08:30 a.m. for work. When Prabir Kumar Saha, (conservation asst., Gr. I) refused to absorb him due to official problems, in the result he became angry and threatened to kill him. Thereafter, he suddenly attacked Prabir Kumar Saha by one Iron Sickle and brutally chopped on various parts of his body. At that time one Susanta Mukherjee (Monument Attendant) (PW-5) and Sri Shyamdapada Kundu (Monument Attendant) (PW-6) were present over there and tried resist Saju Sk. but failed.

- 3.** On receipt of the written complaint addressed to the Officer-in-Charge, Murshidabad Police Station, Lalbagh, Murshidabad Police case being no. 72/ 2002 of 09.07.2002 under Section 302 IPC was started at Murshidabad Police Station. S.I Nilanjan Roy (PW-14) attached to Murshidabad Police Station at the relevant point of time took up investigation of the case. He visited place of occurrence and prepared rough sketch map with index (exhibit-8). He prepared seizure list (exhibit -3/2) in

respect of one blood stained wheel chair, two blood stained cushion, some blood stained greenish paper file, one pair of rubber sandal, blood stained coloured rubber paper and a pair of blood stained rubber shoe from the office room of Prabir Kumar Saha at Hazarduary Palace Museum, Lalbagh, in presence of witnesses. He collected dead body challans and inquest report in connection with Murshidabad P.S U.D Case No. 59/2002. He examined available witnesses and recorded their statement under Section 161 Cr.P.C. Statement of two witnesses under Section 161 Cr.P.C were recorded. He arrested accused Alaudduin Sk. from Kaliganj PS Nabagram for harbouring accused Saju Sk. He made a prayer for adding Section 212 IPC against accused Alauddian Sk. He arrested accused Saju Sk. From village Elahiganj under PS Murshidabad, under custody memo (exhibit-10). On his prayer, statement of Saju Sk. under Section 164 Cr.P.C (exhibit-11) was recorded by the Learned Magistrate. On completion of investigation, Investigating Officer submitted charge sheet against appellants under Section 302/212 IPC.

- 4.** Learned Sub-Divisional Judicial Magistrate, Lalbagh, by his order dated 27.08.2002 committed the case to the Learned

Sessions Judge, Murshidabad, who then transferred the case to the Court of Learned Additional Sessions Judge, 4th Court, Murshidabad, learned Judge framed charge against appellants Saju Sk. under Section 302 of the IPC and separate charge against accused Alauddin Sk. under Section 212 of the IPC. Contents of the charge was read over and explained to the appellants/ accused who pleaded not guilty and claimed to be tried.

Hence the trial.

5. Learned Judge examined as many as 14 witnesses and in course of their evidence a good number of documents were admitted in evidence as exhibit- 1 to 11. Seized articles were also admitted in evidence as material exhibit-1 (collectively). On completion of evidence accused Saju Sk. and Alauddin Sk. were examined under Section 313 Cr.P.C. no evidence was adduced on behalf of the accused.

Findings of the Ld. Trial Judge:

6. Learned Judge after considering all prosecution evidence and after hearing submissions of both the prosecution and the accused persons convicted accused Saju Sk. under Section 302 IPC and accused Alauddin Sk. under Section 212 of the IPC.

Learned Additional Sessions Judge recorded in his judgment impugned in this appeal that witness Hari Parsad Singh as PW-1 himself saw the accused Saju Sk. chopping Prabir Kumar Saha with a iron made sickle and this statement of Hari Prasad Singh has been sufficiently corroborated by Habal Sk. (PW-3), Allarakhi Bewa (PW-4), Sushanta Mukherjee (PW-5), Shymapada Kundu (PW-6), who came to the place of occurrence either at the time of incident while Saju Sk. was chopping Prabir Kumar Saha or after the incident while Saju Sk. was coming out of the office with blood stained sickle.

- 7.** Learned Judge also took note of the Post Mortem examination report (exhibit-7) held by PW-13, Dr. Sekhar Sinha. Learned Judge having satisfied about the confessional statement of accused Saju Sk. under Section 164 Cr.P.C (exhibit-11) and also relying on the evidence of doctor (PW-13) who conducted Post Mortem examination (exhibit-7) over the dead body of Prabir Kumar Saha and therefore, considering the evidence of prosecution which was direct and convincing, found no difficulty to hold Saju Sk. guilty for commission of offence under Section 302 of the IPC.

8. Learned Judge after hearing submissions of the accused Saju Sk. on the question of sentence and after taking into account all relevant facts and circumstances was of the view that offence committed by Saju Sk. came within the definition of 'rarest of rare cases' and only a sentence of death would be adequate and accordingly, without recording a sentence for life imprisonment, Saju Sk. was condemned to death by hanging.
9. With regard to accused Alauddin Sk., Learned Judge relied on the reply given by accused Saju Sk. during examination under Section 313 Cr.P.C. Learned Judge also relied on exhibit-10 custody memo of accused Saju Sk. who was arrested from the house of Alauddin Sk., situated at Kaliganj. On the aforesaid evidence Learned Judge returned his findings of conviction of accused Alauddin Sk. for the offence punishable under Section 212 of the IPC and sentenced him to suffer imprisonment for five (5) years and to pay a fine of Rs. 10,000/- with default imprisonment for five (5) years further.

Arguments Advanced:

10. Appearing in support of the Appeal No. 123 of 2021, Ld. Advocate Mr. Arnab Chatterjee has taken us through the evidence on record, particularly evidence of Prosecution Witness

(For short PW) -1, 3, 4, 5 & 6 who were all post occurrence witnesses. Mr. Chatterjee has submitted that PW- 3, 4 & 6 saw the accused Saju Sk. with a 'Hasua' which has never been seized by the Investigating Officer let alone producing the same before the Trial Court.

11. Mr. Chatterjee assailed the Post Mortem report (exhibit-7) and submitted that carbon copy of the Post Mortem report is inadmissible in evidence and that cannot be relied upon. In support of his contention, Mr. Chatterjee has relied upon a decision of ***Vijendra v. State of Delhi, (1997) 6 SCC 171***. Mr. Chatterjee has tried to convince this Court that none of the witnesses saw the accused Saju Sk. entering into the room of deceased with a hasua with a homicidal intent to kill the deceased and incident might be happened on sudden provocation. Therefore, in absence of exact motive for the offence alleged should be converted from 302 IPC to 304 IPC. In support of his contention, he relied on authority in ***Gurdial Singh and other v. State of Punjab (2011) 2 SCC 768***.

12. So far as sentence is concerned, Mr. Chatterjee has submitted that before inflicting sentence for death 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 mitigating circumstances. In this regard, Mr. Chatterjee has relied upon decision in ***Manoj and other v. State of Madhya Pradesh, 2022 SCC OnLine SC 677.***

- 13.** In support of Appeal No. 197 of 2021, Ld. Advocate, Mr. Tapan Dutta Gupta, at the outset, has referred to the provision of Section 212 of IPC having a crucial ingredient of knowledge of the accused that the person allegedly sheltered by him is an offender and the accused conceals the offender for screening him from the legal punishment. Mr. Dutta Gupta has strenuously contended that albeit there is no evidence on record regarding such knowledge of the accused, Learned Judge convicted the accused (Alauddin Sk.) only on the basis of reply given by the offender (Saju Sk.) during his examination under Section 313 Cr.P.C. and on the basis of custody memo of Saju Sk. (exhibit-10). Mr. Dutta Gupta has further referred to the confessional statement of Saju Sk. (exhibit-11) wherefrom it appears that Saju Sk. surrendered before Police Station. In support of his contention he relied on a case reported in ***AIR***

1999 Supreme Court 782 (Sanvi Kumar v. State of Himachal Pradesh with Kamalesh Tyagi v. the State of Himachal Pradesh).

- 14.** Therefore, Accordingly to Mr. Dutta Gupta, prosecution hopelessly failed to prove the provision of offence under Section 212 of the IPC against accused Alauddin Sk.
- 15.** Mr. Neguive Ahmed appearing on behalf of the State in both the appeals has relied on the evidence on record and submitted that there is sufficient evidence of eye witnesses of the incident as well as post occurrence witnesses to justify the order of conviction of the appellants. Mr. Ahmed has further submitted the ocular evidence conjointly with the medical evidence clearly established without any shadow of doubt that the accused Saju Sk,, committed murder of Prabir Kr. Saha (since deceased).
- 16.** Mr. Ahmed has further submitted that accused Saju Sk. gave statement before the Learned Magistrate under Section 164 Cr.P.C admitting his guilt as well which is in consonance with the evidence of the witnesses examined in this case.
- 17.** Mr. Ahmed strongly defend the findings recorded by the Learned Trial Judge in respect of appellant Alauddin Sk. who

sheltered the appellant Saju Sk. in his house immediately after the commission of offence.

Decision

Criminal Appeal No. 123 of 2021

- 18.** We have heard Mr. Chatterjee and Mr. Ahmed and we have also carefully examined entire fact and evidence on record. From the evidence on record we find that in this case, to bring home charge framed against the appellant Saju Sk., the prosecution side examined and has fully relied on the evidence of prosecution witness no. 1 to 14 and documents admitted in evidence.
- 19.** PW-1 (complainant of this case) has deposed in his evidence that on 09.07.2002 he along with victim Prabir Kumar Saha had a programme to go to Malda. On that day at about around 8 a.m. he along with victim came to their office at Hajarduwari Palace as they were reported by Shyamapada Kundu (PW-6) that accused Saju Sk. started working forcibly. Victim entered into the office room and lifted telephone receiver to call someone but the phone was not working. Then victim asked PW-1 to inquire into the fault. PW-1 came out of the office room and asked Susanta Mukherjee (PW-5) to work out

the fault. Thereafter, he again came back to office of the victim and he found Saju Sk. chopping victim with a hasua. He along with PW-5 tried to resist Saju Sk. and Susanta Mukherje (PW-5) nabbed the accused from his back. But Saju Sk., somehow, fled away along with his hasua. Then PW-1 called on Shyamapada Kundu (PW-6) and one Amal Dey (employee to the office room) and victim was shifted to Lalbagh hospital where doctor declared him dead. PW-1 lodged written complaint (exhibit-1) at Police Station.

20. In Cross-examination PW-1 has stated that there are as many as 25/30 employees on daily basis attached to the Palace and their office is situated within the Hajarduwari Palace. On the date of incident there was no labour present inside the Palace but they were working in the compound adjoining to Palace. He denied other suggestions put to him during cross-examination.

21. PW-2, Constable Ashis Banerjee attached to Murshidabad Police Station, has deposed that he carried the dead body of Prabir Kr. Saha (victim) from Lalbagh morgue for Post Mortem examination. He proved dead body challan (exhibit-2).

22. Habal Sk. (PW-3) has stated that he was an employee of Hajarduwari Palace. On hearing the hue and cry from the office of Prabir Saha (victim) he was proceeding towards the office and found Saju Sk. coming out with a blood stained hasua in his hand. After entering into the office room of Prabir Saha, he found PW-5 and 6 carrying the body of Prabir Saha towards hospital. In cross-examination he has stated that at the time of incident he was on duty at 'chorsiri' of Hajarduwari. He denied other suggestions. He identified the accused Saju Sk. in Court.

23. Allarakhi Bewa (PW-4) has stated in his evidence that on the date of incident in the morning at about 8 a.m. victim came to the office and at that time he was sweeping the Palace. He gave victim drinking water and thereafter he went to latrine and from latrine he heard the hue and cry and then he came out of the latrine and found Saju Sk. coming out of the room of victim carrying a hasua. Then he asked 'chotobabu' about the incident and came to know that Saju Sk. assaulted victim with hasua. He found victim with severe bleeding injury. In cross-examination he denied suggestions.

24. Susanta Mukherjee (PW-5) another employee of Hajarduwari Palace has stated that on 09.07.2002 at about

7:45 a.m. he attended his duty at Hajarduwari Palace in the room of foreman i.e Hari Prasad Singh (PW-1) who asked him to meet Prabir kr. Saha (victim). Accordingly, he went office room of victim who asked him to inquire about the telephone fault. Then he came out of the room of victim and tried to find out the fault. Then Habal Sk. (PW-3) came to him running and reported that Saju Sk. already murdered victim. He rushed to the office room of victim and found victim lying on the floor and also found Saju Sk. chopping throat of Saha babu with a weapon like hasua. In the mean time Shyamapada Kundu (PW-6) entered into the said room. Then he rushed to Saju Sk. and caught hold of him. He started shouting and called on Hari Prasad Singh (PW-1) who also rushed to the office of victim. They tried to save victim from further assault by Saju Sk. Victim died at the spot and subsequently confirmed by the doctor at Lalbagh Hospital. He proved his signature in the seizure list (exhibit-3) in respect of various articles of the office room of victim. He identified the material exhibit produced before the Court.

- 25.** In cross-examination PW-5 has stated that at first he had seen Habal Sk. (PW-3) fleeing away and then he rushed to the

office of victim. He shouted and caught hold of Saju Sk. and at that time PW-1 came to the office room but PW-6 was already present there and they shifted victim to hospital. In his cross-examination he denied the following suggestions :

“ I never heard as to whether Prabir Babu was in habit to take bribe from different person to provide service to any outsider or to give to promotion to the employees.” He denied other suggestions put to him during cross-examination.”

26. PW-5 has also stated in his examination in chief on recall that he made statement before the Learned Magistrate who recorded the same. He identified his signature on the statement recorded under Section 164 Cr.P.C (exhibit 4 series).

27. Shayampada Kundu (PW-6) claiming himself as an employee of Hajarduwari Palace has stated that on 09.07.2002 he went to Hajarduwari Palace at 8 a.m. in the morning. At that time Saju Sk. demanded work from him. The matter was reported to Prabir Saha (victim) but he told not to provide any work to Saju Sk. for two/ five days and he would provide the work as day labour after he returned from Malda. Victim came to the office to convince Saju Sk. Thereafter PW-6 proceed to

towards Immabara to see the cleaning work and when he reached at the staircase of Hajarduwari Palace, he heard shouting of Habal Sk. (PW-3). He rushed to the office room of victim and found Susanta Mukherjee (PW-5) caught hold of Saju Sk. who was carrying a hasua in his hand. Victim already received severe injury. They shifted to hospital where doctor declared him dead. He witnessed seizure of articles during investigation.

28. In cross-examination he has stated that PW-1 had entered into the office room after few minutes after his entry. He attended duty at 8 a.m. He narrated the incident to the Magistrate but he did not have any talk with Police in connection with this case. He denied suggestions.

29. PW-6 in his examination in chief on recall has stated that on 11.07.2002 he made statement before the Magistrate under Section 164 Cr.P.C and his signatures on the statement were marked as exhibit 5 series.

30. PW-7 and PW-8 neither identified the accused in Court nor stated anything about the incident. PW-9 brother of accused Saju Sk., could not say anything about the incident alleged in this case.

31. Tapan Bose (PW-10) claimed himself as an employee of Mushidabad Municipality and Pranab Kumar Chowdhury (PW-11) claimed himself as an employee of Hajarduwari Palace. They were present at the time of inquest over the dead body of victim. They identified their signatures (exhibit-6 & 6/1). PW-12 (Soumen Das) was also present at the time of holding inquest over the dead body of Prabir Saha (victim). He identified his signature (exhibit 6/2).

32. Doctor Sekhar Sinha (PW-13), attached to Lalbagh Sub Divisional Hospital held Post Mortem on Prabir Kr. Saha on 09.07.2002.

33. On examination PW-13 found 17 injuries over the dead body as follows:

“ 1. 6”X5” X1” – Deep incised wound over the right shoulder.

2. Three deep incised wounds over the right forearm i) 3”X 1” X ½”. ii) 4”X1/2”X1/2”; iii) 2”X1/2” over right forearm.

3. Severely lacerated wound with bony exposure over the right elbow.

4. Deep incised wound (3”X1”X1”) over right side of the neck.

5. Incised wound 2”X1/2” over right Exilla.

6. *Incised wound 1 ½" X 1/4" X 1" over left shoulder.*
7. *Obliquely placed incised wound 7" X 1/4" X ¼" over middle portion of scalp with exposure of bomb.*
8. *3" X 1" X 3" deep penetrating wound over left side of chest at the level of intercostals space with hematoma extending pleural chest cavity.*
9. *Deep penetrating wound over right side of upper abdominal wall. 5" X 2" opening into the peritoneal cavity.*
10. *Deep cut injury over chin 3" X ½" X 1" below mouth.*
11. *Bred Vessels of heart namely venacava and aorta punctured blood in pericardian.*
12. *Deep incised wound 7" X 1" X ½" over right foot extending from great toe to right side of foot.*
13. *Compound fracture of right elbow joint with dislocation of humerus, radius and ulna bones.*
14. *Compound fracture of both bones (radius and ulna) of left forearm and that of ring finger of left hand.*
15. *Almost total amputation of left forearm with severe avulsion of all structure – skin, muscles, blood vessels, nerves and bones.*
16. *Two deep incised wound (4" X 1" X 2" above the elbow joint) and (3" X 1/2" X 1" between shoulder and elbow over the left arm.)*

17. Three deep incised wound over left thigh (4" X 1" X 1", 4" X ½" X ½", 3" X ½" X ½", the last one is situated just above the right knee."

34. In the opinion of doctor, death was due to cardio-respiratory failure showing the following hemorrhage and caused by above noted injuries which is ante mortem and homicidal in nature. According to doctor the injuries were caused by both sharp and blunt object. Carbon copy of the Post Mortem report was prepared by him in his own hand writing which bears his signature. Post Mortem report was marked as exhibit-7.

35. In cross-examination he has stated that he did not have any special degree for holding Post Mortem but he denied the suggestion regarding no Post Mortem according to medical law. He held Post Mortem in the morgue after taking a note. Original report was lying in the office of the Superintendent of Police, Murshidabad or in the Hospital.

36. PW-14, Investigating Officer in this case, took up investigation of the case. He visited place of occurrence and prepared rough sketch map with index (exhibit-8). He prepared

seizure list (exhibit -3/2) in respect of one blood stained wheel chair, two blood stained cushion, some blood stained greenish paper file, one pair of rubber sandal, blood stained coloured rubber paper and a pair of blood stained rubber shoe from the office room of Prabir Kumar Saha at Hazarduwari Palace Museum, Lalbagh, in presence of witnesses he collected dead body challan and inquest report in connection with Murshidabad P.S U.D Case No. 59/2002. He examined available witnesses and recorded their statement under Section 164 Cr.P.C. Statement of two witnesses under Section 161 Cr.P.C were recorded. He arrested accused Alauddin Sk. from Kaliganj PS Nabagram for harbouring accused Saju Sk. He made a prayer for adding Section 212 IPC against accused Alauddian Sk. He arrested accused Saju Sk. from village Elahiganj under PS Murshidabad, under custody memo (exhibit-10). On his prayer, statement of Saju Sk. was recorded under Section 164 Cr.P.C (exhibit-11) by the Learned Magistrate. On completion of investigation, Investigating Officer submitted charge sheet against appellants under Section 302/212 IPC.

37. In cross-examination PW-14 has stated that he did not collected any document showing employment of victim and also did not seize attendance register of Hajarduwari Palace which is not a protected area. He examined Susanta Mukherjee (PW-5) who did not disclose that on 09.07.2002 he was on duty at Hajarduwari Palace. Susanta Mukherjee (PW-5) did not disclose before him that accused Saju Sk. chopped the throat of victim Prabir Kumar Saha with hasua. PW-5 did not disclose that he caught hold of Saju Sk. or he along with Shyamapada Kundu (PW-6) entered into the room of Saha Babu.

38. There is no denying of the fact that the entire incident happened in quick succession and witnesses were engaged in their respective duties at Hajarduwari Palace. Prosecution witness nos. – 1, 3, 4, 5 & 6 were present at Hajarduwari Palace at the relevant point of time when accused Saju Sk. assaulted Prabir Kr. Saha (since deceased) in the office room of the deceased.

39. From the evidence of witnesses it appears that appellant Saju Sk. used to work in Hajarduwari Palace as daily labour. Evidence further manifest that on that fateful day there was a dispute regarding engagement of appellant, Saju Sk. As a result

appellant Saju Sk. assaulted Prabir Kr. Saha (since deceased) with a 'Hasua' (sharp instrument) causing severe bodily injuries and he succumbed to his injuries.

- 40.** In the aforesaid facts and circumstances it is not possible for any particular witness to give all details of the incident without any contradiction or embellishment.
- 41.** In this case, prosecution witness nos. – 1,3,4,5 & 6 have stated in their respective evidence that the appellant Saju Sk. assaulted deceased and fled away from the Palace with the blood stained Hasua. After the incident victim was shifted to hospital where doctor declared him dead.
- 42.** Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case.
- 43.** In our case witnesses particularly prosecution witness nos. 1,3,4,5 & 6 were cross examined at length but except for minor contradictions here and there which are only to be/ expected when the witnesses deposed in course after a lapse of time, nothing substantial shaking the substratum of the prosecution case has surfaced to discredit them.

44. Dr. Sekhar Sinha (PW-13) conducted Post Mortem over the dead body of the victim at Lalbagh Hospital Morgue. He found seventeen (17) injuries on the dead body and according to his opinion death was caused by those injuries which was ante mortem and homicidal in nature. Thereby Post Mortem doctor also corroborated the injuries sustained by the victim. That apart, PW-13 further corroborated that sharp weapon was used for causing injuries.

45. Mr. Chatterjee, in course of argument, submitted that the Post Mortem doctor (PW-13), has no special qualification for Post Mortem. We cannot accept this contention of Mr. Chatterjee. A doctor attached to hospital must have basic knowledge for Post Mortem. He found seventeen (17) injuries by sharp weapon, on the dead body of the victim and he opined that those injuries caused the death of the victim. In these circumstances, we are of the view, no special knowledge is required.

46. Mr. Chatterjee relying upon the observation in paragraph 19 of **Vijendra** (supra) has tried to make us understand that the Post Mortem report (exhibit-7) being carbon copy cannot be relied upon.

47. Paragraph 19 of **Vijendra** (supra) runs as follows:

“ 19. It passes our comprehension how the trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post-mortem examination. It is of course true that in an exceptional case where any of the prerequisites of Section 32 of the Evidence Act is fulfilled a post-mortem report can be admitted in evidence as a relevant fact under sub Section (2) thereof by proving the same through some other competent witness but this section had no manner of application here for the evidence of PW 21 clearly reveals that on the day he was deposing Dr Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to

say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also.”

48. In ***Vijendra*** (supra) Hon’ble Apex Court did not rely upon carbon copy of Post Mortem report on two scores. One is that Post Mortem doctor was not examined and original was not produced. Carbon copy of the Post Mortem report did not come within the purview of Section 65 of the Indian Evidence Act.

49. But, in our case, Post Mortem was conducted by the doctor Sekhar Sinha, attached to Lalbagh Sub Divisional Hospital and he was examined in this case as prosecution witness no. 13. Besides, he testified that the Post Mortem report was prepared in his own hand writing and signature. Carbon copy of Post Mortem report was prepared with the same process as the original document and the same was prepared and signed by doctor (PW-13) himself thereby it assumes the character of the original document within the meaning of Section 62 of the Evidence Act.

50. Therefore, evidences adduced by the prosecution witnesses nos. 1,3,4,5 & 6 were corroborated by the prosecution witness no. 13.

51. Mr. Chatterjee, referring to ratio of **Gurdial Singh** (supra), has submitted that the appellant Saju Sk. had no intention to kill the deceased and incident happened out of sudden provocation. Thus, this is a fit case where the conviction can be altered from 302 IPC to 304 IPC.

52. It would be appropriate to reproduce relevant paragraphs of **Gurdial Singh** (supra) as follows:

“12. We, however, feel that a case under Section 302 IPC is not spelt out. It is clear from the prosecution story that the incident happened all of a sudden when Buta Singh objected to the construction of the drain by Gurdial Singh and others in violation of an injunction order in operation. Buta Singh was apparently attacked as he was making his way to his fields when he objected to the taking of measurements as a prelude to the diversion of the drain. The evidence shows that some altercation took place on which the three appellants Gurdial Singh armed with a gandasi and the other two with dangs caused injuries to Buta Singh and the PWs, We,

however, see that the weapons used were in fact implements of common use which are normally carried by villagers all over India and they do not reflect any prior intention on the part of the accused to commit murder.

13. It also appears that Gurdial Singh had used the gandasi from its blunt side as would be clear from the evidence of the doctor. PW-4 who had examined Buta Singh on 11-9-1995 in Dayanand Medical College Hospital, Ludhiana opined that both the injuries on the deceased had been caused by a blunt weapon. We, therefore, find that if the appellants had intended to murder Buta Singh, there was nothing to stop Gurdial Singh from using the gandasi from its true side as that would have made it a much more effective weapon. We are, therefore, of the opinion that the appellants are liable for the offence under Section 304 Part I read with Section 34 IPC.”

53. In our case, appellant Saju Sk. went to Hajarduwari Palace for work but he was refused to do so on the alleged date of incident. There was no altercation between Saju Sk. and the deceased. Moreover, Saju Sk. assaulted deceased repeatedly with a sharp weapon obviously, with intent to kill the deceased. From the evidence of Post Mortem doctor (PW-13) it appears

that doctor found 17 injuries on the body of the deceased. The fact dealt with by Gurdial (supra) cannot be said to be identical of that of ours.

54. Mr. Chatterjee has drawn our attention to the evidence on record and has submitted that Investigation Officer did not seize any weapon whatsoever in connection with this case. Investigating Officer also could not seize attendance Register of Hajarduwari Palace.

55. It is well settled that even if the investigation is improper or defective the rest of the evidence must be scrutinized independently of the impact of it. In the instant case, the prosecution has succeeded in establishing the guilt of the appellant Saju Sk. beyond reasonable doubt. On the other hand, the appellant has not placed any material before us to show that any prejudice was caused to him for the reason of defective investigation which does not go to the root of the prosecution case.

56. That apart, prosecution case has been further fortified by the confessional statement (exhibit-11) of the appellant Saju Sk. After careful scrutiny of the confessional statement of the appellant Saju Sk. we find that Ld. Magistrate recorded the

confessional statement of appellant after strict compliance of the provisions of 164 (2) to (4) of the Criminal Procedure Code.

- 57.** Therefore, having re-appreciated the entire evidence on record, we concur with the Ld. Trial Court in convicting the appellant Saju Sk. for the offence under Section 302 of the IPC.

Criminal Appeal No. 197/2021

- 58.** Ld. Trial Judge found appellant Alauddin Sk. guilty of committing offence under Section 212 of the IPC only on the place of arrest of appellant Saju Sk. according to custody memo (exhibit-10) corroborated by the Investigating Officer (PW-14).

- 59.** Mr. Dutta Gupta has submitted that the prosecution has failed to adduce any evidence to show that appellant Alauddian Sk. would know the offence alleged to have been committed by the appellant Saju Sk. It has been further submitted that there was correction of column showing place of arrest in the custody memo. In support of his contention he referred to the ratio of ***Sanjiv Kumar*** (supra) where identical issue was dealt with as follows:

“ 21. So far as accused Lekh Raj is concerned, we do not find and iota of material to indicate that he knew about the commission of offence by accused Sanjiv Kumar when he took him on his scooter

and, therefore, the conviction of accused Lekh Raj of the offence under Section 212, I.P.C. is wholly unsustainable in law. It may be stated that to attract the provision of Section 212, I.P.C. it is necessary to establish commission of an offence, harbouring or concealing the person known or believed to be the offender, and such concealment must be with the intention of screening him from legal punishment. The evidence adduced by the prosecution in this regard is wholly insufficient to establish either of the aforesaid ingredients, though all the ingredients are necessary to be proved. In this view of the matter the conviction of accused Lekh Raj for the offence under Section 212 is unsustainable and, we accordingly set aside the conviction and sentence and acquit him of the charge.

22. In the net result, therefore, the conviction of accused Sanjiv Kumar and accused Kamlesh under Section 302/120-B, I.P.C. and the sentence passed thereunder is set aside. Accused Sanjiv Kumar, however, is convicted under Section 302, I.P.C and sentenced to imprisonment for life. The conviction of accused Kamlesh under Section 201, I.P.C. is upheld; but the sentence is modified to the period already undergone. She may be released forthwith unless required in any other

case. The conviction and sentence of accused Lekh Raj under Section 212, I.P.C. is set aside and is acquitted of the charge leveled against him.”

- 60.** The offence of harbouring offender within the meaning of Section 212 of the IPC will attract whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender with the intention of screening him from legal punishment. Therefore, crucial ingredient of Section 212 of the IPC is “**knowledge**”, but in our case we find hardly any single evidence showing that appellant Alauddin Sk. would know the incident of murder alleged to have been committed by Saju Sk. From that point of view we are unable to concur with findings of conviction of appellant Alauddin Sk. who is rather entitled to be acquitted of the charge under Section 212 of the IPC.

Death Reference No 1 of 2021

- 61.** Learned trial Judge has retuned findings of death sentence as under :

“In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offenders

also. This court has noticed the aggravating circumstances which, in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

In the exercise of its discretion in the instant case, the Court shall take into account the following circumstances:-

- (1) Whether the offence was committed under the influence of extreme mental or emotional disturbance?*
- (2) The age of the convicts.*
- (3) The probability that the convicts would not commit criminal acts of violence as would constitute a continuing threat to society.*
- (4) The probability that the convicts can be reformed and rehabilitated.*
- (5) That in the facts and circumstances of the case the convicts believed that they were morally justified in committing the offence.*
- (6) That the convicts acted under the duress or domination of another person.*
- (7) That the condition of the convicts showed that they were mentally defective and that the said defect impaired their capacity to appreciate the criminality of their conduct.*

Considering the facts on record, such as the victim being an employee of Hazarduary Palace

was butchered inside the Hazarduary Palace and the condition of convict Saju Sk @ Sahajur, this is a fit case where punishment of death penalty can be awarded to the said convict.

Therefore, keeping in view of the nature of offence, the submission as made by the convicts, I am not inclined to invoke the provision of the Section 360 of the Code of Criminal Procedure, 1973 or the provision of the probation of Offenders Act. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix.

Public abhorrence of the crime needs a reflection through the Court's verdict in the measurement of punishment which must be kept in view of the rights of the criminals but also the rights of their society at large. Any kind of mercy in this case would be misplaced.

Hence, it is,

ORDERED

That the convicted person, namely, Saju Sk @ Sahajur is found guilty for the offence under Section 302 of I.P.C. and he is convicted under Section 235 (2) of the Code of Criminal Procedure and he is sentenced to death."

62. In fact, Learned Judge did not find any mitigating circumstance and only focused on aggravating circumstances.

63. At this stage it would be appropriate to refer to the relevant observation with regard to death sentence in ***Manoj & others*** (supra) as under:

“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 Singh¹¹⁰ 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.”*

64. 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.***

65. However, on requisition of this Court vide order dated 05.08.2022 State has also submitted a report on 16.08.2022 divulging the conduct of the convict as follows:

“ The conduct of the Death Row convict is disciplined and satisfactory.

Views of co-inmates: the convict is supportive and no complain found from co-inmates against the Death Row at inside the Correctional Home.”

66. The Hon’ble Supreme Court, in recent times, has placed great importance on the crime and criminal tests that examine the aggravating and mitigating circumstances. The judgment in ***Bachan Singh*** (supra) where the Hon’ble Supreme Court lays down various principles for awarding sentence, has found centre-stage in this discourse. The case lays down three principles, that of individualized sentencing, the threshold of rarest of rare, and principled sentencing.

67. The guideline of the Hon’ble Supreme Court rendered in the case of ***Bachan Singh*** (supra) in the matter of making a choice between death sentence and life imprisonment was further illustrated in the case of ***Machhi Singh vs. State of Punjab, 1983 SCC (Cri) 681.***

68. In this particular case we find from the record that the appellant committed heinous crime. We further get from the evidence that at the time of the incident the appellant was about 35/38 years of age, there is no record of any previous heinous crime committed by the appellant who was a day labour and there is also no evidence that he will be a danger to the society if the death sentence is not awarded. After taking into account of age of the appellant being a member of marginalized community, his livelihood by doing manual labour, no records of his criminal antecedents, no adverse report against him about his conduct in jail and the reason behind the commission offence, we are of the considered view that the case of the appellant does not come within the definition of '**rarest of the rare cases**' and on this consideration alone, we are unable to persuade ourselves to accept the reference and to uphold the contention in support of the death sentence.

Conclusion

69. Accordingly, we are of the view that it will sufficiently meet the ends of justice if we modify the sentence of death to that of imprisonment for life.

- 70.** In view of our above discussions, the Criminal Appeal No. 123 of 2021 stands dismissed and death reference being no. 01 of 2021 is refused.
- 71.** The order of conviction recorded by the Learned Trial Judge against the appellant Saju Sk. under Section 302 of the Indian Penal Code in connection with CRA 123 of 2021, is hereby confirmed. The appellant Saju Sk. is sentenced to suffer rigorous imprisonment for life and to pay a fine of rupees ten (10) thousand in default further rigorous imprisonment for another five (5) years.
- 72.** Issue modified jail warrant against appellant Saju Sk. accordingly at once in the name of the Superintendent of Correctional Home where the appellant Saju Sk. is lodged. Let a copy of this judgment and order be communicated to the Learned Trial Judge, forthwith.
- 73.** Our findings in paragraphs 58 to 60 lead us to allow the appeal no. 197 of 2021 and consequently, the appellant Allauddin Sk. is acquitted of the charge under Section 212 of the Indian Penal Code. The appellant Alauddin Sk. is reported to be on bail, therefore, his bail bond shall continue for a period

of Six (6) months from date in view of the Provisions of Section 437-A of the Criminal Procedure Code.

- 74.** All pending applications, if any, stand disposed of accordingly.
- 75.** Let a copy this judgment along with the Trial Courts record be sent back forthwith.
- 76.** All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.
- 77.** Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[BIBHAS RANJAN DE, J.]

78. I Agree.

[DEBANGSU BASAK, J.]