REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 396 OF 2008

Mulla & Anr. .... Appellant(s)

Versus

State of U.P. .... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) This appeal is filed on behalf of the appellants through the Jailor, District Jail, Sitapur, U.P. against the impugned judgment dated 03.03.2006 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, in Criminal Reference No. 2 of 2005 and Criminal Appeal No. 713 of 2005 whereby the High Court allowed Criminal Reference No.2 of 2005 filed by the State confirming the death sentence awarded to the appellants

herein and dismissed Criminal Appeal No. 713 of 2005 filed by the appellants herein.

2) The prosecution case is as under:

(a) On the fateful night of 21.12.1995 when Shiv Ratan, Nanhakey, Ram Kishore and Sushil were irrigating their fields in the northern side of the village from the tubewell of Sundari, widow of Jai Narain, at about 8.30 p.m., eight miscreants armed with guns reached the spot. A boy and two girls were also with them. All the miscreants caught hold of the four persons who were irrigating their fields and enquired about their properties and made a demand of Rs.10,000/- each and threatened that otherwise they would be killed. At the very moment, Harnam, Ganga Dai, Chhotakey s/o Gaya Ram and Hari Kumar Tripathi who were returning home after irrigating their fields were also stopped by the miscreants demanding Rs.10,000/- each from them. When all of them expressed their inability to pay the money, the miscreants assaulted Sushil, Shiv Ratan and Harnam by butt of the gun and took away Hari

Kumar Tripathi, Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakkey and Ganga Dai towards western side of tubewell leaving Sushil, Shiv Ratan and Harnam directing them to bring money otherwise they would be killed. These three persons returned to the village and informed the villagers about the incident and by the time the villagers reached near the field, the miscreants had taken away all the five abducted persons along with them. Due to the night and being afraid of the miscreants, the villagers could not lodge a complaint immediately. On the very next day i.e. 22.12.1995 at 6.10 a.m., a complaint was lodged at P.S. Sandana, Dist. Sitapur and a case was registered and the investigation was commenced for searching the abducted persons. At about 25 mts. away from the tubewell in the sugar cane field of Laltu, the dead body of Hari Kumar Tripathi was recovered and the dead bodies of Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakkey and Ganga Dai were found in the Arhar field at a distance of 1 km. from the tubewell. After recovery of

the dead bodies, they were sent for post-mortem. After recording the statements, S.H.O. Ram Shankar Singh arrested Mulla and Guddu on 01.01.1996 and Tula on 08.01.1996 and recovered a countrymade gun, two cartridges and one knife.

(b) After completion of investigation, charge sheet was filed against Mulla, Guddu, Tula and Asha Ram. The accused persons were produced in the Court of Judicial Magistrate, First Class, Sitapur. Before committal of the case, the Judicial Magistrate vide his order dated 19.11.1996, separating the case of accused Asha Ram committed the case to the Additional Sessions Judge, Sitapur for trial vide his order dated 03.03.1997. During the trial, since accused Tula was absent, his case was separated. By order dated 30.4.2005, the trial Court convicted Mulla and Guddu under Section 365 IPC and sentenced them to undergo R.I. for 7 years and a fine of Rs.1000/- each and in default of payment of fine further simple imprisonment for one year. The appellants herein

were also convicted under Section 148 IPC and sentenced to undergo R.I. for 3 years. They were further convicted under Section 302 read with Section 149 IPC and sentenced to death.

(c) Challenging the said judgment, Guddu filed Crl. A. No. 698 of 2005 and Mulla filed Crl. A. No. 701 of 2005 before the High Court from Jail and both of them jointly filed Crl.A. No.713 of 2005 through counsel. The High Court, vide order dated 03.03.2006, confirming the death sentence imposed on the appellants dismissed the appeals filed by both the appellants. Aggrieved by the said judgment, both the accused persons filed this appeal through the Jailor, Distt. Sitapur, U.P. On 14.7.2006, this Court issued notice and on 21.7.2006, stayed the execution of death sentence pending further orders.

3) We heard Ms. Ranjana Narayan, learned *amicus curiae* for the appellants and Mr. Pramod Swaroop, learned senior counsel for the respondent-State.

4) After taking us through the relevant materials relied on by the prosecution, Ms Ranjana Narayan, learned *amicus curiae* raised the following contentions:

a) No eye-witness to the alleged incident;

b) Accused persons are not named in the FIR. In other words, FIR was lodged against unknown persons;

c) delay in conducting the Test Identification Parade (TIP);

d) Prosecution failed to establish motive for the incident;

e) In any event, even if the Court accepts the prosecution case, imposition of death sentence is not warranted.

5) Mr. Pramod Swaroop, learned senior counsel for the State of U.P. while disputing all the above contentions pointed out that a) though the FIR was registered against unknown persons, by proper investigation and examining the persons who witnessed the occurrence, the prosecution proved its charge b) PWs 1, 2 and 3 were present at the place of occurrence and in the absence of

any contradiction in their statements, the Courts below have rightly relied on and accepted their version c) PWs 2 and 3 identified Mulla and Guddu in the test identification parade which was conducted in accordance with the procedure d) the evidence of PW 4 is more probable and acceptable in view of the fact that she being a victim at the hands of the miscreants including the appellants, the Courts below have rightly relied on her statement e) all the miscreants were armed with illegal guns in their hands and came to the spot along with a boy and two girls demanding ransom, f) inasmuch as the appellants-accused killed five persons including a woman, all between the age of 25-50 mercilessly, the award of capital punishment is justified and no interference called for by this Court.

6) We have carefully perused the entire records including depositions and documents and considered the rival contentions.

7) The prosecution mainly relied on the evidence of PW 1 - Rajesh Kumar Tripathi, PW 2 - Sushil, PW 3 –Harnam, independent eye witness - PW 4 - Kiran, PW 5 – Dr. A.K. Verma-Post Mortem Doctor, PW 7 - Dr. Sudarshan, who treated the injured witness, PW 8 – S.I. - Ram Kripal Bharati, PW 9 - Sub-inspector of Police, PW 11 Vijay Kumar Verma, an officer who accompanied and assisted the Magistrate in conducting the test identification parade and one Rajni Kant Mishra, the then Reader, as a court witness (CW 1). No one was examined on the side of the accused as defence witness.

8) It is true that either in the complaint or in the first information report, no one was specifically named for the commission of offence. In other words, the accused persons are not named in the FIR and it merely mentions 'unknown persons'. Though a suggestion was made to prosecution witnesses that the accused persons are from the nearby villages, the same was stoutly denied and in such circumstance, miscreants being outsiders, it would

not be possible to name those persons in the complaint itself without further verification. On the other hand, the prosecution through their witnesses particularly, PWs 1 to 4, established that it was the appellants, who along with few more persons committed the offence by killing five persons mercilessly for non-payment of ransom amount which they demanded for the release of five persons caught hold by them. In view of the same, though none was named in the FIR, subsequently, the name of the appellants came into light during investigation.

9) Rajesh Kumar Tripathi who made the complaint-Ex. Ka-1 was examined as PW 1. He was examined on 09.04.2001 and narrated that on the night of the incident, namely, on 21.12.1995 nearly at about 8.30 p.m. in the north of his land, Shiv Ratan, Ram Kishore @ Nanhakkey Naney, Nanhakkey and Sushil were watering their respective fields from the tubewell of Sundari, widow of Jai Narain. At that very moment, eight miscreants, armed with guns, reached there. They also had two girls and a

boy with them. One by one, they caught hold of all the four persons and enquired them about their lands and threatened to kill them if they failed to bring Rs.10,000/- each. He further narrated that in the meantime, Harnam, Ganga Dai, Chhotakkey and Hari Kumar Tripathi, all from his village who were returning their home after watering their fields were also stopped by the miscreants. He also reached the spot. The miscreants were flashing their torches. The accused made all those persons to sit and asked to bring Rs.10,000/- each. When they replied that they are poor and wherefrom they would bring money to give them, all the accused persons assaulted Sushil, Shiv Ratan and Harnam by butt of the gun. The remaining five persons were taken away by accused persons towards west. All of them were told by the accused to come back immediately with money failing which these five persons would be killed. Sushil, Shiv Ratan and Harnam went to their village and informed the villagers about it. With the help of the villagers, they started searching the abducted

persons who were taken away by the accused but could not found anyone. According to him, in the night itself they tried to inform at Sandana Police Station by telephone but they could not get the connection. Next day, early in the morning, he along with Sushil, Shiv Ratan and Harnam went to Police Station by bicycles. He prepared a complaint in his own handwriting under his signature. The said complaint has been marked as Ex. Ka-1. Thereafter, after sending the injured persons to hospital at Sandana for treatment, he came back and with the help of villagers started searching for the kidnapped persons. In the western side of the tubewell dead body of Hari Kumar Tripathi was found lying in the sugarcane field of Laltu. At a distance of 1 km. in the west of Village Fatehpur, near a pond, they found the dead bodies of remaining four persons. These bodies were identified as Ram Kishore @ Chhotakkey Naney, Ganga Dai, Chhotakkey S/o Gaya Ram, Nanhakey. He along with the others noticed that the neck of all the four persons had

been cut. PW 1 further deposed that after recovering the dead bodies, his statement was recorded and Daroga Ji (PW 8) I.O. prepared a sketch map of the place of occurrence. He asserted that he had seen the faces of all the accused persons in the light of the torch. However, he admitted that he could not go and attend the identification parade which was conducted in the District Jail, Sitapur, due to his illness. In cross-examination also, he asserted that he had seen the guns in the hands of the accused and Sushil Kumar, Shiv Ratan and Harnam were assaulted by the accused persons by the butt of the gun. He informed that he had witnessed the incident from the distance of 10 mts. He also informed the Court that Hari Kumar Tripathi, who came from the western side had lantern and torch and when he focused his torch on criminals they assaulted him and snatched away his torch and extinguished the lantern.

10) The other important witness heavily relied on by the prosecution is PW 2 Sushil Kumar. He was an injured eye

witness. He narrated before the Court that nearly six years earlier i.e. on 21.12.1995, on the night of the incident, nearly about 8.30 p.m. he along with his brother Ram Kishore @ Chhotkaney, Shiv Ratan and Nanhakey were watering their fields from the tubewell. The said tubewell was owned by Sundari Devi, widow of Jai Narain. At that moment, eight miscreants reached there. They were armed with guns and torches. Two girls, one aged 10-13 years and the other 18-20 years and a young boy was also with them. All the miscreants came near the tubewell and caught hold four of them and asked about their properties and wealth. They threatened that unless they bring Rs.10,000/- each, they would be killed. In the meantime, Harnam, his mother Ganga Dai, Chhotakey and Hari Kumar Tripathi came there from western side. They were also caught hold of by the miscreants and enquired about their properties. They started beating Harnam, Shiv Ratan and him with the butt of the gun and directed him along with the others to go to village and

bring money. Thereafter, Hari Kumar Tripathi, Ram Kishore @ Chhotakey and his mother Ganga Dai and Nanhakey were taken away by them towards west. He also asserted that the miscreants were flashing their torches regularly. They had been recognized by PW 2 and others in the light of their torches. They were unknown to them. PW 2 along with others went to their village and informed the villagers about the demand of the miscreants. Thereafter, they started searching the accused and the persons who were taken away by the accused. PW 1 Rajesh had submitted a written complaint to the police. Since PW-2 had sustained injuries at the hands of the miscreants, he along with others went to Sandana hospital for treatment. Due to absence of doctor, treatment could not have been availed and he was given treatment only in Government Hospital on 27.12.1995. He further deposed that on return, he saw the dead body of Hari Kumar Tripathi in the sugar cane field of Laltu nearly 200-250 yards away from the tubewell. The other

four dead bodies were lying in the boundary of Arhar fields about 1 km. away near the pond. These dead bodies were of Ram Kishore @ Chottakey Naney, Nanhakey, Chhotakey and Ganga Dai. He also deposed about his visit to District Jail, Sitapur for test identification parade of miscreants. He informed the Court that he had identified three miscreants, namely, Guddu, Mulla and Tulla, who were present in the Court. These persons had also been identified in the jail. He further explained that these accused had been seen for the first time by him at the time of incident and thereafter, he saw them in the test identification parade. He also reiterated that before the incident, these miscreants were neither known nor seen by him. In his cross-examination, he reiterated that in the test identification parade which was conducted in District Jail, Sitapur, he identified the three accused. He explained that all three miscreants were not in one line and there were no specific marks of identification on the faces of accused persons. The face of all the accused were

not similar. He also reiterated that when miscreants were beating him they were flashing torches. He also denied the claim that the accused Mulla is a labourer and residing in Mohmadpur half a kilo metre away from his village.

11) It is seen that PW 2 corroborated the evidence of PW 1. It is further seen from his evidence that he also sustained injuries by one of the miscreants and this is also clear from his assertion and statement as well as the evidence of PW 7 - Dr. Sudarshan. In his evidence, PW 7 has stated that he examined injured Sushil Kumar - PW 2 and noticed the following injuries:

> "Abrasion 1 cm x 0.5, which was present on the fore arm at the left side at 10 cm. below the wrist joint, the same was healed".

According to him, this injury was of simple nature, one week old and it was inflicted by any blunt object. His report was marked as Ex K-15. Dr. Sudarshan - PW 7 has also asserted that this injury could have been caused by the butt of a gun. It is also relevant to point out that

apart from the fact that he had been injured at the hands of one of the accused persons which is evident from the statement of PW 7 who treated him. PW 2 also participated in the test identification parade which was held at District Jail, Sitapur. He also identified three miscreants, namely, Guddu, Mulla and Tulla. He further asserted that except on the date of occurrence of the incident, he had not seen them earlier and only on the date of test identification parade, he identified these persons at the jail. There is no reason to disbelieve his version that he did not see these persons on any other occasion except on the date of occurrence and at the time of identification parade. He being an injured eye witness as well as identified the appellants in the identification parade, the trial Judge as well as the High Court rightly accepted his version.

12) The other reliable witness examined on the side of the prosecution is PW 3-Harnam. He asserted that on the date and time of the incident, he witnessed the occurrence

along with PW 2. He also reiterated that those miscreants were carrying country-made guns and torches which they were flashing. He also sustained injuries. He was one of the four persons detained by the miscreants, enquired about their status, land details and demanded Rs.10,000/- each and when he informed the miscreants that he and others are poor people and difficult to comply with their demand, they started beating him. He also explained to the court that when the miscreants detained him and others for about half an hour, he noticed the faces of the miscreants in the light of their torches. Like PW 2, he also explained that in view of their inability to pay the ransom as demanded by the miscreants, initially they killed one Hari Kumar and thereafter killed other four-Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakey and Ganga Dai, by throwing their dead bodies 1 km. away from the spot near a pond.

13) Along with PW 2 and others, PW 3 also reached Sandana Police Station at about 6 a.m. PW 1 lodged a

written complaint at the Police Station. He further explained that apart from himself, the other injured persons, namely, PW 2 and others were sent to Government Hospital, Sandana for medical examination. According to him, due to non-availability of doctor, they returned back to their village and searched the kidnapped persons and found one dead body near a tubewell and other four dead bodies one km. away from the tubewell near a pond.

14) About the injury of PW 3, PW 7 - Dr. Sudarshan stated that he conducted the medical examination of Harnam, PW 3, who was taken along with Sushil Kumar and Shiv Ratan. He prepared a medical report in his own hand writing with his signature which has been marked as Ex. K-16.

15) Like PW 2, PW 3 also asserted before the Court that none of the accused was known to him earlier. He also explained that he had gone to jail for identification of the accused. Before the Court, PW 3 identified, by putting his

hand on the accused Guddu, Tulla and Mulla who were standing in the dock and said that these miscreants were involved in the incident and for the first time he had seen these persons at the time of occurrence and second time in jail at the time of test identification parade. Though he was cross-examined at length, his evidence about the incident, the involvement of the accused, threat to kill the persons in custody, recovery of dead bodies, identifying the accused in the test identification parade, could not be shattered in any way. He being an injured eye witness, corroborated the evidence of PW 2 and identified the accused persons in the properly constituted test identification parade, his evidence was fully relied on by the prosecution and rightly accepted by the trial Court as well as by the High Court.

16) The next witness relied on by the prosecution is PW 4 – Smt. Kiran. Learned *amicus curiae* by pointing out the conduct of PW 4 in respect of her statement in the earlier case in ***State*** vs. ***Kailash Chandra & Ors***. submitted

that the reliance on her evidence before the Trial court and accepted by the High Court cannot be sustained. She further pointed out that inasmuch as in the case of ***State*** vs. ***Kailash Chandra & Ors***. though she claimed to be a victim, she deposed before the Court that the present accused Mulla and Guddu have nothing to do with the earlier incident. In such circumstances, according to the *amicus curiae* she is not competent to narrate the present incident and implicate the very same accused. On going through her entire evidence, we are unable to accept the stand taken by amicus for the following reasons: About the first incident, namely, setting fire to her house, she informed the court that six years earlier when she was at her matrimonial home at Surjapur, three criminals came there and set the roof of her house on fire. At the time, when she was in her house and male members had gone to extinguish the fire, the criminals forcibly took her away with them. This incident took place at 1.00 a.m. in the midnight. They had taken her to the nearby forest. She

further explained, that on the third day on which they had taken her away, after the sunset when it had become dark, eight miscreants armed with guns and torches reached near the tubewell of the village. She and other girl and a boy who were brought from somewhere were with them. There the criminals had caught eight persons and made them to sit at tubewell and they were asking them to bring Rs.10,000/- each then only they would be released. The accused persons had assaulted two to three persons by the butt of the gun and they were having torch lights. After keeping them for one hour, they released three persons and told them to bring Rs.10,000/- each and threatened that only then the remaining five persons would be released. After waiting for sometime since nobody came from the village the miscreants took away the said four men and one woman towards north. Nearly after crossing two or three agricultural fields they killed one person by slitting his throat by knife. Thereafter, about 1 km. in the southern side of the village near a

pond they took the remaining four persons, that is, three men and one woman and killed them by cutting their throat and left the dead bodies near a pond. She informed that after leaving the dead bodies, they all went away. She, however, managed to escape from the custody of the said criminals after 10-12 days. Among the eight persons who committed the crime at the tube-well one was Asha Ram, Ram Sebak, Guddu, Mulla and Tulla whose names she came to know since she was with them for 10-12 days. She asserted that Mulla had killed three persons and Guddu had killed two persons. She pointed out that she can recognize the accused Guddu, Mulla and Tulla by face and by name and she also identified them when Mulla and Guddu were present in the Court.

17) It is relevant to point out that just prior to the incident the very same accused, that is, Mulla and Guddu set fire to her house and took her to the forest. She was in the custody of miscreants for 10-12 days. It is true that at one stage she complained that they attempted to rape

her. However, in the said case, before the Court she failed to mention their name and implicate them in the said crime. In the present case, when she was examined, she explained that due to threat and fear she made a statement in the earlier case disowning these accused. Considering her explanation, particularly, because of the threat and fear she was forced to make such statement and in view of the categorical statement about the present occurrence implicating the miscreants including the present appellants Mulla and Guddu, explaining all the details about keeping three youngsters in their hands and five villagers demanding ransom for their release, identifying the five dead bodies at different places, there is no reason to disbelieve her version.

18) As rightly pointed out, the trial Judge has accepted her conduct in making a statement about the earlier case and relied on her present statement with reference to abduction and killing of five persons. The statement of PW-4 also corroborates with the evidence of injured eye

witnesses PWs 2 and 3. Further she was in the clutches of these miscreants for a period of 10-12 days and because of her familiarity of their faces, in categorical terms, she informed the Court that it was Mulla, who killed three persons and Guddu, who killed two persons by slitting their neck. Her explanation about her own case and detailed narration in respect of the present case are acceptable and rightly relied on by the Trial Court and accepted by the High Court.

19) Apart from the evidence of PWs 1-4 about killing of five persons, medical evidence also supports the case of prosecution. Dr. A.K.Verma, Medical Officer, District Hospital, Sitapur who conducted autopsy on the five dead bodies was examined as PW 5. He explained before the Court that on 22.12.1995 at about 8.00 p.m., he conducted post mortem on the dead body of Hari Kumar Tripathi, Nanhakey, Ram Kishore @ Chottakey Naney, Chhotakey and Ganga Dai, who were all residents of village Sandana, Police Station Sandana, District Sitapur.

According to him, the dead bodies had been brought by the constables and identified by them. After post mortem, he prepared a report (Ex. K2-K6). The details are as follows:-

> "The post mortem on the dead body of Hari Kumar Tripathi was conducted by Dr. A.K. Verma on 22.12.1995 at 8.30 p.m. and he noted the following ante mortem injuries on the person of the deceased:
>
> > 1. Incised wound 14 x 2 cm. x tissue deep on front of neck (more towards right side) 4.5 cm. below chin trachea, all blood vessels of both side nerves and muscles divided.
> > 2. Incised wound 3 x 0.5 cm. side just above eye brow.
> > 3. Incised wound 3 x 0.5 cm. skin deep on the nose.
> > 4. Incised wound 2 x 0.5 cm. x skin cartilage deep upper part of the Pinna of right ear.
>
> In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.
>
> The post mortem on the dead body of Chhotkanney was conducted by Dr. A.K.Verma on 22.12.1995 at 8.00 p.m. and he noted the following ante mortem injuries on the person of the deceased:
>
> > Incised wound 9 cm. x 1.5 cm. x tissue and bone deep. 1 cm. neck 6.5 cm. below 1 cm. chin. All self tissues uncludy muscle, blood vessels, trachea and oseophagus cut.
>
> In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of Chhotakkey was conducted by Dr. A.K.Verma on 22.12.1995 at 9.30 p.m. and he noted the following ante mortem injuries on the person of the deceased:

> 1. Incised wound 8.5 cm. x 2 cm. x bone deep on part of neck just below the adamis apple (Thyroid cartied) trachea, nerves, blood vessels of both sides divided along with other tissues oseophagus also cut.
> 2. Incised wound 2 cm. x 0.5 cm. x bone deep dorsum of left ring finger at its base.
> 3. Incised wound 1.5 cm. x. 0.5 cm. x muscle deep over finger web between ring finger and middle finger of right hand.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of Nanhakey was conducted by Dr. A.K. Verma on 22.12.1995 at 9.30 p.m. and he had noted the following ante mortem injury on the person of the deceased:

> Incised wound 9 cm. x 2 cm. x bone deep just above adamis apple (Thyroid cartied) trachea, nerves, blood vessels of both sides divided along with other tissues oseophagus also cut.

In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

The post mortem on the dead body of Gangadai was conducted by Dr. A.K. Verma on 22.12.1995 at 10 p.m. and he had noted the following ante mortem injury on the person of the deceased:

> Incised wound 9.5 cm. x 2 cm. x bone and trachea deep over fold neck just above the thyroid

> cartilage, trachea, blood vessels of both sides nerves and much and oseophagus all cut.
>
> In the opinion of the doctor cause of death was due to shock and haemorrhage as a result of ante mortem injuries."

In all the reports, he mentioned cut in the nerves and muscles of neck and blood vessels apart from other injuries. He also opined that death was caused due to shock and hemorrhage and approximately one day before the post mortem. Though the police could not produce the knife used for killing the five persons, one of the accused had admitted about possession of knife apart from unlicensed gun at the time of the occurrence. There is no reason to disbelieve the assertion of PWs 1 to 4 as well as the evidence of PW 7 who treated the injured witnesses PWs 2 and 3 and the medical opinion of PW 5 about the cause of death of five persons.

20) Now, let us consider the arguments of the learned *amicus curiae* on the delay in conducting the test identification parade. The evidence of test identification is

admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr. P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court.

21) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of

conviction. As was observed by this Court in ***Matru*** v. ***State of U.P.,*** (1971) 2 SCC 75, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (Vide ***Santokh Singh*** v. ***Izhar Hussain,*** (1973) 2 SCC 406).

22) The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to

test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

23) In **Subhash v. *State of U.P.*** (1987) 3 SCC 331, the parade was held about three weeks after the arrest of the

accused. Therefore, there was some room for doubt if the delay was in order to enable the identifying witnesses to see him in jail premises or police lock-up and thus make a note of his features. Moreover, four months had elapsed between the date of occurrence and the date of holding of the test identification parade. The descriptive particulars of the appellant were not given when the report was lodged, but while deposing before the Sessions Judge, the witnesses said that the accused was a tall person with shallow complexion. The Court noted that if on account of these features the witnesses were able to identify the appellant Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time when his face was fresh in their memory. It is important to note that since the conviction of the accused was based only on the identification at the test identification parade, the Court gave him the benefit of doubt while upholding the conviction of the co-accused. This is also a case where the conviction of the appellant

was based solely on the evidence of identification. There being a delay in holding the test identification parade and in the absence of corroborative evidence, this Court found it unsafe to uphold his conviction.

24) In **State of Andhra Pradesh v. *Dr. M.V. Ramana Reddy*** (1991) 4 SCC 536, the Court found a delay in holding the test parade for which there was no valid explanation. It held that in the absence of a valid explanation for the delay, the approach of the High Court could be said to be manifestly wrong calling for intervention.

25) In the case of ***Brij Mohan & Ors. v. State of Rajasthan,*** **(**1994) 1 SCC 413, the test identification parade was held after three months. The argument was that it was not possible for the witnesses to remember, after a lapse of such time, the facial expressions of the accused. It was held that generally with lapse of time memory of witnesses would get dimmer and therefore the

earlier the test identification parade is held it inspires more faith. It was held that no time limit could be fixed for holding a test identification parade. It was held that sometimes the crime itself is such that it would create a deep impression on the minds of the witnesses who had an occasion to see the culprits. It was held that this impression would include the facial impression of the culprits. It was held that such a deep impression would not be erased within a period of three months.

26) In ***Rajesh Govind Jagesha*** **v.** ***State of Maharashtra*** (1999) 8 SCC 428, the accused was apprehended on 20th January, 1993, while the identification parade was held on 13th February, 1993. It was also not disputed that at the time of identification parade the appellant was not having a beard and long hair as mentioned at the time of lodging of the first information report. It was also not disputed that no person with a beard and long hair was included in the parade. The

witnesses were alleged to have identified the accused at the first sight despite the fact that he had removed the long hair and beard. This Court held that the Magistrate should have associated 1-2 persons having resemblance with the persons described in the FIR and why it was not done was a mystery shrouded with doubts and not cleared by the prosecution. In these circumstances, the Court observed that the possibility of the witnesses having seen the accused between the date of arrest and the test identification parade cannot be ruled out. This case also rests on its own facts, and mere delay in holding the test identification parade was not the sole reason for rejecting the identification.

27) In the case of ***Daya Singh v. State of Haryana,*** (2001) 3 SCC 468, the test identification parade was held after a period of almost eight years inasmuch as the accused could not be arrested for a period of 7-1/2 years and after the arrest the test identification parade was held

after a period of six months. It was pointed out that the purpose of test identification parade is to have the corroboration to the evidence of the eye witnesses in the form of earlier identification. It was held that the substantive evidence is the evidence given by the witness in the Court and if that evidence is found to be reliable then the absence of corroboration by the test identification is not material. It was further held that the fact that the injured witnesses had lost their son and daughter-in-law showed that there were reasons for an enduring impression of the identity on the mind and memory of the witnesses.

28) This Court in ***Lal Singh v. State of U.P.,*** (2003) 12 SCC 554, while discussing all the cases germane to the question of identification parades and the effect of delay in conducting them held that:

> "It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid

down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

29) In the case of ***Anil Kumar* v. *State of Uttar Pradesh,*** (2003) 3 SCC 569, this Court observed as under:

"It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal ..A mere lapse of some days is not enough to erase the facial expressions of assailants from the memory of father and mother who have seen them killing their son..."

30) In another case of ***Pramod Mandal* v. *State of Bihar,*** 2004 (13) SCC 150, placing reliance on the case of ***Anil Kumar* (supra)**, this Court observed that it is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These

matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the Test Identification Parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the

evidence on record before pronouncing upon the acceptability or rejection of such identification.

31) The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two-fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

32) Therefore, the following principles regarding identification parade emerge: (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses; (2) this condition can be revoked if proper explanation justifying the delay is provided; and, (3) the authorities must make sure that the

delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.

33) In the light of the above principles, let us consider whether the test identification parade conducted on 24.02.1996 at District Jail, Sitapur is valid. It is contended by the learned *amicus Curiae* that the appellants were arrested on 01.01.1996 and they were placed for identification only on 24.02.1996. It is further pointed out that the accused were put up for identification after 63 days of the occurrence and 55 days after their arrest. It is also pointed out that in the meantime, these persons were taken to court and present before the test identification parade, innumerable persons noticed them and in the absence of evidence that they were kept baparda at a time when they were taken to court, the report has no value at all. It is true that though the appellants were arrested on 01.01.1996 they were put up for identification on 24.02.1996. However, merely because

there is delay, the outcome of the identification parade cannot be thrown out if the same was properly done after following the procedure. In fact, when PWs 8 and 9 - I.O. and S.I were examined, nothing was suggested to them regarding delay in conducting the identification parade.

34) PW 6, Suresh Kumar, while examining before the court explained in categorical terms that all the accused were kept in baparda when they were taken to court for remand. He also claimed that when persons connected with the incident came to the Police Station, they were kept in baparda. In view of the assertion of the official witness and in the absence of allegation against him, it is to be accepted that the accused were not seen by these witnesses more particularly PWs 2 and 3, who identified them in the identification parade.

35) Admittedly, the Magistrate before whom the identification parade was conducted at the District Jail, Sitapur is no more and was not available for examination. On the other hand, One Vijay Kumar Verma, who

accompanied the Magistrate for test identification parade was examined as PW 11. He proved the identification memo as secondary evidence due to non-availability of the Magistrate in whose presence test identification parade was conducted. PW 11 has stated that witnesses PW 2 and PW 3 had correctly identified these accused persons. It is further seen that the accused persons' thumb impressions and signatures were obtained before starting of identification parade as well as after completing the process. It is further seen that in the report, the Magistrate had put his signature. PW 11 who is competent to speak about the proceedings of the learned Magistrate and who recorded the test identification parade has also explained the presence of PW 2 and PW 3, the procedure followed and identification by them correctly identifying the accused Mulla and Guddu. After completing the process, identification memo was signed by the Magistrate and he also put his signature. Identification memo Ex. K-58 has been proved by PW 11.

From the materials, we hold that the test identification parade was properly conducted and all required procedures were duly followed. The statement of witnesses PWs 2 and 3 clearly show that they identified the appellants as the accused who involved in killing five persons on the night of 21.12.1995. In those circumstances, merely because there was some delay, evidence of PWs 2 and 3 who identified the appellants-accused coupled with the statement of official witnesses PW 6 and PW 11 who accompanied the Magistrate clearly prove the fact that test identification parade was conducted in accordance with the established procedure. There is no reason to disbelieve their version and we hold that the trial Court has correctly appreciated their evidence and the High Court has rightly affirmed it.

36) Learned *amicus curiae* put-forth another feeble argument that in the absence of proper light at the time of occurrence it is highly improper to accept the version of prosecution witnesses particularly, PWs 2 and 3

identifying these appellants. PW 1, in his cross examination, has stated that Harikumar Tripathi, who came from the western side had lantern and torch and when he focused his torch on criminals, they assaulted him and snatched away his torch and extinguished the lantern. PW 2 has asserted that "the miscreants were flashing their torches regularly. They have been recognized properly by us in the light of their torches. They were not known to us. They were unknown……" Again he deposed "when miscreants were beating me, they were flashing torches……" PW 3 has also asserted by saying "the miscreants detained us at about half an hour at this spot and I had seen the faces of miscreants in the light of their torches….." In cross-examination, he also reiterated "at first time, I had seen these persons at the time of occurrence and second time in jail when I went for identification".

37) Apart from the evidence of PWs 1 to 3, about the information that through their torch lights they were able

to recognize the faces of miscreants, PW 4 who was taken away by the miscreants to the forest in respect of the first incident informed the name of the accused correctly. Inasmuch as her association with the accused was longer than others, she mentioned the name of the accused without any difficulty. In those circumstances, the learned trial Judge is perfectly right in holding that the prosecution witnesses were able to correctly identify these persons and rightly rejected the defence plea.

38) Finally, we have to consider whether the death sentence awarded by the trial Judge affirmed by the High Court is justifiable and acceptable. After finding that the prosecution has established beyond reasonable doubt in respect of offences under Sections 148, 364A, 365 and 302 IPC, the learned Trial Judge, by giving adequate reasons, awarded death sentence to both the appellants which was confirmed by the High Court. Now, we have to find out whether death sentence is warranted in the facts and circumstances duly established by the prosecution.

39) When the constitutional validity of death penalty for murder provided in Section 302 of the Indian Penal Code and sentencing procedure embodied in sub-section 3 of Section 354 of the Code of Criminal Procedure, 1873, was questioned, the Constitution Bench of this Court in ***Bachhan Singh*** vs. ***State of Punjab*** (1980) 2 SCC 684, after thorough discussion, rejected the challenge to the constitutionality of the said provisions and ruled that "life imprisonment is the rule and death sentence is an exception".

40) The above said decision of the Constitution Bench was considered by a three-Judge bench in ***Machhi Singh & Others*** vs. ***State of Pubjab*** (1983) 3 SCC 470. The discussion and the ultimate conclusion as well as instances/guidelines are relevant:-

> "Death Sentence
>
> **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 realized 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 of those who have no scruples in killing others if it suits their ends. Every member of the community owes a doubt 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*

33. 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*

34. 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, or (*c*) a murder is committed in the course for betrayal of the motherland.

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

35. (*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*

36. 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*

37. 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.

38. In this background the guidelines indicated in *Bachan Singh case*[1] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case*[1]:

of death need not be inflicted except in gravest cases of extreme culpability.

(*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

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

(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

41) Following the guidelines and principles enunciated in ***Bachhan Singh's*** case & ***Machhi Singh's*** case, (supra), this Court in subsequent decisions applied those principles and either confirmed the death sentence or altered the same as life sentence vide ***Asharfi Lal & Others*** vs. ***State of Uttar Pradesh***, (1987) 3 SCC 224, ***Ravji*** vs. ***State of Rajasthan***, (1996) 2 SCC 175 and ***Ram Singh*** vs. ***Sonia & Others***, (2007) 3 SCC 1.

42) It is settled legal position that the punishment must fit the crime. It is the duty of the Court to impose proper punishment depending upon the decree of criminality and desirability to impose such punishment. As a measure of

social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime.

43) This Court in ***Bachhan Singh's*** case (supra) has held that:

> "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

44) Therefore, it is open for the court to grant a death penalty in an extremely narrow set of cases, which is signified by the phrase 'rarest of the rare'. This rarest of the rare test relates to "special reasons" under Section 354(3). Importantly, as the Court held, this route is open to the Court only when there is no other punishment which may be alternatively given. This results in the death penalty being an exception in sentencing, especially in the case where some other punishment can suffice. It was in this context that the Court had noted:

> "The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on

the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal"

45) In ***Panchhi v. State of U.P.***, (1998) 7 SCC 177, this Court also elucidates on "when the alternative option is foreclosed" benchmark in the following terms:

> "16. When the Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in Bachan Singh v. State of Punjab this Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the rarest of rare cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid freaks wherein the lesser sentence would be, by any account, wholly inadequate. In Machhi Singh v. State of Punjab a three-Judge Bench of this Court while following the ratio in Bachan Singh case laid down certain guidelines among which the following is relevant in the present case: (SCC p.489, para 38)"

Here, this court quoted Guideline no. 4 in para 38 of ***Machhi Singh*** (supra) which we have extracted earlier.

46) In the same case, this court held that the brutality of the murders must be seen along with all the mitigating factors in order to come to a conclusion:

> "20. We have extracted the above reasons of the two courts only to point out that it is the savagery or brutal manner in which the killers perpetrated the acts on the victims including one little child which had persuaded the two courts to choose death sentence for the four persons. No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or

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

47) In ***Bachan Singh (supra)*** again, this Court discussed mitigating circumstances as follows:

"206. Dr Chitale 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 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.

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

48) Therefore, in the determination of the death penalty, para. 38 of ***Machhi Singh's*** case (supra) must be paid due attention to it. The test for the determination of the 'rarest of the rare' category of crimes inviting the death sentence thus includes broad criterions i.e. (1) the gruesome nature of the crime, (2) the mitigating and aggravating circumstances in the case. These must take into consideration the position of the criminal, and (3) whether any other punishment would be completely inadequate. This rule emerges from the dictum of this Court that life imprisonment is the rule and death penalty an exception. Therefore, the Court must satisfy itself that death penalty would be the only punishment which can be meted out to the convict.

49) In the light of the above principles, let us examine the reasoning of the Trial Judge and its confirmation by the High Court in awarding death sentence. Before the Trial Court, High Court and even before us the learned *amicus curiae* appearing on behalf of the accused Mulla and

Guddu argued that the offences alleged to have committed by these persons cannot come in the category for which they may be punished with death sentence. She also pointed out that neither they have any criminal history nor the prosecution could show that the accused Mulla and Guddu were involved in dacoity/gang or taken part in any criminal activities prior to the occurrence of the present case. Learned *amicus curiae* further pointed out that even the one incident pressed into service by the prosecution ended in acquittal. On the other hand, the learned senior counsel appearing for the State by pointing various instances how the five persons were killed mercilessly by these accused, pleaded that no sympathy or leniency should be afforded to these persons and prayed for confirmation of the death sentence as awarded by the Trial Court and confirmed by the High Court. We have already quoted the Constitution Bench decision in ***Bachhan Singh*** **(supra)** and three-Judge Bench decision in ***Machhi Singh*** **(supra)** to the effect that in the case of

murder, "life imprisonment is a rule and imposition of death sentence is an exceptional one" and the same should come within the purview of "rarest of rare category". We have already noted that the accused Mulla is of the age 50 years and Guddu is of the age 30 years at the time of committing the offence in question. No material was placed or available about the family background of these two accused and whether these persons are married or not and about the family circumstance etc. Learned *amicus curiae* fairly stated that no family member ever approached during the entire proceedings enquiring these appellants. The perusal of the case records also shows that no one is depending on them and no family responsibility is on the shoulders of these accused persons.

50) Now, coming to their background as to the criminality, the prosecution pressed into service the earlier incident relating to the offences of abduction, murder, mischief by firing led against these persons. The

fact remained that ultimately both of them were acquitted from those offences. Admittedly, prosecution has not placed any other material about their criminal antecedents.

51) No doubt, the aggravating circumstances against the appellants show that it is a case of cold blooded murdering of five persons including one woman of the middle age, the unfortunate victims did not provoke or resist. The murder of five innocent persons were committed for ransom which was executed despite the fact that the poor villagers were unable to pay the ransom as demanded, the accused knowing fully aware of their inability and poverty of the victims.

52) As we have noted above, along with the aggravating circumstances, it falls on us to point to the mitigating circumstances in the case. In this case, we observe three factors which we must take into account, 1) the length of the incarceration already undergone by the convicts;

2) the current age of the convicts; and finally, 3) circumstances of the convicts generally.

53) As we have noted above, old age has emerged as a mitigating factor since ***Bachhan Singh*** **(supra).** This court in ***Swamy Shraddananda v. State of Karnataka*** (2008) 13 SCC 767 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 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 larger. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."

57) This Court in ***Subash Chander v. Krishan Lal*** (2001) 4 SCC 458 considered the length of life imprisonment, while going over the precedents germane to the question and observed as follows:

> "20. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment of imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoners sentenced to life imprisonment is bound in law to serve the

life term in prison. In **Gopal Vinayak Godse** v. **State of Maharashtra & Others** 1961 Cri L J 736a , the convict petitioner contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in **Pandit Kishori Lal** v. **King Emperor** 1944 (1) 72 LR IndAp this Court held:

"If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to s. 57 of the Indian Penal Code, 20 year's imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p.10:

"Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission."

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

> 21. In **State of Madhya Pradesh** v. **Ratan Singh & Ors.** 1976 Cri L J 1192 this Court held that a sentence of imprisonment for life does not automatically expire at the end of the 20 years, including the remissions. "The sentence for imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government choses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure", observed the court. To the same effect are the judgments in **Sohan Lal** v. **Asha Ram & Others** AIR 1981 SC 174a , **Hagirath** v. **Delhi Administration** 1985 Cri L J 1179 and the latest judgment in **Zahid Hussein & Ors.** v. **State of West Bengal & Anr.** 2001 Cri L J 1692 ."

Finally, this Court held that life imprisonment would mean imprisonment for the rest of the life of the convict, unless the State Government remits the sentence to 20 years. This position has been accepted by this Court on various occasions [**See Shri Bhagwan v. State of Rajasthan, (2001) 6 SCC 296; Jayawant Dattatray Suryarao v. State of Maharashtra, (2001) 10 SCC 109]**.

58) This question came up again recently before this Court in **Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh,** 2009 (14) SCALE 533, where this Court considered the variance in precedents and ruled as follows:

"15. What ultimately emerges from all the aforesaid decisions is that life imprisonment is not to be interpreted as being imprisonment for the whole of a convict's natural life within the scope of Section 45 of the aforesaid Code. The decision in Swamy Shraddananda's case (supra) was taken in the special facts of that case where on account of a very brutal murder, the appellant had been sentenced to death by the Trial Court and the reference had been accepted by the High Court. However, while agreeing with the conviction and confirming the same, the Hon'ble Judges were of the view that however heinous the crime may have been, it did not come within the. definition of "rarest of rare cases" so as to merit a death sentence. Nevertheless,' having regard to the nature of the offence, Their Lordships were of the view that in the facts of the case the claim of the petitioner for premature release after a minimum incarceration for a period of 14 years, as envisaged under Section 433A Cr.P.C., could not be acceded to, since the sentence of death had been stepped down to that of life imprisonment, which was a lesser punishment.

16. On a conjoint reading of Sections 45 and 47 of the Indian Penal Code and Sections 432, 433 and 433A Cr.P.C., it is now well established that a convict awarded life sentence has to undergo imprisonment for at least 14 years. While Sections 432 and 433 empowers the appropriate Government to suspend, remit or commute sentences, including a sentence of death and life imprisonment, a fetter has been imposed by the legislature on such powers by the introduction of Section 433A into the Code of Criminal Procedure by the Amending Act of 1978, which came into effect on and from 18th December, 1978. By virtue of the *non-obstante* clause used in Section 433A, the minimum term of imprisonment in respect of an offence where death is one of the punishments provided by laws or where a death sentence has been commuted to life sentence, has been prescribed as 14 years. In the various decisions rendered after the decision in Godse's case (supra), "imprisonment for life" has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the power vested in the Governor under

> Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the concerned authorities to determine the actual length of imprisonment having regard to the gravity and intensity of the offence. Section 433A Cr.P.C., which is relevant for the purpose of this case, reads as follows:
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> **433A. Restriction on powers of remission or commutation in certain cases.-** Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.
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> 17. In the present case, the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years imprisonment. The petitioner's case for premature release may be taken up by the concerned authorities after he completes 20 years imprisonment, including remissions earned."

59) We are in complete agreement with the above dictum of this Court. It is open to the sentencing Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The Court should be free to determine the length of imprisonment which will suffice the offence committed.

60) Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.

61) Here we like to note that the punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons.

62) For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we confirm the conviction, however, commute the death sentence into that of life imprisonment. The appeal is disposed of accordingly.

.....J.
(P. SATHASIVAM)

.....J.
(H.L. DATTU)

NEW DELHI;
FEBRUARY 08, 2010.