



Court No. 46.

1. Case:- Capital Cases No. 5003 of 2010

Petitioner: Saleem

Respondent: State of U.P.

Petitioner Counsel: R.K. Pandey, Pawan Kumar Shukla.

Respondent Counsel: Govt. Advocate.

2. Case: Capital Cases No. 5245 of 2010.

Petitioner: Sabnam.

Petitioner Counsel: A.G.A, Arshiyam Nasir, Braham Singh, From Jail, S.I. Siddiqui, Tahira Kazmi.

Respondent Counsel: From Jail. A.G.A

AND

3. Capital Reference No. 8 of 2010.

Hon'ble Amar Saran, J

Hon'ble S.C. Agarwal, J

(Delivered by Hon'ble Amar Saran, J)

These two connected capital appeals arise from the judgement of Sessions Judge dated 15.7.2010 convicting and sentencing the two appellants Saleem and Shabnam to death sentence under section 302/34 I.P.C.

An FIR was lodged by PW-1 Lateef Ullah who was a neighbour of appellant Shabnam and the deceased at Police Station Kotwali Hasanpur which was 4 ½ Km away from the place of incident on 15.4.2008 at 3.05 a.m. The said report was scribed by Sabir Ali. This FIR alleged that at 2.15 A.M in the night of 14/15.4.2008, the informant had heard the cries of Shabnam "*Bachao-Bachao Maare-Maare*". He rushed to the house of the deceased Shaukat and on climbed up the stairs of the house he found Shabnam lying in an unconscious condition and found the corpse of Shaukat in the verandah with his neck

cut. In the eastern room, Rashid was lying dead on a cot. In the South-Western room, Shaukat's son Anees and his daughter-in-law Anjum were seen lying on the cot with fatal injuries on their necks, and their ten month old child Arsh was also lying dead on the same cot. In the north-eastern room, Hashmi the wife of Master Shaukat and Master Shaukat 's niece Rabia were also lying dead with injuries on their necks. Blood was spread all over. On his alarm, the villagers gathered and he proceeded to the police station for lodging the FIR.

After registering the FIR, PW-26 SI Babu Ram Sagar started investigation of this case. After recording the statements of the informant and the scribe, he reached village Bawankhera, and found seven dead bodies at the house of the deceased Shaukat. After conducting inquests, the corpses were sealed and sent for the post-mortem through PW 15 Constable Virendra Singh. PW-24 Dr. Deewan Ram conducted the post-mortem on the dead bodies of Shaukat, Arsh and Rashid at District Hospital, Moradabad.

The deceased Shaukat Ali, whose post-mortem was conducted on 15.4.2008 at 3.30 P.M had the following ante-mortem injuries:

1. Multiple stab wound 9 x 5 cm on front of chin and left cheek x bone deep.
2. Multiple two stab wound 6x5 cm x trachea cut x front of neck.

Stomach contained about 350 ml food content. There was gas in small intestine and large intestine. The cause of death was shock and haemorrhage due to ante mortem injuries and the viscera was preserved. Rigor mortis had passed from the neck and it was present on the upper and lower parts of the body. The time of death was about one day.

The post-mortem on the body of 10 month old Arsh was carried out on 15.4.2008 at 4.00 P.M. Rigor mortis had passed from the upper part of the body but it was present on the

lower part. The following ante-mortem injuries were seen:

1. Multiple abrasion and contusions on both side of front of neck.

The cause of death was Asphyxia as a result of ante-mortem throttling. The viscera of the child was also preserved.

Post-mortem was conducted on the body of Rashid Ali aged 22 years on 15.4.2008 at 4.30 P.M.

Rigor mortis in the neck present, upper and lower limbs, passed. The following ante-mortem injuries were found:

1. Incised wound 12 x 6 cm x Trachea cut in front of neck, both carotid arteries cut.

Both lungs were congested. Both chamber of hearts were empty. The small and large intestines contained gas. The cause of death was shock and haemorrhage. The viscera was preserved.

PW-27 Dr. R.P. Sharma conducted the postmortem on the remaining four deceased persons at District Hospital. He conducted the post-mortem on Smt. Hashmi at 3.40 P.M on 15.4.2008. She was aged about 50 years.

Rigor mortis was present on both upper and lower limbs. Clotted blood was present. Decomposition had not started. The time of death about half a day old. Ante-mortem injuries were as under:

1. An oblique incised wound of size 4 cm x 2 cm x trachea deep on the front of right side neck. Clotted blood present and its direction from above downwards.

2. Stab wound 2.5 cm x 2 cm x bone deep on right side chest from upper part 4 cm above right tip of shoulder tapering from medial to lateral. Clotted blood present.

3. Transverse incised wound 7 cm x 5 cm x trachea cut just above right side manubrial sterni, direction from medial to lateral. Clotted blood present. Viscera was preserved.

PW-27 Dr. R.P. Sharma also conducted autopsy on the body of Km. Rabia aged 14 years on 15.4.2008 at 4.00 P.M. Rigor mortis was present in both upper and lower limbs. Decomposition was not present and clotted blood was present from both nostrils. The following ante-mortem injuries were seen:

1. Transverse incised wound of size 8 cm x 5 cm x trachea, esophagus and blood vessels were cut. Wound direction from right to left. Clotted blood present. Gall bladder, spleen and both lungs were congested. Both chambers of heart were empty. Stomach contained unidentified food material and gases. Death was due to shock and haemorrhage as a result of ante-mortem injuries. Viscera was preserved.

Dr. R.P. Sharma conducted post-mortem on the body of Anees aged 35 years on 15.4.2008 at 4.30 P.M. Rigor mortis was present in upper and lower limbs. Decomposition was not present. Blood from both nostrils coming out. Following ante-mortem injuries were found:

1. An oblique incised wound 1 cm x .5 cm x muscle deep on the right side face just outside the right eye. Clotted blood present. Wound's direction from above downward.
2. An oblique incised wound 3 cm x 0.8 cm cartilages cut on upper part of right ear pinna. Clotted blood present. Wound is directing from outer to inwards.
3. Transverse incised wound 8 cm x 5 cm trachea cut in front of lower part neck 3 cm above Manubrium sterni esophagus, blood vessels and nerves are cut. Clotted blood present. Larynx was congested. On internal examination, membranes of brain, both lungs, spleen and both kidneys were congested. C 6 vertebra was cut. Death was due to Asphyxia as a result of shock and haemorrhage as a result of ante-mortem injuries. The viscera was preserved.

Dr. R.P. Sharma also conducted postmortem of Smt. Anjum

aged 25 years on 15.4.2008 at 4.45 P.M. Time of death was about half a day old and rigor mortis was present. No decomposition was present. The following anti-mortem injuries were found:

1. An oblique incised wound 3 x 2 cm trachea cut on the front of neck, lower part on the right side . Clotted blood present. Wound is directing from medial to lateral.
2. An oblique transverse incised wound 4.5 x 2 cm x trachea cut on front of neck lower part 2 cm behind injury no. 1. Wound is directing from medial to laterally. Clotted blood present.

On external examination, both lungs were congested. Both chamber of hearts were empty. Liver and kidneys were congested. The viscera was preserved. The cause of death as due to Asphyxia due to shock and haemorrhage due to ante-mortem injury.

The viscera of all the seven deceased persons was sent to the Forensic Laboratory at Agra. In the case of Shaukat Ali , Smt. Hashmi, Anees Ahmad, Smt. Anjum, Rasid Ali and Km. Rabia, diazepam tranquillizer poison was found in the organs of the viscera. It was however, not found in the viscera of the 10 month old child Arsh. The empty wrapper of 10 tabs biopose tablest was also sent in Forensic Science Laboratory but there was no chemical poison seen in the said wrapper.

After the charge sheet was submitted by the IO PW-29 on 21.6.2008, the learned Sessions Judge framed the charges on 22.8.2008 against the accused persons under sections 302 and 302/34 I.PC to the effect that in the night of 14/15.4.2008 at about 2.15 A.M, in prosecution of their common intention after administering biopose tablets in their tea to the deceased persons namely Shaukat Ali , Smt. Hashmi, Anees Ahmad, Smt. Anjum, Rasid Ali and Km. Rabia other than deceased Arsh by, they were murdered by causing injuries on their necks with an axe and baby Arsh was done to death by

throttling.

The prosecution has examined 29 witnesses in this case.

PW-1, informant Lateef Ullah who was the neighbour of the deceased Master Shaukat and the appellant Shabnam lodged the report containing the allegations as mentioned above. He supported his FIR (Ext. Ka-1) in his examination in court. He further clarified in his testimony that Shabnam was lying on the ground in an unconscious condition. By her side, in the Verandah, her father's corpse was lying with his neck cut. He further mentioned that one empty unused bedding was lying near the corpses of Rabia and Hashmi in the room where they were sleeping. He identified all the deceased persons and stated that apart from Arsh, the neck of the other six deceased persons had been cut, as a result of which, blood had spread all over in the room. It was also clarified that the necks of none of the deceased was severed from their bodies. He further mentioned that as his access to the house from the main door was blocked, as it was shut, he entered the house from another place, where there was no wall. When he tried to shake Shabnam on reaching her, she did not respond. He further stated that as he did not know the names of the assailants, he did not mention the same in the report. After Hashmat gave some water to Shabnam, she became conscious and as she kept on crying, he could not speak to her.

PW-2 Husain who lived in front of the house of the deceased stated that he was a regular visitor to the house of Master Shaukat. He was a retired teacher. At about 2.00 A.M in the night, he had heard the cries of Shabnam, whereupon he had rushed to the house. Shabnam was crying from the stairs and on great persuasion, she opened the door of the stair way. On all the beddings, *Gaddas* sheets, and pillow cases there was blood. There was also blood on Rabia and Shaukat and his wife Smt. Hashmi. He remained at the house

till arrival of the police and was present at the time of inquests and post-mortem. He further disclosed that there was a love affair between Shabnam and Saleem. He had seen them going together on a motorcycle. On the night of the incident at about 1.00 A.M, he had seen Saleem going in the Southern direction when he stopped to urinate. The claim of Shabnam that she was sleeping alone on the roof appeared to be false when the others were sleeping inside, hence when he had gone on the roof, he found that there was no cloth or bedding etc. lying there but that Shabnam had closed her eyes and was lying on the floor. He further stated that on 16.4.2008, when his statement was recorded by the police, he disclosed his version and he further disclosed to the police that Master Shaukat was annoyed with Shabnam on account of her love affair.

PW-3 Lal Mohammad, resident of village Rajhaiti, P.S. Bahadurgarh, district Ghaziabad was the father of deceased Anjum, who had married deceased Anees son of Shaukat two and a half years earlier and they had given birth to Arsh. He received information of this incident on the mobile of Shabnam's *mama* Abdul Rahman on 15.4.2008 at 6.00 A.M. When he arrived at the spot, he saw seven dead bodies lying there and when he enquired from the appellant Shabnam, she disclosed that in the night she was feeling hot and hence she had gone to the terrace to sleep but when it started raining at about 2.00 A.M she came down and then she saw all the bodies lying there and hence she had raised an alarm. She also stated that some miscreants had caused the incident. The inquest was conducted in his presence but he was distressed owing to the murder of his daughter. He further mentioned that Anjum had earlier disclosed to him that the conduct of Shabnam was not good. She was insisting on marrying Saleem, making the atmosphere of the house very uncongenial. His daughter had also told him that Shabnam's father had even beaten her and had snatched away her

mobile, but she did not know how Shabnam had got another mobile. PW-3 also stated that on 18.4.2008, the I.O had taken him on his vehicle on which the accused Saleem was also sitting. They parked the vehicle at some distance from Saleem's house. They then reached Saleem's house from where Saleem took out a checked gray coloured shirt which had blood stains on it and which was lying behind a wheat coloured tin trunk. He also gave a mobile which was sealed and the recovery memo was prepared on which he signed. PW-3 also disclosed that on 19.4.2008, the I.O recovered the *Salwar- Kameez*, mobile, a SIM, an empty wrapper of ten tablets. The *Salwar-Kameez* had spots of blood. He further disclosed that Saleem had entered in a pond and taken out an axe whose handle was broken. Mud and blood stains were visible on the axe. It was exhibited, on which he appended his signature.

PW-4 Mahendra Singh had stated that he was Block Pramukh of Hasanpur. On 16.4.2008 at 7.15 A.M, Saleem had come to his house in Hasanpur and began to make excuses and confessed to his guilt stating that he was in love with Shabnam and that he along with Shabnam had committed the murders. Saleem further stated that he had given intoxicating (*Nashe ki golis*) tablets to Shabnam, who had administered the same to her family members, making them unconscious. Thereafter Shabnam had caught each of the deceased by their hair, whilst Saleem cut their necks with the axe. According to Saleem, Shabnam throttled the 10 month child Arsh herself. He claimed to have thrown the axe in the Pond and clothes in the jungle. PW-4 disclosed this fact to the I.O on 17.4.2008.

PW-5 Nischal Tyagi deposed that he was an-Incharge Teacher in the primary School Bawankheri. Km. Noor Fatima and Km. Shabnam were working as *Shiksha Mitras* with him in the school. Shabnam had told him on a number of occasions that she would marry Saleem and Saleem used to come to

visit her at the school. Shabnam used to travel on his motorcycle. She did not deposit her wages at her home and had collected Rs. 16,000/ which as per information furnished to him by Shabnam, she had given to Saleem. Shabnam had two mobiles bearing numbers 9917812717 and 9917838184. She further told him that her mobile had been snatched by her family members.

PW-6 Belal Ahmad who is the other witness of extra-judicial confession stated that on 16.4.2008 at about 1.00 P.M the accused Saleem had come to his hotel and had told him that he had fallen in love with one co-villager Shabnam. As the family members of Shabnam were educated and belonged to another caste and Saleem was poor hence they were not agreeable to marry Shabnam with Saleem. Saleem also disclosed to this witness that he given ten sleeping tablets to Shabnam who mixed it with the tea meant for the deceased, and when they became unconscious after partaking of the same, she called him, whereupon Saleem reached there along with an axe. Thereafter he cut the necks of the six deceased and Shabnam throttled the deceased Arsh herself. He threw the axe in the pond whilst running to the jungle.

PW-7 Sukkhan Ali disclosed that in the night of incident i.e. 14/15.4.2008, he had gone from his village to Taharpur. When he was returning to his village, he saw Saleem in the jungle, and when he questioned him about what he was doing there, Saleem had become nervous.

PW-8 Rais Ahmad claims to recognise Saleem very well from before. On 14.4.2008 at about 10.00 A.M, he saw Saleem asking for some intoxicating/sleeping tablets from Dr. Mobeen at S.K. Nisha Medical Store but the doctor refused to give him the said medicines. Then Saleem asked Pappu, a fruit seller from where he could get the tablets. Pappu disclosed that it could be brought from Moradabad. Then Saleem gave him Rs. 25/- and the keys to his motorcycle. After one and a half

hours, Pappu returned with ten calmpose tablets which he handed over to Saleem.

PW-9 Fareed alias Bobby disclosed that during the period of incident, he used to deal in Mobiles. Saleem who had an earlier mobile, had sought a fresh mobile connection from him. Saleem had shown his Driving Licence as his identity proof and this witness had given a new SIM to Saleem. He had filed the photo copy of the Driving Licence (DL) and the application form in the Court (Ext. Ka-2 to Ext. Ka-3). The photograph and DL of Saleem were present on the application form.

PW-10 Sajil Ali had disclosed in his evidence that he used to sell SIMs. He had sold a SIM bearing number 9917812718 to Saleem who had filled his identity card with the application. Photo copies of these papers are Ext. ka-4 and Ka-5.

PW-11 Mobeen Husain had disclosed that he had a *Hakeem* shop at Hashimpur Chauraha, where he used to sell juice and *Chatni*. Earlier, Noor Mohammad was running S.K. Nisha Medical Store in the said shop which he had taken on hire from Noor Mohammad in December 2007 and which he transferred to his father-in-law. The appellant Saleem who was running a Saw Mill and a brick-kiln nearby used to visit him. Ten days before the incident, Saleem had come to him and told him that he was suffering from great tension and he was in need of sleeping pills but he had refused to give them to Saleem. The latter had met him in the morning on 14.4.2008 at 10.00 A.M, at that time Pappu Thelawala who was present nearby overheard their conversation that Saleem was in need of medicines. Then Pappu agreed to get them for Saleem from Moradabad for which the appellant Saleem had given him Rs. 25/- and his motorcycle. Pappu returned after 1 ½ hours and gave Saleem 10 biopose tablets . As it appeared in the news paper on 24.4.2008 that the tablets had been purchased from S.K. Nisha Medical Store, he shut the shop and had run away

from the place. Pappu had also left the place. When the police came to his residence two months later searching for Pappu then he disclosed the aforesaid facts to the police.

PW-12 Dr. Vandana disclosed that she was a Law Officer at the Forensic Laboratory, Moradabad unit. She disclosed that she had visited the spot with her team on 19.4.2008 and prepared the inspection report (Ext. Ka-6).

PW-13 Constable 406 CP Manveer Singh of Forensic Laboratory, Moradabad Unit deposed that he had gone to the place of incident with the Dog Squad. Six corpses, whose necks were cut and the corpse of a little child Arsh who had been strangled were lying there. They inspected the spot but found no finger prints there nor did the field unit find any weapon of attack at the spot. There was no facility of climbing up the wall. It appeared to him that the deaths had been caused by the same person with the same weapon. There appears to be no resistance at the time of murder and that it appears that some intoxicating substance had been given to the deceased persons in order to facilitate the crime. Nothing was disturbed in the house. No *Almirah* or Box were broken, hence it did not appear that any miscreants had come for the purpose of loot. There was only one door for reaching the second floor of the house. This was a strong steel door which could be closed from the inside. On questioning Shabnam when they had gone to sleep as to whether the door had been locked from the inside, Shabnam replied that the door was locked from the inside. When Shaukat's house was inspected from all sides, then no signs of any attempt of scaling the wall were seen.

PW-14 Noor Mohammad disclosed that he has a shop by the name of S.K. Nisha Medical Store at Deegarpur Road Hasampur Chauraha in 2005. In 2007, he had given the shop on rent to one Mobeen.

PW-15 Constable 295 Virendra Singh of P.S. Hasanpur

deposed that after the inquests, he along with Constable Teekam Singh took the four corpses of Rabia, Shaukat, Hashmi and Arsh for the post-mortem.

PW-16 SI, Ganesh Dutt Joshi deposed that on receiving orders, he tried to search out the accused and in this connection, they interrogated Saleem who got a mobile and Gray colour Shirt recovered from a tin trunk. The mobile number was 9917812718. He had noted the IMEI number and prepared the recovery memo (Ext. Ka-9). The mobile along with his SIM Card were marked as material Ext. -1. The sealed bundle was marked as Ext. 2.

According to SI Ganesh Dutt Joshi, the accused Shabnam was arrested on 19.4.2008 and she got her Salwar suit and mobile with Nokia paper and SIM recovered. She also got recovered an empty wrapper of Bipose tablets (Ex. Ka-10). According to this witness, on 19.4.2008, Saleem got an axe recovered from the pond which was Exhibited as Ext. Ka-7 to Ext. Ka-11.

PW-17 Sayeed Ahmad disclosed that he possessed no SIM Card but someone had got a fake SIM card made in his name. Paper No. 5/29 and 5/30 did not contain any photograph of this witness.

PW-18 Pankaj Sharma, Assistant Nodal Officer, Idea Cellular Ltd, gave out call details as sought by the police person and verified the same (Ext. Ka-12) which contained seal of the company and Tower number. The details given by him were mentioned in paper nos. 178 to 261. When he prepared the call details, the computer was in a fit condition.

PW-19 SI Madan Pal Singh stated that he prepared the inquest papers and got the signatures and opinions of the witnesses scribed therein. He sealed the clothes of the deceased persons and sent them for post-mortem through Constable Virendra Singh and Constable Preetam Singh. He had filled the inquest detailed in the inquest of Smt. Hashmi

and prepared the relevant papers viz form 33, photo lash, *challan lash*, *Seal mohar*, letter for CMO, letter for RI, *Nakal Chik* and *Nakal G.D*, under his signature (Exts. Ka-13 to Ka-20). He also prepared inquest and other relevant papers relating to deceased Arsh (Ext. ka-20 to Ext. Ka-30).

PW-20 Chandra Prakash Sharma, the photographer had deposed that he took 10 photographs of all the seven corpses which were present on record. The negatives numbering 13 were also present (which are marked as material exhibits 8 to 17) and the photographs have been exhibited as material exhibit 8 to 27.

PW-21 SI Dinesh Kumar Singh stated that he collected one and a half litres of milk which were lying in a steel bucket on the spot. This was marked as Exhibit Ka-32. He prepared the inquest note and relevant papers regarding the death of Rasid Ali (Ext. Ka 33 to Ext. ka-41) and also relating to deceased Anees (Exts. ka-42 to Ext. ka-50). He sent the viscera of all the deceased to Forensic Laboratory, Agra. He further deposed that Shabnam and Saleem used to talk by using a fake ID on mobile No. 9837873493 and 9837873503.

PW-22 SI Sanjay Kumar has deposed that he had conducted the inquest on the dead body of Smt. Anjum and prepared other relevant papers at Exts. ka-51 to ka-59. The axe which was recovered at the instance of accused Saleem from a pond on 19.4.2008 and was marked as Ext. Ka- 11 also bears the signature of this witness.

PW-23 Karanveer Singh deposed in his evidence that he prepared the inquest of Shaukat Ali and Km. Rabia, which have been exhibited as Exts. Ka- 60 to 77.

PW- 24 Dr. Deewan Ram, Medical Officer, Moradabad, who has conducted the post-mortem as mentioned above of the dead bodies of deceased Shaukat, Arsh and Rashid, the reports of which are Exts. Ka 78 to 80 respectively.

PW-25 Dr. Jagmal Singh conducted the ultrasound of

appellant Shabnam and certified that Shabnam was pregnant of about 7 weeks and prepared the report (Ext. Ka-81).

PW-26 Babu Ram Sagar, S.O. P.S. Hasanpur got the inquest conducted and also collected the blood stained pillow near the corpse of Anees Ahmad. He dictated the recovery memo to SI Madan Pal Singh on which he signed (Ext. ka 82). From near Rashid's corpse, he took a piece of blood stained Gadda (Ext. Ka- 83). From near Smt. Hashmi's corpse, he took a piece of Razai (Ext. ka-84) and from Shaukat's corps, he also cut out a piece of rope and Razai from Shaukat Ali's cot (Ext. Ka 85). He took a piece of bloodstained mattress and Razai from near Anjum corpse (Ext. ka 86), from near Km. Rabia he collected a blood stained piece of Gadda (Ext. ka 87). The milk-can (Ext. ka 88) and piece of Gadda were found near Anees's corpse. He also made a spot inspection and prepared the site plan (Ext. Ka 89).

PW-27 Dr. R.P. Sharma conducted the post-mortems as mentioned above on the corpses of Smt. Hashmi (Ext. ka-90), Rabia (Ext. ka- 91), Anees Ahmad (Ext. Ka-92), Smt. Anjum(Ext. Ka-93). PW-27 was also shown the axe and he stated that the injuries received by the aforesaid deceased could have been caused by the said axe.

PW-28 Constable Shailendra Kumar was posted as Head Constable at P.S. Hasanpur on 15.4.2008. On the basis of a written report, he registered a case at crime No. 880 of 2008 under section 302 against unknown persons and prepared the *chik* and G.D. Entry at 3.05 A.M. The *chik* FIR was marked as Ext. ka- 94 and the carbon copy of G.D. Entry, was marked Ext. ka 95.

PW-29 Incharge SI R.P. Gupta, P.S. Hasanpur assumed the investigation of this case under the order of S.P. Moradabad on 16.4.2008. He also investigated the case at crime No. 880 of 2008 under Section 302 IPC. He prepared C.D. no. 11 in which he entered the inquest reports of all the

deceased Shaukat Ali, Hashmi, Rabia, Rashid, Anees, Smt. Anjum and Arsh. After that he recorded the statements of Km. Shabnam, Lal Mohammad, Hashmat, Sukkhan Ali, Shahnawaj, Mahendra Singh, Nischal Tyagi and Bilal Ahmad and he also arrested the appellant Saleem and made an entry in the G.D. On the pointing out of Saleem, he recovered Nokia Phone No. 2300 bearing SIM No. 9917812718 from his house and also one blood stained shirt (Ex.Ka-9). He arrested the accused Shabnam from her house on 19.4.2008 (vide Ext. 96-97). On Shabnam's pointing out, from the room in the basement, he recovered a Nokia mobile and an empty wrapper of 10 biopose tablets, one SIM which was wrapped in a paper, one blood stained Salwar suit (ext. ka-10). The wrapper of tablets was marked as Ext. Ka-37, which was sent to Forensic Laboratory at Agra whose report is on the record, bearing paper No. 5/177.

On 22.4.2008, he prepared C.D. Paper no. 7A, in which he mentioned that SIM No. 9837873493 and 9837873503 were purchased from Muskan Telecom on fake IDs. Against accused Irfan and Mohd. Nawaj, a case under section 420 IPC was earlier got registered and their statements were recorded on paper no. 8 on the same day. In paper no. 9, a site plan and recovery of an axe was entered (Ext. Ka- 98). On the same day, the memos of the mobile recovered from the appellant Saleem, SIM and blood stained shirt were also prepared by this witness (Ex. Ka 99). The site plan and recovery of mobile phone, SIM, clothes and wrapper of tablets was also prepared (Ex. Ka 100). On 25.4.2008, the case property viz. clothes, crime weapon, blood stained clothes of Saleem and Shabnam, wrapper of intoxicating tablets were sent through constable Rakesh Kumar to the Forensic Laboratory. On 28.4.2008, he recorded the statement of Dr. R.P.Sharma and on 30.4.2008 this witness recorded the statements of S.K. Tyagi, SO, Aman Dehat, Ganesh Dutt Joshi,

S.O.G. Incharge , J. P. Nagar, Constable Vikal Kumar, Const. ChandraPal Singh, Constable Mohd. Arif, Constable Rajendra Singh and Constable Yogendra Singh. Thereafter he recorded the statements of the remaining constables. On 11.5.2008 he received the report of the Forensic Laboratory, Agra. On 13.5.2008, he sent the blood stained shirt of Saleem to the Forensic Laboratory. On 29.5.2008, he received the viscera reports which were recorded in the case diary. On 30.5.2008, he recorded the statement of Dr. Deewan Ram. On 5.6.2008, he recorded the statement of Pankaj Sharma, Nodal Officer, Idea Company and received C.D.R and I.D from Pankaj Sharma (Ext. ka 12). On 7.6.2008, he received the Forensic report. After that he recorded the statements of Constable Manveer Singh, HC Rakesh Singh, Constable Mahesh, HCP Nahar Singh, Dr. Smt. Vandana Dubey, Forensic Officer, Mobeen alias Pappu and Rais Ahmad. On 20.6.20-08, he recorded the statement of Constable Rakesh Singh, Constable Dinesh Kumar, Pargana Magistrate M.M. Khan. On 21.6.2008, he submitted the charge sheet (Ext. Ka 101).

We have heard Shri Saiful Islam Siddiqui and Mrs. Tahira Kazmi for the appellant-Shabnam and Shri R.P. Pandey and Shri Pawan Kumar Shukla for the appellant-Saleem and learned Government Advocate assisted by Shri Anand Tiwari, learned Additional Government Advocate.

Learned counsel for the parties have also filed some case laws.

Shri Anand Tiwari, learned Additional Government Advocate has also filed written arguments. After additional hearing S.I. Siddiqui and Tahira Kazmi have also filed written arguments on behalf of appellant Shabnam. However no written arguments have been filed by learned counsel for appellant Saleem.

Arguments for appellant Shabnam

It is argued by the learned counsel for the appellants that the incident has been committed by some unknown persons. The FIR does not mention the names of any accused persons. When the informant Latifullah arrived and entered the house of the appellant-Shabnam on his own at 2.15 a.m., he found her lying in an unconscious condition. The appellant-Shabnam was sleeping on the terrace and when she came down subsequently she saw that seven of her family members had been murdered and after raising a cry she became unconscious. No blood was seen on her clothes, which negatives her participation in the crime. There was no evidence of administration of tranquilizer by the appellant-Shabnam. The motive suggested by the prosecution that the deceased Master Shaukat and other family members used to object to the liaison between Shabnam and Saleem, provides an inadequate motive for committing the murders. The appellant Shabnam being an educated lady could have taken legal advice regarding her proposed marriage to Saleem, being an earning person she would not have acted in this manner which would have jeopardized her future. She also had the option of leaving her home with Saleem.

The field unit which reached the house of the deceased and appellant Shabnam did not find any finger or foot prints or blood stains or any other marks anywhere in the house.

The trial court has wrongly treated the 313 Cr.P.C statement of the appellant as a confession of guilt, which was factually and legally incorrect.

In the alternative the learned counsel contended that award of death sentence in this case was unwarranted, as it was not the rarest of rare case, and the lesser option of imprisonment for life was not unquestionably foreclosed in the light of the law laid down in Bachan Singh's case, (1980) 2 SCC 684. Before imposing the death penalty the earlier circumstances of the threat to the appellant's life because of her liaison with Saleem

which may have prompted her to adopt this extreme measure ought to have been taken into account. Another reason for commuting the death sentence awarded to the appellant with a sentence of imprisonment for life, was that the appellant Shabnam had given birth to a child in jail, Taj Mohammad, who would be orphaned if the appellants were executed.

Arguments for Appellant Saleem

Learned counsel for the appellant-Saleem further argued that in this case there was no direct evidence, but only circumstantial evidence, and the chain of circumstances for establishing the complicity of the appellant in this incident was not complete. PW 2 Hashmat did not disclose to the investigating officer in his statement under section 161 Cr.P.C. that he had seen Saleem at 1.00 a.m. in the village on the date in question. PW 6, Bilal Ahmad and Bhure, who are said to be the so-called independent witnesses of the recoveries were in fact the pocket witnesses of the police. Much reliance could not be placed on the alleged extra-judicial confession made by Saleem to PW 4 Mahendra Singh and PW 6 Bilal Ahmad. In any case an extra-judicial confession is regarded as a weak kind of evidence. Only the co-appellant Shabnam had committed the crime because of her dispute with her family, and the appellant had nothing to do with the offence.

Submissions on behalf of the State

Learned Government Advocate on the other hand argued that there was a clear motive for the appellants for committing this crime as the appellant-Shabnam was in love with Saleem, who belonged to another caste group and was comparatively poor, and the deceased Master Shaukat used to object to the liaison. Shabnam had a six weeks pregnancy at the time of incident and she admitted in her 313 Cr.P.C. statement that the said child (Taj Mohammad), who was born later had been fathered by Saleem. The appellant-Saleem purchased the

tranquilizer and gave it to Shabnam, who administered it to six of the deceased other than Arsh, the ten months old child and in pursuance of that conspiracy the six grown up deceased persons other than Arsh were given axe blows on their necks and done to death and Arsh was murdered by throttling. At the time of incident, the residential house of Shabnam, who used to live with the other deceased was closed from inside and there was no other way to reach the first floor where the incident occurred. According to PW 1 and PW 2, Shabnam herself had opened the door. At the time of spot inspection by the forensic team, Shabnam stated that the main door of the house was closed from inside when the entire family went to sleep. No other sign of ingress in the house by any other means was found, as per the evidence of P.W. 13 Manveer Singh, the Forensic Expert. Under section 106 of the Evidence Act, a heavy burden lay on Shabnam to explain as to how the deceased persons had died in her house and she has failed to discharge this burden. Furthermore, in her statement under section 313 Cr.P.C., she admits her presence by taking the stance that the co-accused Saleem had committed the murder and she herself has seen Saleem having a *Chhoori* in his hand at the place of occurrence.

Learned Government Advocate further submitted that administration of the tranquilizer diazepam to six persons of the house was only possible with the help of an inmate. The viscera report of six of the seven deceased persons other than the minor child Arsh, showed the presence of a tranquilizer in the viscera, which no outsiders would have been able to administer.

On the pointing out of Shabnam, her *Salwar* and *Kurta* were recovered (item Nos. 43 and 44), which were found to be bloodstained in the report of the forensic expert. This shows that she was very near to the deceased when the incident took place. Furthermore, after the incident she has changed the

clothes and concealed the bloodstained clothes, which were recovered later on her pointing out after her arrest. This was another circumstance against her. She did not deny the recovery of bloodstained clothes, wrapper of biopose tables and mobile phone. When a specific question was put to her under section 313 Cr.P.C., that her claim that she was sleeping on the roof alone is improbable and unreliable as she had earlier stated that she never used to sleep alone and she used to sleep along with her mother or father. It was also not explained why on that date, she chose to sleep alone. The call details showing the repeated calls on the date of incident between the mobile phone of Shabnam (number 9837873493) to Saleem 9917812718 show the frequent calls on the date of incident. They talked on the said mobile numbers since 7.30.52 to 1.9.41 and there was a gap of 31 minutes. This was the time when the co-accused Saleem would have been in the house of Shabnam and had not talked on the telephone. Thereafter they made conversations on the aforesaid mobile numbers from 1.40.19 to 2.9.35. Thereafter Shabnam chose to raise a hue and cry to attract the persons of the locality by saying that "*Bachao Bachao Mar Dala Mar Dala*" after the safe departure of the appellant-Saleem. There was no evidence of any loot or dacoity in the house and there was no occasion for any other person for committing the said offence and if any other person for any other motive has committed the offence, then Shabnam would not have been left unharmed and she would also have been assaulted.

So far as the appellant Saleem is concerned, learned Government Advocate contended that motive was established against both Saleem and Shabnam on account of their love affair and inability of Saleem to marry Shabnam because Saleem was very poor and the liaison was opposed by the family members. The extra-judicial confession by Saleem to PW 4, Mahendra Singh and PW 6, Bilal Ahmad is reliable and

finds corroboration from the other circumstances of the case. There was last seen evidence of Sukhan Ali as he had seen the accused between Bavankhedi and Tehpur on the date of incident after mid-night and the accused Saleem himself admitted his presence in the house of the co-accused Shabnam in the night of incident in his written statement under section 313 Cr.P.C.

On the pointing out of accused-Saleem the recovery of bloodstained shirt and bloodstained axe, which was confirmed to have human blood on them as per the report of the forensic expert, is also a very important circumstance against this accused, which is unexplained by the appellant-Saleem. The call details, which have been mentioned in the case of Shabnam also apply in the case of Saleem.

The evidence of PW 8 Raes Ahmad and PW 11 Mobin Husain with regard to the talk between accused-Saleem and Mobin Husain in respect of sleeping pills is the another piece of evidence for showing that accused-Saleem procured sleeping pills through one Pappu, who brought the sleeping pills after he got Rs. 25/- and motorcycle from Saleem. In his written statement under section 313 Cr.P.C. each and every aspect of the matter has been admitted by the accused-Saleem, but he stated that the murder has been committed by accused-Shabnam.

Analysis of the evidence and findings

So far as the analysis of the motive is concerned, learned counsel for the appellants argued that in case Shabnam wanted to marry Saleem and her family members were objecting to the liaison, there was no reason for them to have murdered all the family members as they could have simply gone away.

This is also an undeniable fact that Shabnam at the time of incident, was carrying a six weeks' fetus of Saleem, whom

she allowed to take birth. In her 313 Cr.P.C. statement, she clearly stated that Saleem was the father of the said infant.

In our view it is the idiosyncratic reaction of an accused when faced with such a situation when there had been a major confrontation in the house of Shabnam regarding the relationship of the two appellants as has been mentioned by PW 2, Hashmat, PW 5 Nischal Tyagi and PW 7 Sukhan Ali, who even stated that Shaukat had beaten accused-Shabnam because of her relations with accused-Saleem, who was of another caste and of poorer economic status and who had snatched away her mobile. It is possible that in such circumstances, one couple may decide to leave their house and to go elsewhere to get married and another couple may decide to murder the inconvenient persons going to the extent of eliminating every single member including the ten months infant so that no co-sharer remains for inheriting the property of the deceased.

The issue of motive can never be conclusive for establishing as to whether a particular accused has committed the crime, but the other circumstances have to be examined for reaching a conclusion as to whether the accused persons have committed the crime.

An important circumstance that has been relied on in this case for connecting the two appellants with the crime are the recoveries of bloodstained clothes from the two accused-appellants and the bloodstained axe from the appellant-Saleem. The appellant Saleem after he was arrested on 18.4.2008 at about 5.30 PM by the investigating officer Shri R.P. Gupta was taken to the police station Hasanpur at 6.05 PM as has been mentioned in GD No. 27. He was interrogated as is mentioned in GD No. 28 at 6.30 PM. On his disclosure, a mobile phone Nokia 2300, SIM No. 9917812718 and a bloodstained white and gray shirt were got recovered from his house from behind a tin trunk, whose recovery memo (Ext. Ka

9) were made. The said recoveries were also corroborated by P.W. 29, S.H.O Shri R.P. Gupta, , PW 16, Shri Ganesh Dutt Joshi and public witness Lal Mohammad, PW 3. As per the report of the Forensic Laboratory, Agra dated 13.5.2008 (Ext. Ka 102), big bloodstains were seen on a large part of the shirt which was recovered from the accused-Saleem. The biggest bloodstain being 3 cm in length. The shirt contained human blood, although the blood group could not be determined.

On the pointing out of Saleem, an axe with a broken handle was got recovered on 19.2.2008 by S.H.O. Shri R.P. Gupta, PW 29, PW 16, Ganesh Dutt Joshi and other police personnel and witness Lal Mohammad, PW 3 and Bhure from a pond about 200 yards from the road. On close examination, the said axe was found to contain small spots of blood and it was also covered with wet mud. According to the report of Forensic Laboratory, Agra dated 5.5.2008 at item No. 45 the said axe contained a big spot of blood. Also the blood on the axe was of human origin. In response to question No. 44 in his examination under section 313 Cr.P.C, which *inter alia* mentions about the recoveries of the Nokia phone and bloodstained shirt, the accused offered no explanation. Again in response to question No. 30, as to how the appellant-Saleem got recovered the axe from the pond on 19.4.2008 in the presence of police party and witness, the appellant-Saleem stated nothing in his initial statement under section 313 Cr.P.C.

However, in his written statement, which he handed over on 17.6.2010, he stated that Shabnam had called him after committing the seven murders and then Shabnam gave him a knife and clothes wrapped in a polythene and asked him to throw them at some distant place. The knife was about 10-12 inches long and it had bloodstains. He put the clothes of Shabnam and knife on a truck loaded with timber, which was standing there. So far as the recovery of axe is concerned, he

stated that he himself came to the police station on 18.4.2008 at about 10-11 AM to one constable Vijay Pal, but was detained by the S.H.O, who beat and tortured him and forced him to confess. After than the police picked up the axe whose handle was broken from the police station and took him in the night on a car to a pond in the village, and there the police threw the axe in the water. After few minutes the police personnel with some divers reached there. He was asked to tell the divers about the location of the axe, so he pointed out the direction, and after 6-7 minutes, the divers took out the axe. Then the SHO asked the divers to again place the axe in the same place. On the next morning on 19.4.2008, he was taken to the pond at 8-9 AM, then he was forced to point out to the police where the axe was thrown and the axe was got recovered by the divers. This version of the accused does not commend itself to us. Clearly, as the said axe had human blood and which has been corroborated in the report of the Forensic Expert, it is wholly improbable that the police would be in a position to obtain such a bloodstained axe and they would engage in the complicated operation as described by the appellant-Saleem only for the purpose of falsely implicating him in this case.

Significantly, in his written statement, Saleem does not mention that the axe, which has been given to him by the police had no bloodstains on it. Also, if the said axe was planted by the police, the police would never risk throwing the axe in the water not once, but twice because in such circumstances the blood stains may vanish or disappear.

The appellant Saleem appears to have developed the theory of use of knife by the co-accused Shabnam for committing the crime only because two doctors PW 24, Dr. Deewan Ram and PW 27, Dr. R.P. Sharma have found some stab wounds on the six dead bodies of Master Shaukat, Rashid, Smt. Hashmi, Anees, Smt. Anjum and Rabia. However

the recovered axe was shown to the two doctors, who have clearly stated that the said axe could have caused the stabbed wounds if its edge had struck the deceased persons.

The theory of the accused that he had put the weapon of assault and the bloodstained clothes of Shabnam on a truck, which was standing there is also belied by the fact that Shabnam got her bloodstained clothes recovered from the storeroom under her house on 19.4.2008. No doubt the bloodstains were dim as by that time, 4 days after the incident the appellant could have been expected to have washed off the bloodstains.

Another problem with the theory of Saleem that Shabnam had handed over the bloodstained knife and her clothes in a cellophane sheet to him when he was standing downstairs and she was also standing downstairs when the deceased had already been murdered on the upper floor. As per this theory, there was no question of any blood stains being found on his shirt, which have actually been found as per the report of the Forensic Laboratory and he has given no explanation as to how his shirt, which was got recovered from his house from behind the tin trunk contained human blood.

Even otherwise, it is highly improbable that Shabnam could have single handedly cut the necks of six deceased persons with the axe and also throttled the little child Arsh with her bare hands, without the assistance of appellant-Saleem, who appears to be hands in gloves with Shabnam at every stage of the crime.

So far as Shabnam is concerned, when she was arrested by the S.H.O. R.P. Gupta, PW 29 and SI G.D. Joshi, PW 16 and other police personnel on 19.4.2008 at 4.45 a.m., from her house, on interrogation, she is said to have confessed to her guilt and to have agreed to get the intoxicant bio-pose, mobile, SIM and clothes which she was wearing at the time of the incident recovered. Even though the said confession may

not be admissible in evidence, but the discovery of the empty 10 tablet wrapper of bio-pose, the bloodstained *Salwar Kurta* and Nokia mobile set whose number was 9837873493 and another SIM No. 9917542440 from the storeroom in a basement of her house, at the instance of the accused Shabnam points to her complicity in the crime in view of section 27 of the Evidence Act. This recovery memo (Ext. Ka 10) bears the signature of Shabnam and also that of the police personnel and Lal Mohammad, PW 3.

The report of the Forensic Laboratory, Agra dated 5.5.2008 (Ext. Ka 104) clearly establishes that the *Kurta* and *Salwar* (item Nos. 43 and 44) contained bloodstains in large parts, although the origin of the blood could not be determined as it had disintegrated.

To the specific question Nos. 29 and 44 put to Shabnam that on 19.4.2008 after the police arrested her, she got recovered Salwar suit, mobile and SIM wrapped in a paper and tranquilizer (Exts. 3 to 6) respectively, in her explanation she had stated nothing regarding these recoveries.

When the witnesses arrived, they saw Shabnam wearing normal clothes, which were not blood stained. The recovery of the blood stained clothes from the basement of her house and their concealment in the said portion of the house, was another circumstance for suggesting that Shabnam had hurriedly changed her clothes which she would not have done had her clothes got blood stained when she was embracing the deceased after she had found that they had been murdered by some outsider. This is another circumstance which suggests her complicity in the offence.

The forensic field unit not finding finger or foot prints, blood stains or other marks in the house of the appellant Shabnam and the deceased rather than being a circumstance in favour of the appellant, is either a neutral circumstance or an inculpatory circumstance. Even if some outsiders had

committed the crime, such marks would be present if the field unit had carefully searched for them, unless they had all been wiped off by Shabnam, in the same manner that she had changed her clothes before she dramatically raised the alarm for drawing the attention of the witnesses, and then feigned unconsciousness.

The viscera report of the Forensic Laboratory, Agra dated 16.4.2008 regarding the six deceased persons (Ext. Ka 105 to 110) showing the presence of diazepam tranquilizer and absence of any poison in the viscera of the ten month old deceased Arsh who may still only have been drinking milk, also supports the prosecution suggestion that the grown up deceased persons were given tranquilizer probably in some food substance such as tea, so that when the murder was committed, they could offer no resistance, and this indeed appears to have been the case as the six deceased persons appear to have been murdered when they were still lying on their beds as established by the fact that the beddings, pillows etc. of all the deceased persons had bloodstains and except the injuries on their necks and chest portion of the deceased, they appear to have received no injury on any other part of the body. Only the little child Arsh was not given any tranquilizer as it was not needed for throttling the little child. None, but a family member who has normal access in the house could have administered the tranquilizer to the deceased persons in order to accomplish the job of murdering the deceased. The finger of guilt would point for this reason also on Shabnam the only other surviving inmate of the house.

The explanation given by Shabnam that she was sleeping on the roof alone and hence the assailants had murdered the other seven members of her house sparing her, appears wholly unbelievable. If outsiders had arrived at the house and tried to murder the deceased with sharp edged weapons then some of the deceased would have woken up in

the noise which was likely and there would be marks of injuries on arms etc. as some kind of scuffle would have taken place. Also diazepam would not have been found in the viscera of the the 6 deceased other than the child Arsh, as no outsiders could have had any opportunity to administer the same.

The explanation given by Shabnam to question No. 3 that there were beddings laid down next to the two corpses of her mother Hashmi and niece Rabia, she had replied that on the night in question she was sleeping on the roof otherwise normally she either sleeps with her mother or her father. This conduct appears to be improbable and unnatural. The Forensic team and witnesses have not found any bedding on the roof. No doubt Shabnam claimed that she brought the bedding down when the rain started. No bed was found by the side of the stairway, but only an unused bedding was found in the room where the deceased were sleeping.

The learned AGA is also right in his contentions that the field unit did not find any other signs of ingress or egress by any outsider. No robbery or dacoity was committed. None else had a motive for committing these serial killings. The appellant Shabnam who was the solitary person who remained alive in the house was required to explain how the 7 persons had been killed on the night in question. A heavy burden was cast on her in view of section 106 of the Evidence Act to explain these circumstances of which she alone could have special knowledge, which burden has not at all been discharged by her.

On a close scrutiny of the entire evidence and material on record we find that the chain of circumstances for establishing the complicity of the two appellants in this offence is complete. We therefore find that the prosecution has succeeded in establishing the charges against the two appellants under section 302 read with section 34 IPC beyond the shadow of

any reasonable doubt.

Question of sentence, whether life imprisonment or death sentence appropriate

One final question which remains is whether this Court ought to accept the death reference and to confirm the sentence of death awarded to the two appellants or would it be proper to substitute the same with a sentence of imprisonment for life.

The Apex Court in the Constitutional Bench decision in *Bachan Singh v State of Punjab*, AIR 1980 SC 898 has broadly approved the description of the aggravating and mitigating circumstances mentioned by Chitale whose balance sheet must be prepared before a decision may be taken whether a death sentence or a sentence of imprisonment for life would be appropriate. The aggravating circumstances are mentioned in paragraph 200 which reads as follows:

"200. Drawing upon the penal statutes of the States in U. S. A. framed after Furman v. Georgia, in general, and clauses 2 (a), (b), (c), and (d) of the Indian penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances" :

"Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion :

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

The mitigating circumstances are mentioned in paragraph 204 as follows:

204. Dr. Chitaley has suggested these mitigating factors : "Mitigating circumstances :- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :-

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.*
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.*
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.*
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*
- (6) That the accused acted under the duress or domination of another person.*
- (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."*

A three Judge decision of the Apex Court in *Machhi Singh v State of Punjab*, AIR 1983 SC 957 has further thrown some light on the balance sheet of circumstances for determining when life sentence would be adequate in a case of murder and when death sentence would be the only appropriate option.

The relevant paragraphs 32 to 35 are extracted below:

'32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence in no case" doctrine are not far to seek. . In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a

deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :

I Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance.

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house,

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. for instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

III Anti-social or socially abhorrent nature of the crime.

(a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry-deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another

woman on account of infatuation.

IV Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity. (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

33. In this background the guidelines indicated in *Bachan Singh's case (supra)* will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh's case* :

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime';
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;
- (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

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

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

35. If upon taking an overall global view of all the

circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

Aggravating circumstances in the present case

Tested in the light of these binding decisions, we find that in the present case, the aggravating circumstances would include the diabolical and calculated nature of the crime which was committed after methodical planning. Biopose sedative tablets appear to have been obtained by the appellant Shabnam with the help of Saleem, and were mixed in some food substance which was given to all the 6 grown up family members, all of whom were murdered with an axe in their sleep. Their bodies were found in their beds, with no injuries on the arms or hands of any deceased. All the injuries were on the neck, face or trunk regions which supports the hypothesis that the murders were committed when the deceased had been strongly sedated. The viscerae of all these 6 grown up deceased indicated the presence of diazepam tranquilizer. The axe which was got discovered by the appellant Saleem contained human blood. No mercy was even showed to the 10 month old child Arsh who was strangulated, and thus the only other person from the household who could have inherited the property was also eliminated.

The subsequent conduct of the accused Shabnam in removing all signs of the crime, by changing her clothes, removing any signs, and finger prints etc. and then raising an alarm for help and thereafter pretending to be unconscious for creating an impression that some outsiders had committed this crime, all indicate the cold blooded planning before, during and after the commission of the crime. These features would fall within the aggravating circumstances (a) and (b) mentioned in para 200 of *Bachan Singh*, i.e. "*(a) if the murder has been committed after previous planning and involves extreme brutality; or (b) if the murder involves exceptional depravity;*"

The special features of the crime would indicate that it was covered under the heading *I :Manner of Commission of Murder* – i.e. the murder being had been committed in an extremely brutal, grotesque and diabolical manner, which would give rise to intense indignation in the community; heading *II :Motive for commission of murder-* the depravity and meanness of the motive, and the cold blooded attempt to acquire the property by eliminating all family members; heading *IV :Magnitude of crime,* the crime of eliminating all 7 family members was very grave; heading *V :Personality of victim of murder,* the victim is an innocent child or helpless woman (or even a man) rendered helpless by old age or infirmity, (and in this case by a sedative). These are referred to in paragraph 32 in *Machhi Singh*

Mitigating circumstances

(i) Appellant Shabnam under great mental stress

The mitigating circumstances could be that the appellant Shabnam was under great emotional and mental stress (Mitigating circumstance (a) in paragraph 204 of *Bachan Singh*), as the appellant's father was not agreeable to the alliance of Shabnam with Saleem and even her mobile phone had earlier been snatched away and she may have once been beaten by him. Indeed learned counsel has likened their situation to a situation where an honour killing was in the offing because of Shabnam's was not agreeable to her family's objection to the alliance. But we find no basis for such a supposition. There was no evidence of any previous attack on the lives of the appellants, even if their liaison was frowned upon because of the economic and caste disparity between Shabnam and Saleem. In any case the elimination of all 7 members of her family, including the 10 month old child Arsh was a grossly disproportionate and uncalled for response for any apprehensions that the appellants may have nurtured

regarding their proposed alliance from the deceased. Moreover there could be no threat of honour killing from the baby Arsh, who was also throttled.

(ii) No positive evidence for showing that the appellants non-reformable or likely to abstain from future violence – need to read down requirement

No affirmative evidence has been led by the prosecution to show that the appellants could not be reformed, or that they could commit such violent acts in the future. This requirement is mentioned in relation to the third and fourth mitigating circumstances, i.e (c) and (d) enumerated by Chitaley, which passage has been incorporated in paragraph 204 (*supra*) in *Bachan Singh*. But we think there is need to read down this requirement. It may be pointed out that logically it would be impossible for the State to give affirmative evidence for showing that the offender was unlikely to reform in the future or that he was bound to indulge in violence again. No such prediction can affirmatively be made even for a killer for hire or a dreaded terrorist or a dacoit, as theoretically it is possible for anyone to reform and to abstain from future violence. If a burden is cast on the State to furnish positive evidence on these aspects in each case, then such an effort is bound to be fruitless, and can hardly conceive of any case where a death sentence could be awarded. That would amount to indirectly repealing the death penalty, which has been held to be constitutional in *Bachan Singh* itself, even in the rarest of rare cases where the exceptional and special reasons for awarding the death penalty exist.

ii) Nature of the crime as important as the criminal – features of the criminal can be inferred from the crime.

That exaggerated importance need not be given to this aspect, whether the prosecution has led evidence for repelling the

defence claim that the appellant is likely to reform and not engage in future violence is apparent from the fact that *Bachan Singh's* has disputed the correctness of the proposition in *Rajendra Prasad v State of U.P.*, (1979) 3 SCC 646 that the 'special reasons' in section 354(3) Cr.P.C for awarding the death penalty "must relate *not* to the crime as such but to the criminal." In paragraphs 200 and 201 *Bachan Singh* records its disapproval of the "murder most foul" test laid down in *Ram Prasad* in these words:

"200.According to it, after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. 'Special reasons' necessary for imposing death penalty 'must relate not to the crime as such but to the criminal'.

201. *With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist." (Emphasis added). Thus from the style and gravity ('depravity') of the crime, also the criminality of the accused and his likelihood for repeating crimes in future may be inferred.*

iii) Bachan Singh clarifies that death sentence possible in crimes against individuals, not only in major crimes

affecting the state, society and public order

We would also like to point out that *Bachan Singh* clarifies that a sentence of death, need not be confined only to crimes affecting large masses of people, which affect public order, such as major dacoities or acts of terrorism, by persons with criminal antecedents, about whom a presumption may be raised that it was highly probable that they would not reform or abstain from violence in the future, but also for murders of individuals, if the crime shows extreme cruelty or culpability. *Bachan Singh* therefore in paragraph 204 also overrules as Constitutionally impermissible the propositions that the 'special reasons' only apply to cases where the murder threatens or has the potentiality to threaten the security of the State and Society, public order and the interests of the general public. According to *Bachan Singh* for making the choice of punishment the court must give due regard both to the crime and the criminal and also the narrow categorization that the 'special reasons' only apply to crimes against the State and Society threatening public order is constitutionally impermissible. Thus capital punishment is not only permissible for habitual criminals engaged in murders after dacoities or abductions for ransom or in terror crimes, or by hired assassins, but also where murders are of individuals, where there may not be evidence of the likelihood of the repetition of the crime, but where the culpability and heinous character of the crime indicates "aggravation of an abnormal or special degree". In this context *Bachan Singh* in paragraph 199 reiterates these lines from the decision in *Ediga Anamma, AIR 1974 SC 799* that : "*The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.*" Likewise in paragraph 200 it approves the award of death penalty in *Paras Ram, (SLP (Cri) Nos. 698 and 678 decided on 9.10.1973)* to a person who in a

fit of anti social piety commits a "blood-curdling butchery" of his child. These crimes of great butchery or depravity against individual victims are usually one-time events and not committed by accused with criminal antecedents, and therefore it could not ordinarily be assumed that the offenders would not reform, or invariably engage in violence again. But *Bachan Singh* has approved the award of the death penalty in these situations. The aggravating circumstances for awarding the death penalty in paragraph 200 of the law report, include cases where the murder has been committed after previous planning and involves extreme brutality, or if the murder involves exceptional depravity and is not only confined only to murders disturbing public order or affecting the safety of the State or society.

iv) Chitaley's guidelines are only indicative, judicial discretion lies with Courts on weight to be attached to aggravating and mitigating circumstances

Even if it is accepted for the sake of arguments that the prosecution has failed to lead positive evidence for showing that the appellants were non-reformable or they would not abjure from future violence, the Court is not precluded from exercising an independent judicial mind for reaching a conclusion, whether on an overall consideration of the balance sheet, the nature of the aggravated circumstances, could be outweighed by the mitigating circumstances.

Bachan Singh points out how the U.S. Supreme Court in *Gregg v Georgia*, 428 US 153, and other companion cases was forced to read down the fixed criteria for the capital sentence, which had been introduced in some U.S. States following *Furman v. Georgia*, 408 US 238(1972) which had struck down the death penalty as violating the Eighth and Fourteenth Amendments because clear, definite and articulate standards for channeling the sentencing discretion for imposition of the death penalty

had not been laid down in a statute. Stewart J speaking for the Court in *Gregg v Georgia*, 428 US 153, had pointed that *Furman* had called for fixed criteria in the matter of capital sentences, "so as to *minimize* the risk of *wholly* arbitrary and capricious action." But *Gregg v Georgia* emphasized that it was necessary to give a role for judicial discretion in the matter of sentencing, which could not be completely fettered by rigid statutory requirements, because exhaustive standardization was not feasible and indeed could prove counter-productive.

As *Bachan Singh* puts it in paragraph 186:

"186. by reading down the concerns expressed in *Furman*. In this connection, Stewart, J. said, all that *Furman* mandates is that discretion in so grave a matter must be suitably directed "so as to minimize the risk of wholly arbitrary and capricious action". This was, if we may say so with respect, an admission of the fact that a considerable range of sentencing discretion has perforce to be left with the sentencing body to be exercised by it according to its own good sense and reason; and that no standards howsoever meticulously drafted can totally exclude scope for arbitrary and capricious action.

Paragraphs 192 and 193 of *Bachan Singh* may also usefully be perused in this connection:

192. It appears to us that in *Gregg v. Georgia* and the companion cases, the Supreme Court of U.S.A. was obliged to read down the requirements of *Furman* and to accept these broadly worded, loose-ended and not-all-inclusive 'standards' because in the area of sentencing discretion, if it was to retain its judicial character, exhaustive standardisation or perfect regulation was neither feasible nor desirable.

193. Moreover, over-standardisation of the sentencing process tends to defeat its very purpose, and may actually produce opposite results.

Again paragraph 195 of *Bachan Singh* reads as follows:

"195. Critically examined, it is clear that the decisions in *Gregg v. Georgia* (428 US 153) and its companion cases demonstrate the truth of what we have said earlier, that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards. Nevertheless, these decisions do show that it is not impossible to lay down broad guide-lines as

distinguished from ironcased standards, which will minimise the risk of arbitrary imposition of death penalty for murder and some other offences under the Penal Code."

The requirement for a judicial role for interpreting what weight is to be given to the aggravating and mitigating circumstances is much greater in India where Chitale's guidelines favoured by *Bachan Singh* do not have any statutory status, and indeed have only been described as guide-lines and not an all-inclusive charter enumerating the cases where capital penalty is appropriate or inappropriate. *Bachan Singh* cautions against fixing of inflexible criteria for fettering the jurisdiction of the Courts for exercising their judicial discretion for determining as per their good sense and wisdom the weight to be attached to the aggravating and mitigating circumstances in the balance sheet for reaching a decision on the facts of the particular case whether the normal sentence of life imprisonment was called for, or whether the 'special reasons' exist where only a sentence of death would satisfy the ends of justice.

Thus it has been observed in paragraph 203 of the law report:

"203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

V) Application of the principles to the present case:

In the present case only because some objections had been raised to Shabnam's liaison with Saleem, in a cold blooded and pre-planned manner the two conspiring appellants had executed the crime. They had acquired diazepam tablets which were administered to 6 of the deceased, who were Shabnam's father, mother, two brothers, two sisters in law and a 14 year old niece, who were then hacked on the head, face and trunk regions with an axe in their sedated sleep by the appellants and the blood stained axe was got discovered by the appellant Saleem. Even the seventh deceased Arsh, the 10 month old

child of Shabnam's brother, who could not have protested to the liaison of the appellants was not spared and was throttled, so as to leave no survivors for claiming the property in the future. Then the clothes and other marks of the crime were removed from the scene, and a cry was raised by Shabnam who tried to insinuate that this crime had been committed by some outsiders and to feign unconsciousness. There was no injury on her person, even though the rest of the family had been eliminated. The appellants had even shown disloyalty to each other in their 313 Cr.P.C. statements as both the appellants had tried to shift the burden for the crime on the other whilst exonerating themselves. All these features indicates the extreme brutal, calculated and diabolical nature of the crime, which suggested that there was little likelihood of reform of these accused and of their abstaining from future crime. In any case the aggravating circumstances are such that they substantially outweigh the mitigating circumstances.

Shabnam's pregnancy and subsequent delivery of child, no ground for reducing sentence

It was also contended that the Salma was carrying a child in her womb whom she has delivered in jail and who would be orphaned if the appellants are executed. In most murder cases the accused have minor children, or aged parents or a spouse who would be bereaved if the convict is executed. This according to the Supreme Court in *Sevaka Perumal v State of Tamil Nadu, 1991 Cri.L.J. 845 (SC)* can not provide a legitimate reason for not awarding the death penalty, if the case is one, where looking to the heinous nature of the crime and the criminal a death penalty is the only appropriate sentence.

Conclusion:

On an overall consideration of the balance-sheet of

aggravating and mitigating circumstances, even if the maximum weightage is accorded to the mitigating circumstances, for the reasons mentioned above we are of the considered opinion that the the 'special reasons' as required under sections 354(3), and 235(2) Cr.P.C exist for treating this case as one of the 'rarest of rare' cases where the normal sentence of imprisonment for life would prove grossly inadequate and that option is unquestionably foreclosed on the facts of this case, and the only appropriate course would be to confirm the sentence of death awarded by the trial judge. We therefore uphold the conviction and also confirm the sentence passed by the trial Court.

The appeals are dismissed and the reference under section 366 Cr.P.C. is accepted.

Date: 26.4.2013

sfa/ishrat