

**IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**DR 6 of 2020
The State of West Bengal
Vs.
Tapan Bag**

With

**CRA 272 of 2020
With
CRAN 1 of 2020
Sandhya Bag
Vs.
The State of West Bengal**

With

**CRA 273 of 2020
With
CRAN 1 of 2020
Tapan Bag
Vs.
The State of West Bengal**

For the Appellants	: Mr. Kallol Mondal, Adv. Mr. Krishan Ray, Adv. Mr. Souvik Das, Adv. Mr. Anamitra Banerjee, Adv. Mr. Samsher Ansari, Adv.
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For the State	: Mr. Antarikhya Basu, Adv.
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Hearing Concluded on	: November 29, 2022
Judgement on	: January 3, 2023

DEBANGSU BASAK, J.:-

1. The death reference has arisen from the judgement of conviction dated March 6, 2020 and the order of sentence

dated March 7, 2020 passed by the learned Additional Sessions Judge, 2nd Court, Serampore, Hooghly in Sessions Trial Case No. 01 of 2009. The learned judge had awarded the death penalty to the accused by the impugned judgement of conviction and the order of sentence.

- 2.** On April 12, 2008 the wife of the victim had lodged a missing diary in respect of her husband. On April 14, 2008 she had lodged a written complaint on the basis of which, a First Information Report (FIR) being No. 65 of 2008 dated April 14, 2008 was registered under Section 365 of the Indian Penal Code, 1860. The body of her husband had been recovered by the police on May 11, 2008. Police had added Section 302/201/120B/364 of the Indian Penal Code, 1860 on July 4, 2008 to the First Information Report. The police had investigated the incident and filed a charge sheet against the accused. The trial court had framed charges against seven accused persons on November 20, 2012. The accused persons had been charged primarily with kidnapping and murdering the victim and destroying evidence relating to the crime. The accused persons had pleaded not guilty and claimed to be tried.

- 3.** At the trial, the prosecution had examined 52 witnesses and tendered documentary exhibits being Exhibits 1 to 64 and material exhibits being Material Exhibits I to XVII. The accused persons had declined to adduce any evidence.
- 4.** PW 1 had stated that, she went to her paternal home at Asansol on April 9, 2008 with the understanding that, her husband, the victim, would join her on April 11, 2008. On April 11, 2008 when her husband did not reach her paternal home, she started enquiring about his whereabouts for which she talked to PW 31 who was a friend of her husband. Prior to that, she had tried to call her husband on his mobile phone but it was switched off. She had told PW 31 that both the mobile phones of her husband were switched of and for which she requested him to obtain the news of her husband and inform her about his whereabouts. Subsequently, she had spoken with PW 31 over mobile phone when, he informed her that her husband was not found at his residence and at the same time, his motorcycle was also not found there. She had talked with PW 31 on April 11, 2008. On such date, she started with her brother, PW 2 from her paternal home to her

matrimonial home. On April 12, 2008, in the morning, she had reached her matrimonial home in the early morning. After arriving there, she had tried to search for her husband at many places. During the morning, she could not trace out her husband at any place.

5. Subsequently, PW 1 had gone to the local police station in the morning to lodge a missing diary. Some persons had reported to her that, her husband had gone to the warehouse of PW 35. She had gone to the warehouse of PW 35 in search of her husband when she was informed that her husband was trying to talk to Tapan Bag. She had also come to know that, Tapan Bag had asked her husband to go to Kalipurmore. Her husband had told her about Tapan Bag. She had stated that, after one month of such incident, the body of her husband was found from the septic tank which was available near the residence of Tapan Bag. She had identified her husband from the wearing apparels.
6. PW 1 had been cross-examined at length. In cross-examination, she had stated that, her husband had a partnership business with Niranjan Bag and Tapan Bag. Beside such persons, her husband did not have any partnership business with anybody else. She had also

stated that she was a partner in any business of her husband. The defence could not elicit anything favourable to them by such cross-examination.

7. The brother-in-law of the victim and the brother of PW 1 had deposed as PW 2. He had corroborated the deposition of PW 2 with regard to PW 1 coming to her paternal home on April 9, 2008 and her going back to her matrimonial home on April 12, 2008 and the steps taken to find the victim. He had also corroborated the fact that, during the search of the victim, they learnt that, the victim had gone to the warehouse of PW 35. PW 35 had told them that, the victim was there and that one telephone call of Tapan Bag was received by the victim who called him for taking money. After such phone call, the victim had gone away.

8. PW 2 had stated that, on May 11, 2008, he received information from the police station that one body was recovered. He had gone to the place of recovery of the dead body with PW 31. He had identified the dead body as that of the victim seeing the dresses, height, structure of the body, belt and mobile cover attached with the belt. The police had held the inquest of the dead body and prepared a document. He had tendered the inquest report and the seizure list in

evidence. After identifying the dead body, he had gone to the place of occurrence with the police where he met Tapan Bag. At that time, Tapan Bag had said that, he killed the victim by a Katari (sharp cutting weapon) and that the weapon of murder was handed over to the police as well as the papers of the vehicles contained in a Pollypack. The police had prepared a seizure list where he put his signature which was marked as Exhibit 17. Tapan Bag had also signed seizure list. The papers of the vehicle belonging to the victim had been marked as Exhibit 10 series.

9. A neighbour of the victim deposed as PW 3. He had stated that, he was called by PW 1, the wife of the victim who asked him to break the padlock. He had broken the padlock. After breaking the padlock PW 1 had entered into her house. He had stated that, he knew the appellants. He had acted as the night guard of the nut and bolt factory of the victim. He had been cross-examined on behalf of the defense.

10. The brother of the victim had deposed as PW 4. He had stated that, the victim had the business of supply of bricks and sand. The victim had a nut and bolt manufacturing factory also. He had stated that, the victim was murdered.

He had stated that, he talked over telephone with Gokul Shaw who deposed as PW 31. He had narrated about the steps taken after the recovery of the dead body. He had identified his signature in the seizure list.

11. A neighbour of the appellants had deposed as PW 5.

He had stated that, when, the owner, Kanan Baduri informed him about a stinking smell in her septic tank he informed the matter to the Panchayat. The Panchayat Officer had informed the Dankuni Police Station. The police had then came and found the dead body. He had described the manner in which the dead body was discovered. He had lodged a written complaint at the police station. The written complaint however was not marked as Exhibit. He had witnessed certain seizures made by the police. He had identified his signature in such seizure list.

12. The Police Constable who was present during the recovery of the dead body from the septic tank had deposed as PW 6. He had stated about the recovery of the dead body, its identification and the subsequent steps taken. He had also witnessed the seizure. He took the dead body to the hospital. The doctor there did not hold the post mortem.

The dead body had been taken to the police station and thereafter to Kolkata for post mortem examination.

13. A neighbour of Hena Ghosh had deposed as PW 7. He did not add much value to the case of either the prosecution or the defence.

14. PW 8 had brought the GD entry dated May 11, 2008 to Court, which was marked as Exhibit 24.

15. A worker of the garage where motorcycle of the victim was kept had deposed as PW 9. He had stated that, the motorcycle of the victim was kept for 28/29 nights. He had identified his signature on the seizure list with regard to the motorcycle. He had tendered his statement recorded under Section 164 of the Criminal Procedure Code as Exhibit 28.

16. Another witness relating to the seizure of the motorcycle had deposed as PW 10. The owner of the motorcycle garage had deposed as PW 11. A person who repairs motorcycles in the garage of PW 11 had deposed as PW 12. He had been declared hostile by the prosecution. A worker at the garage of PW 11 had deposed as PW 13. He had identified his signature on the seizure list relating to the motorcycle. He had stated that, he could not remember the name and title of the person who brought the motorcycle to

the garage. He could not identify the person as the incident took place long time ago. He however had stated that, there was a register. He had tendered the relevant entry in such register. He had stated that, there were 11 motorcycle lying at the relevant point of time.

17. The photographer engaged by the police at the time of the recovery of the body had deposed as PW 14. He had identified his signature on the seizure list and the photographs that were taken. The photographs had been marked as Material Exhibit No. XIV.

18. The person who had seen the dead body in the plastic bag lying inside the chamber of the septic tank of Hena Ghosh had deposed as PW 15. A police personnel who witnessed the seizure on May 13, 2008 had deposed as PW 16. The police personnel who made the GD entry dated April 12, 2008 had deposed as PW 17. He had stated that, after receiving the complaint on April 14, 2008 at about 20:45 hours, he had put his signature on it and started Uttarpara Police Station Case No. 68/08 dated April 14, 2008 under Section 365 of the Indian Penal, 1860. He had also tendered GD entry dated April 4, 2008 in evidence.

- 19.** A Member of the Panchayat had deposed as PW 18. PW 19 had stated that, Swapan Hati told him that, there was a matter of murder at the hands of Tapan Bag. He had claimed that, Swapan Hati and he went to the Panchayat Pradhan but could not meet him. Thereafter, he had heard about the murder and the recovery of the dead body. He had recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 34 series.
- 20.** Assistant Commissioner of Police who was then posted with the Uttarpara Police Station had deposed as PW 20. The Assistant Sub-Inspector of Police who was posted at the Uttarpara Police Station at the relevant point of time had deposed as PW 21. He had identified his signature in the seizure list and the Jimmanama. A neighbour of Tapan Bag had deposed as PW 22. She had been declared hostile. PW 23 had deposed with regard to his signature on the seizure list relation to broken Jafri seized from the house of Hena Ghosh.
- 21.** The Judicial Magistrate before whom the statement under Section 164 of the Criminal Procedure Code of Joydeep Chakraborty was recorded has deposed as PW 24.

The person who had witnessed the agreement between the deceased and Niranjana Bag had deposed as PW 25. He had stated that, the deceased used to run a factory which was thereafter leased out to Niranjana Bag. After granting the lease Niranjana Bag and his son had used to run the factory. The deceased had given a sum of Rs. 1,50,000 to Niranjana Bag and subsequently Rs. 2,00,000 to Niranjana Bag.

22. The shoe shop owner had deposed as PW 26. The Judicial Magistrate who recorded the statements under Section 164 of the Criminal Procedure Code of three persons had deposed as PW 27. He had identified his signature in Exhibit 28, 34 and 41. A witness who had signed the seizure list being Exhibit 20 deposed as PW 28. The Inspector-in-charge of Uttarpara Police Station had deposed as PW 29. He had stated that, on the basis of the message a GD entry bearing No. 438 on May 11, 2008 which was marked as Exhibit 42 was entered. He had received the written complaint of Hena Ghosh which was marked as Exhibit 43. He had stated that, an Unnatural Death case was started being No. 32/2008 dated May 11, 2008 on recovery of the dead body. The dead body had been identified by the brother of the deceased. The inquest had

been held in his presence. After completion of the inquest, the dead body had been sent for post mortem.

23. Another police personnel who was present at the time of the recovery of the dead body had deposed as PW 30. He had prepared the inquest report. The inquest report had been marked as Exhibit 14. He had also prepared the seizure list dated May 13, 2008 and signed it. The seizure list has been marked as Exhibit 24. A neighbour of the victim had deposed as PW 31. He had witnessed the inquest. He had identified his signature in the inquest report. He had corroborated the deposition of PW 1 with regard to events of April 11, 2008. He had identified Tapan Bag. He had identified his signature on the seizure list being Exhibit 19. He had identified the signature on the seizure list being Exhibit 20 relating to the recovery of the keys belonging to the deceased.

24. The witness who had signed the seizure list being Exhibit 16, 17 and 18 had deposed as PW 32. He had identified his signature on such seizure list. Another witness to the seizure list being Exhibit 18 and 16 had deposed as PW 33. He had identified his signature on such seizure list.

25. The witness with regard to Exhibit 18 and 49 had deposed as PW 34. The owner of the warehouse where the victim had gone, deposed as PW 35. He had stated that, in the morning, the victim came to meet him in connection with placing an order for bricks. While the victim was talking to him, the victim had received a phone call and thereafter left the place. Since then he did not meet the victim.

26. A mobile shop owner had deposed as PW 36. A shop owner of gold jewelry had deposed as PW 37. A hardware shop owner had deposed as PW 38. He had identified his signature on Exhibit 50.

27. PW 39, 40 and 41 had stated that, they have no personal knowledge with regard to the police case. The Executive Officer of Uttara Para Co-operative Bank at Makhla had deposed as PW 42. He had identified the letter issued to the Sub-Inspector of Police dated July 4, 2008. He had identified the signature of the Manager in such letter. Such letter have been marked as Exhibit 51. The manager of Indian Overseas Bank, Dankuni had deposed as PW 43. He had stated that, on July 3, 2005 one cheque for an amount of Rs. 50,000 belonging to the deceased was

cleared. The cheque was in the name of Sandhaya Enterprises whose proprietor was Niranjana Bag. The scribe of the written complaint of PW 1 had deposed as PW 44. PW 45 had stated that, he had no personal knowledge of the case.

28. The brother-in-law of the victim had deposed as PW 46. He had stated that, at the relevant time, the victim had land in his possession which he leased out to Niranjana Bag for running his factory. Niranjana Bag had obtained loans from the victim for a sum in excess of Rs. 3,50,000 to establish the factory. The victim had granted such loan to Niranjana Bag. After 2/3 months of the grant of the loan, the victim demanded refund when, Niranjana Bag did not repay the sum on various pleas. He had identified the appellants in Court. He had identified his signature in the seizure list being Exhibit 1, 2 and 15.

29. The first Investigating Officer had deposed as PW 47. He had stated about the conduct of the investigation and the seizures that were made. He had identified his signature on such seizure list. A vegetable vendor who was present near the house of Tapan Bag on June 7, 2008 had deposed as PW 48. He had witnessed the seizure made by Exhibit

17. He had been declared hostile by the prosecution. The post mortem doctor had deposed as PW 49. He had tendered his report which was marked as Exhibit 55. He had stated that, in his opinion, the death was due to the effects of injury as noted in the post mortem, ante mortem and homicidal in nature. He had stated in cross-examination that, he was not an autopsy surgeon. The body was completely decomposed. He had however denied the suggestion that the body was totally decomposed and therefore the opinion tendered by him was incorrect.

30. The police personnel posted in the Questioned Document Examination Bureau, C.I.D, West Bengal had deposed as PW 50. He had tendered his report with regard to the examination of the signatures of Niranjan Bag and Tapan Bag appearing in the registered agreement dated April 3, 2007 and November 14, 2007.

31. The Second Investigating Officer had deposed as PW 41. He had stated about the conduct of the investigations. The Investigating Officer who had conducted the investigations subsequent to May 30, 2008 had deposed as PW 52. He had spoken about the conduct of the investigations. He had stated that, he recorded a statement

of Tapan Bag in custody on June 7, 2008. He had recovered the murder weapon as per the leading statement of Tapan Bag. He had tendered the statement as Exhibit 61.

32. The appellants had been examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent. The appellants had declined to adduce any defence witness.

33. As noted above, the police had filed charge sheet dated April 15, 2009 against six accused. Charges had been framed against all six accused. Charges had been framed against Gopal Hati, Somnath Hati and Swapan Hati under Section 411 of the Indian Penal Code, 1860 and under Section 302/201/120B of the Indian Penal Code, 1860. They had been acquitted by the impugned judgement of conviction dated March 6, 2020. Out of the six accused, three had been found guilty by the impugned judgement of conviction dated March 3, 2020. Tapan Bag, Niranjan Bag and Sandhaya Bag had been found guilty of offences punishable under Section 365/364/302/201/120B of the Indian Penal Code, 1860. By the impugned order of sentence, out of the three appellants, Tapan Bag had been

sentenced to death while the two others had been sentenced to suffered rigorous imprisonment for their respective lives.

34. Learned advocate appearing for the appellants has submitted that, the prosecution could not establish the charges against any of the appellants beyond reasonable doubt. The prosecution had failed to produce any eyewitness to the murder at the trial. The prosecution had failed to complete the chain of circumstances so as to prove the charges as against the appellants beyond all reasonable doubt.

35. Learned advocate appearing for the appellants has drawn the attention of the Court to the contents of the First Information Report. He has submitted that, the First Information Report does not contain any allegations of Section 365 of Indian Penal Code, 1860. The commission of any cognizable offence has not been alleged in the written complaint. Considering the contents of the First Information Report, it has been contended that, the investigating agency acted over zealously and that the appellants have been made scapegoats for a crime which they did not commit.

36. Learned advocate appearing for the appellants has submitted that, PW 44, who was the alleged scribe of the

written complaint, stated that he did not read over and explained the contents of the written complaint to the PW 1.

37. Learned advocate appearing for the appellants has contended that, although, PW 1 and 2 stated that, they came to know from PW 45 that the deceased went to the appellants after being called by Tapan Bag, but, such fact was not stated in the missing diary or in the First Information Report. Moreover, PW 35 did not corroborate such claim of PW 1 and 2 in his deposition.

38. Referring to the alleged recovery of the murder weapons and documents of the motorcycle and the pair of sandals, learned advocate appearing for the appellants has submitted that, the prosecution could not place cogent evidence at the trial. He has referred to the statements of PW 5 and Exhibit 60. He has submitted that, Tapan Bag never stated that he would recover the murder weapon if he has taken to the particular place. Moreover, the witness to the seizure being Exhibit 60 being PW 2 and 32 did not support the factum of the seizure. The pair of seized shoes claimed to be that of the victim, was not recovered pursuant to the leading statement made by the appellants.

39. Learned advocate appearing for the appellants has submitted that, the existence of a jural relationship, assuming, though not admitting, that there was such jural relationship between the appellants and the victim, then also, the same is not an incriminating circumstance as against the appellants. The victim had other business also. If existence of business relationship is a motive for murder then other business partners of the victim should have been brought to trial also.

40. Referring to the recovery of the dead body, learned advocate appearing for the appellants has submitted that, the body was recovered from a septic tank of another person. The identification of the dead body is shrouded in mystery. The police did not sent the dead body for DNA test in order to ascertain the identification.

41. Learned advocate appearing for the appellants has submitted that, there are major contradictions in evidence of the prosecution witnesses. He has highlighted such contradictions.

42. Learned advocate appearing for the appellants has relied upon **2011 Volume 11 Supreme Court Cases 724 (Mustakeem @ Sirajudeen vs. State of Rajasthan)**. On

the aspect of defective investigations reliance has been placed on **2013 Volume 2 Supreme Court Cases 427 (Sunil Kundu & Another vs. State of Jharkhand)**. On the aspect of the accused not being required to prove his defence beyond all reasonable doubt reliance has been placed on **2019 volume 3 Supreme Court Cases 309 (Anand Ram Chandra Chougule vs. Sidarai Laxman Chougala and Others)**.

43. In such circumstances, learned advocate for the appellants had contended that the order of sentence should be set aside and the appellants should be acquitted.
44. Learned advocate appearing for State has submitted that, the prosecution placed relevant and cogent evidence at the trial to establish the guilt of the appellants. The prosecution has proved the charges beyond all reasonable doubt.
45. Learned advocate appearing for the State has submitted that, after receiving a complaint regarding foul smell coming from the septic tank, the police started an investigation. The police had found a dead body in the septic tank. The dead body was identified by PW 2 to be that of the husband of PW 1. Wearing apparels of the victim had

been found which were identified by PW 1 to be that of PW 1. The police had been informed that on April 11, 2008 the victim had gone out with his motorcycle bearing WB 16 T 8384 from his house and was reported missing on April 12, 2008. The police had seized the document in relation to the motorcycle from Tapan Bag. The motorcycle of the victim had also been recovered.

46. Learned advocate appearing for the State has referred to the testimonies of the prosecution witnesses. He has submitted that, from the testimonies of the prosecution witnesses it can be established that the victim had been last seen with Tapan Bag. He has referred to the chain of circumstances which allows one to draw the conclusion that, the victim had been last seen with Tapan Bag.

47. Learned advocate appearing for the State has submitted that, there was motive behind the commission of the offence. The victim had a business of construction and building material and was in possession of a landed property which had been leased out to Niranjana Bag, the father of Tapan Bag. The victim had lent and advanced a sum in excess of the Rs. 3,50,000 to Niranjana Bag to run the factory. The victim had demanded refund of the loan,

two to three months prior to the incident. He has referred to the seizure list dated April 19, 2008 being Exhibit 15 as well as the written documents being Exhibit 11 and 12 and submitted that, jural relationship between the victim and the appellants were established by those documents.

48. Learned advocate appearing for the State has submitted that, the murder weapon was recovered on the leading statement made by Tapan Bag. He has referred to Exhibit 60 with regard thereto. The murder weapon had been recovered from Niranjan Bag who was the father of Tapan Bag. Folio bag belonging to the victim containing the documents of the motorcycle of the victim had been recovered from the father of Tapan Bag. Shoes of the victim had been recovered from the burial ground. The motorcycle of the victim had been recovered from a garage owner near the Railway Station. Learned advocate appearing for the State has relied upon Exhibits 18 and 26 in this regard.

49. Learned advocate appearing for the State has referred to the statement of PW 9 recorded under Section 164 of the Criminal Procedure Code, being Exhibit 28. According to him, PW 9 had stated that, Tapan Bag came to keep the motor cycle belonging to the victim.

50. Learned advocate appearing for the State has relied upon **2013 Volume 7 Supreme Court Cases 417 (*Rumi Bora Dutta vs. State of Assam*)** and **2011 Volume 3 Supreme Court Cases 530 (*Gurjinder Singh vs. State of Punjab*)** in support of his contentions. On the aspect of missing link, learned advocate appearing for the State has relied upon **2013 Volume 14 Supreme Court Cases 266 (*R. Shaji vs. State of Kerala*)**, **2016 Volume 14 Supreme Court Cases 640 (*Mehboob Ali and Another vs. State of Rajasthan*)** and **2017 Volume 7 Supreme Court Cases 177 (*Charandas Swami vs. State of Gujarat and Others*)**. On the aspect of Section 391 of the Criminal Procedure Code, learned advocate appearing for the State has relied upon **2001 Volume 4 Supreme Court Cases 759 (*Rambhau and Another vs. State of Maharashtra*)** and **2004 Volume 4 Supreme Court Cases 158 (*Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others*)**.

51. Learned advocate appearing for the State has contended that, since the prosecution established the charges against the appellants beyond reasonable doubt,

the judgement of conviction and order of sentence should be affirmed.

52. The appellants had been charged with abducting the victim with the intention to kill him, the appellants had jointly killed the victim by using a sharp cutting weapon and that the appellants had jointly and severally conspired with other accused persons to kill the victim. The appellants had also been charged with connivance with other accused persons to cause disappearance of evidence of murder, took away and misappropriate belongings and valuables from the dead body of the victim and illegally possessed stolen property of the victim. Such charges had been framed on February 19, 2009. In addition to the appellants, three other persons had also been charged on February 19, 2009 with similar offences. They had, however, been acquitted from charges.

53. The victim had a business of supply of building materials. The victim had also owned immovable property. The victim had a factory. The victim was supposed to meet his wife at his matrimonial home at Asansol on April 8, 2008 and had failed to do so. The wife of the victim, PW 1 had started making inquiries about the victim when he did

not turn up at Asansol, where she had gone. She had found that the mobile phone of the victim was switched off. She had therefore, called a neighbour being PW 31 for information about the victim. She had lodged a missing diary with the police on April 12, 2008.

54. The dead body of the victim had been recovered on May 11, 2008 from a septic tank belonging to Hena Ghosh who is the owner of the house adjacent to Tapan Bag.

55. Post mortem of the dead body of the victim had been conducted by PW 49. Post mortem report of the victim had been tendered in evidence and marked as Exhibit 55. PW 49 had opined that the death of the victim was due to effects of injuries as noted in Exhibit 55, ante mortem and homicidal in nature.

56. PW 49 had noted a number of injuries on the dead body of the victim in the post mortem report being Exhibit 55. In cross-examination, PW 49 had stated that he was not an autopsy surgeon. It has been contended on behalf of the appellants that, no reliance should be placed on Exhibit 55 as well as the testimony of PW 49 since he was not an autopsy surgeon and that no autopsy surgeon had conducted the autopsy.

57. PW 49 had performed the autopsy is a doctor and at the material point of time was posted as Assistant Professor, Department of Forensic and State Medicine, Medical Collage, Kolkata . He had submitted a report which is Exhibit 55. Nothing has been placed on record on behalf of the appellants to suggest that, Exhibit 55 cannot be relied upon. PW 49 as a doctor had noted the injuries that he detected on the body of the victim in Exhibit 55. In his opinion, the death was due to effect of such injuries, which were homicidal in nature. His opinion and report are with sufficient clarity, based upon materials he had disclosed and inspires confidence as to its veracity. The injuries noted in the post mortem report in the normal cause would have caused death to a person.

58. The victim had been missing since April 11, 2008. PW 1, the wife of the victim had stated that, she went to her paternal home on April 8, 2008 on the understanding that the victim would be joining her there on April 11, 2008. On April 11, 2008, when the victim did not reach her paternal home, PW 1 had started inquiring about his whereabouts. PW 1 had talked to PW 31 who was a friend of the victim. PW 1 had tried to call the victim on his mobile phones

which came as switch off. PW 31 had informed PW 1 that the victim was not in his residence and that his motorcycle was also not found there.

59. PW 1 had come down to her matrimonial home on the morning of April 12, 2008. She had tried to locate her husband. She had ultimately got a lead that her husband went to the warehouse of PW 35. She had gone to the warehouse of PW 35 whereupon she was informed by PW 35 that the victim was trying to talk to Tapan Bag.

60. The motorcycle of the victim was recovered from a garage belonging to PW 11. It has come out at the trial that, PW 11 used to keep motorcycles and cycles at the garage on rent. The motorcycle of the victim had been kept in the garage of PW 11. Seizure of the motorcycle of the victim had been made from the garage belonging to PW 11. PW 9, who was a worker at such garage, had stated in his statement recorded under Section 164 of the Criminal Procedure Code being Exhibit 28 that, Tapan Bag had kept such motorcycle. The defence did not cross-examine PW 9 on Exhibit 28. In Exhibit 28, PW 9 had stated that, on May 7, 2008 at about 9 in the morning Tapan Bag had kept the motorcycle at the garage.

- 61.** The police had seized a blue coloured folio bag belonging to the victim and containing inter alia, the registration documents and tax token documents relating to the motorcycle of the victim. Such seizure had taken place on June 7, 2008 at the house of the father of Tapan Bag, namely, Niranjan Bag. The seizure was witnessed by two persons who had identified their signatures on the seizure list. The seizure list had been marked as Exhibit 17.
- 62.** The defence did not explain the presence of the documents relating to the motorcycle of the victim at the house of Niranjan Bag and as had been seized under Exhibit 17. The motorcycle of the victim had been kept by Tapan Bag at the garage belonging to PW 11. PW 9 had testified as to the same. The testimony of PW 9 as recorded in Exhibit 28 had not been questioned in cross-examination by the defence at the trial.
- 63.** The motorcycle of the victim had been seized from the garage of PW 11 by Exhibit 26. A sharp cutting weapon had been recovered from the house of Niranjan Bag, the father of Tapan Bag, by way of Exhibit 17 on the leading statement made by Tapan Bag while in custody. The leading statement made by Tapan Bag had been marked as Exhibit 60 at the

trial. The injuries on the dead body of the victim were such that, they could have been inflicted by the sharp cutting weapon seized by Exhibit 17.

64. Tapan Bag had been arrested on June 7, 2008. He had made a leading statement on June 7, 2008 while in custody which was tendered in evidence and marked as Exhibit 60. The murder weapon as well as the blue colour folio bag containing the documents relating to the motorcycle of the victim had been seized on June 7, 2008 in the leading statement made by Tapan Bag. The seizure list of the murder weapon and the blue colour folio bag containing the documents of the motorcycle of the victim had been marked as Exhibit 17 at the trial. PW 2, 32 and 48 had witnessed the seizure being Exhibit 17.

65. It has been contended on behalf of the appellants that, PW 2 had given different dates for the seizure and therefore, the factum of seizure is doubtful. Moreover, PW 48 had been declared hostile.

66. As has been noted above, PW 2, 32 and 48 had witnessed the seizure being Exhibit 17. PW 32 had stated that, he had put his signature on a blank paper although he had identified his signature. PW 48 had been declared

hostile. Before being declared hostile, PW 48 had stated that, on June 7, 2008 at around 12 noon he came to sell vegetables near the house of Tapan Bag. At that time, police asked him whether he knew the accused and to identify him. He had stated that the police arrested the accused on such date. The police had prepared the seizure list and he signed on the same. He had identified his signature on Exhibit 17.

67. PW 48 had been declared hostile on the aspect of an extra judicial confession that Tapan Bag made, in presence of the police, him and other persons. PW 48 had stated that, he did not tell the police about the extra judicial confession made by Tapan Bag. On such aspect, the prosecution had cross-examined him after declaring PW 48 as hostile. It is trite law that, every bit of testimony of a hostile prosecution witness need not be discarded. Such portion of deposition of the prosecution witness who had been declared hostile at the trial which inspires confidence in the Court can be relied upon.

68. PW 48 had identified his signature on Exhibit 17. He had stated that, the police prepared Exhibit 17 at the spot and that he was asked to signed thereon. Therefore, Exhibit

17 was prepared at the time when, seizure was made and that PW 48 had witnessed and signed on it. He had been present at the place where the seizure were made.

69. The emphatic deposition of PW 48 with regard to the place of seizure, the time of seizure and his signature thereon, negates the contentions of the appellants that, the seizure was suspect. PW 2 had tendered his evidence on February 4, 2012 with regard to a seizure taking place on June 7, 2008. It is not expected that, all prosecution witnesses will remember all the dates perfectly and will be able to recollect the same with precision after 4 years. PW 2 had stated that there was a seizure of the articles noted in Exhibit 17.

70. PW 32 has stated that, he had signed Exhibit 17 when it was a blank paper. He had however, identified his signature. He had stated that, he did not know whether the police seized any articles or not. In cross-examination, he stated that, he had put his signature as per the conviction of the police.

71. Signatures of PW 2, 32 and 48 on Exhibit 17 have been admitted by the respective prosecution witnesses. The recoveries noted in Exhibit 17 had been made pursuant to

the leading statement made by Tapan Bag which has been marked as Exhibit 60. All of them were present when the recoveries had been made. It would be strenuous to accept that the recovery made by Exhibit 17 was suspect.

72. In the contention with regard to Section 27 of the Evidence Act, **Gurjinder Singh (supra)** in the facts of that case, has held that, recovery of the pistol was made from a public place but it was recovered from the place which could not be easily located by anyone. The pistol had been hidden by digging earth under a plant.

73. Mustakeem @ Sirajudeen (supra) has held as follows:-

“25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

26. If the recovery memos were prepared at the police station itself then the same would lose their sanctity as held by this Court in Varun Chaudhary v. State of Rajasthan [(2011) 12 SCC 545 : AIR 2011 SC 72] .

27. The scope and ambit of Section 27 were also illuminatingly stated in *Pulukuri Kotayya v. King Emperor* [(1946-47) 74 IA 65 : AIR 1947 PC 67] reproduced hereinbelow: (IA p. 77)

“... it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

The same were thereafter restated in another judgment of this Court in *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657 : 2005 SCC (Cri) 597].”

74. On the aspect of Section 27 of the Evidence Act, **Rumi**

Bora Dutta (supra) has held as follows:-

“16. In this context, we may refer with profit to the ruling in *State of Maharashtra v. Damu* [(2000) 6 SCC

269 : 2000 SCC (Cri) 1088] wherein it has been observed that : (SCC pp. 282-83, para 35)

“35. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum.”
Thereafter, the two learned Judges proceeded to state as follows : (SCC p. 283, para 35)

“35. ... It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section [Section 27]. The decision of the Privy Council in Pulukuri Kotayya v. King Emperor [Pulukuri Kotayya v. King Emperor, (1946-47) 74 IA 65 : AIR 1947 PC 67] is the most quoted authority for supporting the interpretation that the ‘fact discovered’ envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.”

17. In State of Punjab v. Gurnam Kaur [(2009) 11 SCC 225 : (2009) 3 SCC (Cri) 1311] it has been laid down that : (SCC p. 228, para 14)

“14. If by reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who had

made the statement in terms of Section 27 of the Evidence Act.”

18. In *Aftab Ahmad Anasari v. State of Uttaranchal* [(2010) 2 SCC 583 : (2010) 2 SCC (Cri) 1054] , after referring to an earlier decision in *Pulukuri Kotayya* [*Pulukuri Kotayya v. King Emperor*, (1946-47) 74 IA 65 : AIR 1947 PC 67] , a two-Judge Bench opined in the context of the said case that when the accused was ready to show the place where he had concealed the clothes of the deceased, the same was clearly admissible under Section 27 of the Evidence Act because the same related distinctly to the discovery of the clothes of the deceased from that very place.

19. In *Bhagwan Dass v. State (NCT of Delhi)* [(2011) 6 SCC 396 : (2011) 2 SCC (Cri) 985 : AIR 2011 SC 1863] , relying on the decisions in *Aftab Ahmad Anasari* [(2010) 2 SCC 583 : (2010) 2 SCC (Cri) 1054] and *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385 : AIR 2010 SC 2352], the Court opined that when the accused had given a statement that related to discovery of an electric wire by which the crime was committed, the said disclosure statement was admissible as evidence.”

75. In ***Mehboob Ali and Another (supra)*** the Supreme Court has held that, if on a statement something is discovered or recovered from the accused which was not in the knowledge of the police before discovery of the statement of the accused is recorded the same is admissible in evidence under Section 27 of the Evidence Act.

76. In *Charandas Swami (supra)* the Supreme has noted the authorities under Section 27 of the Evidence Act, 1872 and held that, facts discovered pursuant to discovery made by the accused contemplated by Section 27 of the Evidence Act is not limited to actual physical material object.

77. In the facts of the present case, Tapan Bag was arrested on June 7, 2008 and he made a statement on that day which was tendered in evidence and marked as Exhibit 60. In Exhibit 60, he had stated that the murder weapon which was used for murdering the victim, was kept concealed in his house and that, the folio bag containing documents of the motorcycle of the victim was kept on the top of the main door of the house. On such leading statement, recoveries of the murder weapon and the documents of the motorcycle had been made by Exhibit 17. Therefore, in our opinion, the murder weapon and the documents relating to the motorcycle seized by Exhibit 17 will come into evidence to that extent the statement of Tapan Bag made on June 7, 2008 being Exhibit 60 pursuant to Section 27 of the Evidence Act, 1872.

78. It has come in evidence that the murder weapon had blood stains on it. It has been contended that, the

prosecution did not establish the link between the blood found on the seized articles and the blood of the deceased. In support of such contention reliance has been placed on ***Sunil Kundu & Another (supra)***. In the facts of that case, there were number of irregularities and deficiencies in the investigations which had been commented upon by the Supreme Court.

79. In ***R. Shaji (supra)*** the Supreme Court has observed that, a failure by the serologist to detect the origin of blood due to disintegration of the serum does not mean the blood stuck on the axe could not have been human blood at all. It has also held that, once the recovery is made pursuant to a discovery statement made by the accused, the matching and non-matching of blood group becomes insignificant.

80. In the facts of the present case therefore, since the murder weapon had been recovered on the leading statement of Tapan Bag, the absence of evidence on the part of the prosecution with regard to the blood of the murder weapon and the blood group of the victim becomes insignificant.

81. On the aspect of burden of proof of the defence ***Anand Ram Chandra Chougule (supra)*** has held that :-

“10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

*11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In *Sunil Kundu v. State of Jharkhand*¹⁰, this Court observed : (SCC pp. 433-34, para 28)*

“28. when the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabalise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.”

82. In the facts of the present case, none of the appellants had adduced any evidence at the trial. The prosecution did

not draw support from the weakness of the case of the defence, rather the prosecution had proved the charges beyond reasonable doubt.

83. Since no additional evidence is required to be taken in the present appeal, we are not dealing with **Rambhau and Another (supra)** and **Zahira Habibulla H. Sheikh and Another (supra)**.

84. The prosecution has relied upon circumstantial evidence and motive to bring home the charges against the appellants. The trial Court had convicted the appellant on the anvil of circumstantial evidence and motive.

85. On conviction based on circumstantial evidence **Rumi Bora Dutta (supra)** has held as follows :-

“10. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court have referred to certain circumstances. When a case totally hinges on the circumstantial evidence, it is the duty of the court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.

11. More than six decades back this Court in Hanumant Govind Nargundkar v. State of M.P. [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri

LJ 129] had laid down the principles as under : (AIR pp. 345-46, para 10)

“10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

12. In Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] (SCC p. 185, para 153) the five golden principles which have been stated to constitute the panchsheel of the proof of the case based on circumstantial evidence are:

(i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely “may be” fully established,

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

13. In *C. Chenga Reddy v. State of A.P.* [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205] it has been held that : (SCC pp. 206-07, para 21)

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

- 86.** PW 1 had lodged a missing diary about her husband on April 12, 2008. She had tried to locate her husband, but she could not. During her search for her husband, she was informed that her husband had gone to the warehouse of PW 35. She had met PW 35 and came to know that her husband received a call from Tapan Bag. PW 31 had stated that, he learnt from PW 35 that, Tapan Bag had called the deceased over phone with regard to some monetary transaction. PW 35 had stated that, the deceased came to

him for placing an order. However, the deceased received a phone call and left. He corroborated the statement of PW 1 and PW 2 that, they came to him to enquire about the deceased when he told them that the deceased left after receiving a phone call.

87. The dead body of the deceased was recovered on May 11, 2008. Tapan Bag had been arrested on June 7, 2008. Tapan Bag had made a leading statement while in custody being Exhibit 60. Pursuant to his leading statement being Exhibit 60, murder weapon and documents relating to the motorcycle belonging to the deceased had been seized by Exhibit 17.

88. The motorcycle of the victim had been recovered from the garage belonging to PW 11 by Exhibit 26. A worker in the garage of PW 11 had recorded a statement under Section 164 of the Criminal Procedure Code being Exhibit 28. PW 9 in Exhibit 28 had stated that, Tapan Bag had kept the motorcycle belonging to the deceased in the garage belonging to PW 11.

89. The body of the victim had been recovered from the septic tank belonging to the neighbour of Tapan Bag,

namely, Hena Ghosh. It has come out in evidence that, Hena Ghosh is the next door neighbour of Tapan Bag.

90. Regarding motive, the prosecution at the trial had relied upon a seizure made on April 19, 2008 which was marked as Exhibit 15. By such seizure, documents had been seized one being a written deed being Exhibit 11 and another being a written agreement being Exhibit 12.

91. Exhibit 11 is a writing on a stamp paper in which, Niranjana Bag had admitted that, he took a loan of Rs. 1,50,000 from the victim. Exhibit 12 is a written agreement by which Niranjana Bag had admitted that, he had taken a loan of Rs. 2 lakhs from the victim by hypothecating a machine. These two loans had been outstanding and not repaid by Niranjana Bag.

92. PW 19 in his deposition at the trial had stated that, Swapna Hati had told him that Tapan Bag had murdered a person. These statement of PW 19 however, is hearsay and would be inappropriate to place reliance upon to convict the appellants.

93. Three persons had been convicted by the Trial Court. Tapan Bag and Niranjana Bag had been convicted on the basis of circumstantial evidence and motive. So far as

Sandhya Bag is concerned learned Trial Judge had convicted her on the basis of the statement of the Investigating Officer being PW 52. According to the learned Trial Judge, Sandhya Bag had abetted the crime.

94. PW 52 in his deposition, in our understanding, did not refer to Sandhya Bag as the person abetting the crime. Sandhya Bag is the wife of Niranjan Bag and the mother of Tapan Bag. There appears nothing in the prosecution evidence that Sandhya Bag abetted the commission of such crime and in what manner.

95. On appreciation of the facts and circumstances of the case it can be said that the prosecution has been able to prove beyond reasonable doubt that, Tapan Bag was involved in the murder of the victim.

96. The trial Judge had found Tapan Bag guilty of murder of the victim and awarded death penalty to him. This award of death penalty has to be considered on the parameters laid down by authorities for a sentence of death.

97. In **2012 Volume 4 Supreme Court Cases 257 (Ramnaresh vs. State of Chattisgarh)** the Supreme Court has held as follows :-

“72. The above judgments provide us with the dicta of the Court relating to imposition of death

penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

73. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

74. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contradistinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

75. Since, the later judgments of this Court have added to the principles stated by this Court in *Bachan Singh* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and *Machhi Singh* [*Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681], it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.

76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates

the principles that were stated in *Bachan Singh* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in *Machhi Singh* [*Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681]. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the ‘aggravating circumstances’ while the other being the ‘mitigating circumstances’. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device

which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

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

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

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

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

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

Mitigating circumstances

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

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

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

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

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

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

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

77. While determining the questions relatable to sentencing policy, the court has to follow certain

principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on

the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

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

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to 'rarest of rare' cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

98. Tapan Bag had committed the murder. He had also taken steps so as to destroy the evidence of the crime. The murder cannot be said to have been committed for a motive which evidences total depravity and meanness or was cold blooded. The aggravating circumstance against Tapan Bag are the commission of the offence of murder and his conduct in fleeing the correctional home during trial and threatening the witness. As against Tapan Bag, the mitigating circumstances are the age of Tapan Bag and the probability of reformation. Tapan Bag was approximately 23 years of age at the time of the incident. Tapan Bag was 35 years of age at the time when his statement was recorded under Section 313 of the Criminal Procedure Code. Tapan Bag should be around 37 years of age now.

99. The State has not placed any material on record to suggest that, Tapan Bag is beyond reformation and rehabilitation. By an order dated August 17, 2022, State was called upon to submit a report with regard to the conduct of Tapan Bag subsequent to his arrest as also place any material on record on the aspect of the death penalty suffered by Tapan Bag. Report dated August 31, 2022 submitted on behalf of the State had been taken on record

on September 12, 2022. The report did not have any material adverse to Tapan Bag.

100. When murder is proved, award of life imprisonment is the rule and death sentence is an exception. While considering ground of an award of death sentence, the Court is required to form an opinion that, imposition of the other punishment, that is, life imprisonment would be completely inadequate and would not meet the ends of justice.

101. In the facts and circumstances of the present case, we are not in a position to form an opinion that, imposition of life imprisonment would be completely inadequate and would not meet the ends of justice. We say so in view of the age of Tapan Bag and in view of the fact that the State did not place any material before the Court to establish that, Tapan Bag was beyond reformation and rehabilitation.

102. In such circumstances, we remit the death sentence of Tapan Bag to one of life imprisonment.

103. The Supreme Court in **2019 Volume 12 Supreme Court Cases 460 (Rajendra Pralhadrao Wasnik vs. State of Maharashtra)** has noted that it was the obligation of the prosecution to prove to the Court, through cogent

evidence that, probably the convict cannot be reformed or rehabilitated in order to sustain a sentence of death penalty. Such material has not been placed before this Court. It has held as follows:-

“45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the “special reasons” requirement of Section 354(3) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.”

104. As noted above, as against Tapan Bag there is an aggravating circumstance which is of some importance. He had fled from the correctional home and threatened witnesses before being subsequently arrested. In view of such conduct of Tapan Bag during his custody, we are of

the view that, the principles enunciated in **2016 volume 7 Supreme Court Cases 1 (Union of Indian vs. V. Sriharan @ Murugan and Others)** should be applied. **V. Sriharan (supra)** has held that, the power to impose a modified punishment providing for specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not any other inferior Court.

105. We, therefore, commute the death sentence of Tapan Bag to life imprisonment without the possibility of remission for a period of 30 years from the date of his arrest. We clarify that Tapan Bag is sentenced to life imprisonment and that, any prayer for remission, so far as he is concerned, can only be considered after 30 years from the date of his initial arrest.

106. So far as Sandhya Bag is concerned, we acquit her from the charges. Sandhya Bag is acquitted from the charges she was charged with. She is directed to be set at liberty forthwith, if not required in any other case. She shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

107. A copy of this judgement along with the trial Court records be remitted to the appropriate Court forthwith. In view of the commutation of the death penalty of Tapan Bag, any warrant issued by the appropriate Court with regard thereto in respect of Tapan Bag stands modified in terms of this judgement and order. Department will inform the Correctional Home where the appellants are lodged as to this judgement and order. The Correctional Home will record the fact of commutation of death penalty to the sentence awarded by this judgement and order in respect of Tapan Bag, in their records.

108. DR 6 of 2020 along with CRA 272 of 2020 and CRA 273 of 2020 are disposed of accordingly. All connected applications including CRAN 1 of 2020 in CRA 272 of 2020 and CRAN 1 of 2020 in CRA 273 of 2020 are disposed of accordingly.

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

[DEBANGSU BASAK, J.]

110. I agree.

[MD. SHABBAR RASHIDI, J]