SHOBHIT CHAMAR AND ANR. A

*v.*

STATE OF BIHAR

MARCH 4,1998

[G.T. NANAVATI AND S.P. KURDUKAR, JJ.] B

*Indian Penal Code, 1860-Section 302—Muder—Rarest of rare case-Conviction of appellants (A-2 and A-1) under Sections 302/149, 380 and 460 for committing dacoity and murder of all the six male members of a family including two minor childern of 8 years and 10 years—A-1 was awarded death sentence on the basis of general statement made by all the eyewitnesses that the miscreants had gunned down six persons during the incident—Evidence showing that A-1 had also exhorted that no male member of the family of the deceased' should be kept alive—One of the eye-witnesses admitting that A-1 was not having any firearm in his hand at the time of the incident—But all the eye-witnesses consistently deposed that A-2 had fired from firearm on all the six persons who died instantaneously—A-2 had mistaken belief that one of the deceased was responsible for the murder of his brother and nephew—A2 and A-1 not related—The case of A-2 only will fall in the category of rarest of rare case—Death sentence awarded by the courts below, upheld—Sentence of A-1 altered to life imprisonment—Criminal Trial—Sentence—Death Sentence—Criminal Procedure Code. Section 354(3).* C D E

*Criminal Procedure Code, 1973 :*

*Section 313—Allegaton of non-compliance of procedure regarding recording of statement of acused under Sectionn 313—Allegation brought first time before Supre e Court—Held, unless material prejudice is shown to have caused to the accused, challenge to conviction cannot be entertained—No such prejudice demonstrated—Held, trial cannot be said to have been vitiated—Criminal Trial—Penal Code, 1860, Sections 302/149,380 and 460.* F

*Section 235(2)—Trial Court—Mandatory duty to give the accused opportunity of being heard on the question of sentence—After convicting, the accused was remanded to judicial custody for a week and after that giving them full opportunity of being heard and also after fully hearing the Advocate for the accused, passed the death sentence—Held, no prejudice was caused to the accused an the ground of non-compliance of Section 235(2).* G H

A *Penology—Sentence—Court has to bear in mind the crime and the criminal while awarding sentence—More then one person involved in the crime—Distinction in awarding the sentence can be drawn between the accused on the basis of degree of complicity and brutality in the offence.*

Appellant (A-2) had animosity against the family members of the B deceased for he belived that one of the deceased was responsible for causing murder of his brother and nephew. To take revenge, A-2 along with other accused persons along with 15 to 20 miscreants, armed with rifles and other firearms, entered the house of the decased and looted the ornaments and other belongings and then murdered 6 male members of the deceased family C including two minor children of 8 to 10 years with a veiw that these minor should not take revenge for the murder when they became major.

After investigation appellant along with three other accused persons were tried for offences committed under Section 302/149, 380 and 460 of the Indian Penal Code and Section 27 of the Arms Act. Before the trial, D evidence showing that A-1 had exhorted that no male member of the family should be kept alive. One of the eyewitnesses admitting that A-1 was not having any firearm in his hand at the time of the incident. But all the eyewitnesses deposed that A-2 had fired from the firearm on all the six persons who died instantaneously. The trial court after careful scrutiny of the oral and documentary evidence on record held the appellants (A-2 and E A-1) guilty of offences punishable under Section 302/149, 380 and 460 IPC and also under Section 27 of the Arms Act. The trial Court had acquitted two other accused. After hearing the appellants and their counsel, the trial court awarded death sentence to both the appellants and made a reference to the High Court under Section 366 Cr. PC. The High Court on reappraisal F of the entire evidence accepted the reference and confirmed the death sentence awarded to both the appellants and dismissed the cirminal appeals filed by the appellant and the State. Hence this appeal by the appellants.

Dismissing the appeal, this Court

G HELD : 1. The challenge to the conviction based on non-compliance of Section 313 Cr PC first time in this appeal cannot be entertained unless the appellants demonstrate that prejudice has been caused to them. In the present case, the prosecution strongly relied upon the ocular evidence of the eye witnesses and relevant question with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the H conviction can be sustained unless it is shown by the appellants that a

prejudice has been caused by them. No such prejudice was demonstrated. A
[129-G-H; 130-A]

*Rama Shanker Singh* v. *State of West Bengal,* AIR (1962) SC; (1962) 2 Crl LJ 296; *Suresh Chandra Bahri* v. *State of Bihar*, [1995] Supp. 1 SCC 80 and *Bijoy Chandra Patra* v. *State of West of Bengal*, [1952] SCR 202, relied on. B

*Tara Singh* v. *State*, [1951] SCR 729; *Ajmer Singh* v. *State of Punjab,* [1953] SCR 418; *State of Maharashtra* v. *Sukhdav Singh*, [1992] 3 SCC 700 and *Bhalinder Singh* v. *State of Punjab,* [1994] 1 SCC 726, distinguished.

2. In this case the trial court after pronouncing the judgment of conviction, remanded both the appellants to judicial custody for a week and C they were given full opportunity of being heard on the question of sentence. The Advocate for the appellants was also heard fully on the question of sentence. [125-E-G]

*Santa Singh* v. *State of Punjab,* [1976] 4 SCC 190 and *Allaudin Mian* v. *State of Bihar,* [1989] 3 SCC 5, distinguished. D

3.1. In the face of the evidence, a distinction based on the degree of complicity and brutality will have to be drawn which has got a vital impact in awarding the sentence. It is well settled that while awarding the sentence, the court has to bear in mind the crime and the criminal. [134-H; 135-A]

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3.2. A-2 was the principal offender/miscreant who fired from his firearm on all the six persons including the two innocent children. He had a deep-rooted desire for revenge based upon suspicion about the muders of his brother and nephew by one of the family members of the deceased persons which prompted him to take revenge against the deceased and had gone to the extent of killing the six deceased in a most brutal, heinous and F barbaric manner. Nothing was suggested to the eyewitnesses on behalf of A-2 that any of these deceased persons had played any role in committing the murders of his brother and nephew and at any rate having regard to the ages of two minor children (10 years and 8 year) it could not even be remotely suspected that they could be the assailants. A-2 wanted not only to teach a G lesson to the family members of the person against whom he had grudge but also to create terror in the minds of the family members to satisfy his ego and muscle power. A-2 exhibited most inhuman conduct while rejoicing in his victory after commission of the crime. In this background the trial court as well as the High Court have committed no error in awarding death sentence to him. [135-D-G] H

A **3.3. A-1who was not related to A-2 might not be suffering from the same degree of revenge and brutality as A-2 had. With this distinction, the case of A-1 will not fall in the category of rarest of rare cases. Therefore, death sentence awarded to him was not justified having regard to the facts and circumstances of the case. The death sentence awarded to him the courts below is altered to one of life imprisonment. [135-B-D]**

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*Shiv Ram* **v.** *State of U.P.,* **[1998] 1 SCC 149, relied on.**

*Bachan Singh* **v.** *State of Punjab,* **[1980] 2 SCC 684;** *Machhi Singh* **v.** *State of Punjab,* **[1983] 3 SCC 470 and** *Dhananjoy Chatterjee* **v.** *State of*
C *West Bengal,* **[1994] 2 SCC 220, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1084 of 1997 Etc.

From the Judgment and Order dated 26.9.97 of the Patna High Court in
D Crl A.No. 186 of 1996.

R.K. Jain, Ajay Bhalla and Ms. Abha R. Sharma for the Appellant.

Ranjit Kumar and B.B. Singh for the Respondent.

E The Judgment of the Court was delivered by

**S.P. KURDUKAR. J.** The two condemned prisoners/appellants, namely, Shiv Prakash Pandey (A-1) and Shobhit Chamar (A-2) had initially sent a petition through jail to this Court which was registered as Special Leave
F Petition (Crl.) No. 3576 of 1997 wherein leave was granted and a Criminal Appeal No. 1084 of 1997 came to be registered. In the meantime, the condemned prisoners filed Special Leave Petition (Crl.) Nos. 3729-30 of 1997 through their Advocate against the very same judgment and order of conviction passed by the High Court of Patna, hence Leave is granted herein as well. Since both these Criminal Appeals are filed by the condemned prisoners challenging the
G legality and correctness of the judgment of the High Court wherein the death sentence of both the appellants for committing six murders is confirmed, they are being disposed of by this common judgment.

2. The prosecution story unfolded at the trial is as under:-

H Jagarnath Pandey (since deceased) was the resident of village Tirojpur

under police station Durgawati, district Rohtas. He owned a house and an agricultural land having a bore well and a chamber room. The occurrence in the present case took place in his residential house during the night intervening between January 1 and 2, 1989 at about 1.00 a.m. Haridwar Pandey is the son of Jagarnath Pandey. On the date of incident, Jagarnath Pandey and his son Ram Iqbal Pandey (both deceased) went to the chamber (room) for sleeping during that night. Besides Haridwar Pandey and Ram Iqbal Pandey, the family of Jagarnath Pandey was consisted of Taranath Pandey, a cousin (since deceased), Mahendra Pandey, nephew (since deceased), Anil Pandey 10 years old and Sunil Pandey, 8 years old, grand sons (since deceased) and other female members.

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They were in the house. After evening meals, all these persons went to sleep in their respective rooms. At about mid night, Bhajurama Devi (PW 2) who was sleeping in her room heard the knock on the door and a call from Ram Iqbal Pandey requesting her to open the door as he was feeling thirsty. Bhajurama Devi (PW2) then opened the door in good faith but to her surprise, she saw 15 to 20 miscreants who forcibly entered into the house. All these miscreants then started knocking the door of a room where Lalmuni Devi (PW 6), informant, was sleeping. By then she realised that some dacoits had entered into the house. They continued to knock the door and also started abusing the inmates. When she opened the door, 4 to 5 dacoits entered into her room. Lalmuni Devi (PW 6) apprehending danger came out of the room and saw 15 to 20 dacoits armed with rifles had entered into her house and thereafter started collecting the valuables from rooms and putting them into bundles. She then spotted her father-in-law Jagarnath Pandey and Ram Iqbal Pandey in the courtyard with their hands tied from behind. Lalmuni Devi (PW 6) immediately took her children and other family members inside another room called *Dumuha*. Some of the dacoits then started asking the inmates of the house to disclose where the gun and the ornaments were kept otherwise their children would be killed. Lalmuni Devi (PW 6) told that she did not know about the gun and she requested the dacoits not to cause harm to any of the family members. She identified Shiv Prakash Pandey (A-1), Shobhit Chamar (A-2) and Ram Dular who was said to have been killed in encounter during the pendency of trial.

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3. It is alleged by the prosecution that A-2 then started snatching the two children, namely, Anil Pandey and Sunil Pandey from Lalmuni Devi (PW 6) and when she resisted, A-2 assaulted her with baton of the rifle and snatched the children forcibly from her and brought them into the courtyard. Shiv Prakash Pandey (A-1) and Shobhit Chamar (A-2) then fired from their

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A guns killing Jagarnath Pandey and Ram Iqbal Pandey who collapsed due to fire arm injuries on the ground and died on the spot. A-2 along with two or three dacoits then went outside the house and after some time, came back along with Taranath Pandey and Mahendra Pandey who were also gun down in the courtyard. The two minor children were terribly scared and when they started weeping, some of the dacoits said that they be spared. When they B were let off, they went to Lalmuni Devi (PW 6) and sat on her lap. One of the dacoits then said that these children should not be spared because when they would grow, they might take the revenge and, therefore, they should also be finished. A-2 then forcibly brought the children from Lalmuni Devi (PW 6) in the courtyard and thereafter miscreants fired at them. Both the children C succumbed to the fire arm injuries and died on the spot. A-2 was then enquiring about Haridwar, husband of Lalmuni Devi (PW 6) and asked her to call him so that he would also be killed. A-2 then stated that all male members of the family of Haridwar should be finished so that he would be satisfied of taking revenge of murders of his brother and a nephew. During this occurrence, according to the prosecution, the dacoits also assaulted Bindu Devi (PW 4) D wife of Ram Iqbal Pandey. After committing the six murders and assaulting the female members of Jagarnath Pandey, the dacoits left the house with valuables worth Rs. 12.000 raising slogans 'Jai Durga Maa'.

4. Durgawati police station is situated at a distance of 10 kilometers from E the village Tirojpur . Lalmuni Devi (PW 6) went to the police station at about 6.30 a.m. on 2nd January, 1989 and loaded the FIR (Ex.5). The FIR sets out all the details naming Shiv Prakash Pandey (A-1), Shobhit Chamar (A-2), Ram Dular (A-3) and other unidentified dacoits. It is then stated therein that Shobhit Chamar (A-2) had nursed a grudge against her family as he suspected that Haridwar was responsible for causing the murders of his brother and F nephew.

5. After registering the Crime, Arun Shukla (PW 11) who was incharge of Durgawati police station left for the village and after reaching there, commenced the investigation. After carrying out the inquest panchanama on the six dead bodies, he sent them to Bhabhua Hospital for post mortem G examination. The investigating officer thereafter carried out the necessary investigation and also recorded the statements of various witnesses. After completing the investigation, the appellants along with two other acquitted accused, namely, Khobhru Chamar and Narad Chamar were sent up for trial for offences punishable under Sections 302/149, 380 and 460 of the Indian H Penal Code and 27 of the Arms Act.

6. The appellants denied the allegations levelled against them and pleaded that they were innocent and did not know anything about the incident. They also pleaded that they have been falsely implicated in the present crime due to animosity. They also brought on record the copy of the complaint lodged by Gohni Kaur, the wife of elder brother of A-2 filed against Haridwar, Ram Iqbal Pandey and others in connection with the murder of her husband. Certain other documents were also brought on record to show the enmity between the family of Haridwar and the accused.

7. At the trial, the prosecution examined as many as 13 witnesses, of whom, Bhajurama Devi (PW 2), Bindu Devi (PW 4), Lalmuni Devi (PW 6) and Lachhi Devi (PW 7) were the eye witnesses. Sumitra Devi (PW 1) was examined to prove that decoits had forcibly taken away Mahendra Pandey and Taranath Pandey from her house and soon thereafter she found that they were killed. She disclosed the name of A-1, A-2 and Ram Dular Chamar who had whisked away them. Dr. Jai Shanker Mishra (PW 9) was examined to prove the post mortem examination reports and cause of death of six deceased persons.

8. The trial court after careful scrutiny of oral and documentary evidence on record vide its judgment and order dated February 16, 1996 held the appellants guilty of offences punishable under Sections 302, 302/149, 380 and 460 of the Indian Penal Code as also under Section 27 of the Arms Act. The trial court, however, found that the prosecution had failed to establish beyond reasonable doubt any of the charges against Khobhru Chamar (A-3) and Narad Chamar (A-4) and consequently they were acquitted. After hearing the appellants and their counsel on the question of sentence, the trial court awarded death sentence to both the appellants and made a Reference to the High Court under Section 366 of the Code of Criminal Procedure.

9. This Reference came to be numbered as Death Reference No. 1 of 1996 which was heard along with Criminal Appeal Nos. 118 and 136 of 1996 filed by the State of Bihar and the appellants respectively. The High Court on re-appraisal of the entire evidence on record by its judgment and order dated September 26, 1997 accepted the Reference and confirmed the death sentence awarded to both the appellants and dismissed the criminal appeals filed by the appellants and the State of Bihar. It is against this judgment and order of conviction and sentence passed by the High Court, appellants have filed these appeals challenging the legality and correctness thereof.

10. Mr. R.K. Jain, Learned Senior Advocate appearing in support of

these appeals urged that there was total non compliance of Section 235(2) of the Cr.P.C. The trial court did not hear the appellants on the question of sentence inasmuch as they were not told that they had a right to lead evidence on the question of sentence. It was the duty of the court to appraise the appellants in that behalf and having not done so, a serious prejudice has been caused to the appellants and, therefore, the sentence awarded to them is unsustainable.

11. Admittedly, at the trial, the appellants were represented by an Advocate of their choice. The trial court pronounced the judgment of conviction on 16th February, 1996 in the open court and then adjourned the matter to 23rd February, 1996 for hearing learned Counsel for the parties and the appellants on the question of sentence. Relevant portion of the judgment reads thus:-"

> "Since both the accused have faced the trial from behind bar, hence both are remanded to judicial custody to be produced on 23rd February, 1996 when the case will be put up for hearing on the point of sentence."

Accordingly, the appellants were produced in the court on the said adjourned date. The trial court heard the learned Counsel for the parties and thereafter pronounced the order of sentence. From the above facts, it is thus clear that the appellants were given sufficient opportunity of being heard on the question of sentence. No grievance whatsoever in this behalf was made either before the trial court or before the High Court. The arguments as regards non compliance of Section 235(2) Cr. P.C. was first time sought to be raised before us. Learned counsel for the appellants in support of his contention drew our attention to the judgment of this Court in *Santa Singh* v. *State of Punjab,* [1976] 4 SCC 190, While dealing with the true scope of Section 235 (2) Cr. P.C., this Court observed:-

> "This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the

sentence and it is only after hearing him that the court can proceed to pass the sentence." A

The court emphasised that Section 235(2) Cr.P.C. is mandatory and it must be complied with in true spirit. Non compliance thereof would not be a mere irregularity which could be cured under Section 465 Cr. P.C. It was a case where the accused was charged for double murder and was represented by a lawyer throughout the trial. On the day judgment was pronounced, the accused was not so represented. The Sessions Judge pronounced the judgment convicting him under Section 302 IPC and sentenced him to death without giving any opportunity to him to be heard on the question of sentence. It is on these facts, the court found that non compliance of Section 235(2) Cr.P.C. would make the death sentence unsustainable. The same view has been reiterated by this Court in *Allauddin Mian and others Sharif Mian and another* v. *State of Bihar,* [1989] 3 SCC. B C

5. It is true that in paragraph 10, this Court observed:- D

"Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality." E

What had happened in this case was that the trial court recorded the finding of guilt on March 31, 1987 and on the very same day, they were asked if they had anything to say on the question of sentence and immediately thereafter the order of death sentence was pronounced. It appears that grievance as regards non compliance of Section 235(2) Cr.P.C. was made in the courts below and it is in these circumstances, the court held that the accused were not given sufficient opportunity to be heard on the question of sentence and, therefore, there was non compliance of Section 235(2) Cr.P.C. The facts of the case before us are entirely different and in fact after pronouncing the judgment of conviction on February 16, 1996, both the appellants were remanded to judicial custody till 23rd February, 1996 and were given full opportunity of being heard on the question of sentence. The Advocate for the appellants was also heard fully on the question of sentence. It is in these circumstances, we find that the ratio of the above referred two decisions of this Court will have no application. The argument relating to prejudice thus would not survive. F G H

12. Learned Counsel for the appellants then urged that the procedure followed in recording the statements of the appellants under Section 313 Cr.P.C. was totally irregular inasmuch as the material evidence and the circumstances which were relied upon by the prosecution were not put to them and resultantly they were denied an opportunity to explain the same. It was, therefore, contended that non compliance of Section 313 Cr. P.C. has vitiated the trial and the appellants could not be convicted for any offence.

13. The statement of Shobhit Chamar (A-2) recorded under Section 313 Cr.P.C of which a free translation in English was furnished by his Advocate reads thus:-

Q: Have you heard the evidence of witness. It is the allegation of witnesses that on the night of 1/2 January, 1989 Shiv Prakash Pandey, Shobhit Chamar, Khobhare Chamar, Ram Pratap Chamar and Narad Chamar and other associates armed with rifle and gun looted ornaments, clothes, cash from the house of the Informant Lalmuni Devi, situated in village Tirozpur, P.S. Durgawati, Distt. Rohtas, at present in district Bhabhua. Have you got to say anything?

A: No Sir.

Q: It is also alleged by the witnesses that at that time, place and date accused Ram Dular, Shobhit and Shiv Prakash killed Jagarnath Pandey, Ram Iqbal Pandey, Mahendra Pandey, Taranath Pandey, besides two children, namely, Anil Pandey and Sunil Pandey who were sons of Haridwar Pandey (all of them) by firing shots. Have you got anything to say?

A: No Sir.

Q: It is also alleged by the witnesses that at the time of occurrence, electric bulb was illuminating in the court yard of the house of informant, in the light of which (they) recognised you all. Have you got anything to say?

A: No Sir.

Q: Do you want to say something in your defence?

A: On the day of occurrence, I was in the village (Illegible). Because

Haridwar Pandey had killed three persons like Ram Kewal etc.. Due to fear of this, I had left the village. A

The statement of Shiv Prakash Pandey (A-1) is almost similar except the last question to which he had given answer "No Sir".

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14. Relying upon the above statements of the appellants, it was contended by Mr. R.K. Jain, Learned Senior Advocate that the court had failed to formulate the question properly inasmuch as the material circumstances appearing in the evidence of the prosecution were not put to the appellants. Mr. Jain drew our attention to the decision of this Court in *Tara Singh* v. *The State*, [1951] SCR 729 and in particular the observations at page 733. It was C a case where statement of the accused was recorded under Section 342 Cr.P.C., 1898. The questions put to the accused were reproduced in the judgment which according to this Court were not sufficient compliance of Section 342 Cr.P.C. It is interesting to note that the Sessions Court repeated the same questions and answers put to the accused at the committal stage D by the Magistrate. It was, therefore, a case where the Sessions Court did not record the statements of the accused under Section 342 of the Cr. P.C. after recording the evidence of the prosecution at trial and, therefore, in these circumstances, the court held that there was breach of provisions of Section 342 Cr.P.C. and consequently the conviction and sentence inflicted upon the accused was set aside and the case was sent back to the trial court for de E nova trial. In the case before us, the prosecution case mainly rested upon the ocular evidence of eye witnesses. On conclusion of the prosecution evidence, the trial court did put the necessary questions relating to the evidence of eye witnesses to both the appellants and thereafter recorded the answers given by them. It is, therefore, clear that the decision rendered by this Court in *Tara* F *Singh* v. *The State* (supra) is clearly distinguishable.

15. In *Rama Shankar Singh and others* v. *State of West Bengal.* AIR (1962) SC 1239, a similar question arose for consideration before this Court under the old Code, 1898 and this court observed as under:-

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"The examination by the Sessions Judge of the appellants was perfunctory, but as observed in Ajmer Singh's case, [1953] SCR 418, AIR (1953) SC 76 every error or omission in complying with S. 342 does not vitiate the trial. "Errors of this type fall within the category of curable irregularities and the question whether the trial has been H

A vitiated depends in each case upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused."

The Court then observed:-

B "Failure to comply with the provisions of the S.342 is an irregularity; and unless injustice is shown to have resulted therefrom a mere irregularity is by itself not sufficient to justify an order of retrial. The appellate court must always consider whether by reason of failure to comply with a procedural provisions, which does not affect the C jurisdiction of the court, the accused have been materially prejudiced."

16. In *State of Maharashtra* v. *Sukhdev Singh and another*, [1992] 3 SCC 700, this Court had an occasion to consider a similar question. It was a case which mainly depended upon the identification of the accused, various other circumstances forming a chain of circumstantial evidence and the D confessional statement. It is in this context, this Court ruled that the court was duty bound to solicit accused's explanation in respect of every incriminating material used by the prosecution against him irrespective of how weak or scanty the prosecution evidence was in this respect. This appeal was filed by the State of Maharashtra challenging the order of acquittal passed by the E trial court against some of the accused and on examining the records, the Court found that there was non compliance of Section 313 Cr.P.C. and, therefore, the order of acquittal did not call for any interference.

17. In *Bhalinder Singh @ Raju* v. *State of Punjab*, [1994] 1 SCC 726, F this Court held that the circumstances not put to the accused while recording his statement under Section 313 Cr.P.C., cannot be used against him. This was a case where prosecution solely relied upon the circumstantial evidence. This Court, therefore, came to the conclusion that the circumstances which were not put to the accused cannot be used by the prosecution for holding him guilty in a case of circumstantial evidence. This decision again does not help G the appellants on the peculiar facts of this case.

18. Mr. B.B.Singh, learned counsel for the respondent drew our attention to the judgment of this Court in *Suresh Chandra Bahri* v.. *State of Bihar*, [1995] Suppl. 1 SCC 80 and other connected appeals. This Court while dealing H with the scope of Section 313 Cr.P.C. held as under:-

"The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him."

In the final analysis, the Court observed:

"In the facts and circumstances discussed above it cannot be said that any prejudice was caused to the appellant. The contention of the learned counsel for the appellants in this behalf therefore has no merit."

19. In *Bijjoy Chand Potra* v. *The State*, [1952] SCR 202, a similar question arose before this Court as regards the scope of Section 342 of Code of Criminal Procedure, 1898. In this reported decision, only three questions were put to the accused on the conclusion of the prosecution evidence, namely, (1) what his defence was as to the evidence adduced against him, (2) whether he had inflicted injuries on Kumad Patra and (3) whether he would adduce any evidence, While considering the challenge to the conviction on behalf of the accused on the ground that relevant prosecution evidence and other materials relied upon by the prosecution were not put to him under Section 342 Cr.P.C. 1898 the Court observed:-"

To sustain such an argument as his been put forward, it is not sufficient for the accused merely to show that he has not been fully examined as required by Section 342 of the Criminal Procedure Code, but he must also show that such examination has materially prejudiced him."

20. We have perused all these reported decisions relied upon by the Learned Advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non compliance of Section 313 Cr.P.C. first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case as indicated earlier, the prosecution strongly relied upon the ocular evidence

A of the eye witnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention
B raised on behalf of the appellants.

21. Advertising to the merits of the case, at the outset, it needs to be stated that there was no challenge to the fact that six persons were done to death during the incident in question. The medical evidence in the form of post mortem examination reports which was duly proved by the medical expert
C Dr. Jai Shanker Misra (PW 9) unmistakably indicated that deceased persons had sustained several gun shot injuries which caused their instantaneous deaths. The courts below in our opinion have rightly held that six persons died homicidal deaths during the incident in question. We accordantly uphold the finding recorded by the courts below in this behalf.

D 22. In order to prove the complicity of the appellants, the prosecution principally relied upon the evidence of four eye witnesses, namely, Bhajurama Devi (PW 2), Bindu Devi (PW 4), Lalmuni Devi (PW 6) and Lachhi Devi (PW 7). All these witnesses were staying in the house of Jagarnath Pandey and they had witnessed the entire incident in question. Lalmuni Devi (PW 6)
E lodged the First Information Report on 2nd January. 1989 at about 6.30 a.m. naming the appellants and Ram Dular Chamar in addition to some unidentified dacoits. All these eye witnesses identified the appellants. According to them, the source of light was two electric bulbs which were on/burning in the court yard. All these eye witnesses are illiterate ladies who have lost their male family members. Lalmuni Devi (PW 6) in her evidence has given the
F photographic details as to how the incident took place. She stated that the appellants along with other unidentified dacoits entered into the courtyard and gunned down six persons two on each occasion. They died on the spot due to fire arm injuries. She further stated that she identified three assailants of whom two are appellants in the light of electric bulbs which were on/
G burning in the courtyard. The First Information Report lodged by her fully corroborates her evidence.

23. Bhajurama Devi (PW 2) who is the mother of deceased Ram Iqbal Pandey, has stated that when she was sleeping in her room, during the night, her son Ram Iqbal Pandey (deceased) knocked the door and asked her to
H open it as he was feeling thirsty. When she opened the door. 20 to 25 dacoits

entered into the house along with her son Ram Iqbal Pandey and Jagarnath Pandey (both since deceased) with their hands tied from behind. Shobhit Chamar (A-2) and his associates inquired about Haridwar Pandey and the gun and on her reply in the negative, they started looting the valuables and assaulted Bindu Devi (PW 4). Suddenly, A-2 pumped out bullets from his gun killing Ram Iqbal Pandey and Jagarnath Pandey on the spot. Both the appellants then went out of the house and came back along with Taranath Pandey and Mahendra Pandey who were made to stand in the courtyard and thereafter shots were fired killing both of them on the spot. The female members in the house were terribly scarred and they were praying not to kill any of the family members. Anil Pandey aged about 10 years and Sunil Pandey aged about 8 years both sons of Lalmuni Devi (PW 6) were snatched from her. Some of the miscreants then told their associates not to kill the children whereupon A-1 asked his associates not to leave the children because when they would grow, they will take the revenge. In the meantime, the children who had gone to the mother were dragged back by the appellants and thereafter Shobhit Chamar (A-2) fired at them as a result thereof, both the children fell down and died. The appellants and their associates then assaulted some of the inmates who had sustained the injuries. All the six dead bodies were found lying in the court yard. This witness was searchingly cross-examined on behalf of the appellants but no material could be brought on record to disbelieve her evidence. The evidence of this witness is absolutely free from any infirmity and thus clearly establishes that the appellants and other associates entered into the house during the dead hours of Ist and 2nd January, 1989, they were armed with fire arms having a common object to eliminate male members of the family of Haridwar and in pursuance thereof they killed six persons. The evidence of Bindu Devi (PW 4) and Lachhi Devi (PW 7) is almost similar and in their evidence they asserted that they identified the appellants in the light that was burning on in the courtyard. Their evidence in all material particulars support the evidence of Bhajurama Devi (PW 2) and Lalmuni Devi (PW 6).

24. The courts below have very carefully gone through the evidence of these four eye witnesses. We have also undertaken the same exercise and in our opinion the courts below have committed no error whatsoever in coming to the conclusion that during the night in question, the appellants along with other dacoits entered into the house of Haridwar Pandey with deadly weapons and formed an unlawful assembly sharing a common object to eliminate male members of family of Haridwar. In prosecution of this common object, the appellants killed six persons two in each lot by using the fire arms. The trial

court for want of proper identification gave benefit of doubt to Khoohru Chamar (A-3) and Narad Chamar (A-4) and acquitted them of all the charges. As far as Ram Dular is concerned, it was stated that he was killed in police encounter during the pendency of trial and hence trial abated against him. Other miscreants who entered into the house during the said night could not be identified and as a result thereof, they could not be arraigned as accused.

25. The above findings recorded by the trial court and confirmed by the High Court do not suffer from any infirmity. On our careful consideration of evidence on record, we share and confirm the same view. The fact that both the appellants along with other dacoits came armed with deadly weapons during the dead hours would unmistakably show that they had come to the house of Haridwar Pandey with the common object in the first instance to finish Haridwar Pandey as he was suspected to be the killer of brother and nephew of Shobhit Chamar (A-2). Finding that Haridwar was not available in the house, the appellants and other members of the unlawful assembly committed the dacoity of the valuable property and thereafter Shobhit Chamar (A-2) shot down the six male persons of the family of Haridwar Pandey including two innocent children aged about 10 and 8 years.

26.At this juncture, it would be very necessary to refer to the evidence of Bhajuran.a Devi (PW 2) who during her cross-examinations on behalf of A-1 admitted that she did not see any fire arm in the hands of A-1. The evidence of these four eye witnesses is consistent to prove that A-1 shared the same common object with A-2 and other dacoits who had entered into the house of Haridwar Pandey and were insisting that whereabouts of Haridwar Pandey be disclosed to them and his gun be handed over. A-1 also actively participated in getting Jagarnath Pandey and Ram Iqbal Pandey with their hands tied from behind into the courtyard and thereafter A-2 pupped out bullets from his rifle. This evidence has got bearing when we consider the sentence to be awarded to A-1. The eye witnesses then stated that the appellants left the courtyard and within a short time came back along with Taranath Pandey and Mahendra Pandey and forced them to stand in the courtyard and thereafter A-2 fired at them and gunned down in the presence of the family members. Anil Pandey and Sunil Pandey who were sitting in the *Dumuha* here brought dragging by A-2. Having regard to the ages of the children, some of the dacoits asked A-2 to set them free and were accordingly freed. In the meantime, A-1 asked the miscreants not to spare the children because when they grow, they would take the revenge. A-2 and his associate

then brought the children forcibly from the lap of their mother Lalmuni Devi (PW 6) and thereafter A-2 and his associate gunned down them. A-2 then claimed that they had finished all the male members of Haridwar Pandey and now his heart is cooled down. They thereafter left the place of occurrence rejoicing the victory and giving slogans of success in the name of God.

27. Mr. R.K.Jain, learned Senior Advocate appearing for the appellants, however, urged that the prosecution has failed to establish any common object/intention on the pat of the appellants to commit the crime in question. He further urged that if they had a common object/intention to take the revenge, they would not have spared the ladies. This submission does not impress us in view of the ocular evidence of the four eye witnesses.

28. It was then contended for the appellants that the evidence of four eye witnesses who are close relatives of the deceased persons be not accepted as sufficient in the absence of corroboration from independent evidence. He further urged that the relations between A-2 and Haridwar had become strained and inimical because A-2 strongly believed that Haridwar Pandey was responsible for the murder of his brother and nephew. It is because of this enmity, the eye witnesses falsely implicated the appellants at the behest of Haridwar Pandey. This submission again is devoid of any merit. The courts below have very carefully scrutinized the evidence of four eye witnesses and found it trustworthy. We are in agreement with the appreciation of evidence done by the courts below and therefore, we uphold the finding as regards the complicity of both the appellants in the present crime.

29. Coming to the question of sentence, the trial court as well as the High court awarded death sentence to both the appellants having regard to their complicity, the common object shared by them, the degree of brutality and revengeful conduct exhibited by them. The trial court as well as the High Court had also referred to the law settled by this Court on the question of death sentence. The High Court while confirming the death sentence of both the appellants had referred to the decision of this Court in (1) *Bachan Singh* v. *State of Punjab,* [1980] 2 SCC 684. (2) *Machhi Singh* v. *State of Punjab.* [1983] 3 SCC 470 and (3) *Dhananjoy Chatterjee @ Dhana* v. *State of West Bengal,* [1994] 2 SCC 220. After considering the law laid down by this Court in all these three reported decisions, the High Court held that the present case is one of the rarest of rare cases where death sentence to both the appellants must be held to be the appropriate sentence. The High Court also considered the mitigating circumstances urged on behalf of the appellants against awarding

A the death sentence. In paragraphs 34. 35 and 36, the High Court has summarised the contentions raised on behalf of the Learned Counsel for the parties and concluded that the trial court had committed no mistake in awarding the death sentence to both the appellants and accordingly accepted the Reference and dismissed the criminal appeals filed by the appellants.

B

30. Mr. R.K. Jain, learned Senior Advocate appearing for the appellants heavily relied upon the minority decision rendered by Bhagwati, J. in the case of Bachan Singh (supra). Advocating the view expressed by Bhagwati, J., he urged that the present trend in the world is against the death penalty. Moreover, the present crime cannot be said to be the rearers of rare cases. He, therefore,
C urged that this is not a fit case where the appellants need to be awarded death sentence. In the facts and circumstances of this case, sentence of life imprisonment to both the appellants would meet the ends of justice. This argument completely overlooks the majority judgment which has accepted the constitutionality of the death sentence in the rarest of rare cases.

D

31. Having regard to the evidence of the eye witnesses and the facts proved in the present case, we may now deal with the question of sentence in respect of both the appellants separately. We may first deal with the question of sentence awarded to Shiv Prakash Pandey (A-1). It is no doubt true that Shiv Prakash Pandey (A-1) has been awarded the death sentence
E with the aid of Section 149 IPC as also on the basis of a general statement made by the four eye witnesses that the miscreants had gunned down the six persons during the incident in question. The evidence on record discloses that A-1, A-2 and other miscreants came together along with Jagarnath Pandey and Ram Iqbal Pandey with their hands tied behind and forced Ram Iqbal
F Pandey to give a knock on the door under the pretext that he wanted to drink water. When the door was opened by Bhajurama Devi (PW 2), A-1 and his associates entered into the house. A-1 also exhorted that no male number of Haridwar family should be kept alive. Being a member of an unlawful assembly sharing a common object, he was rightly found guilty with the aid of Section 149 IPC for committing six murders. But, however, Bhajurama Devi (PW 2) in
G her evidence has admitted that A-1 was not having any fire arm in his hands at the time of entire episode. Other three eye witnesses undoubtedly made a general statement that A-2 and other miscreants fired at the six persons who died on the spot. The evidence of all the four eye witnesses is consistent that Shobhit Chamar (A-2) had fired from his fire arm on all the six persons who
H died instantaneously. In the face of this evidence, a distinction based on the

degree of complicity and brutality will have to be drawn which has got a vital impact of awarding the sentence. It is well settled while awarding the sentence, the court has to bear in mind the crime and the criminal. Shobhit Chamar (A-2) had an axe to grind against Haridwar and his family members as he believed that Haridwar was responsible for causing murders of his brother and nephew. Shiv Prakash Pandey (A-1) as it appears from the record that he is not related to Shobhit Chamar (A-2) and, therefore, he might not be having the same degree of revenge and brutality as that of Shobhit Chamar (A-2) had, Keeping this distinction in mind, in our opinion, the case of Shiv Prakash Pandey (A-1) will not fall in the category of rarest of rare cases. This distinction was over looked by the courts below. We are, therefore, of the considered view that the death sentence awarded to Shiv Prakash Pandey (A-1) was not justified having regard to the facts and circumstances of the case. His case would not fall in the category of rarest of rare cases. We accordingly uphold the conviction of Shiv Prakash Pandey (A-1) under Section 302/149 IPC but however the death sentence awarded to him by the courts below is altered to one for life imprisonment.

32. Coming to the case of Shobhit Chamar (A-2), the evidence on record proves beyond every reasonable doubt that he was the principal offender/ miscreant who fired from his fire arm on all the six persons including the two innocent children. He had a deep routed revenge based upon suspicion about the murders of his brother and nephew by Haridwar Pandey which prompted him to take avenge against the family members of Haridwar and had gone to the extent of killing six persons belonging the family of Haridwar in a most brutal, heinous and barbaric manner. Nothing was suggested to the eye witnesses on behalf of A-2 that any of these deceased persons had played any role in committing the murders of his brother and nephew and at any rate having regard to the ages of Anil Pandey and Sunil Pandey it could not be even remotely suspected that they could be the assailants. Shobhit Chamar (A-2) wanted not only to teach a lesson to the family members of Haridwar but also to create a terror in the minds of the family members of Haridwar to satisfy his ego and muscle power. A-2 exhibited most inhuman conduct while rejoicing his victory after commission of the crime. It is in this background, we are of the considered view that the trial court as well as the High Court has committed no error in awarding death sentence to him.

33. Mr. B.B.Singh, Learned Counsel for the State of Bihar drew our attention to the recent judgment of this Court in *Shiv Ram and another* v. *State of U.P.*, with connected appeals [1998] 1 SCC 149. This decision to a

great extent is similar even on facts.

34. Mr. Jain was unable to point out any mitigating circumstance which could pursued us to alter the death sentence of A-2. In our considered view, the courts below were right in awarding the death sentence to Shobhit Chamar (A-2) as his case clearly falls within the ambit of rarest of rare cases. We accordingly confirm the death sentence of Shobhit Chamar (A-2).

35. The convictions of both the appellants on other counts i.e. under Sections 380 and 460 of the Indian Penal Code are also confirmed. Conviction and sentence of Shiv Prakash Pandey (A-1) under Section 27 of the Arms Act to stand set aside but, however, the conviction and sentence of Shobhit Chamar (A-2) under Section 27 of the Arms Act is confirmed.

36. In the result, conviction and death sentence of Shobhit Chamar (A-2) passed by the trial court and on Reference confirmed by the High Court is affirmed and his Criminal Appeal is dismissed. The judgment and order of conviction of Shiv Prakash Pandey (A-1) under Section 302/149 of the Indian Penal Code passed by the trial court and an appeal confirmed by the High Court is upheld but however the death sentence awarded to him by the trial court and on Reference confirmed by the High Court is altered to life imprisonment.

R.K.S. Appeal dismissed.