State Of Rajasthan vs Kheraj Ram on 22 August, 2003

Equivalent citations: AIR 2004 SUPREME COURT 3432, 2003 (8) SCC 224, (2003) 7 JT 419 (SC), 2003 (5) SLT 69, 2003 SCC(CRI) 1979, 2003 (6) SCALE 757, 2003 (3) LRI 692, 2003 (7) ACE 520, 2003 (7) JT 419, (2003) 10 ALLINDCAS 81 (SC), 2003 (2) UJ (SC) 1488, (2004) 1 EASTCRIC 45, (2003) 4 ALLCRILR 175, (2003) 3 CURCRIR 219, (2003) 3 ALLCRIR 2905, (2003) 6 SCALE 757, (2003) 11 INDLD 614, (2003) 47 ALLCRIC 668

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Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  830 of 1996

PETITIONER:
State of Rajasthan

RESPONDENT:
Kheraj Ram

DATE OF JUDGMENT: 22/08/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

In the Shakespearian epic 'Othello' principal character Othello suspected his wife's fidelity because of the Machinations of villain Iago. The tragic consequences which followed have become literary history.

In the present case, according to the prosecution, suspecting infidelity on the part of his wife the respondent-accused Kheraj Ram had killed her, two children and brother in law on 10.10.1992. The deceased persons namely, Amru (wife of the accused), Achla (brother-in- law of the accused) and daughters Kesi and Meera were fatally assaulted and suffered homicidal death. Law was set to motion by a First Information Report which was lodged on 10.10.1992 at about 7.30 a.m. and the alleged murders took place after mid-night of 9.10.1992 i.e. around 2.00 a.m. on 10.10.1992. The informant was one Daula Ram who was examined as PW-1. He lodged the FIR on the basis of what he had heard from Gaina Ram (PW-9). According to the prosecution, the following is the factual background.

Accused woke up Gaina Rai (PW-9) around 2.00 a.m. on 10.10.1992 telling that some one had given beatings to his children. When Gaina Rai (PW-9) asked him who the person was and what type of clothes he was wearing, the accused replied that he could not see his clothes but the person had run away. The accused told him that he was sleeping in the small room, and when he came out and started making uproar hearing the said person run away. On a query of the witness as to where the said person had gone, accused replied he did not know. The accused then informed the witness that not only his children, but also his wife and brother-in-law had been beaten. The witness went to the dhani of accused. The accused went inside. From the fencing line outside the dhani, the witness could see that Amru, Achla and Kesi were lying on the cots, and Meera was crying in pain that she was dying. The witness got perplexed. He asked accused to remain present in the house and went to call the neighbours namely, Khartha and Khumbha. He told them about what the accused had told them. Thereafter, the witness and Khartha went to the house of Khumbha, who was also told about the incident. Khartha and Khumbha were sent to the dhani of Kheraj, and the witness called one Daula (PW-1) who was sleeping in the gudal of his house. He disclosed what he had heard and seen to Daula and he and Daula went to the dhani of Kheraj where Khumba and Khartha were sitting outside. Thereafter, the witness and Daula opened the back door and went inside and saw that all the four persons were lying drenched with blood. Immediately they entered inside, and found that except Meera, the rest three had died. He enquired from Meera as to what had happened, but she could not speak. At that time Kheraj was smoking chilam in the courtyard. The witness came out and sent Daula to lodge a report with the police. Subsequently, Meera also died. Then he sent Khartha to call Lalla and Sadula (brother of the accused). After sunrise, they searched for footprints, if any. Though they noticed footprints of a person in the north side going to the dhani of Achla and returning from there, the footprints were of shoe-worn. The footprints were also present in the east of the dhani. The accused used to blame the deceased Amru for her alleged infidelity and was quarrelling with her. He was told by Kannu and Veero (PWs 5 and 6 respectively) that the accused and his wife had a quarrel in the night. The police investigated into the allegations, and came to the conclusion that accused was responsible for the four killings. Initially, a case was registered for commission of offences punishable under Section 302 and Section 307 of the Indian Penal Code, 1860 (for short the 'IPC'), and subsequently, it was modified to Section 302 IPC when all the four died.

The trial Court on consideration of the evidence led by the prosecution found the accused guilty of offence punishable under Section 302 IPC. Considering the brutal nature of the killing death sentence was imposed. Because of the requirement under Section 366 of the Code of Criminal Procedure, 1973 (for short the 'Cr.P.C.') reference was made to the High Court of Rajasthan for confirmation of the death sentence. Accused also filed an appeal. Both the death reference and the appeal were heard together and disposed of by the impugned judgment.

The High Court noted that the case was one which rested on circumstantial evidence. According to the prosecution, the following were the circumstances which unerringly pointed out the finger of guilt at the accused, and having found the accused guilty, he was sentenced to death.

The circumstances relied upon were as follows:

(1) the motive with the accused to commit the murder of his wife as he felt that his wife was a lady of easy virtues and the two deceased daughters were not born from his loin;

and the relations between deceased Smt. Amru and the accused0a-appellant were not cordial and they were quarrelling;

(2) PW5 Smt. Kannu and PW6 Smt. Veero had heard accused and deceased Smt. Amru quarrelling on the previous night and the accused was saying that the two daughters were not born form his loin and deceased Amru had scattered the money to her friends and the parents;

(3) The accused gave false story regarding the commission of the offence to Gaina Ram and other persons who came at the scene of the occurrence when they were called by the accused;

(4) The conduct of the accused in smoking the chilam at the time when the other persons who were called by him, came to his house;

(5) The last seen of the accused in the company of the deceased persons in his house;

(6) The extra judicial confession made by the accused before PW12 Simratha Ram; and (7) The recoveries of the blood-stained dhoti of the accused, the jooti of deceased Achla and the blood-stained kulhari on the information and at the instance of the accused-appellant."

Some of the circumstances noted above were relied upon by the trial Court and accordingly conviction was made and sentence was imposed. The High Court considered the above circumstances not to have been proved and sufficient to prove the guilt of the accused and directed acquittal. Therefore, the State of Rajasthan is in appeal before us.

Learned counsel appearing for the appellant-State submitted that though the case is one which rests on circumstantial evidence, circumstances highlighted and established by the prosecution rule out involvement of any other person and clearly establishes that the respondent-accused was the author of the heinous crime.

Learned counsel for the respondent-accused on the other hand submitted that there has been lot of manipulations done such as suppressing the actual date of arrest of the respondent-accused, and the same is a suspicious circumstance. Other alleged to be inconsistencies and improbabilities have been highlighted by the High Court to justify the order of acquittal.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC

350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

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

In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC

79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.
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> In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl. L.J. 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of

any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

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

A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established; (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

We find that one particular circumstance which is of great relevance has been very casually and in a cavalier fashion dealt with by the High Court i.e. circumstance No.5.

The High Court observed about this aspect as under:

> "The next circumstance relied upon by the prosecution and believed by the learned trial Court is that the accused gave false story to PW 9 Gaina Ram after the incident regarding the commission of the crime by some unknown person. The accused, after the incident, informed PW9 Gaina Ram that somebody had killed Smt. Amru, Achla Ram and his two daughters Meera and Kesi and inflicted injuries to him, also. The accused had injuries on his person, which is clear from the statement of PW13 Dr. Davendra Singh Choudhary, who examined the injuries of the accused after his arrest on 23.10.1992 and found five injuries on his person. PW7 Smt. Saro has admitted in the cross-examination that the police was tracing the foot-prints and they had disclosed to this witness that Smt. Amru has been killed by someone and they were tracing the foot-prints. PW9 Gaina Ram has also admitted that in the morning they followed the foot-prints of one person who had gone towards the northern side of the dhani of Achla and he cannot say that these foot-prints were of whom because he is not a tracer. PW14 Poona Ram has also admitted that the police along with Chimanji came to his house following the footprints. PW18 Jagga Ram- the investigating officer has also admitted that he had followed the footprints. When the footprints were available there and the police tried to trace those footprints, it is surprising to note that the investigating officer did not take the moulds of the footprints in order to establish conclusively the identity of the perpetrator of the crime. From the facts and circumstances of the case and the evidence produced by the prosecution, it is, therefore, clearly established that the accused did not try to give any false explanation, rather on the other hand, the investigating officer did not properly conduct the investigation and rest contended with implicating the accused with the crime instead of making an impartial investigation. The accused himself had injuries on his person and the same have been proved by PW13 Dr. Davinder Singh Choudhary and therefore, it cannot be said that the version given by the accused was false. The learned Additional Sessions Judge was, therefore, not justified in relying upon this circumstance against the accused appellant."

Undisputedly, accused was last seen in the company of the deceased persons in his house and also slept in that house. The accused does not dispute this. He went to the house of Gaina Ram (PW-9) and told him about the assaults on his children. He claimed that he had also received injuries on account of the assaults made by the assailants. Strangely, he did not say anything about the assaults on his wife and brother in law who undisputedly were also assaulted and suffered death at first to Gaina Ram (PW-9). The claim that he sustained injury at the hands of somebody was not stated to Gaina Ram (PW-9). On the contrary, for the first time he was medically examined after about 12 days of the alleged date of occurrence. In the cross- examination of PW-9, the defence itself has brought out that the accused did not tell the witness that he was also beaten by some one and/or that he was injured. The High Court was greatly impressed by the alleged injuries suffered by the

accused. There is no material to show that he had sustained injuries during the course of assaults on his wife, children and brother in law. The injuries were of very superficial nature and self-infliction was not ruled out. The story the accused concocted that some one (and not some others) did the killings is hard to swallow. The killings were possible by one who was known to the victims and who could have gained access without creating any stir or attracting anybody's attention, keeping in view the time and place of incident. The plea that he had raised an alarm is hardly credible. It is not his case that more than one person were involved, and/or that he tried to resist the assaults. Had he tried it, some serious injuries and not the superficial injuries would have resulted. Though much was made by learned counsel appearing for the respondent- accused of the alleged discrepancy of date of arrest, that is really of no consequence. If the accused sustained injuries during the assaults at least he could have described the assailant as well as the nature and manner of defence he tried to protect all or any of them. There is no material that the accused tried to protect his wife, brother in law and children and sustained any injury in that process. This conduct to say the least is unnatural. The explanation offered about the sustaining of injuries is also hard to believe to warrant acceptance. Further, four people were brutally and in a gruesome manner attacked, as the port-mortem report reveals. The nature of injuries inflicted and the manner and position the bodies were found dead on the cots would also go to show that a person who was already inside the house, with a perfect plan and design should have so smartly and swiftly killed all of them without causing any flutter to disturb any one of them, so as to either make them awake or even attempt to escape.

The High Court observed about this aspect as under:

> "The next circumstance relied upon by the prosecution and believed by the learned trial Court is that the accused gave false story to PW 9 Gaina Ram after the incident regarding the commission of the crime by some unknown person. The accused, after the incident, informed PW9 Gaina Ram that somebody had killed Smt. Amru, Achla Ram and his two daughters Meera and Kesi and inflicted injuries to him, also. The accused had injuries on his person, which is clear from the statement of PW13 Dr. Davendra Singh Choudhary, who examined the injuries of the accused after his arrest on 23.10.1992 and found five injuries on his person. PW7 Smt. Saro has admitted in the cross-examination that the police was tracing the foot-prints and they had disclosed to this witness that Smt. Amru has been killed by someone and they were tracing the foot-prints. PW9 Gaina Ram has also admitted that in the morning they followed the foot-prints of one person who had gone towards the northern side of the dhani of Achla and he cannot say that these foot-prints were of whom because he is not a tracer. PW14 Poona Ram has also admitted that the police along with Chimanji came to his house following the footprints. PW18 Jagga Ram- the investigating officer has also admitted that he had followed the footprints. When the footprints were available there and the police tried to trace those footprints, it is surprising to note that the investigating officer did not take the moulds of the footprints in order to establish conclusively the identity of the perpetrator of the crime. From the facts and circumstances of the case and the evidence produced by the prosecution, it is, therefore, clearly established that the accused did not try to give any false explanation, rather on the other hand, the investigating officer did not properly

> conduct the investigation and rest contended with implicating the accused with the crime instead of making an impartial investigation. The accused himself had injuries on his person and the same have been proved by PW13 Dr. Davinder Singh Choudhary and therefore, it cannot be said that the version given by the accused was false. The learned Additional Sessions Judge was, therefore, not justified in relying upon this circumstance against the accused appellant."

To say the least, the observations of the High Court as extracted supra are confusing and without any plausible logic or sense of reason. In the examination under Section 313 of the Code, the accused took the stand that it was one Sadula, his brother who was responsible for the crime. This is contrary to what was his stand during investigation. If in reality Sadula was the assailant, there is no reason as to why the accused who claimed to have seen the assailant but not recognized him could not have spoken about him. This is certainly a very vital factor. The conduct of the accused in going to the house of Gaina Ram (PW-9) and giving out falsehood news further aggravate the guilt pointing factors against the accused. In answering the last question "Do you have to say any more", the accused has not even whispered a word as to what he did to protect at least any one of the victims or what type of resistance if any he offered or with what result. The accused has tried to draw red-herrings to confuse and divert attention of everyone including the investigating agencies from himself. One of such futile attempts was to highlight the footprints. Merely because the trail was not followed by the police, that is really of no consequence. The Investigating Officer (PW-18) has clarified this aspect and justifiably explained the reasons as to why that was not considered necessary or possible.

The evidence on record also fully establish the fact that accused suspected chastity and fidelity of his wife and also doubted that she did not beget the children through him. Though accused claimed to the contrary which appear to be yet another pretence to exculpate himself, credible evidence of Kanu and Veero (PWs 5 and 6) cannot be overlooked. The former has categorically stated about the frequent quarrels between the accused and his wife. An interesting suggestion was given to this effect that when "altercation was taking place in the night in the house of Kheraj Ram, then at the relevant time he (Kheraj Ram) was not present inside his house". In the cross-examination of PW-6, defence has brought out that since the date of marriage of accused up to the date of incident, whenever accused come to his house, he used to quarrel with his wife. The murders were not for any monetary gain and nothing was found or stated to have been stolen. In that context, the said gruesome act should have been committed by somebody to wreck vengeance or settle score of some personal vendetta against the whole family except the deceased.

The High Court proceeded on the basis as if the distance from which these two witnesses claimed to have heard the quarrel was far too a distance from where it was not possible to hear. The distance was stated to be about 1000 to 1500 ft. On a reading of the evidence of the two witnesses it is clear that they have not stated to have heard the quarrel from that distance.

There is another surmise made by the High Court that when quarrelling it was not expected that the accused would talk in such a loud voice that the witnesses would hear it from a distance. The quarrel was taking place at late night when obstruction to sounds would be less. At night, voice would

normal carry to a greater distance than during day time, in village particularly in the absence of bustling activities of a busy town.

The High Court also attached vulnerability to the evidence of PWs 5 and 6 that the words stated to have been used by the accused were not similarly described and repeated by them, and different versions were given about the exact words. On a comparison of the version regarding the exact words, no substantial difference is discernible. Two rustic illiterate ladies while deposing are not expected to reproduce the words verbatim. Had it been so, the normal plea that it is parrot like would have been taken. Human mind is not a tape-recorder that it would make a perfect reproduction later. There is no substantial variance about the sum and substance of words used. The High Court was not justified in discarding the evidence of PWs 5 and 6.

Therefore, the circumstances highlighted by the prosecution present the complete picture which completely rules out the role of any other person and unerringly as well as inevitably point the finger at the accused and in that view of the matter the trial Court was justified in convicting the accused and consequently the High Court was in error in reversing the conviction. So far as conviction is concerned, High Court's judgment is set aside and that of trial Court is restored.

The only other thing which needs consideration is whether death sentence as awarded by trial Court is proper.

Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3). There is another provision in the Code which also uses the significant expression "special reason". It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short "the old Code"). Section 361 which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors, Criminal justice deals with complex human problems and diverse human

beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

It should be borne in mind that before the amendment of Section 367(5) of the old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (26 of 1955) which came into force on 1.1.1956, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the amendment of Section 367(5) of the old Code by Act 26 of 1955, it is not correct to hold that the normal penalty of imprisonment for life cannot be awarded in the absence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the court. The court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. Therefore, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1.4.1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence "special reasons" are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in the Code that the judicial decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood.

This Court in Ediga Anamma v. State of A.P. (1974 (4) SCC 443) has observed : (SCC pp. 453-54, para 26) "26. Let us crystallize the positive indicators against death sentence under Indian law currently. Where the murderer is too young or too old, the clemency or penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless,

helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out of life."

In Bachan Singh v. State of Punjab (1980 (2) SCC 684) it has been observed that: (SCC p. 751, para 209) "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered, (a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?; and (b) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

Another decision which illuminatingly deals with the question of death sentence is Machhi Singh v. State of Punjab (1983 (3) SCC 470).

In Machhi Singh (supra) and Bachan Singh (supra) cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

In Machhi Singh case (supra) it was observed: (SCC p. 489, para

39) The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:-

> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?
>
> The following guidelines which emerge from Bachan Singh case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):-

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

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

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

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

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

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

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis--vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or `dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis--vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the traffic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction that is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

The factual matrix as described by the prosecution and established by the evidence on record shows the cruel and diabolic manner in which the killings were conceived and executed. The accused did not act on any spur of the moment provocation. It was deliberately planned and meticulously executed. There was not even any remorse for such gruesome act. On the contrary, after the killing the accused tried to divert attention and used PW-9 as the cat's-paw. He went on taking diversive tactics to suit his purpose. The calmness with which he smoked 'chilam' was an indication of the fact that the gruesome act did not even arouse any human touch in him. On the contrary, he was satisfied with what he had done. In a given case, a person having seen a ghastly crime may act in a different way. That itself in another case may not constitute a suspicious circumstance. But when the entire chain of events and circumstances are comprehended, the inevitable conclusion is that the accused acted in the most cruel and inhuman manner and the murder was committed in extremely brutal, grotesque, diabolical, revolting and dastardly manner. The victims were two innocent children and a helpless woman. Taking note of these factors, the death sentence imposed by the Trial Court is most appropriate. The respondent shall surrender to custody forthwith and serve out the sentence.

The appeal is allowed to the extent indicated.