

Seven Amendment) Rule, 2019 but has not been able to point out from the said Rule, no power of the State Government to either forfeit the security deposit or the first instalment.

21. Upon a consideration of the submissions made and upon a careful scrutiny of the U.P. Minor Minerals (Concession) Rules, 2017 and 2019, we are unable to discern any power of forfeiture.

22. Under the circumstances therefore, the impugned order cannot be sustained and the petition deserves to be allowed.

23. The deposit made by the petitioner in the year 2017 as the Letter of Intent was cancelled on 28.01.2019, the security deposit as also the first instalment of royalty, which had been deposited by the petitioner upon cancellation of the Letter of Intent is liable to be refunded. The respondents instead of refunding this amount have forfeited the same, wrongly and illegally and in the absence of any power to do so.

24. Under the circumstances, the submission of learned counsel for the petitioner, he is entitled to interest on this delayed payment has substance.

Learned counsel for the petitioner has placed reliance upon a judgment of the Apex Court in *Dharmendra Kumar Singh vs. State of U.P.* AIR 2020 SC 5360, especially paragraph 43, therein, wherein in similar circumstances 9% interest is payable.

25. Accordingly, we allow the writ petition and quash the impugned order dated 28.08.2021 and direct the

respondents to refund the security deposit and the first instalment of royalty deposited by the petitioner within a period of three weeks from today.

26. This refund shall be accompanied with simple interest at the rate of 9%, calculated from the date of cancellation of the Letter of Intent till actual payment is made.

(2024) 5 ILRA 2391
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Capital Case No. 20 of 2021

Rajendar & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri Aditya Gupta, Sri G.S. Chaturvedi (Sr. Advocate)

Counsel for the Respondent:

A.G.A., Sri Kuldeep Johri, Sri Kuldeep Kumar Dixit

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 164, 173 (2), 207, 293, 311, 313, 315, 319, 354(3), 366(1), 374(2) & 415 - Indian Penal Code, 1860 - Sections 302, 307 & 34 - Conviction and Sentenced - Complaint - FIR - offence of Murdered of three minor daughters of informant - were of six persons inflicting injuries using an axe - Capital sentence - reference and jail appeals - Appreciation of evidence – convicted appellants on the account of enmity – they have been held guilty under section 302/34 IPC – they killed three minor daughters of informant – lapse in investigation – trial court held that shoddy and

suspicious investigation was conducted by the IO in giving clean chit to the accused persons - finding of the trial court is based on appreciation of the medical jurisprudence is correct – held, court uphold the judgment of conviction of the appellants – appeal qua conviction is dismissed. (Para – 95, 98, 99, 100)

(B) (A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 173 (2), 311, 313, 315, 366(1), 374(2) & 415 - Indian Penal Code, 1860 - Sections 302, 307 & 34

- Conviction and Sentenced - Complaint - FIR - Conviction – Sentence – Capital punishment - jail Appeal - murder of three minor girl child – Capital case and the death reference – Whether rarest of rare Case – Held, appellants are aged about 75 & 50 years - no any previous criminal history – trial court not recorded any aggravating circumstances and has even not scrutinized the case in the light of mitigating circumstances – no any finding that awarding of severest punishment is the only possibility in the case – trial court also no recorded any finding that accused persons are menace to the society - there is no *mens rea* of the appellant to killed the three daughters as motive was killed to informant who succeeded in running away - - held, instant case cannot be termed as 'rarest of rare case', even though accused has committed a grave offence - hence, capital punishment awarded to both the appellants should be commuted to life imprisonment for a fixed term of 20 years – appeal qua sentence is modified. (Para – 95, 96, 98, 99)

Capital Case Dismissed. (E-11)

List of Cases cited:

1. Vadivelu Thevar Vs St. of Madras, 1957 0 AIR (SC) 614,
2. Javed Shaukat Ali Qureshi Vs St. of Guj., (2023) 9 SCC 164,
3. n Tarun Tyagi Vs C.B.I. reported in (2017) 4 SCC 490,
4. St. of Mah. Vs Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564,

5. St. of U.P. Vs Ram Kumar & ors., 2017(5) R.C.R.(Criminal)785,

6. Chhannu Lal Verma Vs St. of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192,

7. Dnyaneshwar Suresh Borkar Vs St. of Mah., 2019(2) R.C.R.(Criminal) 302,

8. Manoharan Vs St. by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746,

9. Veerendra Vs St. of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254,

10. The St. of Har. Vs Anand Kindo & anr. etc., 2022(4)R.C.R. (Criminal)735,

11. Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571,

12. Sundar @ Sundarrajan Vs St. by Inspector of Police, 2023 Cri.L.R.(SC) 473,

13. Ravindar Singh Vs The St. Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220,

14. Digambar Vs The St. of Mah., 2023 Cri. L.R. (SC) 564,

15. Bhaggi @ Bhagirah @ Naran Vs The St. of M. P., 2024(1) Crimes 121,

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Reference No. 17 of 2021 is made by the Additional Sessions Judge, Court No. 43, Shahjahanpur for confirmation of capital punishment in Sessions Trial No. 853 of 2003. The Jail Appeal being Capital Case No. 20 of 2021 has been filed by the appellants challenging the judgment of conviction dated 22.11.2021 holding the appellants-Rajendar and Narvesh guilty of offence punishable under Section 302 of IPC and order of sentence of the same date

vide which both the accused-appellants were sentenced to death under Section 302 of IPC.

2. The Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Aditya Gupta, learned counsel for the appellant, Sri Kuldeep Johri, learned counsel for the informant and learned A.G.A. for the State.

4. With the aid of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated. After judgement was reserved, certain clarification were again sought by both the learned counsels for the parties by giving hearing in open Court.

5. The case of the prosecution is that on the intervening night of 15.10.2002/16.10.2002, a complaint was given by the informant-Avdhesh Kumar (who was later on charge sheeted as an accused). The written complaint (Ex.Ka-2) reads as under :

"...one Chutkannu alias Nathulal of our village harbours enmity towards me since I have given evidence as a witness in a criminal case against him. Due to this reason on dated 15-10-2002 at around 6 PM when after giving fodder to my milch animals, I was lying on a cot in my house, just at that time Chutkannu alias Nathulal having his licensed gun, alongwith one Rajendarr who was having a local made gun and Narvesh Kumar who was having a local made Rifle, came to my house and opened fire at me to commit my murder. I ran away from there to save my life. On

hearing the sound of gunshot fire, my neighbour Ramesh s/o of Kanauji Lal, his wife Alka, Devesh Kumar, Hari Sharan s/o of Ram Chander came over there. On raising the hue and cry, all the accused persons hit my three daughters who were sleeping near me, in the mosquito net, vizually, Rhohini 09years, Neeta 08 years, both of whom died on the spot due to the gunshot injuries while my third daughter Surbhi 07 years also passed away in the way, while I was coming to the police station. I, my wife Shashi and the witnesses mentioned above besides other people of our village have seen the accused persons commit the murder. Due to fear of the accused persons I have come hiding to the police station. The dead bodies of my daughters are lying in my house.."

6. On the basis of the aforesaid written complaint (Ex.Ka-2), the police registered formal F.I.R. (Ex.Ka-26), against three accused persons namely Chutkannu alias Nathulal and his brother Rajendar and son - Narvesh Kumar. Accused-Chutkannu died around the year 2010 as verified by the Trial Court.

7. During the course of investigation, a site plan of the crime was prepared as pointed out by complainant-Avdhesh Kumar. The same was exhibited as Ex.Ka-7. The dead body of all three daughters of informant were sent for postmortem examination which was also done on 16.10.2002. The Postmortem reports of Rohini aged 09 years is Exhibit A-5, Neeta aged about 08 years is Exhibit A-4 and Surbhi aged about 07 years is Exhibit A-6. During investigation, the Investigating Officer did not arrest any of the above named three accused persons and rather started investigating of the case in a manner that, Avdhesh Kumar, the father of

three girls, had in fact committed the gruesome murder in presence of his wife namely Shashi Devi (PW-5). Accordingly by giving a clean chit to the three accused persons, at initial stage itself, the Investigating Officer namely Hoshiyaar Singh (PW-13) submitted report under Section 173 (2) Cr.P.C. against accused-Avdhesh Kumar which was exhibited as Exhibit A-25. Charge under Section 302 of IPC was framed against accused-Avdhesh Kumar on 12.3.2004 which reads as under :

“...that on dated 15-10-2002 at around 18:00 hours in village Jeva Mukundpur in your own house which is within the territorial jurisdiction of PS Nigohi Shahjahanpur, you opened fire from your licensed firearm, possessed by you, at your own 03 daughters vizually, Rohini, Neeta and Surbhi and thereby you ave committed their murder. Thus, you have committed an offence which is punishable under Section 302 I.P.C. and which is within the cognizance of this Court”

8. In the evidence, initially 06 prosecution witnesses were examined. Har Saran Lal (PW-1) stated that he knew accused-Avdhesh Kumar and he had no knowledge who committed murder of the three daughters of Avdhesh Kumar. However, he came to know from the villagers that Chutkannu alias Nathulal, Rajendarr and Narvesh Kumar had killed the three daughters of Avdhesh Kumar. This witness was declared hostile and was cross examined by A.D.G.C. and when confronted with his statement under Section 161 Cr.P.C., he refused having made such statement. He further stated that Chutkannu alias Nathulal was a previous convict in a case of murder where he has been granted bail by the High Court.

9. Kali Charan (PW-2) is a witness to three Panchayatnama which were exhibited as Ex.Ka-1 to Ex.Ka-3. In cross examination, this witness stated that Avdhesh Kumar was a witness in an F.I.R. under Section 307 IPC registered against Chutkannu. Chutkannu was putting pressure on Avdhesh Kumar for not giving evidence against him. However, Avdhesh did not accept it and therefore, Chutkannu was extending threat to Avdhesh Kumar.

10. Sarvesh Kumar (PW-3) is real brother of Avdhesh who stated that three daughters of Avdhesh were murdered at night and on that day, he was in village-Nigohi. At midnight, Avdhesh along with Har Saran Lal, Ram Niwas, Rajiv and Mukesh came on a tractor and informed him that his daughters were murdered. Thereafter, the Panchayatnama was done in his presence. In cross examination, this witness stated that people told him that Chutkannu, Rajendar and Narvesh committed murder of the three daughters of Avdhesh.

11. Dinesh Kumar (PW-4) stated that he knew Avdhesh Kumar. He had heard the noise of firearm on the night of incident. He visited the house of Avdhesh in the morning where he found that the three daughters of Avdhesh were lying dead. He had seen Avdhesh carrying a licensed gun and he has no knowledge who had committed the murder of the three girls. This witness was declared hostile. In cross examination by ADGC, he denied that he has given a statement to the Investigating Officer that on the intervening night of 15/16.10.2002, he had heard the noise of three fire shots. He also denied that he had gone to the house of Avdhesh and had not seen any person running from the spot. This witness was further confronted with his

statement under Section 161 Cr.P.C., to which he replied that he has not made such statement and had no knowledge as to how the Investigating Officer had recorded the same.

12. In cross examination by defence, he stated that initially Chutakannu was arrested but under the influence of one Prem Awasthi, the police had released him.

13. Smt. Shashi Devi (PW-5), wife of Avdhesh Kumar and mother of the three girls who were murdered, stated that her three daughters, Rohini, Neeta and Surbhi were sleeping on one cot. At about 7.00 PM, Chutkannu carrying a licensed gun, Rajendar carrying country made double barrel gun and Narvesh carrying country made pistol, came, stated kill them and started firing. PW-5 was washing utensils and when she raised voice, the accused persons ran away. When she came near her daughters, she found that Rohini and Neeta had died and she along with her husband took Surbhi to the Police Station, however, she died on way. This witness was also declared hostile and was cross examined by ADGC. She denied having made any statement to police under Section 161 Cr.P.C. which was read over to her. She denied the suggestion that she insisted with her husband-Avdhesh Kumar to bring winter clothes for their daughters and due to anger and under the influence of liquor, her husband opened fire and killed his three daughters. She denied suggestion that being wife of Avdhesh Kumar she was not giving correct statement. In further cross examination by defence, she stated that apart from three girls which were murdered, she has five more children out of which, three are daughters and two are sons, who are alive.

14. Ashok Kumar (PW-6) stated that on hearing the noise of gunshot, he had

gone to the house of Avdhesh Kumar where three girls were found dead. He stated that wife of Avdhesh Kumar told him that Chutkannu alias Nathulal, Rajendarr and Narvesh Kumar who were also the resident of her village had come to kill her husband-Avdhesh and the gunshots hit her daughters. Avdhesh Kumar was having enmity with Chutakannu. Thereafter, Avdhesh Kumar got an F.I.R. registered against Chutkannu etc. Chutkannu had a licensed gun and he has died about 4 to 5 years ago. In cross examination, this witness stated that Avdhesh had sufficient agricultural land and had no shortage of any finance.

15. After initially recording the statements of these six witnesses, the prosecution moved an application under Section 319 Cr.P.C. for summoning Rajendar and Narvesh as additional accused which was allowed and de novo trial started. The above statements of PW-1, PW-4 and PW-5 were recorded before de novo trial referred to in this judgment as these witnesses were later on confronted and corroborated with their earlier statements when they again appeared after framing of charge against Rajendar and Narvesh.

16. In de novo trial, fresh charges were framed against Rajendar and Narvesh under Section 302/34 IPC on 24.1.2018.

17. Therefore, the prosecution, out of six witnesses whose statements were already recorded, recorded statement of PW-1 again. The first statement was recorded on 3.2.2007 and for the second time, it was recorded on 13.12.2018 that is after a period of about 11 years. In the second statement, PW-1 stated that sixteen years ago, at the evening time, he heard the

noise of firing. When he went to the house of Avdhesh Kumar, he saw that his one daughter was lying dead on one cot and two daughters on another cot. He stated that Narvesh, Chutkannu and Rajendar were seen coming. They were carrying guns and many people gathered. In cross examination, this witness stated that his elder brother's name is Ram Saran and he has two sons namely Ram Niwas and Shree Niwas. Chutkannu was murdered and his both nephews are accused in the said murder case. He denied the suggestion that due to enmity, he is making a false statement. He further stated that Ram Bharose was murdered and Vinod was injured in an incident and in that case, on account of murder of Ram Bharose, he (PW-1) was sentenced to life imprisonment and he is on bail from the High Court. This witness stated that accused-Avdhesh Kumar has two real brothers namely Sarvesh and Narendra Dev who are residing at Village-Nigohi. This witness further stated that his real niece Prema is married in Village-Akholi. He also stated that the elder daughter of Avdhesh namely Archana has been married to his niece-Prema's son namely, Chhotu and thus he is related to Avdhesh Kumar. This witness further stated that he has made statement to the Investigating Officer that he has heard noise of firing in night but he has not seen anybody firing or running away and he had not witnessed the incident.

18. Dinesh Kumar (PW-4) whose first statement was recorded on 7.1.2009, again appeared for the second time on 4.2.2019 and stated that on hearing the noise of firing, he went to the house of Avdhesh Kumar which is situated 4 to 5 houses away. Avdhesh Kumar was carrying double barrel gun from which smoke was emitting out. In the morning at about 8.00

AM, Avdhesh Kumar came and told him that he had killed his three daughters and PW-4 should help him as he was under the influence of liquor at night. Liquor was kept under his cot and two empty cartridges were lying there. This witness further stated that Chutkannu, Rajendar and Narvesh have not killed the three girls rather Avdhesh Kumar, under the influence of liquor, killed his own daughters.

19. This witness stated that at the time of incident, his wife was Village Pradhan. Avdhesh Kumar was having enmity with Chutkannu, Narvesh and Rajendar and, therefore, he has named them in the F.I.R.

20. In cross examination on behalf of accused-Avdhesh Kumar, he stated that his wife-Nirmala contested election against Pratima Devi who is wife Narendra Dev, the real brother of Avdhesh Kumar. When confronted with his previous statement, this witness stated that it is correct that his statement was previously recorded in the Court and in that statement he had stated that he had not heard any noise of firing and he had gone to the house of Avdhesh Kumar in the morning and found that his three daughters were lying dead. He further stated that previous statement was made because accused-Avdhesh Kumar had threatened him to kill. When the Court asked a question that why he has made false statement on oath, this witness stated that under the threat of Avdhesh Kumar, he has not made the same statement which he has made at the time of recording the present statement.

21. In further cross examination on behalf of accused-Narvesh, he stated that the Investigating Officer recorded his statement twice and on second occasion, he

told that Avdhesh Kumar had killed his three daughters and requested for help. He further stated that at night when he reached at the house of Avdhesh Kumar, no petromax gas was lightening and he was carrying a torch. This witness stated that at the time when the accident took place, Avdhesh Kumar had only five daughters and his financial condition was very poor and he used to ply Tanga to earn his livelihood.

22. In her second statement, Shashi Devi, PW-5, (wife of Avdhesh Kumar and mother of the three girls who were murdered) stated that about sixteen years ago, her husband-Avdhesh Kuamr had enmity with Chutkannu. Chutkannu had given gunshot injury to one Rajnessh and her husband-Avdhesh Kumar was witness in the said case. She stated that Chutkannu was putting pressure on Avdhesh Kumar not to appear as witness against him otherwise he would be killed. She stated that at about 6-7 PM, petromax gas was lightening, her husband-Avdhesh Kumar was lying on a cot and her three daughters namely Rohini, Neeta and Surbhi were also lying on another cot. Her two daughters, Pooja and Archana, were lying inside the room and she was washing utensils. At that time, Chutkannu, carrying single barrel licensed gun, Rajendar, carrying double barrel country made gun and Narvesh, carrying country made pistol, came and shot dead the three daughters of Shashi Devi and Avdhesh Kumar. Her husband escaped and ran away from door of the room which was in a dilapidated condition. She stated that accused fired on his husband-Avdhesh Kumar which hit his three daughters. Rohini and Neeta died on the spot and Surbhi got injured and when she raised voice, the accused persons ran away and her neighbours, Har Saran and

Kali Charan came there. Thereafter, she along with her husband took Surbhi to Police Station but she also died on her way. The complaint was given by her husband. After the postmortem of the deceased-girls was conducted, the Police arrested Avdhesh Kumar by saying that he has killed his daughters rather she had made a statement that Chutkannu, Narvesh and Rajendar have killed her daughters. She further stated that in the case where her husband was a witness and Chutkannu was an accused, Chutkannu was convicted.

23. In cross examination, this witness stated that when she was washing utensils her face was towards north. The Investigating Officer has colluded with accused-Rajendar, Narvesh and Chutkannu and has recorded her false statement in this regard though she has made a categoric statement to the Investigating Officer that aforesaid three persons had killed his daughters. She stated that her husband never used to consume liquor and at the time of incident, he was lying on a cot and on hearing the noise of firing, he succeeded in running away from a passage of small room and she had seen the accused persons in the light of burning a petromax gas. She further stated that the Investigating Officer by himself firing from the gun, took away the gun of her husband and empty cartridges.

24. This witness further stated that in her previous statement if the factum of petromax gas is not mentioned, she cannot tell the reason. This witness further stated that she has not given any such statement that before Dussehra, she insisted upon her husband-Avdhesh Kumar to get winter clothes for her daughters and due to that reason her husband was disturbed and stated that he would not get it. This witness

categorically stated that she has told to the Investigating Officer that when she was washing utensils, Chutkannu, carrying single barrel licensed gun, Rajendar, carrying double barrel country made gun and Narvesh, carrying country made pistol, came and killed her daughters and her husband ran away from the door of a dilapidated room. This witness stated that she has no knowledge if elder brother of her husband namely Narendra Dev has been convicted for life and is on bail. She pleaded ignorance that her father-in-law, Damodar Das was murdered but she has no knowledge.

25. Narendra Dev (PW-7) is a witness who had written the complaint and read over the same to his brother Avdhesh Kumar and submitted the same under the signature of Avdhesh Kumar to police. In cross examination, he stated that his son Gyandev is an Advocate and he himself is a convict in the case under Section 302 of IPC. He denied the suggestion that after due consideration, in order to save life of Avdhesh, a false FIR has been registered. In further cross examination, this witness stated that his father died in an accident.

26. Rajneesh (PW-8) stated that he has no knowledge about the incident and who committed the murder of daughters of Avdhesh Kumar as he was out of the village. This witness was declared hostile and in cross examination by ADGC was confronted with the statement under Section 161 of Cr.P.C. to which he stated that he has not made any such statement. In cross examination by defence, this witness stated that Narendra Dev has even scribed a complaint in another FIR against Chutkannu @ Nathulal.

27. Lal Bahadur (PW-9) clearly denied any knowledge of the incident. This

witness was also declared hostile and in cross examination by ADGC, he denied having given a statement under Section 161 Cr.P.C. In cross examination on behalf of accused persons, he stated that when he reached the house of Avdhesh Kumar, he has not seen anyone running from the place, his daughters were lying dead and he was sitting with his gun.

28. Ram Bahore (PW-10) has also denied having any knowledge about the incident by saying that he came 4-5 days after the incident. He was also declared hostile and in cross examination by ADGC, he denied making any statement under Section 161 Cr.P.C. In cross examination by accused-Narvesh Kumar, he denied that in statement under Section 161 Cr.P.C., he has stated that he apprehended that the fires were shot from the gun of Avdhesh.

29. Bade Lalla (PW—11) also stated that he has no knowledge about the incident and he was also declared hostile. In cross examination by ADGC, he denied the statement under Section 164 Cr.P.C. In cross examination of accused Narvesh Kumar, he denied that under the influence of Avdhesh Kumar, he has not given any statement.

30. Dr. Anil Sood (PW-12) conducted the postmortem of three girls, namely, Rohini, Neeta and Surbhi and found the following injuries :-

“Name Rohini Age 09 years

Ante Mortem Injuries

1. A gunshot wound of entry 2 cm. x 0.5 cm into skull cavity deep (to and through). It was on the right side fo the skull about 5 cm above the right ear. The margins were inverted. Blackening and Tattooing present.

2. Gunshot injury of Exit 10 cm x 5 cm Bone deep communicating to injury no.1 of entry was present on the left side of the face. The margins were everted. Left Frontal, Mandible and Maxilla Bones were broken.

3. Contusion 4 cm x 2 cm and 3 cm x 2 cm on right arm 9 cm below right shoulder is seen

Lungs were both Pale.

Liver – Lacerated.

Spleen – Pale.

Kidney – both Pale.

Time since death – Died on dated 15.10.2002, about one day old.

Cause and manner of death – Immediate cause- Shock and hemorrhage.

Death due to – ante mortem firearm injury....’

‘Name- Neeta Age 08 years, Height- cm

Ante Mortem Injuries-

1. A Gunshot Wound of Entry 0.3 cm x 0.2 cm Brain Cavity Deep on Right Side of Skull 4 cm above Right ear present. Margins are inverted. No Blackening and Tattooing present.

2. A Gunshot Wound of Exit 8 cm x 9 cm Brain Cavity Deep which communicated to injury no. 1 was on Left Temporal Parietal side. Margins were everted.

3. A Gunshot Wound of Entry size 0.3 cm x 0.2 cm x Muscle deep to 0.4 cm x 0.2 cm x skin deep in front of right hand. No Blackening or Tattooing.

4. A Gunshot Wound of Exit 10 cm x 5 cm x cavity deep on Right side of Stomach and 4 cm above Right Iliac crest. Margins everted. Blackening and Tattooing present. The Right Parietal and Temporal bone were fractured. The Brain matter was lacerated.

Lungs were both Pale.

Liver – lacerated.

Spleen – Pale

Kidney – both Pale.

Time since death – Died on dated 5.10.2002

Cause and manner of death – Immediate cause – Shock and hemorrhage.

Death due to – ante mortem firearm injury....’

“Name – Surbhi Age 07 years, Height - cm,

Ante Mortem Injuries-

1. A Gunshot Wound of Entry 1 cm x 0.2 cm Stomach cavity deep (to and through) which was in the Left and went upto the Left buttock. It was 4 cm below Iliac crust. Margins were inverted. No Blackening and Tattooing.

2. A Gunshot Wound of Exit 10 cm x 6 cm x Abdominal Cavity deep. The injury communicated with the injury no.1. It was above the Iliac crust. Margins were everted.

Lungs were both Pale.

Liver – Lacerated.

Spleen – Pale.

Kidney – Both Pale.

Time since death – Died on dated 15.10.2002

Cause and manner of death Immediate cause – Shock and hemorrhage.

Death due to – ante mortem firearm injury ...”

31. In cross examination, this witness stated that injury no. 1 of Surbhi was mentioned as a firearm injury and death occurred about six hours prior to the postmortem.

32. Hoshiyar Singh (PW-13), retired Sub Inspector, the Investigating Officer stated that on 15.10.2002 at about 6.00 p.m., the incident took place and after

taking the chick report, he reached the place of occurrence and recorded the statement of informant. Site plan was prepared as Exhibit-Ka-10. A recovery of blood stained earth, a mosquito net and the pellets of empty cartridges etc. were taken in possession by separate recovery memo which are Exhibits Ka-8 to Ka-10. A double barrel licensed gun along with ten live cartridges were recovered in presence of the witnesses, Hari Sharan and Sarvesh Kumar which is Exhibit Ka-11.

33. Upon the identification of the licensed gun of 12 bore No.5344/80 it was also taken in possession vide Exhibit-Ka-12.

34. The Panchayatnama of all the three dead girls was prepared which are Exhibit Ka-1 to Ka-3. The photographs of the deceased, Neeta, Rohini and Surbhi which is Exhibit Ka-13 along with letter of Chief Medical Officer, sample-C is exhibited as Ka-13 to K-24. On 21st October, 2002, the articles which were taken in possession i.e. blood stained earth, mosquito net, 12 bore gun, pellets were sent to Forensic Science Lab, Agra. Statement of Doctor Anil Sood who conducted the postmortem was also recorded. The statement of Smt. Shashi was recorded in case diary who stated that the offence was committed by the Avdhesh Kumar. Avdhesh Kumar was arrested in presence of Bade Lalla and he confessed having committed murder of his three daughters who were sleeping on a single cot. His confession statement was sent to the Court. The statements of Chutkannu @ Nathulal, Rajendar and Narvesh Kumar were also recorded. Similarly statement of other witness was also recorded. Thereafter, charge-sheet was presented against Avdhesh Kumar vide Exhibit Ka-25 and his

previous criminal history was also recorded on the charge sheet.

35. The chick FIR and GD CC were exhibited as Ka-26 and Ka-27. He further stated that he enquired from the Avdhesh Kumar about the time then he stated that it was time of sunset and started crying by saying that he has committed the offence and, therefore, PW-13 found that Chutkannu @ Nathulal, Rajendar and Narvesh Kumar were falsely implicated. This witness further denied that PW-5-Shashi wife of Avdhesh Kumar did not make any such statement that her husband was a witness in an incident when Chutkannu @ Nathulal gave gun shot injury to one Rajneesh and that when he recorded the statement of Shashi, a petromax gas was on. He further denied that Shashi has not given any such statement that her husband Avdhesh Kumar was lying on a cot in Baramada (Courtyard) and two daughters, Pooja & Archana were lying on a cot inside the room. This witness even denied that Shashi has not given the statement that Chutkannu alias Nathulal carrying a single barrel licensed gun, Rajendar carrying country made double barrelled gun, Narvesh Kumar carrying country made pistol came and killed the three daughters of Shashi and thereafter, her husband ran away from the door.

36. He further stated that Shashi has not given statement that she was washing utensils in the courtyard and her face was towards north side. Shashi (PW-5) told him that she insisted upon Avdhesh Kumar that as winter season is coming after Diwali, he should get the winter clothes for his daughters. Shashi has stated that she had five daughters and no son, therefore, her husband was disturbed. He also stated that Shashi has given statement that under the

influence of liquor, her husband opened fire and hearing the noise, she woke up and found that her husband- Avdhesh Kumar was standing near the cot of her dead daughters, when she asked her husband, he started crying.

37. In further statement, this witness by opening seal of a packet which carried a 12 barrel licensed gun, this witness stated that this is a licence gun of Avdhesh Kumar which was recovered, the same was exhibited as Ex-1, four cartridge of 12 bores were Exhibit TC-1 to TC-4 as this witness stated that these are the same empty cartridges which were sent to F.S.L. and two empty cartridges marked as EC-1 and EC-2 were stated to be recovered at the spot. These were exhibited as Ex.2 and Ex.3, one cartridge was Exhibited-4 and some pellets from one packet were exhibited as Ex.5 to Ex.11.

38. In cross examination, he stated that after recovery of the gun and empty cartridges, the cartridges were deposited in the police station but were never produced before the Magistrate. He also stated that the empty cartridges and the gun were not deposited in the Sadar Malkhana. This witness also stated that on 16.10.2002, he made the recovery of gun and empty cartridges and after two days, he deposited the same in the police station on 18.10.2002 vide G.D. No.25 at 18:15 a.m.. and for two days, the gun and empty cartridges remained in his custody before these were deposited to the Malkhana. This witness further stated that sample seal was prepared on simple paper and no copy was prepared. The sample seal is not present on the letter prepared by him. The bundle carrying the gun and empty cartridges which were opened in the Court did not carry the sample seal prepared by him. He denied the

suggestion that by firing from the gun of Avdhesh Kumar himself, he has made fake recovery of empty cartridges. He further stated that before sending the gun and empty cartridges to Ballistic Expert, he has not produced the same before Magistrate even before the Superintendent of Police. He also denied that with regard to keeping the case property in safe custody of the head Moharrir, he did not record his statement in CD and he cannot tell the name of head Moharrir, in whose custody, the same were kept.

39. This witness also stated that the G.D. by which the case property was taken out from the Malkhana is not available on record and the C.D. in which the case details of case property is mentioned, is not the copy of G.D. This witness further stated that constable-Tikaram who has taken the case property to Ballistic Expert, his statement is also not recorded in CD. This witness also stated that in the recovery memo(Exhibit-Ka-9), he has not mentioned that there was fresh smell of gun powder on the empty cartridges. This witness also stated that in none of the Panchayatnama of three girls, he recorded about recovery of empty cartridges or its time and on 16.10.2002, witness Dinesh did not make statement to him that Avdhesh Kumar came to his house on the same morning at about 8:00 a.m. and told him that he has committed murder of three daughters under the influence of liquor and that the liquor and two empty cartridge were lying under the cot, rather stated that the statement was recorded on 22.10.2002.

40. In cross examination on behalf of Avdhesh Kumar, this witness stated that none of the witnesses whose statements recorded in CD have stated that Avdhesh Kumar or Narvesh Kumar and Rajendar,

have committed the offence. The statement of PW-13 concluded on 14.3.2019.

41. The prosecution evidence was closed on 14.3.2019 and the case for the first time was fixed for recording statement of accused under Section 313 Cr.P.C. on 16.3.2019.

42. On 16.3.2019, finding the F.S.L. Report not on record, a direction was issued that the FSL report through special messenger be requisitioned from FSL, Agra. The case was adjourned for this purpose on two occasions.

43. On 27.3.2019, another order was passed and prosecution was directed to produce the FSL report, but an application was moved from the side of the prosecution that regarding the concerned report of the present session case, there is no entry available in the police station therefore as per order of the Court, special messenger was sent for obtaining report at FSL, Agra but the report was not provided and an objection was raised that case file is not traceable, therefore, correct date of deposit of the parcel in the laboratory and its number be informed. The prosecution was directed that the case number and the correct date be informed and the report be submitted before the next date and the case was adjourned for 29.3.2019.

44. On 29.3.2019, the following order was passed :

“आरोप पत्रावली पेश हुई। मुल० अवधेश व नरवेश जेरे जमानत हाजिर है। मुल राजेन्द्र जेल से तलब होवे अभियोजन को Forensic report दाखिल करने के निर्देश थे परन्तु Prosecution की ओर से एक प्रा०पत्र इस आशय का प्रेषित किया गया कि मौजूदा सत्र परीक्षण से संबंधित अभिलेखों का इंड्राज थाने पर उपलब्ध नहीं है और न्यायालय के आदेश के अनुपालन में

विशेष वाहक का० 1509 सरोज यादव को विधि विज्ञान प्रयोगशाला आगरा भेजा गया था परन्तु रिपोर्ट नहीं दी गई और इस टिप्पणी के साथ प्रा०पत्र प्रस्तुत किया गया कि अभियोग Trace नहीं हो पा रहा है। प्रयोगशाला में जमा करने का सही दिनांक व लाट नं० के साथ भेजने का कष्ट करो।

अभियोजन को निर्देशित किया जाता है कि लाट नं० व सही दिनांक अंकित कर Prosecution Report नियत दिनांक तक प्रस्तुत करो।

पत्रावली दि० 29.3.19 को पेश है। ”

45. On 1.4.2019, trial court passed following order:

“Put up case. File is taken up Rajendar as accused and other co-accused on bail. The FSL report is received. Same be kept on the file for recording statement under Section 313 Cr.P.C. Adjourned to 2.4.2019.”

46. Thereafter on 2.4.2019 statement of the accused was recorded under section 313 Cr.P.C. and the case was adjourned for 5.4.2019 when accused side moved an application that they do not want to lead any evidence. However, accused Avdhesh sought time to file written argument.

“Case called out. Accused present. Learned ADGC Cr.) has today filed a copy of the FSL report which pertains to the blood stained an application 144-A has also been moved stating that the FSL report is incomplete and the report regarding the weapon of the offence is missing. He has prayed that he be given time to call for the FSL report regarding the weapon of the offence. This is an old case and previously time was granted to the prosecution to file the FSL report but instead of filing the complete report the prosecution has filed an incompleated one.

A last opportunity is being awarded to the prosecution to file the remaining FSL report positively by date fixed 1.4.2019”.

47. Thereafter the statement of the accused persons were recorded under Section 313 Cr.P.C.. All the incriminating evidence were produced and were put to the witness. In the statement Avdhesh Kumar it is stated that Sarvesh is not an eye witness and Dinesh has given a false statement as wife of Dinesh and real sister-in-law of Avdhesh had contested village Pradhan election and due to that enmity he has given false statement. It is stated that his wife Shashi was told him that correct statement is made against accused persons. He further stated that he has been falsely implicated. The police is not trying to find out the truth under the influence of Block Pradhan, namely Vinod who was using political pressure, therefore, he has been named in the FIR. In their statement Rajendar and Narvesh have stated that they have been falsely implicated by Avdhesh on account of previous enmity in a criminal case.

48. Thereafter, the Trial Court acquitted the accused-Avdhesh Kumar of the charges and held accused-appellants, Rajendar and Narvesh guilty of offence punishable under Section 302 IPC as the third accused-Chutkannu had died during pendency of case in 2010. Both the appellants were sentenced to death as noticed above.

49. Learned Senior Advocate has argued that statement of PW-1, PW-4 & PW-5 are not trustworthy.

50. It is argued that statements of all the aforesaid three witnesses were recorded twice i.e. firstly, when the charges against Avdhesh were framed on 12.3.2004

and secondly, after summoning of the appellant under Section 319 Cr.P.C. when charges were again framed on 24.01.2018, under Section 302/34 IPC. It is argued that statements of these witnesses were recorded after a gap of more than 10 years after their statements were recorded for the first time and there are material improvements and contradiction in the statements recorded in the second time as confronted during cross examination by accused – Narvesh and Rajendar.

51. With reference to PW-1, it is argued that while recording his first statement, he has stated that he had no knowledge who committed murder of three daughters of Avdhesh Kumar and he had come to know this fact from the villagers that Chutkannu alias Nathulal, Rajendar and Narvesh had killed the three daughters of Avdhesh Kumar. This witness was declared hostile and when confronted, he even denied having made any statement under Section 161 Cr.P.C.. Learned Senior Advocate submits that the first statement of PW-1 was recorded on 03.02.2007 and post de novo trial, it was recorded on 13.12.2018, when this witness made improvements and stated that when he had gone to the house of Avdhesh Kumar on hearing the noise of firing, he had seen one daughter of Avdhesh was lying dead on one cot and two daughters on the other cot. He had seen Narvesh, Chutkannu and Rajendar coming from that side and they were carrying guns and many people gathered.

52. It is argued by the counsel for the appellant that once this witness was declared hostile at the first instance when only Avdhesh Kumar was facing trial, his second statement after 11 years levelling allegation against the three additional accused is not at all trustworthy. It is

submitted that this witness has admitted that one Ram Bharose was murdered and Vinod was injured and he i.e. PW-1 was an accused in the aforesaid incident and was sentenced to life and he is on bail from the High Court. This witness further stated that Avdhesh Kumar has two real brothers namely Sarvesh and Narendra Dev. Real niece of this witness namely Prema is married in village-Akholi and elder daughter of Avdhesh Kumar namely Archana is married to his niece Prema's son namely Chhotu and he is in direct relationship with Avdhesh Kumar. Learned Senior counsel argued that after 11 years of recording of first statement, on account of new development in the family and PW-1 himself being convicted to life, he has changed his statement and, therefore, his statement cannot be relied upon as he has motive to falsely implicate Narvesh and Rajendar.

53. It is next argued that even first statement of PW-4 was recorded on 07.01.2009. In the first statement, PW-4 had stated that he had visited the house of Avdhesh Kumar in the morning and found that his three daughters were lying dead and he had seen Avdhesh Kumar carrying a licensed gun but he had no knowledge who had committed murder. At that stage, this witness was also declared hostile and denied having made any statement under Section 161 Cr.P.C. Learned counsel argued that while making statement again this witness made improvements by stating that when he had gone to the house of Avdhesh Kumar, he was carrying a double barrel gun from which smoke was emitting and Avdhesh Kumar told him that he had killed his three daughters and PW-4 should help him as he was under the influence of liquor at night and had kept liquor and two empty cartridges under his cot.

54. Learned counsel for the appellant has further submitted that this witness has stated that his wife was Village Pradhan and Avdhesh Kumar was having enmity with Chutkannu, Narvesh and Rajendar and, therefore, he had named them in the F.I.R. In cross examination, this witness admitted that his wife Nirmala contested and won the Election of Village Pradhan against Pratima Devi who is wife of Narendra Dev, real brother of Avdhesh Kumar. When confronted with his earlier statement recorded before the Court, he admitted the same to be correct. Counsel submits that even this witness, in view of the changed circumstances and because of the political enmity against Avdhesh Kumar, has changed his version and, therefore, he is not a reliable witness.

55. Learned Senior Counsel argues that the star witness namely Shashi Devi (PW-5) who is wife of Avdhesh Kumar and (mother of the three girls who were murdered), in her first statement, had stated that Chutkannu, carrying a licensed gun, Rajendra, carrying a country made double barrel gun and Narvesh, carrying a country made pistol, came and started firing. At that time she was washing utensils and when she heard the noise of firing, the accused persons ran away. She came near her daughters and found that Rohini and Neeta had died and she along with her husband took her third daughter namely Surbhi to Police Station but she died on her way. Even this witness was declared hostile at the time of first statement and denied having made any statement under Section 161 Cr.P.C. wherein she had stated that she was demanding winter clothes from her husband for her five daughters which he could not bring and due to anger and under the influence of liquor, he committed murder of his three daughters.

56. Learned counsel for the appellant has referred to her second statement recorded after about 10 years to submit that even PW-5 has made improvements. She has stated that her husband Avdhesh Kumar was a witness to a case wherein Chutkannu had given gunshot injury to one Rajneesh and Chutkannu was putting pressure on Avdhesh Kumar not to appear as a witness, however, he did not bow to his demand and Chutkannu was later on convicted in the said case. This witness further stated that at about 6-7 PM, the Petromax Gas was lighting, her husband was lying on a cot and her three daughters were lying on another cot when three accused persons came carrying their respective weapons and fired towards Avdhesh who ran away and they shot dead her three daughters. Her husband succeeded in running away through a passage from a dilapidated room. This witness stated that accused persons came to fire upon her husband but killed her three daughters. In cross examination, this witness stated that the Investigating Officer, in collusion with the three accused persons, recorded her false statement against her husband as narrated above and rather the Investigating Officer took the licensed gun of her husband by firing upon two shots and also took the empty cartridges. In cross examination with regard to her previous statement recorded in the Court, she pleaded ignorance about non mentioning of Petromax Gas Light as well as denied that she had demanded winter clothes for her five daughters and being disturbed by the same and under the influence of liquor, her husband murdered her three daughters. It is submitted that save her husband, she has levelled false allegation.

57. Counsel for the appellant thus submits that in view of the variation and

improvements made by PW-5, even her statement is not reliable. Learned counsel has relied upon the judgment of Supreme Court in **Vadivelu Thevar Vs. State of Madras, 1957 0 AIR (SC) 614** wherein the Supreme Court has held that generally speaking, oral testimony may be classified into three categories namely (i) Wholly reliable; (ii) Wholly unreliable and (iii) Neither wholly reliable nor wholly unreliable. Counsel submits that this judgment is consistently upheld by the Supreme Court and even in a recent judgment in **Javed Shaukat Ali Qureshi vs. State of Gujarat, (2023) 9 SCC 164**, the **Vadivelu Thevar Case** (Supra) has been reiterated. Learned counsel has argued that in view of the same, statements of all the three witnesses namely PW-1, PW-4 & PW-5 being inconsistent statements are liable to be held as totally unreliable.

58. Learned counsel has next argued that even the statement of PW-7, Narendra Dev, who has written the complaint (Tehrir) and on behalf of Avdhesh which was given to the police under the signature of Avdhesh Kumar, being real brother of Avdhesh Kumar is also an interested witness as he has admitted that he himself is a convict and is undergoing life sentence in a case under Section 302 of IPC.

59. Counsel then referred to the statement of PW-8 who though declared hostile, in cross examination has admitted that Chutkannu alias Nathulal was murdered during the trial and even in that case, the complaint was scribed by Narendra Dev. Counsel submits that Narendra Dev being an interested witness having enmity with family of Chutkannu, his statements cannot be relied upon.

60. Counsel submits that PW-9 & PW-10 have denied having seen the incident or giving any statement under Section 161 Cr.P.C.

61. It is further submitted that the last witness of fact is Bade Lalla (PW-11) in whose presence the accused-Avdhesh Kumar had made confession statement before Investigation Officer (PW-13) has also not supported the prosecution version and he was also declared hostile.

62. Learned counsel has even referred to the site plan (Ex.Ka-7) to submit that it was prepared at the instance of Avdhesh Kumar also did not prove the prosecution version against accused Narvesh and Rajendar as in the Site Plan (Ex.Ka-7), the place marked 'X' from where accused have opened fire on Avdhesh Kumar who was lying on a cot marked 'C' and the place where cot 'A' & 'B' on which the three girls were shot dead, do not fall in the line of firing range if, from the place 'X', the three accused persons had fired upon the point 'C' where accused-Avdhesh was sitting on a cot. It is submitted that site plan itself do not prove that the firing had occurred at the instance of the appellants in the manner as stated in the site plan detailed by Avdhesh Kumar.

63. It is next argued that none of the three accused persons were arrested by the police after the registration of the F.I.R. and upon verification, the Investigating Officer, Hoshiyaar Singh (PW-13), had come to a conclusion, after recording statements of witnesses under Section 161 Cr.P.C. that it is Avdhesh Kumar who had murdered his own three daughters as he was seen at the place of incident carrying a gun which was emitting smoke and made confession

statement in presence of PW-11 that he has killed his three daughters.

64. Counsel submits that no recovery was effected from any of the accused and, therefore, in the absence of recovery of any weapon of offence, convicting the appellants on the basis of unreliable statements of PW-1, PW-4 & PW-5, is unsustainable as the Trial Court has not adopted a correct approach. Learned counsel for the appellant has further submitted that at page 3 of the impugned judgment, the Trial Court has made the following observations :

“At this (initial) stage of writing the judgement, it is ‘highly’ imperative to divulge here that the instant case is a glaring example where due to a botched investigation carried out by an investigating officer, an innocent father who was a victim of dastardly act committed by the actual accused persons in which his 3 small daughters were gruesomely murdered in his presence and in the presence of his wife. Yet more, as if this was not enough this innocent father, who was the complainant of this case, was turned into a murderer by the purposely designed defective investigation of the investigating officer. A complainant of a case ensures that the accused persons are brought to face the consequence of their offence. However, the complainant himself became ‘hunted’ in this case due to the contorted investigation (of the case). In other words, ‘Sh. Hoshiyar Singh’ the ‘investigating officer’ of this case, most shamelessly, did a complete ‘turn around’ in this case. ‘Avdhesh’ who was the ‘complainant’ of this case, ‘in whose house’ the ‘alleged incident’ of crime ‘occurred’ and ‘whose 03 minor daughters’ were ‘killed’ in that incident, was himself

made the 'culprit' by 'Sh. Hoshiyar Singh', the investigating officer. According to him (the investigating officer), it was Avdhesh/the complainant who had actually carried out the murder of his own 03 daughters and not the accused persons vizually, Chutkannu alias Nathulal, Narvesh and Rajendar (against whom the FIR was got registered by the complainant Avdhesh) on that fateful day. How this complete turn around of the facts transpired in the investigation is something which this Court shall deal with, in detail, in the later part of the judgment. For now, it is sufficient to divulge here, cursorily that after accusing the complainant (Avdhesh) of having murdered his own three daughters, the investigation was completed by the investigating officer. Thereafter, even the 'Chargesheet', which is on record as 'Exhibit A-25' was filed 'only' against Avdhesh (Complainant) before the Court in Crime No. 224 of 2002 under Section 302 IPC PS Nigohi, Shahjahanpur. In other words, solely the complainant was named in the Chargesheet whereas, the original three accused persons, namely, Chutkannu alias Nathulal, Narvesh and Rajendar, against whom all, 'Tehrir' was given and F.I.R. 'was' registered were dropped out in the report, under Section 173 (3) Cr.P.C., by the Investigating Officer."

65. Learned counsel submits that the Trial Court, at the very beginning of impugned judgement, has drawn conclusion that Avdhesh Kumar has been falsely implicated as the Investigation Officer (PW-13) in a shameless manner did not conduct a proper investigation against the three accused persons including the appellants. It is submitted that the Trial Court, before recording findings in the judgment, has concluded that Avdhesh Kumar is an innocent

person. It is next argued that Trial Court did not follow the correct procedure. Counsel submits that after framing of fresh charges against the appellants on 24.01.2018, de novo trial started and statement of all the 13 witnesses were recorded. Counsel submits that last statement of PW-13 was concluded on 14.3.2019 when prosecution evidence was closed and the case was fixed for recording statement of accused under Section 313 Cr.P.C. on 16.3.2019. Counsel laid emphasis on the fact that it is only at that stage, the Trial Court in the order dated 16.3.2019 observed that in fact ballistic/F.S.L report is not on record and, therefore, three successive orders were passed on 16.3.2019, 27.3.2019 & 29.3.2019 directing the prosecution to procure the report from Forensic Science Laboratory, Agra. In these orders, it is observed that the Police as well as Forensic Science Laboratory at one point of time has raised objection that there is no entry available either in the police station or in the Forensic Science Laboratory regarding the case number or F.I.R. vide which the report was sent and through special messenger, the report was produced before the Court for the first time on 1.4.2019 when observing that the F.S.L Report is received and the case was fixed for recording statement of accused under Section 313 Cr.P.C. on the next date i.e. 2.4.2019. Counsel submits that the order dated 1.4.2019 is silent if this F.S.L. report was supplied to the accused persons and therefore there is non compliance of Section 207 Cr.P.C.

66. Learned counsel with reference to the F.S.L. Report has submitted that neither this document was exhibited by the prosecution either by re-recording statement of PW-13 or by tendering the

same by the Public Prosecutor as an exhibit on record.

67. Counsel submits that a careful perusal of the statement recorded under Section 313 Cr.P.C. of Avdhesh Kumar, Rajendar and Narvesh show that this F.S.L. Report was never put to them and, therefore, none of the accused was given adequate opportunity to rebut the said report as it was neither part of the report submitted under Section 173 (2) Cr.P.C. nor it was proved exhibited in the statement of PW-13 nor it was tendered to be exhibited. Counsel submits that in such circumstance, the accused were denied a valuable right to examine the Investigating Officer regarding the F.S.L. Report.

68. Reliance has been placed by the counsel for the appellant in the decision of Supreme Court in **Tarun Tyagi vs. C.B.I. reported in (2017) 4 SCC 490** wherein the Supreme Court has held that where a scientific report is not supplied to the accused under Section 207 Cr.P.C. and is not put to an accused under Section 313 Cr.P.C., it amounts to denying the valuable right as accused had no occasion to cross examine the Investigating Officer on the point.

In the present case, expert who prepared the FSL report, has not been examined and after the report was produced before the Trial Court, the same has been taken into consideration under Section 293 Cr.P.C., therefore, in the absence of FSL report ever supplied to either of the accused at any stage and no application was filed by the prosecution under Section 311 Cr.P.C. to summon the Investigating Officer for further cross examination, an important right of the accused is taken away.

69. Learned counsel has argued that all the witnesses are highly interested witnesses and having enmity with the family of the Chutkannu, therefore, the appellants have been falsely implicated. It is also argued that against submission of challan report against accused Avdhesh, no complaint was filed before any authority for further investigation or reinvestigation of the case to suggest that the police authorities recording statement of witnesses under Section 161 Cr.P.C., has drawn wrong or biased conclusion that primarily Avdhesh has committed the offence.

70. Learned counsel submits that the licensed gun which was recovered from Avadhesh alongwith two cartridges were sent to FSL and as per the FSL report, it was found that the empty cartridge were fired from the same licensed gun of Avdhesh. It is submitted that investigation is highly shoddy as all victims suffered bullet injuries i.e. one injury by Rohini having entry/exit wound, two injuries by Neeta with entry/exit wound and one injury by Surbhi with entry/exit wound but no bloodstained bullets were recovered at the spot and this raises a suspicion that Avdhesh has committed the murder and has destroyed this important evidence.

71. Learned counsel submits that though the trial court has recorded finding that 13 prosecution witnesses were called for into two halves i.e. there was two sets of witnesses for recording the statements so as to prove the manner in which murder of three daughter of Avdhesh was committed. One set of two witnesses stated that Chutkannu and others have stated Avdhesh committed murder.

The learned counsel submitted that in view of the two set of evidence, the evidence which is scrutinized and relied upon by the Trial Court against appellants, in fact is not sufficient to hold them guilty because the first informant-Avdhesh, himself being accused was never examined as prosecution witness against appellants. He being an eye-witness to the evidence against appellants was never examined and appellants were never afforded opportunity to cross examine him. It is submitted that if Avdesh was examined as a prosecution witness, the truth would have come on record as to who had committed murder. It is submitted that to save skin of Avdhesh, neither prosecution nor the trial Court made any effort to examine him as a witness.

72. Learned counsel submits that trial court has wrongly relied upon the statement of the witness who had stated that it is the appellants Narvesh and Rajendar who have committed murder by holding that the motive proved against the appellant was that Avdhesh was witness against Chutkannu and in that case Chutkannu was convicted.

73. Learned counsel submits that motive set up by the prosecution against Avdhesh is that he has five daughters and no son and he had a poor financial condition. When his wife asked him to bring winter clothes for the daughters and he being unable to buy the clothes, has committed murder of his three minor daughters by his licensed gun.

74. Learned counsel has argued that since the trial court has at initial formed opinion that Avdhesh was not the accused, therefore, no effort was made to bring FSL report on record in accordance with law though same suggested that the empty

cartridges were fired by the licensed gun of Avdhesh and he was acquitted of the charges.

75. Learned counsel submits that even as per the FIR motive was attributed only to Chutkannu that he was accused in a case where Chutkannu had caused firearm injury to one Rajneesh and Avdhesh Kumar was the witness of that case and Chutkannu was putting pressure on Avdhesh Kumar not to depose against him. It is submitted that no motive is attributed towards the appellants-Rajendar and Avdhesh and admittedly Chutkannu was murdered somewhere in the year 2010.

76. Learned counsel submits that in the absence of any motive against the appellants Rajendar and Narvesh, trial court has wrongly drawn a conclusion that they have committed offence.

77. Learned counsel submits that it has come in the statement of PW-1 that Chutkannu was murdered and his elder brother Ram Saran and his two sons Ram Niwas and Srinivas are accused in the said murder case.

78. Learned counsel submits that on account of enmity, prosecution witness have deposed against the appellants and the prosecution has failed to prove the motive against the appellant.

79. Learned counsel lastly argued that severest punishment of death penalty has been awarded to the appellant without recording any finding that how it is a 'rarest of rare case'. It is submitted that Rajendar is presently 75 years of age and Narvesh is 50 years of age and trial Court did not examine the aggravating or mitigating circumstance before awarding death penalty.

80. In reply learned State counsel has argued that even in the absence of any scientific evidence against the appellants Rajendar and Narvesh if the Court finds that the statement of prosecution witnesses are trustworthy, the same have been rightly relied upon by the trial court. It has also been argued that on account of any fault on the part Investigation Officer (PW-13), prosecution case does not become weak when the eye witnesses have supported the prosecution version.

81. Learned counsel has argued that Chutkannu, the deceased, has enmity with the appellant Avdhesh, therefore, he alongwith his son Narvesh and brother Rajendar have committed offence.

82. It is submitted that in view of protection given under Article 20 (3) of the Constitution of India read with Section 315 of Cr.P.C., Avdhesh could not be examined as a prosecution witness as he himself was facing trial as accused and, therefore, statement of PW-5 as eye-witness is rightly relied upon by the Trial Court.

83. It will be relevant to note down that the Trial Court while recording the finding has acquitted Avdhesh and no appeal against acquittal has been filed by the State. The Trial Court while convicting the appellants, Narvesh and Rajendar, has heavily relied upon the postmortem of the three girls and has also recorded the finding that the firing was not done by Avdheh from his double barrel gun and rather it was fired upon by a different weapon. The operative part of the judgment of the Trial Court is reproduced as under :

“Now the Court shall deal with the post mortem examination report of Rohini, Neeta and Surbhi, the 3 daughters of

Avdhesh who were gunned down on the evening of 15.10.2002. This discussion will make it clear as to what kind of ‘ante mortem firearm injuries’ did those 3 girls suffer and also that ‘could those ‘all’ ante mortem firearm injuries have possibly come by the use of ‘one’ single (kind of) firearm weapon or ‘more than one’ (kind of) firearm weapon was used in the firing on dated 15.10.2002, inside the house of Avdhesh. This Court is of the most considered opinion that the discussion about the nature of injuries sustained by the 3 deceased daughters of Avdhesh will cast ample light on the perpetrators of this crime. It will certainly not be out of the context to reiterate here that accused Avdhesh had just ‘one licensed DBBL shot gun’. If it was Avdhesh who had committed the crime on dated 15.10.2002 then the nature of injuries and the weapon used to give those injuries must have been one. But on the other hand, if the nature of injuries sustained by all the 3 girls were the result of different types of fire arms or more than one type of guns/ rifles, then it will certainly help this Court in drawing an inference that ‘on dated 15.10.2002, more than one kind of deadly firearm were used in the firing due to which different (kinds of) injuries were suffered by the daughters of Avdhesh. This will also be indicative of an inevitable inference that ‘whether on dated 15.10.2002 it was more than one person who opened fire on the 3 daughters inside the house of Avdhesh and also that whether the firing was done from more than one type of firearms or from a single firmarm. But, much, before the Court gets down to discuss the post mortem examination report of Rohini 9 years, Neeta 8 years and Surbhi 7 years, it is equally imperative for this Court to first quote a few relevant excerpts from the various Books/ Journals of ‘Medico-Legal Jurisprudence and

Toxicology. These relevant extracts will potentially make it clear as to what (particular) kinds of injuries can only ensue by the use of a particular kind of firearms only. Thereafter, the Court shall apply those well settled rules discussed in the excerpts (below) to the facts and circumstances of the instant case in order to arrive at a just and reasonable conclusion. It will certainly not be out of the context to also divulge here that according to Avdhesh and his wife, Smt. Shashi (since it is their version) that their 3 daughters had been shot dead by the 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh who were having a Rifle, a desi gun and a tamancha. At this point, for the discussion, it is not relevant as to which of the 3 named accused persons was having which particular kind of firearm since it will be seen by the Court in the later part of the judgment when it will deal with the oral evidence. Therefore, as of now, from the deposition of Avdhesh and his wife, Smt. Shashi, it is apparent that 3 different kinds of weapons were used by the assailants/ 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh. Whereas, on the other hand it is the version of the prosecution that since the murder of the 3 girls had been committed by their father/ Avdhesh, who owns only a DBBL shotgun, therefore, it was only one 'single shot gun' that was used in committing the murder of the 3 daughters of Avdhesh. In view of the above, this Court shall first discuss the kinds of injuries these differently named weapons cause on the surface of the skin and then compare them with the post mortem examination of the 3 deceased girls. To begin with, in 'Parikh's Textbook of Medical Jurisprudence and Toxicology (for classrooms & Courtrooms), Medical Publication' it is stated and I quote,

"Shot Gun Injuries – The characteristics of shotgun injuries are due to (1) multiplicity of the projectiles including shots and wads (2) shot dispersion with the distance and (3) unusual projectiles in refilled cartridges or in muzzle loaders. The wounding by the shot gun is both due to shot or pellets and at appropriate distance, due to the wad.

When a shot gun is fired, the projectiles travel in a compact mass. As the stage increases, the individual pellets continue at their own speed and direction but spreading in a cone like manner ignoring the loss in velocity with distance and drop due to gravity. A rough calculation of the 'rate of spread' is '1 inch per yard' from the 'muzzle'.

When a shot gun is fired with the muzzle in contact with or near the body, the shot enters as a mass and the gases produced by the explosion cause considerable laceration of the surface skin, destruction of the deeper tissues, and often fragmentation of bone. Scorching of the skin, singeing of hair and blackening are seen around the wound. The powder residues are driven into the skin wound often very deeply and tattooing may be seen around and also in the depth of the wound. With smokeless powder, there is relatively less blackening and tattooing. The wad is often found in the wound and this may prove an important clue to the type of cartridge used. The exit wound, when present, may show greater disruption of tissues than is seen in the entrance wound, a number of exit wounds due to multiple pellets and bony fragments may be seen. Occasionally, even in contact or near injuries, the shot and wad may remain in the body and there is no exit wound. Shot gun projectiles which generally do not exit out of the body, may when the shot size is sufficiently large and the firing has taken

place from sufficiently near distance, give rise to a single entrance and multiple exit wounds.

In shot gun injuries, close distance phenomenon such as burning, scorching and blackening are generally seen upto about a yard. The halo of tattooing also gradually widens upto about a yard but upto about three yards, a few particles of powder grains may still be found on careful search. Infrared photography for the determination of powder marks particularly on dark colour clothing is of considerable assistance in the estimation of range.

The shot enters as a single mass upto about a yard. Upto about two yards, the overshoot wad may be seen in the body. The wadding can produce an injury about three yards. Upto 2-3 yards, the shot produces an entrance hole with individual pellets holes round the periphery. An independent injury may be caused by the wad. As the range of fire increases, in separate pellets entering the body, appears round the central opening caused by the main mass of the shot. With further increase in the range, this is followed by more even distribution of pellet injuries with disappearance of the central aperture. At still longer ranges, the shot depending upon its size and velocity, may not lodge in the body.

Rifled Firearm Injuries- Rifled weapons may produce two wounds, one of entry and one of exit. Their dimensions vary with the calibre of the weapon. The Power of penetration of the tissues is generally greater with 'rifle and pistol' bullets than with the revolver bullets...when a bullet makes an entry into the human body, it first stretches the skin, then effects penetration of the skin and subsequently depending upon the energy, effects penetration soft tissues or bones and either lodges in the body or comes out

causing an exit wound. After the entry of the bullet, the skin partially returns to its original position. The size of the entry wound may therefore, be smaller than the size of the bullet, especially at lower speed.

Entry wound- the entry wound are in relation to the distance of the muzzle of a firearm from the body. When a weapon is discharged, the projectile leaves the muzzle at its maximum velocity and is followed by a flame, burning and unburnt particles from the propellant charge together with metallic particles and by gases formed by explosion under tremendous pressure. At close range, all these will cause injury to the body giving the entry wound many special characteristics which the exit wound will lack...In a close contact, discharge from the muzzle consisting of the flame, powder, metallic particles and gases under pressure may be blown into the track taken by the bullet through the body. In a close shot, within the range of flame and powder blast, within a few inches from the muzzle the entrance wound is circular, singed by flame. In case of smokeless powder, there will be less blackening and shows tattooing. However, the blackening and tattooing may be absent on the body if the injury is on a clothed part. In a near shot within the range of powder blast but outside the range of flame, within 1-2 feet, in case of handguns and more in case of other weapons, the deposit of tattooing is spread out over a larger area but there is no singeing of hair or charring of the skin. As the range increases tattooing from the powder becomes more sparse until no trace of powder marks can be found which is normally beyond a yard. In a distant shot there is no burning, no tattooing, no soot. The wound is circular with inverted margins and may be same size or even slightly smaller than the bullet owing to the initial stretching of the skin.

Exit wound- this is free from the signs of burning, blackening or tattooing.

The fibres of the clothes are turned out at the exit. The wound is usually split form within outwards. It has everted irregular edges. It is often bigger than the missile...usually there is more bleeding at the exit wound than at the entrance. In a close contact shot the entry wound being split by blast is larger than the exit unless the bullet comes out sideways or carrying bone with it. In a distant shot, the entry wound may be slightly smaller than or the same size as the exit wound. The wound edges may be inverted at the entry and everted at the exit.

When the projectile traverses the skull, the angle struck is ascertained from the way the track has opened up. An entrance bullet hole bevels inwards and therefore, the entrance is usually clean cut and the defect on the inner surface of the bone is larger than that on the outer surface. An exit hole in the skull is bevelled outwards. It is larger on the outer than on the inner surface of the bone and may justly be referred to as crater shaped...as the obliquity of the fire is increased, the wound becomes elongated in shape, and if the skin is struck at a tangent, penetration may fail to occur and only a slight linear furrowing of the skin may be produced..."

According to 'Field's Expert Evidence (Expert Evidence and opinions of third person – Medical and non- medical) 3rd Edition, 1988', and I quote,

"there is one more method which is sometimes considered as possible help towards the determination of the range of a fatal shot, namely the effect of the striking velocity of the bullet. A bullet travelling with a very high velocity will cause greater damage to tissues and make a larger wound one travelling at a very low velocity."

In 'Modi's Medical Jurisprudence and Toxicology, 20th

Edition by N.J. Modi', it has been stated and I quote,

"Distance of the Firearm- if a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over the area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburned gunpowder or smokeless propellant powder...blackening is found if a firearm like shotgun is discharged from a distance of not more than 8 feet and a revolver or pistol is discharged within about 2 feet...blackening with a high power rifle can occur upto about one feet...at a distance of one to three feet, small shot makes a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun as the shot enter as one mass but are scattered after entering the wound and cause great damage to the internal tissues...on the other hand, at a distance of six feet, the central aperture is surrounded by separate openings in an area of about two inches in diameter made by few pellets of the shot which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched but is tattooed to some extent. At a distance of twelve feet the charge of shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter..."

In 'H.W.V. Cox's Medical Jurisprudence and Toxicology revised by Dr. Bernard Knight, 5th Edition',

"...upto about one yard/ one meter, the wound is likely to be single, due to the shot entering the body in one mass. Beyond this satellite pellet holes begin to appear around the main wound margins. Even

wads are also present in the wound at this distance...at a moderate range, between one and five yards (one to five meters) the wound will begin to enlarge due to the spread of the pellets...”.

It will not be out of the context to also refer to ‘Medical Jurisprudence by R. M. Jhala and V. B. Raju, 4th Edition’,

“...the wounds of entrance caused by a shotgun have characteristics of their own. Upto the distance of one yard the whole charge fired from the gun enters the body en masse. This produces a round wound with ragged edges. When inflicted close vicinity there is also blackening and burning around the wound as with other firearm injuries. Beyond one yard, there is dispersion of pellets in the cartridge. The extent of dispersion offers a valuable guide in assessing the distance. According to Taylor, the dispersion of pellets in inches equals about 1 and a half times distance in yards. According to him, the dispersion is less if the barrel is choked...whereas, the characteristic of Rifle firearm shot is the fact that usually the wound of exit is larger and sometimes many times larger than the wound of entry...

Wound of exit- the bullet together with the core of tissue ahead, acquires larger size and bigger mass...this mass has an opportunity to act on unsupported skin. This leads to the skin yielding to a tearing force and hence the wound is lacerated and turned outwards, i.e., everted. The conventional larger size of the wound of exit is essentially attributable to larger mass carried ahead by the bullet...”

Having quoted the relevant excerpts from the various textbooks on MedicoLegal Jurisprudence and Toxicology, this Court shall now venture to discuss various case laws keeping in mind the subject matter of discussion ‘ante mortem gunshot injuries’, at this stage of

writing the judgment. In ‘Jaibir and others vs. State’ ‘(Criminal Appeal no. 1056 of 1978) decided on September 23, 1986’, following ante mortem injuries were found on the dead body of the deceased.

1. Gunshot wound of entry 4 cm x 3 cm on right side forehead 2 cm above the right eye brow. No blackening or charring present around the wound. Wound was brain cavity deep.

2. Gunshot wound of exit 5 cm x 4 cm on back of head in middle. It communicates with injury no. 1.

3. Gunshot wound of entry 2 cm x 2 cm into abdominal cavity deep back of right side abdomen upper part 4 cm from lumber and spine. No blackening charring present around the wound.

4. Gunshot wound of exit in mid axillary line on left side (3cm x 3 cm) chest 16 cm below the axilla. Communicates to injury no. 3.

5. Gunshot wound of entry 1 cm x 1 cm bone deep on back of left forearm upper part. No blackening or charring present underneath.

6. Gunshot wound of exit 2 cm x 2 cm in front of left forearm, middle point. It communicates with injury no. 5”

Internal examination revealed that all the skull bones were fractured. Membrane and brain were lacerated. All cranial fossae were fractured...”

It was so observed (under similar circumstances as in here before this Court) by ‘the Hon’ble High Court of Allahabad’ and I quote,

“...it is noteworthy that out of the six gun-shot wounds found on the dead body of deceased, three were wounds of entry and the remaining three were the wounds of exit. There is thus no dispute that the deceased had received three gunshot wounds, one of which was received on right side forehead, the second on back of right side of abdomen and the third on back of

left forearm and all the three bullets had passed through and through. The post mortem report also shows that there was no blackening or charring present around any of these wounds which indicates that the shots had been fired from a distance. From looking at the injuries, it must be inferred that all the three wounds had been caused by some powerful firearm with a long barrel such as rifle...none of these injuries could have been caused by a country made pistol, which is comparatively less powerful with low velocity and small barrel...Injury no. 1 which has a gunshot wound of entry on the forehead and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as rifle because all the skull bones underneath this injury had been fractured. It is common knowledge that the skull bones are thick and stronger and require more power for being fractured...so far as injury no. 3 and 5 are concerned, in our opinion, could have been easily caused by the shot fired from a country made pistol or revolver fired from a distance of more than 5 to 6 feet but less than 10 or 12 feet..."

Keeping in mind the above stated established principles of the Medico-Legal Jurisprudence and Toxicology and also relevant excerpts from the case law quoted above, the Court shall analyze the post mortem examination report of the 3 deceased daughters of Avdhesh and assess as to what kind of injuries did the deceased sustain and from what (kind of) weapon could those injuries have come to them. This will sufficiently indicate whether different kinds of firearms were used in the killing of the 3 deceased girls on dated 15.10.2002 or was it just one kind of firearm weapon that killed the 3 daughters of Avdhesh.

First the Court shall take up the post mortem examination report of

deceased Rohini aged 09 years on the date of incident.]

Ante Mortem Injuries

1. A Gunshot wound of entry 2 cm x 0.5 cm into skull cavity deep (to and through). It was on the right side of the skull about 5 cm above the right ear. The margins were inverted. Blackening and Tattooing present.

2. Gunshot injury of Exit 10 cm x 5 cm Bone deep communicating to injury no. 1 of entry was present on the left side of the face. The margins were everted. Left Frontal, Mandible and Maxilla Bone were broken.

It is the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which indicates the fact that these 1 & 2 injuries to the deceased have been caused by 'one bullet' and not from any shotgun, which accused Avdhesh owns. A shot gun cannot cause so much of damage as is caused in the injury no. 2. A shotgun does not create so much of force, once fired that it could fracture a skull bone which arguably is one of the strongest bone in the body. The injury no. 1 and 2 are clean cut injuries of one single 'Rifle' bullet since one is an entry and second is the exit wound. In the most considered opinion of the Court a shotgun cartridge cannot cause such an injury as is divulged in injury no. 1 and 2 of deceased Rohini. Since, the above injuries have been caused in the skull and by looking at the injuries, it must be inferred that these two wounds had been caused by a 'powerful firearm' with a 'long barrel' such as 'rifle'. None of these injuries could have been caused by a shotgun or a country made pistol, which is comparatively 'less powerful' with 'low velocity' and 'small

barrel'...Injury no. 1 which has a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as 'rifle' because 'the Maxilla, Mandible and tempo parietal bones in and around the skull' underneath this injury have been fractured. It is common knowledge that the 'skull bones' are 'thick' and 'stronger' and 'require more power for being fractured. Under these circumstances, it is next to impossible that the assailant could have been Avdhesh who only had a DBBL shot gun at the time of the incident, according to the prosecution version. A DBBL shotgun inconceivably cannot cause such a fatal injury.

3. Contusion 4 cm x 2 cm and 3 cm x 2 cm on right arm 4 cm below right shoulder is seen. Brain matter was lacerated.

So far as injury no. 3 is concerned, it is the most considered opinion of the Court that when a person gets such life taking injuries then such an injured person before he dies must be bearing extreme pain and agony. While the person is dying of such brutal injuries, it is not inconceivable that the injured in those few minutes or for that matter a few seconds of the final moments of his life will throw his arms and legs around in pain thinking of anyone who can save his life. During these final countdowns of his life the person during the course of throwing around his arms and legs in extreme pain might have struck his hands to some hard object which might cause contusion in his. Even in this case, the victim has a contusion in her hand. It is very human to throw around arms and legs in pain. The victim is a small girl of 09 years. When she sustained these injuries, it might be that Rohini had threw her arms around in extreme pain in those final moments of her life when she was

attacked barbrously by the assailants. In that reaction, it is common for the deceased to have got those contusions.

Now I shall take up the post mortem examination report of second daughter Neeta, aged 08 years on the date of the incident.

Ante Mortem Injuries

1. A Gunshot Wound of Entry 0.3 cm x 0.2 cm Brain Cavity Deep on Right Side of Skull 4 cm above Right ear present. Margins are inverted. No Blackening and Tattooing present.

2. A Gunshot Wound of Exit 8 cm x 9 cm Brain Cavity Deep which communicated to injury no. 1 was on Right Temporal and Parietal side. Margins are everted.

The Right Parietal and Temporal bones were fractured. The Brain matter was lacerated.

So far as deceased Neeta is concerned, it is the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which indicates the fact that these 1 & 2 injuries to the deceased have been caused by one bullet. Further, the above injuries have been caused in the skull. From looking at the injuries, it must be inferred that these two wounds had been caused by some 'powerful firearm' with a 'long barrel' such as 'rifle' because it is only a metallic missile fired from a Rifle is capable of fracturing Parietal and Temporal bones. Even the brain matter was lacerated. These injuries could not have been caused by a shotgun or a country made pistol, which is comparatively 'less powerful' with 'low velocity' and 'small barrel'...Injury no. 1 which has a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon

such as 'rifle' because 'the tempo parietal face bone has been fractured. It is common knowledge that even this bone is considered as a 'thick' and 'stronger' and 'requires more power' for being fractured. This amount of energy can only be generated from a metallic projectile fired from a powerful firearm like 'Rifle'. Only a metallic bullet fired from a Rifle can cause such a lethal injury. So much so, the deceased was a small and tender girl of barely 08 years. Her facial/skull tempo-parietal bones were pierced and fractured and it can only be due to the force of a metallic bullet/ projectile that was generated from being fired from a 'Rifle'.

Moreover, the ante mortem injuries in the post mortem report of Neeta shows that there is absence of blackening and tattooing. In the instant case, according to the prosecution version, accused Avdhesh was standing in front of the cot where his three (deceased) daughters were sleeping. Further according to the prosecution version, in the middle of the night, Smt. Shashi, wife of Avdhesh, woke up upon hearing the gunshot sounds. Also according to the prosecution version, when Shashi/ Pw5 woke up, she allegedly saw Avdhesh, 'drunk', 'standing' with his licensed DBBL gun in his hands from which he allegedly shot his daughters, in front of the cot of deceased girls. Under these circumstances, when the accused Avdhesh was standing in front of the cot of the girls, the distance in such case between Avdhesh and the girls should not have been more than 3-4 feet. Firstly, the firing which caused injury no. 1 and 2 are the result of Rifle firing and not a shotgun, however, even if Avdhesh had fired from his DBBL shotgun having a cartridge, then why in the world, there is no blackening and tattooing on the body of deceased Neeta according to injury no. 1 and 2. It is just impossible that

if accused Avdhesh had allegedly fired from his DBBL shotgun from a distance of 3-4 feet, still then there is devoid of blackening and tattooing. This only confirms the conclusion of the Court that deceased Neeta was fired from a 'Rifle' and not from a 'Shotgun', whereas accused Avdhesh was only having a DBBL shotgun and not 'Rifle'. This shows that in the incident dated 15.1.2002 there was not just 'Rifle' firearm that was used but also a 'shotgun' firearm that was used separately by the assailants. Now the million dollar question is that if according to the prosecution, accused Avdhesh 'only' had a 'DBBL shotgun' who had fired from a close distance as his wife Shashi saw him standing with his 'DBBL shotgun' in front of the cot on which their daughters were, then blackening and tattooing should have been there, but as things stand, neither there is no blackening or tattooing, which indicates that the firing was done from a distance of more than 5-6 feet and also, at the cost of repetition, the injury no. 1 and 2 could only come from a Rifle and not a shotgun DBBL. If that is the case, then in the most considered opinion of this Court, the person/ accused who fired at the three daughters of Avdhesh could not have been accused Avdhesh himself, for all the reasons discussed above, rather the person who fired was having a 'Rifle' and not a 'shot gun'. So much so, the attacker even stood at a distance of more than 6 feet from the deceased and therefore, that person was someone other than, Avdhesh. In other words, one of the persons who fired from a 'Rifle' on the fateful night of 15.10.2002 was someone else and not Avdhesh. The firing was not done by Avdhesh from his DBBL Shotgun but this other person was someone else who was having a Rifle and even stood at a distance of more than 6 feet from the 3 girls, especially, deceased

Neeta, since there is absence of Blackening and tattooing on her body. 3. A Gunshot Multiple Wound of Entry size 0.3 cm x 0.2 cm x Muscle deep to 0.4 cm x 0.2 cm x skin deep in front of Right hand. No Blackening or Tattooing.

This injury shows that these are 'pellet' injuries since there are multiple wounds of entry. These entries are very small of the size 0.3 x 0.2 cm x muscle deep upto 0.4 cm x 0.2 cm x skin deep. This injury could have only been caused by a shotgun firing. Having said that, this injury shows no 'blackening' or 'tattooing' which is further indicative of the fact that the assailant who fired from his gun stood at a distance of more than 6 feet. It is this reason that the pellets when they travelled after being fired from the shotgun by the assailant did not form the tattooing on the skin of the deceased Neeta. This is self explanatory of the distance between deceased Neeta and her assailant which was more than 6 feet. The post mortem examination report of Neeta divulges that in the ante mortem injuries, there were total of 23 pellets that were found inside the body of the deceased, out of which there were 18 small pellets while there were 5 wads. In spite of total 23 pellets that were found in the body of Neeta, aged 08 years, still there is absence of tattooing goes to show that the distance between Neeta and her killer was beyond 6 feet or even more. If that is the case, then how in the world that assailant can be accused Avdhesh who was standing in front of the cot of his 3 daughters when his wife Shashi woke up suddenly hearing the gunshots in the middle of the night, according to the prosecution version. At the cost of repetition, if accused Avdhesh had shot dead Neeta, from his DBBL shotgun from such a close distance of 3-4 feet, then blackening or tattooing must have been there on the body of Neeta, so far as injury

no. 3 is concerned. Absence of blackening and tattooing, only formidable the conclusion of the Court that the alleged shooter was not Avdhesh but was someone who stood at distance of more than 6 feet and so he could not have been accused Avdhesh himself.

4. A Gunshot Wound of Entry 10 cm x 5 cm x cavity deep on Right side of Stomach and 4 cm above Right Iliac crest. Margins Inverted. Blackening and Tattooing present. In the most considered opinion of this Court, injury no. 4 is only a gunshot wound of entry. There is no gunshot wound of Exit which is communicating with injury no. 4. therefore, in the most considered opinion of this Court, injury no. 4 could have been caused by some less powerful firearm like a shot gun which was fired from a closer distance of less than 3-4 feet which is why there is presence of blackening and tattooing. Moreover, there were several pellets that were found in an around this injury. However, since the said firearm was not a Rifle whose metallic projectile goes through and through, that is out of the body, the missile from the firearm that caused injury no. 4 could not make an exit from the body due to the less force created in the bullet that is fired from it. In the instant case, out of the 3 named accused persons in the FIR, Chutkannu, Rajendar and Narvesh, it is alleged that accused Chutkannu had a licensed shot gun of 12 bore, Rajendar was carrying a desi katta while Narvesh was carrying a desi Rifle. Injury no. 4 might appears to have been caused from that firearm which does not create as lethal force in the projectile if fired from it, as does a Rifle. Therefore, this injury appears to have been caused a shot gun and not a Rifle.

Now I shall take up the post mortem examination report of third daughter

Surbhi, aged 07 years on the date of the incident.

Ante Mortem Injuries

1. A Gunshot Wound of Entry 1 cm x 0.2 cm Stomach cavity deep (to and through) which was in the Left and went up to the Left buttock. It was 4 cm below Iliac crust. Margins were inverted. No Blackening and Tattooing.

2. A Gunshot Wound of Exit 10 cm x 6 cm x Abdominal Cavity deep. The injury communicated with the injury no. 1. It was above the Iliac crust. Margins were everted.

Even, in case of deceased Surbhi, aged 07 years, in the most considered opinion of this Court that 'injury no. 1 communicates with the injury no. 2. One is an entry wound while the other is an exit wound which itself is indicative of the fact that injuries 1 and 2 have been caused by one bullet. Further, the above injury has been caused in the stomach. From looking at the injuries, it must be inferred that these two wounds have also been caused by some 'powerful firearm' with a 'long barrel' such as 'rifle', reason being that there is an 'exit wound' which goes to show that the force of the projectile was such that the bullet had made an exit. Only in case of 'Rifle' with a long barrel can produce such effect. The injury further denounces the probability completely that it may have been caused by a shotgun for the reason that there is absence of blackening and tattooing. Furthermore, the injuries 1 and 2 also suggest that the assailant must have stood at a distance of more than 6 feet from the deceased Surbhi. Had if this distance was less than 6 feet, then in that situation there must have been blackening or at least tattooing on the body of deceased Surbhi. It is the most considered opinion of this Court that even in case of Surbhi, the assailant was neither having a shotgun nor was he

standing at a closer distance of less than 3-4 feet from her. Having said so, rather the shooter was having a lethal firearm like 'Rifle' which could only produce such force in the projectile causing these injuries as in this case. So much so, the shooter was also standing at a distance of more than 5-6 feet from the cot on which the deceased 3 girls of Avdhesh were sleeping. Therefore, it is equally the most considered opinion of this Court that considering the above analysis, it is next to impossible that the assailant could have been accused Avdhesh who at the time of the incident was allegedly having a DBBL shot gun and was also standing very close rather in front of the cot on which the 3 of his daughters were sleeping. Since it is the prosecution version that on the sound of the gunshot firing in the middle of the night, Smt. Shashi wife of accused Avdhesh woke up and she saw accused Avdhesh drunk and was standing in front of the cot on which their 3 daughters lay dead and Smt. Shashi saw (allegedly) accused Avdhesh was having his DBBL shot gun in his hands. In view of the analysis carried out above, None of these injuries could have been caused by DBBL shotgun, owned by accused Avdhesh, as he is said to be having in his hands at the time of incident (according to the prosecution version). Put in other words, Injury no. 1 which is reportedly a gunshot wound of entry on the skull and its wound of exit (injury no. 2) evidently appear to have been caused by a powerful weapon such as 'rifle' because 'the tempo parietal face bone has been fractured. It is common knowledge that even this bone is considered as a 'thick' and 'stronger' and 'requires more power or force' in order to be fractured. This amount of energy can only be generated from a metallic projectile fired from a powerful firearm like 'Rifle'. Only a metallic bullet fired from a Rifle can

cause such a lethal injury. So much so, the deceased was a small and tender girl of barely 09 years. Her facial bones were pierced and fractured with the force of a bullet that was generated from that gunshot. The ante mortem injuries in the post mortem report of Surbhi shows that there is no blackening and tattooing. In the instant case, according to the prosecution version, accused Avdhesh was standing in front of the cot where his three (deceased) daughters were sleeping. Further according to the prosecution version, in the middle of the night, Smt. Shashi, wife of Avdhesh woke up upon hearing the gunshot sounds. Also according to the prosecution version, when Shashi/Pw5 woke up, she allegedly saw Avdhesh, drunk, standing with his licensed DBBL gun in his hands from which he allegedly shot his daughters, in front of the cot of deceased girls. Under these circumstances, when the accused Avdhesh was standing in front of the cot of the girls, the distance in such case between Avdhesh and the girls should not have been more than 3-4 feet. If Avdhesh had fired from his DBBL shotgun having a cartridge, then why in the world, there is no blackening and tattooing on the body of deceased Surbhi according to injury no. 1 and 2. It is just impossible that if accused Avdhesh had allegedly fired from his DBBL shotgun from a distance of 3-4 feet, still then there is devoid of blackening and tattooing. This only confirms the conclusion of the Court that deceased Surbhi was fired at from a 'Rifle' and not from a 'Shotgun'. Having said that accused Avdhesh only had a DBBL shotgun and not 'Rifle'. This shows that in the incident dated 15.1.2002, there was not just 'Rifle' firearm that was used but also 'shotgun' firearm that was put to use. Now the million dollar question is that if according to the prosecution, accused Avdhesh only had a

DBBL shotgun who had fired from a distance, then blackening and tattooing should have been there, but as things stand, there is no blackening or tattooing, which indicates that the shotgun was fired from a distance of more than 5-6 feet. If that is the case, then in the most considered opinion of this Court, the person/accused who fired at the three daughters of Avdhesh could not have been accused Avdhesh himself, for all the reasons discussed above, rather the person who fired from a 'shotgun' was a person/accused who stood at a distance of more than 6 feet from the deceased and that person was someone other than, Avdhesh. In other words, the person who fired from shotgun on the fateful night of 15.10.2002 was someone else but not Avdhesh. The firing was not done by Avdhesh from his DBBL Shotgun but this other person was someone else who stood at a distance of more than 6 feet from the 3 girls, especially, deceased Surbhi, since there is absence of Blackening and tattooing on her body."

84. It will also be relevant to refer to certain recent judgments of the Supreme Court on capital punishment on award of capital punishment.

85. The Supreme Court in the case ***State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564***, has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

86. The Supreme Court in ***State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.(Criminal)785***, has held that taking

consideration of facts and circumstances of the case, the capital punishment is to be converted into life imprisonment.

87. The Supreme Court in ***Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192***, has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

“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.”

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.”*

In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

88. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.(Criminal) 302***, it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special

reason as per requirement of Section 354(3) Cr.P.C. It is also held in the judgment that when the DNA report is not done, an adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendency of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted.

89. The Supreme Court in *Manoharan Vs. State by Inspector of Police, Variety Hall Police Station, Coimbatore, 2019AIR (Supreme Court) 3746*, has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

90. In *Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254*, the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

91. In *The State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. (Criminal) 735*, the Supreme Court has again held that if there is any circumstance favouring the accused

such as lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menace to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

92. In Re: *Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R. (Criminal) 571*, the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

93. In *Sundar @ Sundarrajan Vs. State by Inspector of Police, 2023 Cri.L.R.(SC) 473*, the Supreme Court held that it is the duty of the Court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty. It is also held that even though the crime committed by the accused is unquestionably grave and unpardonable, it will not be appropriate to affirm the death sentence as 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation.

94. In *Ravindar Singh Vs. The State Govt. of NCT of Delhi, 2023 AIR (Supreme Court) 2220, Digambar Vs. The State of Maharashtra, 2023 Cri. L.R. (SC)*

564, Bhaggi @ Bhagirah @ Naran Vs. The State of Madhya Pradesh, 2024(1) Crimes 121, the Supreme Court has commuted the death sentence despite holding that the offence committed was brutal or barbaric, however, considering the mitigating circumstances, the capital sentence was commuted to life for a fixed term of sentence.

95. After hearing the learned counsel for appellants, learned counsel for the informant as well as learned AGA for State and on perusal of the paper book as well as on the appraisal of the entire Trial Court's record as noticed above, we find that there is a limited scope of interference in the present appeal for the following reasons :

(a) It is the consistent stand of the prosecution that immediately after the incident, the informant Avdhesh Kumar got the FIR registered. It was scribed by his brother-Narendra Dev (PW-7) who has categorically stated that he had drafted the complaint as directed by Avdhesh Kumar, which was read over to him and, thereafter he had signed the same and submitted to the police. In this complaint, the informant has stated that accused Chutkannu alias Nathulal had enmity towards him as Avdhesh was a witness in a criminal case against him. On the date of incident, at about 6:00 p.m., after giving fodder to his milch cattle he was lying on a cot when due to this enmity Chutkunnu alias Nathulal having his licensed gun along with his brother, Rajendar who has having a country made double barrel gun and son- Narvesh Kumar who was also having country made pistol, came to his house and opened fire at him with intention to kill him. He ran away to save his life. All the three accused persons hit his three daughters who were

sleeping on a nearby cot, in the mosquito net and killed them. Two of them died on the spot and the youngest was critically injured who passed away on way to police station. This witness has stated that he and his wife have witnessed the incident and other people have seen the accused persons at spot.

(b) A perusal of the record show that Hoshiyaar Singh (PW-13), the Investigating Officer, without initiating any investigation against the three accused persons, named in the FIR, gave them a clean chit and proceeded in a manner as if Avdhesh Kumar (father of the girls) has committed the murder. This witness has recovered the licensed gun of Avdhesh Kumar along with ten live cartridges and two empty cartridges and then recorded statements of witnesses, to come to a conclusion of investigation that it is Avdhesh Kumar who has committed the murder. However, in the detailed judgment as noticed above, the Trial Court found that Avdhesh Kumar is innocent and rather the entire mischief is played by Hoshiyaar Singh (PW-13), Investigating Officer in giving clean chit to three accused persons who were named in the FIR.

(c) Perusal of the postmortem report, the three minor girls; nature of gun shot injuries sustained by them having entry and exit wound show that the entry wound size is of different sizes, which suggest that different weapons were used in commission of offence. This corroborate the version of the prosecution as per F.I.R. and, therefore, this Court finds that the finding of the Trial Court which is based on appreciation of the medical jurisprudence is correct that the gun shots were not fired by the double barrel licensed gun of Avdhesh Kumar.

(d) At the cost of repetition, it is again held that the shoddy and suspicious

investigation was conducted by PW-13 in giving clean chit to Chutkannu alias Nathulal, Rajendar and Narvesh Kuamr even in the absence of recovery of the gun made from them which in ordinary course, he was required to do the proper custodial investigation by arresting them in such a heinous crime. PW-13 himself had drawn a conclusion that they are innocent persons and, therefore, they were not even arrested and no charge-sheet was filed against three named persons in the F.I.R.

Therefore, this aspect of the mala fide investigation cannot absolve the appellants Rajendar and Narvesh Kumar of the commission of offence.

(e) The star witness of the prosecution i.e. Shashi Devi (PW-5), the wife of Avdhesh Kumar and the mother of the three girls who were murdered, is consistent in her statement that the above named three accused persons carrying their respective weapons came to the house of the informant who was lying on a cot and his three minor daughters were lying on two different cots and by opening fire with intention to kill her husband, they (accused persons) killed the three daughters of the informant and her husband succeeded in running away.

The argument of the counsel for the appellant that the PW-5 was declared hostile when she was examined at the first instance when only Avdhesh Kumar was facing trial is of no consequence as she was not supporting the chargesheet submitted against Avdhesh Kumar which is contrary to the allegation in the F.I.R. and, therefore, she was declared hostile in that circumstance as she did not depose against her husband who is informant in the F.I.R naming the three accused person.

A perusal of the statement of Shashi Devi (PW-5) after the de novo trial started, is clear that at about 7.00 PM,

accused-Chutkannu, carrying a licensed gun, Rajendar, carrying a double barrel country made gun and Narvesh, carrying country made pistol came and shouted to kill them and started firing. The defence could not put a dent on her testimony as this witness stated that she was very much present there and was washing utensils and on hearing the noise of gunshot, she raised voice and many people gathered. The Trial Court has rightly noticed that when this witness was confronted with her statement under Section 161 Cr.P.C. recorded by Investigating Officer, Hosiyar Singh (PW-13), she consistently stated that she has not made any such statement and rather she has told him that the above named three accused persons had killed her three daughters.

This witness also denied the suggestion that she has made statement under Section 161 Cr.P.C. that she had insisted upon her husband to bring winter clothes for her daughters. The Trial Court has rightly recorded finding that the financial condition of Avdhesh Kumar was not poor as he is owner of agricultural land and was having two more daughters namely Pooja and Archana. Therefore, in our opinion, if investigation of IO Hosiyar Singh (PW-13) concluded that it was Avdhesh Kumar who has killed his three daughters due to poverty, do not find weight with the Court as he had two more daughters who were sleeping in the same premise but, no damages were caused to them by Avdhesh Kumar.

Therefore, we find the statement of Shashi Devi (PW-5) as reliable statement in terms of the decision in Vadivelu Thevar Case (Supra). Some minor discrepancies with regard to non mentioning of burning of petromax gas at the time of incident, is not a serious discrepancy as a lady who has just lost her three minor daughters may not

be mentally in a position to give each minute details while recorded her statement.

(f) It has come in the statement of Har Saran Lal (PW-1) that when he had gone to the house of Avdhesh on hearing the noise of firing, Chutkannu, Rajendar and Narvesh were seen coming carrying guns and many people had gathered. He had seen that two daughters of Avdhesh were lying on one cot and one daughter was lying on another cot.

A suggestion was given to this witness that in the intervening period, accused Chutkannu was murdered, in which his nephews were accused and, therefore, he is making a false statement is of no consequence as this witness has deposed with regard to the incident which occurred much prior to the death of Chutkannu and he has categorically stated that he had seen the three accused at the place of occurrence with their respective guns. Even the suggestion given to this witness that the elder daughter of Avdhesh namely Archana is now married to his niece's son and, therefore, he is giving a false statement is again of no consequence as the marriage took place much after the incident and Court is to assess the motive, if it exists prior to the date incident when the three girls were murdered.

(g) The Trial Court has recorded finding that Dinesh Kumar (PW-4) is not trustworthy as in his first statement, when only Avdhesh Kumar was facing the Trial, he has stated that he has not heard any noise of firing and when he had gone to the house of Avdhesh Kumar in the morning, he saw that his three daughters were lying dead, when confronted with the statement after the de novo stage of trial, when this witness again appeared, has stated that when he had gone to the house of Avdhesh Kumar, he was carrying a double barrel licensed gun

from which smoke was emitting out and Avdhesh told him that under the influence of liquor, he had committed the murder of his own three daughters.

This witness stated that he has not made any such statement on the earlier occasion under the threat extended by Avdhesh. However, it is worth noticing that statement was recorded after 11 years and in the intervening period, he had not lodged any complaint before the police that Avdhesh Kumar was extending threat to him and, therefore, testimony of PW-4 is not trustworthy because only this witness has stated that the financial condition of Avdhesh was very poor and he used to ply a Tanga to earn his livelihood, is contrary to the revenue record produced on behalf of Avdhesh Kumar that he is land owner and his financial condition is not poor that he had committed murder of his three daughters.

(h) Narendra Dev (PW-7) who is brother of informant-Avdhesh has also categorically stated that he had drafted a complaint on asking of Avdhesh Kumar and after it was read over to him, he has signed the same and has given to the police.

Though it has come in the cross examination that he was convicted in a case under Section 302 IPC, however, that incident being subsequent to the present incident will have no bearing regarding conduct of this witness at the relevant time.

(i) Rajneesh (PW-8), Lal Bahadur (PW-9) and Ram Bahore (PW-10) have not supported the case of the prosecution as against Avdhesh Kumar and when confronted with their statement under Section 161 Cr.P.C., they have denied that they have made any such statement to police that Avdhesh Kumar has committed murder of his three daughters.

(j) This also suggests that the Investigating Officer (PW-13) has not

conducted the investigation in proper and fair manner. Even Bade Lalla (PW-11), a witness set up by the prosecution against Avdhesh Kumar that in his presence, Avdhesh Kumar had recorded confession of killing of his three daughters, has not supported the prosecution version and denied having made any such statement under Section 161 Cr.P.C.

96. The argument raised by the learned counsel for the appellant is that the trial court at the initial stage has recorded finding that Avadhesh has been falsely implicated may be an irregularity in dictating the judgment but it is not an illegality. So far as the argument with regard to FSL report of the gun recovered from Avadhesh is concerned, the same was neither supplied to any of the accused nor it was put to the accused persons in their statement under Section 313 Cr.P.C.. Therefore, in view **Tarun Tyagi's Case (Supra)**, no reliance can be placed on this report.

97. Even otherwise this report was only against Avdhesh Kumar as PW-13 by not conducting custodian investigation of Chhutkan alias Nathulal Rajendar and Narvesh did not try to recover the weapon of offence from them though the postmortem report suggests that more than one type of weapons were used in commission of offence which supports the FIR version as stated by PW-5.

98. Another argument raised by the counsel for the appellant that Avdhesh Kumar has not given any statement against appellant Rajendar and Narvesh by appearing as prosecution witness is of no consequence, in view of the protection under Section 315 Cr.P.C. read with Article 20(3) of the Constitution of India.

Therefore, we uphold the judgment of conviction of appellant Rajendar and Narvesh. However, we are unable to uphold the capital punishment awarded by the trial court as it is not a "rarest of rare" case for the following reasons:-

(a) The appellant Rajendar is presently aged about 75 years whereas Narvesh is aged about 50 years. As per prosecution version they came alongwith Chutkannu who was having enmity with informant Avdhesh Kumar. Therefore, they have been held guilty under Section 302/34 IPC.

(b) The trial court has not recorded any aggravating circumstances and has even not scrutinized the case of the appellants in the light of mitigating circumstances. Nothing has come on record that both the appellants had any previous criminal history though co-accused Chutkannu (since deceased) had criminal history.

(c) Trial court has not recorded any finding that awarding of severest punishment, is the only possibility in the case as no finding is recorded that there is no possibility of reformation and rehabilitation of the convicts in the society.

(d) The trial court has also not recorded any finding that accused persons are menace to the society or are having criminal antecedents of multiple cases as nothing has come on record that both the appellants are having any criminal history.

(e) There is no mens rea of the appellant to kill the three daughters as the motive was to kill Avdhesh who succeeded in running away.

(f). As noticed above, it has been held by the Supreme Court in **Nisar Ramzan Sayyed Case (Supra)**, **Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar,**

Manoharan Case (Supra), Veerendra Case (Supra), Anand Kindo & Another Case (Supra), Ravindar Singh Case (Supra), Digambar's Case (Supra) and Bhaggi @ Bhagirah @ Naran's Case (Supra) that if the Court is inclined to award death penalty, there must be exceptional circumstance warranting imposition of excess penalty which cannot be reversed.

99. Therefore, finding that the case of the appellants can not be termed as “rarest of rare” case even though accused has committed a grave offence, we are of the opinion that capital punishment awarded to both the appellants should be commuted to life imprisonment for a fixed term of 20 years.

100. With the aforesaid modification, the appeal qua conviction is dismissed. However, the appeal qua sentence is modified.

101. The accused-appellants are already in custody. They will undergo the remaining sentence in accordance with law.

102. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 5 ILRA 2427
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2024

BEFORE

**THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Application U/S 482. No. 6343 of 2024

Jitendra Mangala ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Bhuvnesh Kumar Singh, Sangeeta Shukla

Counsel for the Opposite Parties:

G.A., Sushil Kumar Chaturvedi

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Negotiable Instruments Act 1881-Section 138-quashing of entire proceedings-the case involved a cheque issued on behalf of one M/s Prerna Construction, but the complaint named only the applicant, the proprietor of the company, without impleading the company itself as an accused-section 141 of the NI Act requires the company to be impleaded when a cheque is issued on its behalf-since the company was not made a party in the complaint the proceedings were defective-The court quashed the complaint as they were not maintainable due to non-impleading of the company-However, the court permitted the opposite party to file a fresh complaint within one month, properly impleading the company.(Para 1 to 14)

The application is allowed. (E-6)

List of Cases cited:

1. Himanshu Vs B. Shivamurthi & anr.(2019) 3 SCC 797
2. Aneeta Hada Vs M/S God Father Travels & Tours Pvt Ltd (2012) 5 SCC 661
3. Dilip Hariramani Vs Bank of Baroda (2022) Live Law SC 457 N. Harihare Krishnan Vs J. Thomas (2018) 3 SCC 663

(Delivered by Hon'ble Arun Kumar Singh
Deshwal, J.)

1. Heard Sri Bhuvnesh Kr. Singh, learned counsel for the applicant, Sri Sushil Kr. Chaturvedi, learned counsel for opposite party No.2 and Sri Rajeev Kr. Singh, learned A.G.A. for the State.