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Criminal Appeal No. 4978 of 2002

Govind Das @ Gudda Appellant
Versus
State of U.P.....Respondent

Connected with

Criminal Appeal No.5234 of 2002

Jai Kishan.....Appellant
Versus
State of U.P.Respondent

Connected with

Reference No.8 of 2002.

Hon'ble Vinod Prasad, J.
Hon'ble Surendra Singh, J.

(Delivered by Hon'ble Vinod Prasad, J.)

The two appellants, Govind Das @ Gudda A-1 and his son Jai Kishan A-2 have preferred these two connected appeals being aggrieved by the judgement and order dated 16.11.2002 passed by Additional Session's Judge, court no.2, Hamirpur in S.T. No.44 of 1997, State Vs. Govind @ Gudda and others, convicting both the appellants under Section 302/34 IPC for committing murder of two sibling brothers Loknath @ Lukkhi and Naval Kishore both sons of informant Mannu, P.W.1 and Shail Kumari, P.W.2. For the murder of Loknath @ Lukkhi, both the appellants have been sentenced to imprisonment for life with Rs. 20,000/- fine on each of them with further direction that in case the fine is realised, half of the amount

out of it shall be paid as compensation to the daughter of Loknath @ Lukkhi deceased. For the murder of Naval Kishore appellant Govind Das @ Gudda A-1 has been sentenced to death whereas appellant Jai Kishan has been acquitted of the said charge. It is noted here that there was a third accused Sushila, daughter of the appellant Govind Das @ Gudda A-1, who was also tried along with the appellants but was acquitted by the impugned judgement and order of both the charges. Since Govind Das @ Gudda A-1, has been sentenced to death, learned trial Judge has sent Reference No.8 to this Court, vide his order dated 16.11.2002, for confirmation of his capital punishment.

Before entering into the merits of the appeal, a brief resume of prosecution allegations, as was sketched in the written FIR, Ext. Ka-1, on the basis of which Chik FIR, Ext. Ka-5 was prepared and as was deposed in the trial by the two fact witnesses, informant Mannu P.W.1 and eyewitness Shail Kumari P.W.2, were that the informant is a resident of village Alra, P.S. Muskara, district Hamirpur along with his wife P.W.2 and younger son Naval Kishore (deceased no.2). Rest of his family abode in village Natarra, P.S. Charkhari, district Mahoba the village of informant's in-laws. For agricultural activities, informant, his wife and deceased Naval Kishore often used to visit village Alra and do the agriculture activities. Eight days prior to the present incident of double murder both the accused appellants had erected a terracotta boundary wall on the back side of informant's

house in village Alra with the idea to grab his open land.

Loknath @ Lukkhi first deceased and son of informant was married to one Pushpa Devi, who was in her family way and was to give birth to the child in near future and because she required nursing and precaution, Loknath @ Lukkhi, deceased no.1, had come to village Alra take her mother for caring his wife on 11.8.96. In the morning at 6 or 7 a.m. P.W.2 Shail Kumari informed Loknath @ Lukkhi, deceased no.1, regarding erection of the terracotta mud boundary by the appellants and because of that same day in the afternoon there was triadic verbal altercation in between the appellants and deceased no.1. Same day in the evening deceased no.1 was accompanying his mother to his resident village Natarra and when they reached Nahariya canal in Gahrauli hamlet in front of the field of Ram Gopal Lodhi and Ram Das, they were approached by the appellants, out of whom A-1 was armed with an axe and A-2 was armed with an spear. Spotting them and sensing danger deceased no.1 Loknath @ Lukkhi sprinted and crossed over Nahariya canal but was chased and surrounded in the field of Devki Nandan where both the appellants assaulted Loknath @ Lukkhi, to death by their respective weapons. P.W.2 witnessed the annihilation of his son and she returned back to his house where she narrated the murder to the informant Mannu P.W.1, who thereafter accompanied with P.W.2 and Naval Kishore, deceased no.2, proceeded for the spot of the murder. As soon as they reached near the pond outside the village, they

came in contact with the appellants, who chased them for being annihilated and ultimately, Naval Kishore, an adolescent boy aged about 11 or 12 years, was also murdered by them and thereafter, accused murderers retreated from the incident scene. Informant left his wife P.W.2 near the corpse of his younger son Naval Kishore, deceased no.2, got his FIR, Ext. Ka-1 scribed in front of Badri's Shop in village Muskara and then measured a distance of 9 kilometres west to the police station Muskara and lodged his FIR at 11.30 p.m. the same day about the double murder, which was registered as Crime No.231 of 1996 under Section 302 IPC against the appellants.

Constable Ghanshyam Sharma P.W.5 registered the crime, prepared Chik FIR Ext. Ka-5 and relevant GD entry no.26, Ext. Ka-6. Investigation into the crime was commenced by S.O. V.K. Singh, the same day, who was present at the police station when the FIR was registered. First of all, I.O. P.W.6 copied Chik FIR and GD entry and thereafter in a government jeep along with informant, constable and inquest papers proceeded for the spot after recording statement of P.W.5 at PS itself. At the spot I.O. inspected both the corpses but because of ensued night could not conduct the inquest on both the cadavers and therefore, I.O. stayed in the village in the premises of a primary school.

At dawn first of all, I.O. P.W.6 conducted inquest on the cadaver of Naval Kishore and thereafter sealed the dead body and handed it over to Constables Narayan Singh and Ram Singh for

carrying it to the mortuary for autopsy. P.W.6 has proved the inquest report as Ext. Ka.7 and other relevant papers of challan lash and photo lash as Ext. Ka-9. He has also prepared and proved the letter addressed to Medical Officer as Ext. Ka-10. From near the dead body of Naval Kishore, I.O. had collected the plain and blood stained earth and had prepared seizure memo, Ext. Ka-11. During the trial, P.W.6 has also proved the attires of deceased Naval Kishore as material Ext. 10 and 11 and the plain and blood stained earth as material Ext. 12 and 13.

Subsequent to the inquest on the corpse of Naval Kishore, I.O. conducted inquest on the dead body of Loknath @ Lukkhi after appointing inquest witnesses and prepared his inquest memo, Ext. Ka 12. He has also prepared other relevant documents of photo lash, challan lash, Exts. Ka-13 and Ka-14, and letter to M.O. Ext. Ka-15. He has proved the attires of the first deceased Loknath @ Lukkhi as material Exts. 14, 15 and 16.

Sealing the cadaver of Loknath @ Lukkhi, it was handed over to constables Narayan Singh and Ram Singh for being carried to the mortuary for autopsy. Blood stained and plain earth were also collected by the I.O. from near the dead body of Loknath @ Lukkhi by preparing seizure memo Ext. Ka-16. These plain and blood stained earths have been proved as material Exts. 17 and 18. After completing inquests I.O. recorded investigatory statements of informant and witnesses and thereafter, at the pointing out of P.W. 1

and P.W. 2, conducted spot inspection and prepared site plan map Ext. Ka-17, about the place of both the murders. Thereafter, I.O. recorded statement of Shail Kumari (P.W. 2). Subsequent thereto, I.O. searched for the murderer culprits but could not apprehend them. On 14.8.96, P.W. 6 copied postmortem examination reports of both the deceased in the case diary. Thereafter on many subsequent dates, I.O. only searched for the accused but could not arrest / apprehend them. On 22.8.96, I.O. filed application for issuing process of attachment under section 82-83 Cr.P.C. Subsequently, on 23.8.1996, he raided the house of the accused but they were still absconding. Subsequently I.O., got the drum beat etc. but the accused continued to abscond. However at last, the accused surrendered in Court on 2.9.96 and were dispatched to penitentiary. After obtaining permission from the Court, I.O. interrogated the accused, who made discloser statement and expressed desire to get the weapons of assault recovered and, therefore, I.O. brought them to their house from where, both the accused got the weapon of assault recovered. In that respect, recovery memo Ext. Ka-2 was prepared. The weapons of assault were also exhibited as material Exts. 1 to 4, which has been proved by P.W. 3, the recovery witness. Thereafter, I.O. prepared the site plan of the places of the recovery vide Ext. Ka-18. Subsequently, I.O. interrogated the autopsy doctor and recorded his statement and concluding investigation, charge sheeted all the three accused, the two appellants and acquitted

accused Kumari Sushila of section 302 I.P.C. vide Ext. Ka-19. During investigation, I.O. had also dispatched the blood stained and plain earth, attires of the deceased and the weapons of assault for Serologist Examination, Agra whose report dated 18.10.96, vide Ext. Ka-21, is on the record.

To complete chronology of factual matrix it is noted that autopsy on the cadaver of both the deceased, Loknath @ Lukkhi and Naval Kishore were performed by Dr. Mrigendra Rajput, PW4, on 12.8 96 at 4& 5.15 p.m. respectively vide their post mortem examination reports Ext.Ka-3 and Ka-4 and doctor has noted following facts in both the autopsy reports-

Postmortem report of deceased Loknath @ Lukkhi

"Loknath @ Lukkhi had average built body, his eyes were closed, mouth disfigured and cut Blood stained discharge was coming out from both the ears. Rigor mortis was absent in upper half but was present in lower half. Mild abdomen distention was noticed. No sign of putrification was present and cadaver had mud staining. Following ante mortem injuries were detected on his body:-

- (1) Puncture wound 2-1/2 x 1/2cm on outer aspect of left eyebrow, just below the orbitel bone. Lat orbital margin #ed 2cm thin bone.*
- (2) Puncture wound 1/2 x 1/4cm, 1/4 above injury No. (1)*
- (3) Contusion 2 x 2cm below & lateral to Rt eye ball.*
- (4) Vertically placed puncture wound 1/2cm to root of nose 1/2 x 1/2 cm x 3-1/2cm deep.*
- (5) 1-1/2 x 1/2cm x 2cm deep punctured wound on left cheek 1cm above lat. end of left mustache.*
- (6) Cut wound 6-1/2 x 2 cm, 5cm deep (Jaw cut2#) on left side of lower jaw & neck, from midline upto 6-1/2cm Mandible #ed in 3 pieces.*

(7) Three small punctured wounds around umbilicus 1cm, 1cm 1/2cm long 1-1/2 to 2cm deep. No 1 is piercing peritoneal cavity.

(8) On back there are seven small punctured wounds three on left side & four on right side 1 to 1 1/2 cm size except one C is 2cm x 1-1/2 cm.

(9) Abrasion 1-1/2 x 1-1/2cm, 7-1/2cm above left elbow on outer aspect of left forearm."

According to the doctor cause of his death was brain stem hemorrhage

and death had occurred 24 hours before."

Postmortem report of deceased Naval Kishore

"Naval Kishore had a lean and thin adolescent male body with mud stained and his head had disarticulated from trunk, attached only by a top of Lt. side of neck 1/2 cm size thread thin with maggots present. His eyes were closed and mouth semi open. Blood stained discharge was coming out from both the ears nail firm. Rigor mortis was present in the lower limbs and mild abdomen distension was noticed. Doctor had noted following ante mortem physical injuries on his body:-

(1) Cut wound, disarticulating the neck and head from rest of trunk at C5 /C6 level, 17 cm – 11 cm A.P. Clavicles, C6 C7 vertebrae, all structures of neck are seen.

2. Cut wound on right side upper chest 11-1/2 x 4cm, parallel & 2 cm below injury No. (1).

According to doctors estimation deceased was murdered 24 hours before and cause of his death was shock sustained due to injuries."

Charge sheeting of the accused resulted in their summoning by learned CJM, Hamirpur, who finding their case triable by Session's Court committed it to the Court of Session's where it was received on 26.2.97 and was registered as S.T. No. 44 of 97, State Vs. Govind Das @ Gudda and two others. The said Session's Trial was alleged to

IIIrd Additional Session's Judge for Trial who, charged the appellants under section 302/34 I.P.C. on 21.1.97. However, the said charge was altered on 1.9.98 by the learned Trial Judge making it inconsonance with the prosecution allegations and evidences and material available in the case diary. The charges were red out and explained to the accused who denied the same, pleaded not guilty and claimed to be tried and consequently, to establish their guilt, Session's Trial procedure commenced.

In an effort to succeed and bring home accused guilt successfully prosecution tendered and relied upon oral testimonies of it's six witnesses out of whom informant Mannu (P.W. 1), eye witness Shail Kumari (P.W. 2) and recovery witness Ram Swarup (P.W. 3) were fact witnesses. Rest of formal witnesses included autopsy doctor Dr. Mrigendra Rajput (P.W. 4), constable Ghanshyam Sharma (P.W. 5), who had registered the crime by preparing chik FIR and GD entry and I.O. V.K. Singh S.O.,PW6, who had investigated the crime as Station Officer P.S. Muskara.

In their statements under section 313 Cr.P.C., all the accused denied incriminating circumstances put to them which were appearing against them in prosecution evidences and took a common defence of false implication. Appellant Govind Das @ Gudda A-1, further stated that but for Jai Kishan A-2 and acquitted accused Sushila, he had no other issue and only to ruin his entire family that they have been falsely implicated. Informant was married twice and

had different issues from both the marriages and, therefore, to grab the property, this murder was committed in between them in which he and his son and daughter have been falsely implicated. Accused however led no defence evidence.

Learned Trial Court after looking into the prosecution evidences, both oral and documentary, and after summing and vetting the facts and circumstances of the case, arrived at the conclusion that the prosecution had successfully anointed only appellants guilt for committing murder of Loknath @ Lukkhi and, therefore, convicted both the appellants for that crime under section 302/34 I.P.C. and sentenced them to life imprisonment with Rs. 20,000/- fine on each of them and further directing that in the event fine is released, half of the amount shall be paid as compensation to the daughter of the deceased Loknath @ Lukkhi. For the murder of Naval Kishore, learned Trial Court found that two of the accused Jai Kishan, A-2, and Km Sushila were falsely implicated and, therefore, acquitted them of that crime. It however found that guilt of appellant Govind Das @ Gudda A-1 for that murder is proved to the hilt and, therefore, convicted him under section 302/34 I.P.C. and sentenced him with death as, in the opinion of the learned Trial Judge, it was a gruesome and grotesque murder of an adolescent child without any rhyme or reason. Hence the two connected appeals by the two convicted accused and a Reference by the learned Trial Court for confirmation of death penalty.

On the facts mentioned herein above we have heard Sri P.N. Mishra, learned senior counsel, assisted by Sri Ram Kishore Gupta, learned advocate, for the appellants and Sri K.N. Bajpai, learned AGA, for the respondent State.

Castigating impugned judgement of conviction and sentence appellants counsel urged that the charge framed against the appellants on 27.1.97 was defective. Much, which was required to be mentioned in that charge was abjured and, therefore, both the accused were misled in their defence and consequently their conviction is unsustainable. It was pointed out that neither the time nor place nor reference of second murder were mentioned in the said charge and more over for two murders a composite charge was framed, which is unsanctified in law and, therefore, appellant's conviction be set aside. Elaborating the argument, it was contended that the first murder is alleged to have taken place at 4 P.M. in the field of Devki Nandan in Gahrauli hamlet, whereas second murder took place at 5 P.M. near the pond in outskirts of village Alra, after a gap of one hour. Places of both the murders were also different and, therefore, in a single charge, appellants could not have been prosecuted. It was next argued that there is no independent witness of the incident, though it occurred in the evening in the month of August where, many co-villagers and passers by must have been present and, therefore, non- examination of any independent witness casts a serious doubt on the genuineness of the prosecution story,

which does not inspire any confidence and cannot be authenticated with any credibility. Elaborating the argument, it was argued that P.W. 1 and P.W. 2, are parents of both the deceased and P.W. 3 is also their real sibling brother and, therefore, only real family members who were interested, partisan, inimical have been examined by the prosecution and hence no reliance should be placed on their depositions especially when learned trial court itself had disbelieved them in respect of Km. Shushila and also disbelieved prosecution allegations regarding participation of A-2 in the murder of Naval Kishore. All these facts cumulatively makes entire prosecution story suspect submitted learned senior counsel. It was further submitted that informant is not an eye witness of the first murder which, according to the prosecution story, was witnessed only by P.W. 2 Shail Kumari. No other person had come forward to support that incident and therefore on a single testimony of an inimical, related and partisan witness, without independent corroboration, appellants should not be judged guilty of that crime. It was further submitted that the conduct of both the fact witnesses, P.W. 1 and P.W. 2 is so bizarre that it does not inspire any confidence and makes them unnatural and got up witnesses. Not only their conduct is unnatural but it is incomprehensible that a mother will only be a mute and silent spectator to an incident where her own son was being annihilated without even raising any hue and cry and *May Day* calls. It was contended that, in fact, none of the two witnesses were

present and witnessed both the murders and subsequently, after discovery of the dead body, a false case was cooked up framing in both the appellants and it was for this reason that no independent corroboration could be sought by the prosecution to lend credence to its story. It was further submitted that the medical evidences does not support the prosecution story about the time of the incident and weapon of assault, in as much as, stomachs and intestines of both the deceased were empty, which does not suggest that incident had occurred at the time alleged by the prosecution, which is in grave doubt. According to appellants suggestion murders had occurred either in the wee hours or late in the night when the food had passed off from the stomachs and intestines. Thus appellants have challenged time of incident alleged by the prosecution. It was further submitted that none of the two fact witnesses are reliable as they have falsely implicated Km. Sushila in this double murder and assigned her specific role of catching hold of the deceased, which embellished story did not go down well with the learned trial court as well, who acquitted her of both the murders. Such an allegation was never stated either by the informant or by P.W. 2 in their FIR or before the I.O. during investigation and, therefore, none of the two fact witnesses can be bracketed as wholly reliable witnesses and, therefore, conviction of the appellants is unsustainable. It was next submitted that if the witnesses can implicate Km. Sushila, a young damsel in such a heinous crime, it cannot be brushed aside as totally

absurd submission that Jai Kishan A-2, too was also falsely implicated. Learned senior counsel further buttressed this submission by stating that Km. Sushila was introduced only to make the prosecution version consistent with the autopsy report of the two deceased perusal which indicate that at least one of the deceased had sustained punctured wounds of very small dimensions, which could not have been caused by spear. Learned counsel relied upon injury nos.1 and 2 of first deceased Loknath @ Lukkhi in support of his submission and argued that these two injuries are not explained at all. *Barchcha* was assigned to Km. Sushila only to explain these injuries harangued learned senior counsel. It is further submitted that the FIR was made ante dated and was registered ante timed as in the written FIR it is mentioned that informant had come to the police station (*soochna dene aaya hu*) and therefore, inked words indicates that FIR was manufactured at the police station itself. By pointing out at the inquest report, it was submitted that there is some interpolation in it and the time has been adjusted and subsequently added. Elaborating the submission further it was argued that according to the informant, he had sprinted towards the police station but the FIR was lodged after a gap of six and half hours and therefore, it is delayed for which no explanation has been offered by the prosecution side and consequently Ext. Ka 1 read with Ext. Ka 5 loses all its corroborative value. Six hours was utilised only to cook up a story to nail in the appellants as it was blind murders submitted

learned counsel. It is further contended that acquittal of Km. Sushila is a big blow in the prosecution story, which is further discredited by acquittal of A-2, from the charge of murder of Naval Kishore. Manner of assault as deposed by the prosecution witnesses are totally unnatural and does not appeal to the common sense. During investigation no such story, as was deposed during trial by PW1&2, was divulged to the Investigation Officer and therefore both the fact witnesses have embellished entire prosecution version contended appellants counsel. It was vehemently argued that it is impossible to cogitate that a mother will have lunch and will keep her adolescent younger son hungry and therefore, the entire prosecution story, vetted from a natural point of view, seems to be feigned and fabricated and therefore, cannot be stamped with credibility and resultantly, prosecution had failed to establish it's case against the appellants whose appeals deserves to be allowed and they deserve acquittal and be set at liberty, were the concluding submissions of the learned senior counsel.

On the question of capital punishment, Sri Mishra submitted that there was no justification for the learned trial Judge to give death penalty to appellant Govind Das @ Gudda, A-1, for the murder of Naval Kishore as the crime was neither diabolical nor was committed in such circumstances with such depravity as to revolt the judicial conscience and it cannot be said that only capital punishment was the just an appropriate sentence and but for it no other sentence

could have been awarded, as it would have resulted in miscarriage of justice. Pointing out towards mitigating circumstances it was contended that regarding that murder learned trial court has disbelieved major part of prosecution allegations and has acquitted two accused. Further manner of assault alleged by the prosecution in respect of that murder was never intimated to the I.O. during entire investigation period and therefore narration by PW1&2, during trial should be taken with a pinch of salt. Incident had occurred between close relatives on a very petty dispute, all of a sudden losing ones saner thoughts in heat of moment and the murder, though gruesome, was not grotesque and diabolical. It was therefore submitted that there were sufficient reasons for not awarding death penalty to Govind Das @ Gudda A-1. and appropriate sentence should have been the imprisonment for life just as the first murder. Case of Govind Das @ Gudda does not fall in the category of rarest of rare cases and therefore, death penalty is excessive sentence which should be scored out and it be commuted into life imprisonment, in case Govind Das @ Gudda, A-1, is not acquitted of both the charges. It was further submitted that earlier this Court had acquitted the appellants but that order was set aside by Hon'ble Apex Court and therefore the reasoning adopted by the previous Bench should also be an adding factor in diluting and commuting the death sentence awarded to appellant Govind Das @ Gudda A-1. With herein above sketched contentions, Sri Mishra concluded by praying that the

appeal of both the appellants be allowed and they be acquitted and be set at liberty.

Per contra, Sri K.N. Bajpayee, learned AGA, refuted all the submissions in a seriatim and point out the flaws in appellants contentions. He firstly took up the criticism regarding charge and pointed out that subsequent to the framing of charge dated 27.1.2007, learned trial court itself noticed the mistakes and therefore itself corrected the cropped up errors by altering the charges making good the mistakes on 1.9.1998. In this altered charge all the necessary requirements which were sufficient to inform the accused about the case to be defended by them were mentioned and therefore accused have not been prejudiced at all either in understanding the prosecution allegations or in defending them from those charges. No prejudiced was caused to them in their defence argued learned AGA. Bringing home the submissions it was pointed out that in the altered charge date, time, place of both the murders were specifically mentioned. It was therefore, submitted that snipping of conviction on the ground of being misled by the charge is contrary to actual facts and is not borne out from the record and therefore is bereft of merits. It was next submitted that both the fact witnesses were consistent in their depositions that the first deceased Loknath @ Lukkhi had come to village Alra to take his mother along with him because his wife was in the family way and was to give birth to a child in near future. This version by the prosecution is well

established on the evidences on record and none of the prosecution witnesses have faltered on the said score nor they have budged from it. It was the accused who brought it in the cross examination of PW2 that after ten or twelve days of the incident Smt. Pushpa, wife of deceased Loknath @ Lukkhi gave birth to a female child. Thus there are convincing evidences on record that deceased no.1 must have come to take her mother to nurse his wife as she was expecting a child very soon. It is further contended that erection of mud boundary wall at the back of informant's house is also an established fact and therefore, the motive for committing the crime was very much in existence. Prosecution case cannot be doubted only because of relationship between witnesses, nor prosecution witnesses can be disbelieved on that score. Testimonies of fact witnesses cannot be brushed aside and relationship is no ground to throw away entire prosecution version, argued learned AGA. It was submitted that there was no reason for the informant and his wife to falsely implicate the appellants in a double murder case of their own children and spare the real assailants. The murder was committed in day light by close relatives and therefore, there was no occasion for both the parents to frame a false story against the appellants, submitted learned AGA. It was further contended that the defence had not at all seriously challenged the place of the incident which is fully established from the presence of the blood, inquest reports and oral testimonies of both the parents. Medical evidence is consistent

with the prosecution story and in spite of lengthy cross examinations, defence has not been able to shatter the prosecution version even slightly. Next, it was argued that recovery of weapons from the house of the appellant with blood stains, at their pointing out, is also a strong circumstance which lend credence to the prosecution version, which cannot be doubted at all. FIR is the true narration of the incident and there was absolutely no interpolation in it nor the defence could discredit fact witnesses by challenging their statements on the said aspects. Sketched version in the FIR is the true narration of actual incident which cannot be doubted harangued learned AGA. It was further contended that on the question of empty stomach, none of the two fact witnesses were at all cross examined by the defence to discredit the prosecution story. It was further submitted that on the conduct also, neither the father nor the mother were tested specifically by the accused while they were in the witness box and therefore to castigate their conduct as being unnatural is wholly unjustified. Learned AGA next submitted that if the accused wanted to take advantage of witnesses surreal conduct, it should have cross examined them on that aspect but without affording opportunity to explain no criticism can be levelled against them. Concluding the argument it was submitted by respondent State that death penalty to appellant Govind Das @ Gudda, A-1, is an appropriate sentence as without any motive he had severed neck from the trunk of an adolescent boy in gruesome manner which revolt the conscience and

therefore, no clemency be conferred on A-1. Lastly, it was contended that both the appeals of the appellants lacks merit and deserves to be dismissed and the sentences awarded to both the appellants be confirmed.

We have considered the submissions raised by both the sides and have critically examined oral and documentary evidences carefully. We have also peeped through the material contained in the case diary only for a limited purpose to separate the grain from the chaff and elicit the truth.

Our vetting exercise and summation of facts brought forth certain conclusions which are *prima facie* evident from the proven facts on the record.

A priori, it is not in dispute that both the sides informant, deceased and the appellants were close relatives of each other. The perusal of pedigree deposed both by PW1&2 establishes it conspicuously clear of all doubts and therefore it will be beneficial to take stock of it.

Both the sides originally are resident of village Alra. They had a common ancestor Tulsi who had two sons Kallu and Mannu (informant). Govind Das @ Gudda, A-1 is the son of Kallu whereas A-2 and acquitted accused Km. Sushila are the two issues of A-1. Informant Mannu P.W. 1, had married twice with two real sibling sisters Ghisitya @ Ghisia and Shail Kumari, PW2, both resident of village Natarra. From his first wife Ghisitya @ Ghisia, informant had a

son Shyam Bihari. After demise of Ghisitya@ Ghisia informant married her younger sister Shail Kumari, PW2 and from her he had three issues Ram Swaroop,PW3, Loknath (deceased no.1) and Naval Kishore (deceased No.2). Loknath @ Lukkhi was married with one Pushpa and were blessed with two daughters, but the elder one had demised at an early age and the younger daughter is Preeti @ Langdi. This pedigree which has been deposed by P.W.1 and P.W.2 at various stages on their depositions has not been challenged by the accused at all and thus, appellant A-1 is the real nephew of the informant P.W.1 and his wife P.W.2, and cousin brother of both the deceased A-2 is cousin grand-son of P.W.1 and P.W.2 and nephew of both the deceased. Since both the sides were resident of the same village Alra and hence it is not a case of mistaken identity. Another important aspect which stands proved on the record is the date and time of the incident, as from the evidences on record, it is evident that accused had made no serious efforts to challenge them from both P.W.1 and P.W.2, albeit appellants counsel vehemently challenged incident time on the basis of stomach and intestine contents of both the deceased. In this respect accused had done a feeble cross examination of only PW2 , which does not dislodge or erodes the creditability of both the fact witnesses. When informant and PW2 were deposing during trial they were not tested on the said aspect of the matter so as to dislodge their versions. P.W.2 was specific that she had taken the lunch and both the deceased had not

eaten anything. Defence has not been able to bring record any material worth in name, which can dislodge such a statement made by the mother of both the deceased, who had no earthly reason to falsely implicate the appellants sparing real assailants. Thus, from the evidences and established attending circumstances it is unerringly proved that the date, time and place of the incident, as alleged by the prosecution is proved to the hilt. Another important aspect is that the use of *axe* and spear (*Bhala*) by the appellants have also not been challenged by the defence and therefore, their use during commission of crime is also not in doubt. All these facts cumulatively lay much credence to the prosecution version and we too do not find any reason to disbelieve it.

Now we propose to consider various contentions raised by appellant counsel. In this connection we find that so far as the first castigation regarding defect in charge and un-sustainability of impugned judgement is concerned the same is devoid of substance. It is trite law, which is now too well settled to be disturbed is that unless defect in charge is of such a nature that the accused was in fact misled and thereby prejudice has been caused to him in defending his case, the defect or omission in charge singularly by itself is insufficient to set aside otherwise well merited conviction. On this aspect we do not vex our mind further but aptly rely upon some of apex court decisions on this aspect which are as follows:-

In **Abdul Sayeed vs State of Madhya Pradesh (2010)SCC**

259 it has been held by the apex court as under:-

Effect of failure to frame proper charges

"41. *It has been canvassed on behalf of the appellants that there was no charge framed under Section 34 IPC by the trial court and the appellant's and other co-accused have been charged under Sections 147/148 IPC. All of them have been acquitted for the said charges. Thus, it was not permissible for the High Court to convict the appellants with the aid of Section 34 IPC. Non-framing of charge is fatal to the prosecution. Thus, the appellants are entitled for acquittal on this ground alone.*

42. *In State of A.P. v. Thakkidiram Reddy this Court considered the issue of failure to frame the proper charges observing as under: (SCC p. 558, para 10)*

"10, Sub-section (1) of Section 464 of the Code of Criminal Procedure, 1973 ('the Code', for short) expressly provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Sub-section (2) of the said section lays down the procedure that the court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless in the opinion of that court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

(emphasis in original)

The Court further held that in judging a question of prejudice, as of guilt, the court must look to the substance of the matter and not to technicalities, and its main concern should be to see whether the accused had a fair trial, whether he knew what he has being tried

for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. In the said case this court ultimately came to the conclusion that despite the defect in the framing of charges, as no prejudice had been caused to the accused, no interference was required.

43. A Constitution Bench of this Court in *Willie (William) Slaney v. State of M.P.* considered the issue of failure to frame charges properly and the conviction of an accused for the offences for which he has not been charged and reached the conclusion as under: (AIR p. 137, paras 86-87)

"86. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out.

87. If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have be established."

44. This Court in *Gurpreet Singh v. State of Punjab* referred to and relied upon its earlier judgments in *Willie (William) Slaney* and *Thakkidiram Reddy*, and held that unless there is a failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should not interfere unless it is established that the accused was in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in *Ramji Singh v. State of Bihar* and *Sanichar Sahni v. State of Bihar*.

45. There is no bar in law on conviction of the accused with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC. The absence of a charge under one or the the other or the various heads of criminal liability for the offence cannot be said to be by itself prejudicial to the accused, and therefore a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 of

the Code of Criminal Procedure, 1973 (Vide Dalip Singh v. State of Punjab, Malhu Yadav v. State of Bihar, Dhaneswar Mahakud v. State of Orissa and Annareddy Sambasiva Reddy v. State of A.P.).

46. *Thus, the law on the issue can be summarised to the effect that unless the accused is able to establish that the defect (s) in framing the charge (s) has caused real prejudice to him; that he was not informed as to what was the real case against him; or that he could not defend himself properly, no interference is required on mere technicalities."*

In Main Pal versus State of Haryana: AIR 2010 SC 3292

it has been held by the apex court as under:-

"9. The following principles relating to sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations :

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

Applying the above law on the facts of the present appeal , we noticed that no prejudice was caused to the accused . Right from the beginning of the trial, they had knowledge about the case they had to meet. Even in the opening address prosecution had informed them about it's case and evidences by which it proposes to prove the charge. Hence first criticism of learned senior counsel does not carry weight and is hereby negative.

The second supplementary contention that a joint trial could not have been framed raised by learned counsel for the appellants is concerned, we do not find any merit in that contention as well. It is provided in the Cr.P.C. that three offences of the same type can be tried together further. This has been so provided under section 219 Cr.P.C. Moreover, we find that both the murders were committed in the same sequence and forms the part of the one and the same transaction and there was no snipping of link in between them. They both were committed in the same sequence one after another and, therefore, they form a conglomerated whole, merely because time and space of both the incidents are different, will not catapult both murders out of the purview of one and the same incident and, therefore, we have no hesitation in rejecting the contention raised by learned counsel for the appellants regarding framing of joint charge against the appellants. Further, since we find that no prejudice has been caused to the appellants at all, on that score, we reject the said submission.

Third submission by appellant counsel was regarding witnessing of first murder only by PW2 and she being related, interested, inimical and partisan, should not have been relied upon without independent corroboration, is concerned the said submission also does not hold any water. It is not the quantity of witnesses which matters in a criminal trial. What is of importance is the quality of evidences adduced and it's convincing nature. It is well settled law that witnesses cannot be disbelieved only because of their relationship, if their depositions are otherwise confidence inspiring. In the present case evidence of PW2 is sufficiently authenticated by medical evidence and site plan. PW2, being mother of both the deceased would not spare the real culprits and nail in appellants in a false case. Defence has not been able to bring on record that informant and witnesses had any other enemy who could have indulged into such a crime. But for appellants there was no other person who could have committed these murders. Attached with this criticism was another castigation that no independent witness has been examined by the prosecution whose story does not seem to be truthful. In respect of both these arguments we draw contrary support from following apex court decisions :-

In **Musheer Khan @ Badshah Khan and Anr. v. State of M. P.: AIR 2010SC 762** it has been held by the apex court as under:-

"25. The Court must remember that PW-3 is a highly interested

witness, being a very close relative of the deceased. That by itself, of course, is not a ground to discard his evidence. But it is a golden rule that in such a situation, the evidence of PW-3 has to be weighed very carefully and cautiously before accepting the same."

In **Dharamveer versus State of U.P. : AIR 2010 SC 1378**

it has been observed by the apex court as under:-

"15. All these submissions are in the realm of appreciation of evidence and the High Court has meticulously examined it. The evidence of an eye witness cannot be rejected only on the ground that enmity exists between the parties".

On the facts of the present appeal we notice that there was absolutely no reason for the informant or his wife to falsely implicate appellants in a double murder crime of their own sons. In between them there was no such enormous enmity that they will go to this extent. Moreover, as already has been pointed out that accused have failed to bring on record that any other person could have indulged into the crime and hence what we find that it is a case of absence of any reason for false implication.

Further it is noted that the police station was at a distance of 9 Km from the place of the incident. Double murder had taken place in the family of the informant and two of his sons, one middle one and the other youngest had lost their lives. In such a view, it will be puerile to cogitate that both the parents will be in a fit state of mind to rush to the police station and lodge the F.I.R. with a rocketing speed. Our heuristic experience informs us that in such types of situations natural and common course of action is seldom observed and time flies by. FIR has been lodged after six and a half hours,

which time, looking to the distance and the crime committed by the accused is not much. It is because of this, that much of the argument could not be advanced that FIR is ante timed. Both the fact witnesses were not tested by the defence on this aspect of delay in lodging the FIR. We, therefore find that there was no delay in lodging the FIR which seems to be prompt containing unembellished version about the incident. Learned senior counsel also could not castigate FIR Ext. Ka-1 except pointing out that it does not contain the name of Km. Sushila and the role played by her during the incident. It was because of this omission in the FIR and non disclosure during the investigation that the learned trial court disbelieved prosecution version in her respect and acquitted her but that does not mean that the entire prosecution version should be discarded for that reason. Acquittal of Km. Sushila is not going to benefit of two appellants and we are not ready to disbelieve entire prosecution story for that reason. Consistency in prosecution evidences is another convincing factor and we failed to fathom out any damaging evidence sufficient to negate prosecution story. Right from the very beginning the prosecution version of deceased no.1 being surrounded near the canal in Gahrauli hamlet near the field of Ram Gopal Lodhi is consistent. It has been deposed by PW2 who never wavered. She is confident about her allegations when she stated that after the two appellants surrounded deceased no.1, he sprinted to save his life by jumping over other side of canal but was unable to avert his death in

the field of Devki Nandan where he was assaulted to death. No serious cross-examination of the fact witnesses was done by the accused to create doubt about such a story deposed by her. Thus, in respect of murder of deceased no.1 Loknath @ Lukkhi, prosecution has been able to bring home accused appellant guilt successfully without any doubt. As a natural corollary argument of appellants counsel regarding time of the incident being different, thus, is unmerited and is hereby repelled. We further note that incident could not have occurred as suggested by appellants. According to the suggestion urged by appellant's counsel, incident had taken place in the early hours of the morning. It will be too much of supposition and purely hypothetical to think that for more than 12 hours two dead bodies lied in the village without anybody noticing it. The places of the incident were such where presence of the villagers during early hours of the morning would have been very natural. The first murder occurred near a canal were normally, the villagers go to attend nature's call in the early hours of the morning or in the evening. The second incident occurred near a pond outside the village where the presence of the villagers during day time is most natural. We are therefore unable to subscribe to defence argument and submission of appellant's counsel therefore, does not carry any weight and consequently we have no hesitation in taking a adverse view favouring prosecution allegations.

Turning towards another contention regarding ante timing of

FIR because of language used in the written report, we are unable to appreciate the said argument. P.W.1 was cross-examined on the said aspect of the matter and he, in no uncertain terms, stated that he had dictated the FIR to scribed Devi Deen in front of Badri's shop in his village. Informant was unambiguously clear in deposing that the words "*paidal suchna dene aaya hoon*" was dictated by him in front of the shop of the Badri and he emphatically denied the defence case that the FIR was cooked up subsequently and was anti timed and ante dated. Defence has not been able to substantiate such a suggestion either from direct or from circumstantial evidences and therefore, there is no room for doubt that FIR was registered at the time and date alleged by the prosecution and castigation by the appellants about authenticity of the said report is unconvincing.

Another submission, which was argued vehemently is regarding conduct of the parents and no venture by them to save their sons lives when they were being annihilated also does not carry much weight. So far as first murder is concerned, P.W. 2 Shail Kumari was the sole witness she had no idea that the appellants, who were her close relative will act in such a ghastly manner and will do away with her son on a pity dispute. She is a rustic lady. On the date of her testimony in 2000, she was 65 years of age. Incident had occurred in 1996 just four years ago and therefore, at the time when she had witnessed the incident, she must have been 61 or 60 years of age. For her to intervene in such an incident from a good distance of

other side of canal was an impossibility. Moreover, from the injuries sustained by the first deceased Loknath @ Lukkhi it does not seem that the incident had lasted for sufficient time. It must have been over but in a few minutes. No serious and worthwhile cross-examination of P.W.2 regarding actual happening of the incident was done by the accused persons. They did not challenge her witnessing the incident because of her surreal conduct. If the appellants wanted to take advantage of her being a mute spectator of the incident, they should have tested her veracity by questioning her, which they failed to do. Without giving opportunity to a mother, castigating her evidence in respect of murders of her two sons will be wholly unjustified and therefore, for the reason of non-intervention during the incident by either of the parents, we are not ready to disbelieve their evidences and dub them as untruthful witnesses and confer benefit of doubt to the appellants.

Moreover, participation of the appellants in the crime is also established from the recoveries made from them from their house on their disclosure statements, which is admissible under Section 27 of the Evidence Act. Both the weapons contained human blood. Serologist report Ext. Ka-21 also indicates that the axe contained human blood and thus, participation of the appellants in the crime is established reasonably and convincingly. The defence has suggested to the parents that because of partition dispute they had got both the deceased murdered but the said suggestion is without any prefix

and suffix and seems to have been given without any basis.

Another criticism raised by appellant's counsel that there was no terracotta boundary wall erection because the same was not shown to the I.O. and regarding the same, there is no convincing evidence, is concerned is also bereft of substance for the reason that all the witnesses are clear, cogent and unambiguous regarding its erection. It was the motive for the appellants to commit double murder in day light. Had that fact being not true, there was no reason for the close relatives to feign a story of such an erection against their close relatives in a case of double murder. Further we note that the conduct of the I.O. in unearthing the crime has not been very fair. I.O. deliberately and intentionally gave a long rope to the accused and for days together did not make any serious effort to apprehend them. Perusal of the case diary, gives an impression as if, the I.O. was not investigating a double murder case. He was only trying to fill up the pages of the case diary to which conduct we seriously deprecate. In such type of cases, it is expected that law enforcing agencies will act courageously and with alacrity. Much has been left to be desired by the I.O. We are, therefore, of the opinion that lapses on the part of the I.O. should not cloud our thoughts against otherwise convincing testimonies of the parents and therefore we repel appellant's argument.

Turning towards another submission raised by Sri Mishra that acquittal of Km. Sushila erodes prosecution story irreparably and

benefit of the same be accorded to the appellants, we are of the view that the said argument has no substance at all. Firstly, the dictum of *falsus in uno, falsus in omnibus* does not apply to our jurisprudential system and secondly, so far as the two appellants are concerned, right from the very beginning of scribing the FIR prosecution case is consistent, clear and unambiguous. At no point of time, prosecution witnesses had expatiated their roles and their participation and, therefore, in absence of any damaging evidence eroding the credibility of the testimonies of the two parents, we do not find any reason to exonerate the appellants from the crime committed by them. Concludingly, we are of the opinion that so far as conviction of both the appellants for the murder of Loknath @ Lukkhi and that of Naval Kishore is concerned, it is well merited but we also find that learned Trial Judge has rightly acquitted Jai Kishan for the second murder and has also rightly acquitted Km. Sushila of both the charges.

At this stage we advert to an application filed by appellant Naval Kishore, A-2, claiming that he was a juvenile on the incident date and, therefore, be conferred benefit of Juvenile Justice Act. In support of that claim, a school living certificate from Primary school, Alra, Gaura Chetra, Muskara has been filed. However, we do not find any merit in that application for the reason that neither during investigation nor during the trial in the trial Court nor during decision of the appeal on the earlier occasion by this Court nor before the

Apex Court in SLP, being Criminal Appeal No. 1049-50 of 2007, State of U.P. versus Govind Das @ Gudda and another, arising out of SLP (Crl) No.46-47 of 2006, any such plea was raised by the said appellant. It is too late in the day to accept such a plea. School going by the said appellant was very well known to his father appellant A-1 who never pointed it out at any previous stage to claim that appellant A-2 was a juvenile. It seems that the application has been filed only to gain benefit without any material basis. No date of birth certificate or other circumstance has been filed by the said appellant to confer him the benefit of Juvenile Justice Act. It is recollected here that the Juvenile Justice Act has been enacted as a beneficial legislation only in cases of Juveniles but that does not mean that it should be taken to be safe heaven for real offenders on the basis of unauthenticated and un-proved document and therefore, we reject the said application.

This now takes us to the question of sentence. For the first murder of Loknath @ Lukkhi, both the appellants have been convicted with imprisonment for life with fine of Rs. 20,000/- and if the same is deposited, half of the amount has been awarded as compensation to the daughter of the said deceased namely Preeti @ Langdi. We do not find any reason to interfere with this sentence as imprisonment for life, for a charge of murder, is the minimum sentence. However, we expatiate appellants sentence by directing that in default of payment of fine both the appellants shall serve one

year further RI.

For the second murder of Naval Kishore, we are of the opinion that imposing of death penalty to appellant Govind Das @ Gudda, A-1, for that crime, is not commensurate with his guilt as we do not find that the said murder falls in the category of rarest of rare cases. The mitigating and extenuating circumstances favouring A-1, in respect of that murder, are that two other accused Jai Kishan and Km. Sushila were acquitted by the learned Trial Court. Manner of assault on the said deceased was disbelieved by the learned trial court. It had further concluded that Km. Sushila had been falsely implicated in entire episode. She was not named in the FIR. Role of Jai Kishan in the murder of Naval Kishore was also not convincingly established and he too was acquitted of that offence. The crime was committed in a heat of moment but the same was not gruesome, grotesque or diabolical. It was because of the earlier dispute which had taken place in the afternoon that out of loss of self-control, appellant A-1 committed the crime. Moreover injuries of Naval Kishore does not indicate that he was murdered in a diabolical manner and, therefore, we do not find any reason to hold that it was a rarest of the rare case. Crime was committed in 1996 and now sixteen years have gone by. From the date of conviction also ten years have passed. Agony and mental tormentaion of being sent to gallows, and thereafter about the well being of both the children must have changed and affected A-1 mentally and physically. It

cannot be said that there is no chance of his reformation. In our this view, we are fortified by one of the Apex Court Judgement rendered in **Neel Kumar Vs. State of Haryana 2012 (1) SC Cr. R. 913**, wherein Hon'ble Apex Court, while dealing with the question as to what is the rarest of rare case and whether the death penalty will be appropriate sentence, has been pleased to observe as under:-

"21. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. 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 for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The 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 before option is exercised.

22. After considering the issue at length, this court in State of Maharashtra v. Goraksha Ambaji Adsul, AIR 2011 SC 2689, held as under: "Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

The same view has been taken by the Apex Court in many other earlier decisions wherein. In **Mulla and Anr. v. State of U. P.**

:AIR 2010 SC 942 it has been held by the apex court as under:-

"53. As we have noted above, old age has emerged as a mitigating factor since *Bachhan Singh*, (AIR 1980 SC 898) (*supra*). This court in *Swamy Shraddananda v. State of Karnataka* (2008) 13 SCC 767 : (2008 AIR SCW 5110) substituted death sentence to life imprisonment since the convicts were 64 years old and had been in custody for 16 years. Even in the present case, one of the convicts is around 65 years old. The charges had been framed in 1999 and they have been in custody since 1996. They have been convicted by the Sessions Court in 2005. Clearly, the appellants have been in prison for the last 14 years.

54. Another factor which unfortunately has been left out in much judicial decision-making in sentencing is the socio-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognize that in the real world, such factors may lead a person to crime. The 48th report of the Law Commission also reflected this concern. Therefore, we believe, socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors lead us to another related mitigating factor, i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This court on many previous occasions has held that this ability to reform amount to a mitigating factor in cases of death penalty.

55. In the present case, the convicts belong to an extremely poor background. With lack of knowledge on the background of the appellants, we may not be certain as to their past, but one thing which is clear to us is that they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time.

56. This Court in *Dalbir Singh and others v. State of Punjab* (1979) 3 SCC 745 : (AIR 1979 SC 1384) had considered the question of the length of incarceration when death penalty is reduced to life imprisonment. It was held that:

"14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad* case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the

community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may. at some remote time repeat murder."

Applying the guidelines laid down by the apex court, on the facts and circumstances of the present appeals, we are of the view that the death penalty awarded to the appellant Govind Das @ Gudda, A-1, is not warranted as his crime does not fall in rarest of the rare case category and, therefore, we commute his conviction from death penalty to life imprisonment for committing murder of Naval Kishore.

In view of above, Criminal Appeal No. 5234 of 2002, Jai Kishan Vs. State, is dismissed with direction that in case of default in payment of fine Jai Kishan appellant shall serve one year RI as default sentence.

Criminal Appeal No. 4978 of 2002, Govind Das @ Gudda, is **partly allowed**. Conviction of appellant Govind Das @ Gudda for murders of Loknath @ Lukkhi and Naval Kishore is affirmed. His awarded sentence of life imprisonment with fine of Rs. 20000/= for murdering Loknath @ Lukkhi is also affirmed and he is further directed to serve one year further RI as default sentence in case he fails to deposit imposed fine. However his sentence of death penalty for the murder of Naval Kishore is set aside and is commuted to life imprisonment. Both the appellants are in jail. They are directed to serve out their sentences.

Reference sent by the learned Trial Judge for confirming death

penalty awarded to appellant Govind Das @ Gudda being Reference
No. 8 of 2002 is hereby rejected.

Both the appeals are decided as above.

Dt.6.7.2012

Rk/Arvind/Tamang