Supreme Court of India
Ashok Debbarma @ Achak Debbarma vs State Of Tripura on 4 March, 1947
Author: E Hear.....J.
Bench: K.S. Radhakrishnan, Vikramajit Sen

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS.47-48 OF 2013

Ashok Debbarma @ Achak Debbarma .. Appellant

Versus

State of Tripura .. Respondent

J U D G M E N T

K. S. RADHAKRISHNAN, J.

1. We are, in this case, concerned with a tragic incident in which a group of Armed Extremists at Jarulbachai village in the night of 11.2.1997, set fire to twenty houses belonging to a group of linguistic minority community of Bengal settlers, in which 15 persons lost their lives, which included women and children and causing extensive damage to their properties.

2. The Takarajala Police Station, West Tripura got information about the incident at about 11.00 p.m. on 11.2.1997 from Jarullabachai DAR Camp stating that extremists had set on fire a number of houses at Jarulbachai village and that the people had been shot dead and injured grievously. Information so received was entered into the General Diary at the Takarajala Police Station in the form of Entry No.292 dated 11.2.1997. PW18 (Officer-in-Charge) of Takarajala Police Station visited the Jarullabachai DAR Camp, cordoned off the area, and conducted search. Most of the houses of the village were found gutted by fire. On the very night of the occurrence, as many as 13 dead bodies were found lying at various places and three persons were found lying injured. A formal written information, as regards the occurrence, was received by the investigating officer from one Gauranga Biswas (PW2) from the place of occurrence. Based on the written information, which was so received at the place of occurrence, Takarajala Police Station Case No.12/97 under Sections 148/149/302/326/307/436 IPC read with Section 27(3) of the Arms Act, 1959 was registered. Later, more number of dead bodies were found and number of dead persons increased to 15, so also the number of injured persons. Dead bodies as well as injured persons were taken to GB Hospital at about 4.00 p.m. on 12.2.1997. Inquests were held on the dead bodies and post-mortem examinations were also conducted. PW.18, the Investigating Officer, seized vide seizure list (Ex.11), two empty cartridges and some ashes from the place of occurrence. Looking at the serious nature of

the evidence, investigation was handed over to the Criminal Investigation Department (CID) and PW20 (a DSP) was entrusted with the investigation.

3. PW20, on completion of the investigation, filed a charge-sheet under Sections 148/149/302/326/307/436 IPC read with Section 34 IPC and 27(3) of the Arms Act, 1959 read with Section 34 IPC against 11 persons, including (1) Rabi Deb Barma, (2) Gandhi Deb Barma, (3) Mantu Deb Barma, (4) Sambhuram Deb Barma, (5) Budhraj Deb Barma. Charge-sheet was also filed against some other accused, who were found absconding, namely, (1) Subha Deb Barma, (2) Sandhya Deb Barma, (3) Samprai Deb Barma, (4) Falgoon Deb Barma, (5) Bijoy Deb Barma, (6) Budh Deb Barma, (7) Mangal Deb Barma, (8) Sankar Deb Barma, (9), Kaphur Deb Barma, (10) Sandhyaram Deb Barma alias Phang and (11) Ashok Deb Barma (i.e. the Appellant herein). Out of the 11 persons named in the charge-sheet, chargers were framed against five persons under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, which included the Appellant herein. All the above-mentioned persons pleaded not guilty and claimed to be tried.

4. The prosecution, in order to establish its case, examined 20 witnesses. Two accused persons, namely, Gandhi Deb Barma and Ashok Deb Barma alias Ashok Achak (i.e. the Appellant herein) were examined under Section 313 CrPC and, in their examinations, they denied to have committed the alleged offences. Due to want of evidence, the trial Court acquitted three persons vide its order dated 23.4.2005 under Section 232 CrPC and only two accused persons, namely, Gandhi Deb Barma and the Appellant herein were called upon in terms of Section 232 CrPC to enter on their defence and, accordingly, the defence adduced evidence by examining two witnesses.

5. The Additional Sessions Judge, West Tripura, Agartala, having found the Appellant and Gandhi Deb Barma guilty of the offences under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, declared both the accused guilty of the offences aforementioned and convicted them accordingly vide judgment dated 7.11.2005, on which date Gandhi Deb Barma was absent since he was absconding. Judgment was, therefore, pronounced by the Sessions Judge in the absence of the co-accused in terms of Section 353(6) CrPC. The Additional Sessions Judge then on 10.11.2005, after hearing the prosecution as well as the accused on the question of sentence, passed an order sentencing the Appellant to death on his conviction under Sections 148/149/302/326/307/436 IPC read with Section 27(3) of the Arms Act, 1959.

6. The Additional Sessions Judge in terms of provisions contained in Section 366 (1) CrPC referred the matter to the High Court for confirmation of death sentence awarded to the Appellant, which was numbered as Criminal Reference No.02/2005. The Appellant also preferred Criminal Appeal (J) 94/2005. Both the Appeals as well as the Reference were heard by the High Court. The High Court vide its judgment and order dated 5.9.2012 set aside the conviction of the Appellant under Section 27(3) of the Arms Act, 1959. However, the death sentence under Section 302 IPC read with Section 34 IPC, in addition to the sentence passed for offence under Sections 326 and 436 read with Section 34 IPC, was sustained, against which these Appeals have been preferred.

7. Shri T.R. Venkita Subramoniam, learned counsel appearing for the Appellant, submitted that the prosecution has miserably failed to establish beyond reasonable doubt the involvement of the Appellant in the incident in question. Learned counsel pointed out that even though 20 witnesses were examined, only two witnesses viz. PW10 and PW13 in their deposition in the Court had mentioned the name of the Appellant, which is nothing but an improvement of the prosecution case, especially when the Appellant was not named in the FIR. Learned counsel also pointed out that PW10 and PW13 had not mentioned the name of the Appellant in their statements made to the Police under Section 161 CrPC. Learned counsel placed reliance on the judgment of this Court in Tahsildar Singh and another v. State of U.P. AIR 1959 SC 1012 and Shashidhar Purandhar Hegde and another v. State of Karnataka (2004) 12 SCC 492 and submitted that the omission to mention the name of the Appellant in the FIR as well as in the Section 161 statement was a significant omission which may amount to contradiction and the evidence of those witnesses should not have been relied upon for recording conviction.

8. Learned counsel also pointed out that the prosecution completely erred in not conducting the Test Identification Parade. Consequently, no reliance could have been placed on the statement of witnesses stating that they had seen the Appellant participating in the incident. Placing reliance on the judgment of this Court in Dana Yadav alias Dahu and others v. State of Bihar (2002) 7 SCC 295, learned counsel pointed out that ordinarily if the accused is not named in the FIR, his identification by the witnesses in Court should not be relied upon. Learned counsel also submitted that the High Court has committed an error in taking note of the fact that the Appellant was absconding immediately after the incident. Such a presumption should not have been drawn by the Court, especially when the question regarding abscondance was not put on the Appellant in the statement recorded while examining him under Section 313 CrPC. Learned counsel placed reliance on the judgment of this Court in Shamu Balu Chaugule v. State of Maharashtra (1976) 1 SCC 438, S. Harnam Singh v. State (Delhi Admn.) (1976) 2 SCC 819, Ranvir Yadav v. State of Bihar (2009) 6 SCC 595 and Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC

468. Learned counsel submitted that, in any view, this is not a case which falls in the category of rarest of rare case warranting capital punishment.

9. Learned counsel submitted that the appellant is a tribal coming from lower strata of the society, totally alienated from the main stream of the society and such extremist's upsurge might have occurred due to neglect and frustration. Further, it was pointed out that, seldom, people like the appellant get effective legal assistance and while applying the RR test, the question whether the appellant had got proper legal assistance, should also be examined. Learned counsel, after referring to few judgments of the U.S. Supreme Court, submitted that the Court, while considering the question of death sentence, should also examine whether there is any "residual doubt" over the guilt of the accused.

10. Shri Gopal Singh, learned counsel for the State, highlighted the manner in which the entire operation was executed by a mob consisting of 30 to 35 persons. Learned counsel submitted that they mercilessly fired at women and children and others with latest arms and ammunitions by killing as many as 15 persons, leaving large number of persons injured. Learned counsel pointed out

that they set ablaze various huts in which poor and illiterate persons were living. Many of the persons who participated in the incident were known to the locals and the prosecution has examined as many as 20 witnesses, of which the evidence tendered by PW10 and PW13 was very crucial so far as the involvement of the Appellant is concerned. Learned counsel pointed out that the Courts have rightly believed the evidence of the above-mentioned witnesses and the mere fact that the Appellant's name did not figure in the initial complaint or in the statement under Section 161 CrPC would not absolve him from the guilt, since the involvement of the appellant has been proved beyond reasonable doubt. Learned counsel also submitted that there is no necessity of conducting the Test Identification Parade since the accused persons were known to the witnesses. Learned counsel also submitted that all relevant incriminating questions were put by the Court to the accused while he was examined under Section 313 CrPC and the answers given by the accused would be sufficient to hold him guilty of the charges levelled against him. Learned counsel also submitted that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence adduced and the Court rightly awarded death sentence, which falls under the category of rarest of rare case.

11. We may indicate that though the trial Court as well as the High Court have found that both Gandhi Deb Barma and the Appellant were guilty of the various offences levied against them, we are in this case concerned with the Appeal filed by Ashok Deb Barma, who has also been awarded death sentence by the trial Court, which was confirmed by the High Court. At the outset, we may point out that the High Court is right in holding that the Appellant is not guilty under Section 27(3) of the Arms Act, 1959, in view of the law declared by this Court in State of Punjab v. Dalbir Singh (2012) 3 SCC 346, wherein this Court held that Section 27(3) of the Arms Act is unconstitutional. The fact that such dastardly acts referred to earlier were committed in the Jarulbachai village in the night of 11.2.1997, is not disputed. The question that we are called upon to decide is with regard to the complicity of the accused/Appellant, who was found guilty by the trial Court as well as by the High Court. The facts would clearly indicate that, in this case, 15 persons were brutally and mercilessly killed and the houses of villagers with all household belongings and livestock were buried to ashes. PW1, an injured person, had given a detailed picture of what had happened on the fateful day and he was not cross-examined by the defence. The evidence of PW1 was also fully corroborated by PW2. PW18, the officer-in-charge of Takarajala Police Station, West Tripura, as already indicated, had visited the site since he got information at the Jarullabachai DAR Camp. At about 4.00 a.m. the next day, he had received the complaint from PW2, by the time, he had already started investigation after getting information from Jarullabachai DAR Camp and on his personal visit to the site. In other words, the police machinery had already been set in motion on the basis of the information PW18 had already got and, it was during the course of investigation, he had received the complaint from PW2. Though the complaint received from PW2 was treated as the First Information Report, the fact remains that even before that PW18 had started investigation. Consequently, written information (Ex.1) received from PW2, at best, could be a statement of PW2 made in writing to the police during the course of investigation. Of course, it can be treated as a statement of PW2 recorded under Section 161 Cr.P.C and the contents thereof could be used not as the First Information Report, but for the purpose of contradicting PW2.

12. PW20, the DSP (CID), as already indicated, was later entrusted with the investigation because of the seriousness of the crime. PW20 visited the place of occurrence and noticed that the entire hutments were gutted by fire, 35 families were affected by fire, 15 persons had been killed and four seriously injured. PW20, during investigation, received 15 post- mortem reports from Dr. Pijush Kanti Das of IGM Hospital (PW9), who conducted the post-mortem on the dead bodies. PW20 had also forwarded on 29.4.2011 one fire cartridge case to ballistic expert for his opinion and, on 19.5.1997, he received the expert opinion of the same date to the effect that it was around 7.62 mm ammunition. PW20 has also deposed that the fire arm was AK47 rifle. PW20 has also asserted that the Appellant was a person who was known to the locality and he remained as an absconder from the day of the occurrence. The evidence of PW20 as well as the evidence tendered by PW9 would clearly indicate that the cartridge seized from the site was found to be of 7.62 mm ammunition and the bullets were fired from an automatic fire arm like SLR and, in the instant case, the fire arm used was nothing but an AK 47 rifle.

13. Evidence of PWs6, 7 and 8, Medical Officers posted in G.B. Hospital at Agartala, would indicate that many of the persons, who had sustained gunshot injuries, were treated in the hospital by them and they had submitted their reports which were also marked in evidence. The fact that the fire arms were used in commission of the crime was fully corroborated by the evidence of PW20 read with evidence of PWs 6 to 9.

14. We may now refer to the crucial evidence of some of the witnesses who had stated the involvement of the Appellant in the instant case. PW10 has clearly stated in his deposition that the accused as well as Gandhi Deb Barma (since absconding) were firing with fire arms, due to which, his brother died on the spot with bullet injuries. PW10 has further deposed that there were around 30-35 members in the group, who had, either set fire to the huts or opened fire from their fire arms. PW10, in his cross- examination, deposed that he had stated before the police that he had seen Gandhi Deb Barma as well as the Appellant opening the fires, which statement was not effectively cross-examined. PW10's version that he had seen the Appellant firing from his fire arm remained wholly unshaken. PW10 asserted in his cross-examination that he had stated before the police that his brother died due to bullets fired by the Appellant. PW11 has also deposed that the extremists had killed 15 persons, injured large number of persons and 23 houses were gutted in fire. PW11, of course, did not name the appellant as such, but has fully corroborated the evidence tendered by PW10. PW11's evidence reinforces the evidence of PW10 that the Appellant is one of those persons who had attacked the villagers and set fire to the houses and injured or killed large number of men, women and children. PW14, a resident of the locality, has also corroborated the evidence of PW11.

15. PW13 is one of the persons who got injured in the incident, lost both his son and wife in the firing occurred on the fateful day. PW13, it is reported, was examined by the police on the night of the incident but, of course, he did name the appellant then, consequently, the appellant's name did not figure in the FIR. PW13, in his evidence, deposed that his wife, Saraswati, aged around 30 years and his daughter, Tulshi aged about 5 years, had died in the incident. PW13 deposed that the miscreants had set fire to his house and when he wanted to come out of his house, 10-12 miscreants with fire arms fired at him and he sustained injuries. PW13 identified the accused in the Court.

16. We have gone through the oral evidence of PW10 and PW13 and, in our view, the trial Court and the High Court have rightly appreciated their evidence and the involvement of the Appellant in the above incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10 and PW13. We are of the view that since the accused persons were known to the witnesses and they were identified by face, the fact that no Test Identification Parade was conducted at the time of investigation, is of no consequence. The primary object of the Test Identification Parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the Test Identification Parade is really to find whether or not the suspect is the real offender. In Kanta Prashad v. Delhi Administration AIR 1958 SC 350, this Court stated that the failure to hold the Test Identification Parade does not make the evidence of identification at the trial inadmissible. However, the weight to be attached to such identification would be for the Court to decide and it is prudent to hold the Test Identification Parade with respect to witnesses, who did not know the accused before the occurrence. Reference may also be made to the judgment of this Court in Harbhajan Singh v. State of Jammu & Kashmir (1975) 4 SCC 480, Jadunath Singh and another v. State of UP (1970) 3 SCC 518 and George & others v. State of Kerala and another (1998) 4 SCC 605.

17. Above-mentioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused. In Malkhansingh v. State of M.P. (2003) 5 SCC 746, this Court clarified that the Test Identification Parade is not a substantive piece of evidence and to hold the Test Identification Parade is not even the rule of law, but a rule of prudence so that the identification of the accused inside the Court room at the trial, can be safely relied upon. We are of the view that if the witnesses are trustworthy and reliable, the mere fact that no Test Identification Parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. This Court in Dana Yadav alias Dahu (supra) has examined the points on the law at great length and held that the evidence of identification of an accused in Court by a witness is substantive evidence, whereas identification in Test Identification Parade is, though a primary evidence, but not substantive one and the same can be used only to corroborate the identification of the accused by witness in the Court. So far as the present case is concerned, PW10 and PW13 have identified the accused in open Court which is the substantive piece of evidence and such identification by the eye-witnesses has not been shaken or contradicted. The trial Court examined in detail the oral evidence tendered by those witnesses, which was accepted by the High Court and we find no error in the appreciation of the evidence tendered by those witnesses.

18. The mere fact that the Appellant was not named in the statement made before the police under Section 161 CrPC and, due to this omission, the evidence of PW10 and PW13 tendered in the Court is unreliable, cannot be sustained. Statements made to the police during investigation were not substantive piece of evidence and the statements recorded under Section 161 CrPC can be used only for the purpose of contradiction and not for corroboration. In our view, if the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 CrPC. Police officer recorded statements of witnesses in an

incident where 15 persons lost their lives, 23 houses were set ablaze and large number of persons were injured. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time, that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.

19. Learned counsel appearing for the accused has raised the question that incriminating questions were not put to the accused while he was examined under Section 313 CrPC. The object of Section 313 CrPC is to empower the Court to examine the accused after evidence of the prosecution has been taken so that the accused is given an opportunity to explain the circumstances which may tend to incriminate him. The object of questioning an accused person by the Court is to give him an opportunity of explaining the circumstances that appear against him in the evidence. In the instant case, the accused was examined in the Court on 23.4.2005 by the Additional Sessions Judge, West Tripura, Agartala, which, inter alia, reads as follows :-

> Question : It transpires from the evidence of PW No.10, 11 and 13 that they had recognized you amongst the extremists. Is it true?
>
> Answer : False.
>
> Question : It transpires from the evidence of the above witnesses that Dulal, Ajit, Saraswati and Hemender sustained severe bullet injuries by the firing of you and your associates?
>
> What do you get to say regarding this?
>
> Answer : Yes Question : It is evident from the evidence of these witnesses and other information that at that night Sachindra Sarkar, Archana Garkar, Dipak Sarkar, Gautam Sarkar, Shashi Sarkar, Prosenjit Sarkar, Saraswati Biswas, Tulsi Biswas, Narayan Das, Mithu Das, Bitu Das, Khelan Sarkar, Sujit Sarkar, Bipul Sarkar and Chotan Sarkar were killed by the bullets of fire arms and fire.
>
> What do you get to say regarding this?

Answer : ..... (Blank).

20. The second question put to the accused was that, from the deposition of PW10, PW11, PW13, it had come out in evidence that it was due to the firing of the accused and his associates, Dulal, Ajit, Saraswati and Hemender had sustained severe bullet injuries, to which the answer given by the accused was “Yes”. In other words, he has admitted the fact that, in the incident, Dulal, Ajit, Saraswati and Hemender had sustained severe bullet injuries by the firing of the accused and his associates. Further, for the question, that from the evidence of those witnesses and other

information, at that night, Sachindra Sarkar, Archana Garkar, Dipak Sarkar, Gautam Sarkar, etc. were killed by the bullets of fire arms and fire, the accused kept silent.

21. We are of the view that, under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in State of Maharashtra v. Sukhdev Singh and another (1992) 3 SCC 700 held that since no oath is administered to the accused, the statement made by the accused under Section 313 CrPC will not be evidence stricto sensu and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 CrPC. But, Sub-section (4) says that the answers given by the accused in response to his examination under Section 313 CrPC can be taken into consideration in such an inquiry or trial. This Court in Hate Singh Bhagat Singh (supra) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In Narain Singh v. State of Punjab (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him.

22. This Court in Mohan Singh v. Prem Singh and another (2002) 10 SCC 236 held that the statement made in defence by accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 CrPC cannot be made the sole basis of his conviction. In this connection, reference may also be made to the judgment of this Court in Devender Kumar Singla v. Baldev Krishan Singla (2004) 9 SCC 15 and Bishnu Prasad Sinha and another v. State of Assam (2007) 11 SCC 467. The above-mentioned decisions would indicate that the statement of the accused under Section 313 CrPC for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

23. We may, however, indicate that the answers given by the accused while examining him under Section 313, fully corroborate the evidence of PW10 and PW13 and hence the offences levelled against the Appellant stand proved and the trial Court and the High Court have rightly found him guilty for the offences under Sections 326, 436 and 302 read with Section 34 IPC.

24. We shall now consider whether this is one of the rarest of rare case, as held by the trial Court and affirmed by the High Court, so as to award death sentence to the accused.

25. In this case, altogether 11 persons were charge-sheeted for the offences under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, but charges were framed only against 5 persons under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC. For want of evidence, three accused persons Budhrai Deb Barma, Mantu Deb Barma and Subhuram Deb Barma were acquitted on 23.4.2005 under Section 232 CrPC and only two accused persons, Appellant and

Gandhi Deb Barma were called upon in terms of Section 232 CrPC to enter on their defence. Out of 11 accused, we are left with only two accused persons who were found guilty, out of whom Gandhi Deb Barma is now absconding, hence, we are concerned only with the Appellant. We will first examine whether the appellant was solely responsible for all the elements of crime.

ELEMENTS OF CRIME

26. Appellant alone could not have organized and executed the entire crime. Eleven persons were originally charge-sheeted out of 30-35 group of persons who, according to the prosecution, armed with weapons like AK47, Dao, Lathi, etc., had attacked the villagers, fired at them and set ablaze their huts and belongings. The High Court while affirming the death sentence, stated as follows:

> "The perpetrators of the crime, including the present appellant, acted in most cruel and inhuman manner and murders were committed in extremely brutal, grotesque and dastardly manner, which is revolting and ought to be taken to have vigorously shaken the collective conscience of the society. The victims, all innocent, were helpless when they were put to death or grievously injured or when their houses and belongings were burnt to ashes. The case at hand, therefore, squarely falls in the category of 'rarest of rare cases', where death penalty could be the only adequate sentence." The High Court, therefore, while confirming the death sentence recognized the accused as one of the "perpetrators of the crime", not the sole, and then stated that they all acted in most cruel and inhuman manner and committed the offences. Offences were committed by other so-called perpetrators of the crime as well, but they could not be apprehended or charge-sheeted. Appellant alone or the accused absconding, though found guilty, are not solely responsible for all the elements of the crime, but other perpetrators of the crime also, who could not be apprehended. The Courts below put the entire elements of crime on the accused and treated those elements as aggravating circumstances so as to award death sentence, which cannot be sustained.

REASONABLE DOUBT AND RESIDUAL DOUBT

27. An accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof "beyond reasonable doubt". This Court in Krishnan and another v. State represented by Inspector of Police (2003) 7 SCC 56, held that the doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth and to constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. In Ramakant Rai v. Madan Rai and others (2002)12 SCC 395, the above principle has been reiterated.

28. In Commonwealth v. John W. Webster 5 Cush. 295, 320 (1850), Massachusetts Court, as early as in 1850, has explained the expression “reasonable doubt” as follows:

> “Reasonable doubt ... is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction.” In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some “residual doubt”, even though the Courts are convinced of the accused persons’ guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as fire arms, dao, lathi etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only 11 persons were charge-

sheeted and, out of which, charges were framed only against 5 accused persons. Even out of those 5 persons, 3 were acquitted, leaving the appellant and another, who is absconding. Court, in such circumstances, could have entertained a “residual doubt” as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of rare category.

29. ‘Residual doubt’ is a mitigating circumstance, sometimes, used and urged before the Jury in the United States and, generally, not found favour by the various Courts in the United States. In Donald Gene Franklin v. James A. Lynaugh, Director, Texas Department of Corrections 487 US 164 (1988) : 101 L Ed 2d 155, while dealing with the death sentence, held as follows:

> “Petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any "residual doubts" it might have had about his guilt. Petitioner uses the phrase "residual doubts" to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject petitioner's "residual doubt" claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its "residual doubt[s]" about petitioner's guilt. See ante at 487 U. S. 175; post at 487 U. S. 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions "beyond a reasonable doubt." App. 15 (emphasis added). Because of this instruction, the jury might not have thought that, in

sentencing petitioner, it was free to demand proof of his guilt beyond all doubt.

30. In California v. Brown 479 U.S. 541 and other cases, the US Courts took the view, “"Residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.”

31. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with “absolute certainty”. But, in between “reasonable doubt” and “absolute certainty”, a decision maker’s mind may wander possibly, in a given case, he may go for “absolute certainty” so as to award death sentence, short of that he may go for “beyond reasonable doubt”. Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge- sheeting other group of persons numbering around 35. All element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor.

COUNSEL’S INEFFECTIVENESS:

32. Can the counsel’s ineffectiveness in conducting a criminal trial for the defence, if established, be a mitigating circumstance favouring the accused, especially to escape from the award of death sentence. Counsel for the appellant, without causing any aspersion to the defence counsel appeared for the accused, but to only save the accused from the gallows, pointed out that the records would indicate that the accused was not meted out with effective legal assistance. Learned counsel submitted that the defence counsel failed to cross examine PW1 and few other witnesses. Further, it was pointed out that the counsel also should not have cross examined PW17, since he was not put to chief-examination. Learned counsel submitted that appellant, a tribal, coming from very poor circumstances, could not have engaged a competent defence lawyer to conduct a case on his behalf. Placing reliance on the judgment of the US Supreme Court in Charles E. Strickland, Superintendent, Florida State Prison v. David Leroy Washington 466 US 668 (1984), learned counsel pointed out that, under Article 21 of our Constitution, it is a legal right of the accused to have a fair trial, which the accused was deprived of.

33. Right to get proper and competent assistance is the facet of fair trial. This Court in Madhav Hayawadanrao S. Hoskot v. State of Maharashtra (1978) 3 SCC 544, State of Haryana v. Darshana Devi and Others (1979) 2 SCC 236, Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 98 and Ranjan Dwivedi v. Union of India (1983) 3 SCC 307, pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose

engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in Hussainara Khatoon case (supra), this Court has held that this is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons, such as poverty, indigence or incommunicado situation.

34. The question raised, in this case, is with regard to ineffective legal assistance which, according to the counsel, caused prejudice to the accused and, hence, the same may be treated as a mitigating circumstance while awarding sentence. Few circumstances pointed out to show ineffective legal assistance are as follows:

(1) Failure to cross-examine PW1, the injured first informant which, according to the counsel, is a strong circumstance of "ineffective legal assistance".

(2) The omission to point out the decision of this Court in Dalbir Singh (supra), wherein this Court held that Section 27(3) of the Arms Act was unconstitutional, was a serious omission of "ineffective legal advice", at the trial stage, even though the High Court has found the appellant not guilty under Section 27 of the Arms Act, 1959. (3) Ventured to cross examine PW17, who was not put to chief-examination.

35. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution. In Charles E. Strickland case (supra), the US Court held that a convicted defendant alleging ineffective assistance of counsel must show not only that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonable effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. Court held that the defiant convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different. The Court also held as follows:

> "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case."

36. The Court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighs

the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

37. When we apply the above test to the facts of this case, we are not prepared to say that the accused was not given proper legal assistance by the counsel appeared before the trial Court as well as before the High Court. As already discussed in detail, there is clinching evidence in this case of the involvement of the appellant. The evidence tendered by the eye-witnesses is trustworthy and reliable. True, PW17 should not have been subjected to cross-examination without being put to chief-examination. Section 138 of the Evidence Act specifically states that witness shall be first examined-in-chief, then (if the adverse party so desires) cross- examined, then (if the party calling him so desires) re-examined. Consequently, there is no scope under Section 138 of the Evidence Act to start with cross-examination of a witness, who has not been examined-in- chief, an error committed by the trial Court. In Sukhwant Singh v. State of Punjab (1995) 3 SCC 367, this Court held that after amendment of CrPC, tendering of witness for cross examination is not permissible. Under the old Code, such tendering of witnesses was permissible, while the committing Magistrate used to record the statement of witnesses, which could be treated at the discretion of the trial Judge as substantial evidence of the trial. In that case, this Court further held as follows:

> "Section 138 Evidence Act, envisages that a witness would first be examined-in-chief and then subjected to cross examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no meaning in tendering a witness for cross examination only. Tendering of a witness for cross examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief." Later, in Tej Prakash v. State of Haryana (1996) 7 SCC 322, this Court, following its earlier judgment in Sukhwant Singh (supra), held as follows:
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> "18. As far as Dr O.P. Poddar is concerned, he was only tendered for cross-examination without his being examined-in-chief. Though, Dr O.P. Poddar was not examined-in-chief, this procedure of tendering a witness for cross-examination is not warranted by law. This Court in Sukhwant Singh v. State of Punjab (1995) 3 SCC 367 held that permitting the prosecution to tender a witness for cross-examination only would be wrong and "the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial". In the present case, however, non-examination of Dr O.P. Poddar is not very material because the post-mortem report coupled with the testimonies of Dr K.C. Jain PW 1 and Dr J.L. Bhutani PW 9 were sufficient to enable the courts to come to the conclusion about the cause of death."
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> 38. Participation and involvement of the appellant, in the instant crime, have been proved beyond reasonable doubt. At the time of commission of the offence, he was 30 years of age, now 45. Facts would clearly indicate that he is one of the members of group of extremist persons, waging war against the linguistic group of people in the State of Tripura. Persons like the appellant armed with sophisticated weapons like AK 47, attacked unarmed and defenceless persons, which included women and

children.

Prosecution has stated that the minority community in the State of Tripura is often faced with some extremists' attacks and no leniency be shown to such persons, at the peril of innocent people residing in the State of Tripura.

39. We have laid down three tests – crime test, criminal test and RR test, not the "balancing test", while deciding the proportionality of the sentence. To award death sentence, crime test has to be fully satisfied and there should be no mitigating circumstance favouring the accused, over and above the RR test. The hallmark of a sentencing policy, it is often said, that sufficiently guides and attracts the Court is the presence of procedures that require the Court to consider the circumstances of the crime and the criminal before it recommends sentence.

40. Arbitrariness, discrimination and inconsistency often loom large, when we analyze some of judicial pronouncements awarding sentence. Of course, it is extremely difficult to lay down clear cut guidelines or standards to determine the appropriate sentence to be awarded. Even the ardent critics only criticize, but have no concrete solution as such for laying down a clear cut policy in sentencing. Only safeguard, statutorily and judicially provided is to give special reasons, not merely "reasons" before awarding the capital punishment In Santosh Kumar Satisbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498, this Court highlighted the fact that the arbitrariness in sentencing under Section 302 may violate the idea of equal protection clause under Article 14 and the right to life under Article 21 of the Constitution. Many times, it may be remembered that the ultimate sentence turns on the facts and circumstances of each case. The requirement to follow the three tests, including the necessity to state "special reasons" to some extent allay the fears expressed in Santosh Kumar Satisbhushan Bariyar case (supra).

41. We have already explained few circumstances which favoured the accused in the instant case, to hold it as not a rarest of rare case, which are that the appellant alone could not have executed such a crime, which resulted in the death of 15 persons and leaving so many injured and setting ablaze 23 houses, that is the entire elements of the crime could not have been committed by the appellant alone. Further, the appellant is a tribal, stated to be a member of the extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their properties, possibly such frustration and neglect might have led them to take arms, thinking they are being marginalized and ignored by the society. Viewed in that perspective, we are of the view that this is not a rarest of rare case for awarding death sentence. All the same, considering the gravity of the crime and the factors like extreme social indignation, crimes against innocent villagers, who are a linguistic minority, which included women and children, we feel it would be in the interest of justice to apply the principles laid down in Swamy Shradananada (2) v. State of Karnataka (2008) 13 SCC 767.

42. Consequently, while altering the death sentence to that of imprisonment for life, we are inclined to fix the term of imprisonment as 20 years without remission, over and above the period of sentence already undergone, which, in our view, would meet the ends of justice. Ordered accordingly.

43. The Appeals are, accordingly, disposed of.

eard Hear.....J.

(K. S. Radhakrishnan) .....J.

(Vikramajit Sen) New Delhi, March 4, 2014.