

A DILIP PREMNARAYAN TIWARI AND ANR.

v.

STATE OF MAHARASHTRA
(Criminal Appeal No. 1026 of 2008)

B DECEMBER 10, 2009

[V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Penal Code, 1860: s.302 – Murder – Inter-caste marriage by sister of A-1 – After seven months, A-1 along with A-2 and A-3 entered the house of her sister's husband and assaulted him, his father and other members of family – Three died and other seriously injured – Conviction under s.302 and death sentence awarded – On appeal, held: No infirmity in the order of conviction – Injured witness was sister of deceased – She was most natural witness and had opportunity to watch the dastardly attack – Her evidence was wholly credible and fully supported by medical evidence – Conviction is confirmed – Regarding sentence, A-1 was young person and not having any criminal antecedent – Murders were outcome of social issue like intercaste marriage – In death sentence matter, background of the criminal, his psychology, his social conditions and mindset for committing offence are also relevant – Murder was brutal, but weighing circumstances, particularly, about the mindset of A-1, death sentence is not justified – A-3 also is a person without any criminal antecedents and he joined the company of A-1 only out of his commitment as he was resident of the same house – A-2 had comparatively lesser role – In that view, he also did not deserve death sentence – They are liable to be awarded life imprisonment – However, in the peculiar circumstances of case, A-1 and A-3 shall not be released unless they complete 25 years of actual imprisonment – In case of A-2, however, since he had not assaulted the helpless ladies, he deserves life imprisonment in the ordinary sense – He shall have to

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*undergo the 20 years of actual punishment – Sentence/ A
Sentencing.*

Prosecution case was that 'S' sister of A-1 married deceased 'P'. The family of A-1 extremely opposed the marriage as the boy did not belong to their caste. The deceased 'A' and 'Bj' used to act as messengers between the couple before their marriage and were also threatened by A-1 and his mother A-5. B

The marriage took place on 29.10.2003. 'S' continued her education, after marriage and started residing with her husband 'P'. A-5, mother of 'S' advised her to leave 'P'. Sister of 'S' also persuaded her to leave 'P'. But she refused. 'S' became pregnant. On account of threats, 'S' was sent by deceased 'P' to his relative's house, PW-2. C

On the fateful day, P's father, his cousin 'Bj', his sister PW-4 and mother PW-8 were present in the house. At 1.15 A.M., A-1, A-2 and A-3 entered their house. A-1 and A-3 attacked P's father with knife on chest and stomach. 'P' tried to save his father. A-1 and A-3 assaulted him with knife and stabbed him in stomach and chest. A-1 asked A-2 and one unknown person to take 'P' out of the house and kill him. PW-4 tried to save her brother 'P'. 'Bj' caught hold of A-3 and asked him not to assault her. A-3 inflicted blows with knife over hand, chest and cheeks of 'Bj'. A-1 and A-3 also assaulted PW-4 and PW-8. A-2 inflicted injuries on the neck of 'A'. Thereafter accused person left the place. PW-4 who was severely injured gathered courage and contacted her uncle PW-1 on phone and informed about assault. PW-1 reached the spot of occurrence along with PW-2. Injured were taken to hospital. 'P' on way to hospital disclosed to PW-2 that A-1 to A-3 and one more person assaulted him and others. PW-4 was unconscious. 'P' died on way. When police reached the spot, they found dead bodies of P's father, D
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A 'Bj' and 'A'. PW-1 lodged FIR against A-1 to A-5. Trial court acquitted A-4 and A-5 but convicted A-1 to A-3 and awarded death sentence. High Court confirmed death sentence. Hence these appeals.

B Dismissing the appeals and modifying the sentences, the Court

C HELD: 1. The names of A-2 and A-3 were not found in FIR. Though the omission of names of A-2 and A-3 is significant, much importance cannot be given to this omission. The FIR was given by a person who had seen the body of his young son 'Bj' having been brutally murdered. He also saw the dead body of his brother-in-law and also came to know that the other three members of the family were also seriously injured in the incident. D The witness was bound to be excited and some scope would have to be given to the mental state of the witness at that time. The trial court as well as the High Court rightly did not attach much importance to this omission. [Para 14] [340-G-H; 341-A]

E 2.1. From the evidence of two important witnesses one of whom was the author of the FIR what transpires is that while the role played by A-1 was reflected in the FIR, the roles played by A-2 and A-3 were not reflected therein. Even the alleged disclosure by deceased 'P' to F PW-2 in the Ambulance Van would depend upon the evidence of PW-4 and PW-8 who were also present in the same van. PW-4 was an injured witness. As per evidence of PW-9, the doctor, PW-4 had suffered as many as four contused lacerated wounds. All the injuries appeared to G be serious injuries and the injuries were stated to be possible with sharp edged weapon. Therefore, there can be no dispute about the presence of PW-4 on the scene. Significantly enough, in her lengthy cross-examination, very little was asked to her about the actual incident of

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assault. This witness was the most natural witness and had also the opportunity to watch the dastardly attack and she had withstood her cross-examination extremely well insofar as the attack by accused A-1 and A-3 was concerned. She was not injured till her father, deceased brother 'P' and 'Bj' were attacked by the accused persons. [Paras 16, 17, 19 and 20] [342-D; 342-E; 344-E]

2.2. The evidence of PW-4 about the role played by A-1 and A-3, to begin with, and thereafter by A-2 in assaulting the deceased 'A' has gone almost unchallenged. There is practically nothing in the cross-examination and the whole cross-examination was only on fringes. She also went to the extent of telling the colours of the clothes which were worn by 'Bj' and her father as also described the clothes worn by 'P'. That claim was also not disputed nor demolished in cross-examination. Very strangely, the cross-examination was directed at the omissions of the claims which the witness had not made in her examination-in-chief and on the basis of the answers given in cross-examination which was not permissible. The whole evidence of the witness was extremely natural and the witness did not try to unnecessarily implicate anybody else. She did not assign any role to the unknown person. It is only as regards deceased 'A' that she attributed the assault to A-2 against him. Her whole evidence being the evidence of injured eye-witness was wholly credible as held by the trial court as well as the High Court. Even her evidence, insofar as the assault on herself and her father and 'Bj' is concerned, is supported by the medical evidence. Therefore, the contention that A-3 was not identified merely because his name did not appear specifically in the FIR cannot be accepted. The contention to the effect that A-2 was not identified at all by this witness also is rejected. This clear cut eye-witness account by PW-4 and

A PW-8 is enough to convict A-1, A-2 and A-3. [Paras 22 and 23] [346-C-H; 348-E]

B 3.1. When the matter was pending before the High Court for confirmation, the accused filed an application under Section 391 Cr.P.C. to take on record dying declaration of 'P'. In that application, production of additional evidence under Section 391, Cr.P.C. was suggested on the ground that though such a dying declaration was given to the doctor PW-5 by deceased 'P', the same was not brought on record by the prosecution and the same was suppressed from the defence before the trial court. It was stated to be a vital omission on the part of the prosecution and it was further claimed that it went to the root of the matter as far as the culpability of A-2 was concerned. It was also pointed out that in the said dying declaration, the name of A-2 was not mentioned and that due to inadvertence, the said dying declaration was not confronted during the evidence of PW-5. The application was rejected by the High Court. Very strangely, this application was opposed by the Public Prosecutor as also the defence counsels. The High Court observed in its order dated 01.09.2007 that though the doctor, PW-5 was examined as witness and though the copy of this dying declaration was furnished to all the accused persons during the trial, no question was put with regard to dying declaration of 'P' by the counsel for A-2, before the trial court. It was on these grounds that the High Court observed that in view of the strong opposition by A-1 and A-3 to the application, the High Court was not inclined to exercise its discretion in favour of the appellant and on that ground the application was rejected. [Para 24] [349-B, H]

H 3.2. The proceedings before the High Court were in the nature of an extended trial. The confirmation

proceedings are always the original proceedings. The High Court was dealing with the accused who was facing death sentence. Therefore, merely because no question was asked to the doctor, PW-5, the document could not have been held back and an opportunity was bound to be given by getting the document proved if necessary by re-calling PW-5 by the High Court itself. The task of the Public Prosecutor is not only to secure the conviction, he has a duty to the Court. He is an officer of the Court and, therefore, in all fairness, the document should have been brought on record and secondly, even if PW-5 who recorded the dying declaration was not confronted with that dying declaration, that opportunity could not have been denied before the High Court. The production of the document is allowed. [Para 25] [350-A-E]

3.3. Since A-1 and A-3 did not have opportunity to cross-examine the witnesses about the document, the said document would not be considered against A-1 and A-3. Insofar as A-2 is concerned, it is true that his name does not appear in the said dying declaration but that would be of no consequence for the simple reason that the evidence of the eye-witness completely fixes the criminal liability on the part of A-2. Therefore, even if the said dying declaration is somewhat helpful to A-2 that by itself would not wipe out the evidence of the two eye-witnesses whose evidence was credible as held by the courts below. The conviction of all the three appellants as ordered by the Sessions Judge and confirmed by the High court was correct and is confirmed. [Para 28] [351-H; 352-A-C]

Rampal Pithwa Rahidas & Others. v. State of Maharashtra 1994 Supp (2) SCC 73, referred to.

4.1. On the question of sentence, a close scrutiny of the judgment does not show any effort on the part of the High Court to consider the mitigating circumstances,

A though such exercise was done by the trial court. The mitigating circumstances considered by the Sessions Court were the age of the accused persons being between 20-25 years; and their past clean record. [Para 32] [353-G, H]

B *Bachchan Singh v. State of Punjab* 1980 (2) SCC 684, relied on.

C *Machhi Singh v. State of Punjab* 1983 (3) SCC 470 as also in; *Dhananjay Chatterjee @ Dhana v. State of West Bengal* 2004 (9) SCC 751; *Ronny alias Ronald James Alwaris & Ors. v. State of Maharashtra* 1998 (3) SCC 625; *Ediga Anamma v. State of Andhra Pradesh* 1974 (4)SCC 443; *State of U.P. v. Dharmendra Singh & Anr.* 1999 (8) SCC 325; *Lehna v. State of Haryana* 2002 (3) SCC 76, referred to.

D 4.2. All murders are foul, however, the degree of brutality, depravity and diabolic nature, differ in each case. Insofar as A-1 is concerned, there can be no doubt that he was the chief architect of the crime. There can also be no doubt that he entered the house of the victims in the dead of night. Obviously, the visit was not intended to be a courtesy call. He was duly armed and in company of three other friends. The psychology of A-1 and why he wait for seven months are relevant considerations for deciding the question of sentence. A-1 was a young person not even having crossed his 25 years of life and not having any criminal antecedent. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, these social issues are relevant, while considering the death sentence in the circumstances as these. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of

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this case. [Paras 39 and 40] [356-E-G]

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4.3. No doubt, the murder was brutal. But weighing all the circumstances, particularly, about the mindset of A-1, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. [Para 42] [358-D-H; 359-A-B]

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Om Prakash v. State of Haryana 1999 (3) SCC 19; *Ram Pal v. State of U.P.* 2003 (7) SCC 141; *Ravji alias Ram Chandra v. State of Rajasthan* 1996 (2) SCC 175; *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* JT 2009 (7) SC 248, referred to.

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4.4. A-3 also does not deserve the death sentence. Even he is a person without any criminal antecedents and he appears to have joined the company of A-1 only out of his commitment as he was shown to be a resident of the same house. A-2 has comparatively a lesser role. Admittedly, he did not assault 'P' or his father to begin with. Who assaulted 'P' and 'A' is still not clear, as it could also be that in the assaults the leading role could have been taken by the unknown accused. In that view, he also does not deserve the death sentence. Ordinarily, they would be liable to be awarded the life imprisonment. However, in the peculiar circumstances of this case, mere life imprisonment which is capable of resulting into 20 years of imprisonment or 14 years of actual imprisonment may not be adequate punishment for these accused persons. Considering the overall circumstances, A-1 and A-3 deserve the life imprisonment. But they shall not be released unless they complete 25 years of actual

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A imprisonment. In case of A-2, however, since he had not assaulted the helpless ladies nor had he taken part in the assault on father of 'P', he deserves the life imprisonment in the ordinary sense. He shall have to undergo the 20 years of actual punishment. [Paras 44 and 45] [360-C-H]

B *Haru Ghosh v. State of West Bengal JT 2009 (11) SC 240; Swami Shradhanand @ Murali Manohar Mishra v. State of Kamataka JT 2008 (8) SC 27, relied on.*

Case Law Reference:

C	1994 Supp (2) SCC 73	referred to	Para 26
	1980 (2) SCC 684	relied on	Para 30
	1983 (3) SCC 470	referred to	Para 30
D	2004 (9) SCC 751	referred to	Para 31
	1998 (3) SCC 625	referred to	Para 31
	1974 (4) SCC 443	referred to	Para 31
E	1999 (8) SCC 325	referred to	Para 31
	2002 (3) SCC 76	referred to	Para 31
	1999 (3) SCC 19	referred to	Para 42
F	2003 (7) SCC 141	referred to	Para 42
	1996 (2) SCC 175	referred to	Para 42
	JT 2009 (7) SC 248	referred to	Para 43
G	JT 2009 (11) SC 240	relied on	Para 45
	JT 2008 (8) SC 27	relied on	Para 45

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

H No. 1026 of 2008.

DILIP PREMNARAYAN TIWARI AND ANR. v. STATE 331
OF MAHARASHTRA

From the Judgment & Order dated 1.11.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 1086 of 2006 and Confirmation Case No.2 of 2007.

WITH

Crl. No. 1025 of 2008

Gaurav Agrawal, S.N. Raj, Sushil M. Shukla, Balaji Srinivasan for the Appellants.

Sushil Karanjkar (for Ravindra Keshavrao Adsure) for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment will dispose of two appeals, they being Criminal Appeal No.1026 of 2008, filed on behalf of the appellant accused Dilip Premnarayan Tiwari and Manoj Paswan, as also Criminal Appeal No.1025 of 2008 filed by Sunil Ramashray Yadav. Their appeals against their convictions by the Sessions Judge have been dismissed by the Bombay High Court and the death sentence awarded to all the three accused has also been confirmed.

2. As many as five accused persons were tried by the Trial Court for offences under Section 302, 307, 452 read with Section 120B of the Indian Penal Code ('IPC' for short) and Section 34 and Section 120B, IPC (substantive). Eventually, original accused No. 4, Premnarayan Brijkishore Tiwari and accused No.5 Talsa Devi were acquitted by the Trial Court whereas the other three accused persons, namely, accused No.1, Dilip Premnarayan Tiwari, accused No.2, Sunil Ramashray Yadav and accused No.3, Manoj Tulshi Paswan were convicted under different Sections for various offences including Section 302 read with Section 34, Section 307 read with Section 34, IPC and Section 452 read with Section 34 of the IPC. While they were awarded death sentence for the offence under Section 302, they were awarded 10 years'

A rigorous imprisonment with fine of Rs. 5,000/- each, and in default, to suffer 5 month's imprisonment each for offence under Section 307 read with Section 34, IPC and three year's rigorous imprisonment and to pay a fine of Rs. 1,000/- each, in default, to suffer one month's imprisonment.

B 3. Since it was a death sentence matter, reference was made to the High Court for the confirmation of the death sentence and the accused also filed appeals against their conviction and the punishment therefor before the High Court. C The High Court has confirmed the death sentence while the appeals of the accused persons were dismissed. That is how these two appeals have come before us.

4. As per the prosecution case, accused No.1, Dilip Premnarayan Tiwari, is the son of original accused No. 4, D Premnarayan Brijkishore Tiwari, and original accused No. 5, Tuls Devi is the wife of accused No.4. Accused No.1, Dilip's sister Sushma fell in love with deceased Prabhu who used to live in the neighbourhood of their residential house. Ultimately, she got married to Prabhu. Prabhu being a Keralite and belonging to 'Ezhava' caste, the marriage was not approved of by the family of Sushma since Sushma belonged to a Brahmin caste from the State of Uttar Pradesh. The whole family of Sushma was extremely opposed to the marriage which took place on 29.10.2003 before the Registrar of Marriages, E Bandra, Mumbai. According to the prosecution, there were efforts to call back Sushma into her familyfold. According to the prosecution, she was threatened and so were her in-laws by F original accused No.1, Dilip.

5. The love affair of Sushma with deceased Prabhu was going on for about 5-6 years and deceased Abhayraj @ G Bachhu and Bijit used to act as messengers between the two. They were also threatened during the love affair by Dilip as well as his mother, original accused No.5, Tuls Devi. According to the prosecution, accused Dilip had assaulted Sushma with H

kicks and fist blows on account of her love affair with Prabhu and had also threatened that in case she married Prabhu, both will be eliminated. However, as has been stated earlier, the marriage took place on 29.10.2003 and after the marriage Sushma started residing with her husband, deceased Prabhu. She was a college going girl at the time of her marriage and she continued her education even after her marriage. Accused No. 5, Tulsia Devi also advised her to leave Prabhu. She also promised her that her second marriage would be arranged in Uttar Pradesh. Her elder sister Kalpana, who is already married had also tried to contact Sushma and had come to the house of Sushma to meet her. She had also met Sushma on 08.05.2004 in her college and tried to persuade her that her husband was not smart and was not earning anything and, therefore, she should accompany her to their hometown in Uttar Pradesh where they had selected one youth serving in the Air Force and that Sushma should marry him. Sushma straightaway refused all these proposals. In fact, on account of these threats, Sushma had suggested that a police complaint should be lodged against Tiwari family. However, she was assured by her husband Prabhu that everything would be alright with the passage of time. There were even proposals that on account of the threats, Sushma and Prabhu should leave Bombay and stay in his hometown in Kerala. However, instead of doing that, Sushma, who was pregnant at that time, was sent to Prabhu's relative's house in Andheri and that is how Sushma was shifted to the house of Shashidharan, PW-2. Shashidharan's wife was the sister of Prabhu's mother, Indira. One Balan, PW-1 also used to live in Andheri. His wife was the third real sister of Prabhu's mother, Indira.

6. The ghastly incident took place on the night of 16/17th May, 2004. On that day, Prabhu's father Krishnan Nochil himself, his nephew Bijit, Prabhu's sister, Deepa (PW-4) and Indira (PW-8) were present in the Noichil household. At about 1.15 a.m. at night someone knocked the back side door of their house. Deceased Krishnan Nochil opened the door. According

A to the prosecution, the three appellants, namely, Dilip (A-1),
 Manoj (A-3) and Sunil (A-2) and one more unknown person
 entered the house. Dilip and Manoj assaulted Krishnan Noichil
 with knife over the chest, stomach and when Prabhu rushed to
 save his father, accused No. 1, Dilip and accused No. 3, Manoj
 B assaulted him also with knife and stabbed him in stomach and
 chest. As per the prosecution case, Dilip asked Sunil and one
 unknown person to take Prabhu out of the house and kill him.
 When Deepa (PW-4) started proceeding ahead to save her
 brother, Dilip and Manoj rushed towards her with knife and at
 C that time Bijit who had come there caught hold of accused Manoj
 and urged him not to assault her. At that time accused Manoj
 inflicted blows with knife over hand, chest and cheek of Bijit as
 a result of which Bijit fell down. The accused Dilip and Manoj
 came near Deepa and inflicted blows with knife on her face and
 D body and when Deepa fell down, Indira, Prabhu's mother who
 was awakened, tried to intervene. At that time, she was also
 assaulted by Dilip (accused No.1) and Manoj (accused No.3).
 At that time, Sunil who had gone out along with the unknown
 assailant came back and inflicted knife blows over the neck of
 E Abhayraj @ Bachhu who had in the meantime come there.
 Abhayraj was the immediate neighbour and used to live in
 between the houses of Tiwari household and Noichil household.
 Having been assaulted, he ran outside when Sunil (original
 accused No.2) chased him and assaulted him also. Accused
 Dilip and Manoj then left the house and while leaving, Manoj had
 F dropped the knife in that room. Deepa who was severely injured
 gathered her courage and after 10-15 minutes of the assault
 contacted PW-1, Balan on phone and informed him about the
 incident of assault at the instance of accused No.1 Dilip,
 accused No.3 Manoj and accused No. 2 Sunil and one more
 G person. Indira, mother of Prabhu who was also seriously injured
 somehow opened the front door and shouted '*bachao bachao*'.

7. At this time Prabhu was lying in an injured condition in
 front of the door and was shouting '*mummy mummy*'. Balan
 H (PW-1), on receiving the phone call in the dead of night from

Deepa, rushed to the Noichil household in Khairpada Waliv at about 4'O clock in the morning only to find that his son Bijit and brother-in-law Krishnan Nochil were dead and lying in the pool of blood while Deepa, Indira and Prabhu who were alive, were shifted to the local dispensary by Head Constable Bhosale who was on *bandobast* duty at check post, Sativali Khind, who had rushed to the spot on being informed. Bhosale had also sent a message to Manikpur Police Station to send one mobile van. Bhosale also brought one tempo and arranged to send the three injured to Primary Health Centre, Navghar.

8. By that time, Balan who was informed by Deepa had contacted Shashidharan and come to Navghar along with Shashidharan. Thereafter, all the injured were taken to one Bhagvati hospital as they were very seriously injured and could not have been treated in the Primary Health Centre at Navghar. Deepa and Indira were not in a condition to speak, however, Prabhu disclosed to Shashidharan who was accompanying them in the mobile van that Sushma's brother Dilip, Manoj and Sunil and one more person had inflicted knife blows and had injured him and other persons of the family.

9. The injured Prabhu reached Bhagvati hospital along with Shashidharan in the mobile van and there he also succumbed to his injuries. Deepa had lost her consciousness while Indira was also very seriously injured and they were treated in the Hospital. But before that, at about 5 a.m. Balan came to the police station and lodged the First Information Report which was registered as C.R.No. 1-144/04 registered at about 5.30 a.m. for the offence under Section 302 and 307, 452 read with Section 34 of the IPC. The police reached the spot and PSI Shri Bharve prepared the inquest *Panchnama* of the dead bodies of Krishnan Nochil and Bijit. He also prepared the inquest *Panchnama* of Abhayraj who was lying outside the house near K.T.Maidan and, thereafter, all the three dead bodies were sent for post-mortem examination. Investigation officer also prepared the spot *Panchnama* and seized blood stained handkerchief,

A blood stained iron knife which were lying there and also collected the blood samples lying on the floor. Deepa's statement came to be recorded on 18.05.2004 after she regained consciousness. Prabhu's body was also sent for post-mortem.

B 10. During the investigation, the statements of witnesses like Sushma and Indira came to be recorded. Dilip was arrested on 29.5.2004 from Uttar Pradesh. One knife, pant and shirt having blood stains were recovered at the instance of Dilip. Since Indira was very seriously injured, her statement could be recorded on 02.06.2004 in the Hospital. Accused Sunil came to be arrested on 02.06.2004. He has also disclosed on 05.06.2004 about the knife and the blood stained clothes which were seized. Accused No.2, Manoj came to be arrested only on 22.06.2004 while the parents of Dilip (original accused No.1), Premnarayan Tiwari (original accused No. 4) and Tulsa Devi (original accused No.5) were also arrested on 25.6.2004. After the completion of the investigation the charge sheet was filed against five named accused and on that basis charges were framed against all the accused persons. The Trial Court, however, acquitted original accused Nos.4 and 5 since they had not taken part in the dastardly attack and the charge of conspiracy under Section 120B, IPC also was not proved against them, but awarded death sentence to the remaining accused and that is how the matter has come before us.

F 11. Shri Gaurav Agrawal, Advocate appeared for accused No.1, Dilip and accused No. 3, Manoj and Shri S.N. Raj, Advocate appeared for accused No.2, Sunil while the State of Maharashtra was represented by Shri Sushil Karanjkar, Advocate. Shri Gaurav Agrawal attacked the findings of the Trial Court and the High Court in respect of both the accused persons. The mainstay of his argument was that the whole prosecution case stood on extremely weak basis inasmuch as all the prosecution witnesses were interested witnesses and as such it was very risky to rely on the evidence of those

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witnesses. Learned counsel severely attacked the so-called oral dying declaration by deceased Prabhu alleged to have been made by him in the Ambulance Van to Shashidharan (PW-2). Learned counsel argues that Prabhu who was severely injured and who died barely within few hours of his reaching the Hospital could not be said to be in the proper physical condition to make a dying declaration. The counsel, therefore, urged that the acceptance of such a weak piece of evidence for corroborating the prosecution evidence could not be accepted. The learned counsel also invited our attention to the fact that though from the beginning, the case of the prosecution was that there were, in all, four accused persons; the fourth accused person besides the three appellants could neither be identified nor brought before the law. Therefore, the whole prosecution case had become mysterious. As regards the evidence of the eye witnesses, the learned counsel pointed out that the said evidence of Deepa (PW-4) and Indira (PW-8) was unnatural, apart from the fact that it was riddled with material contradictions and omissions and was contradictory *inter se*. The learned counsel also commented upon the medical evidence suggesting that the said evidence was not commensurate with the eye witness account. As regards the rest of the circumstantial evidence, the learned counsel pointed out that it was not trustworthy. Insofar as the verdict of the High Court in confirming death sentence was concerned, the learned counsel urged that this was not a rarest of rare case though as much as four persons had lost their lives.

12. Shri Raj, learned counsel appearing on behalf of the accused No.2, Sunil adopted the arguments of Shri Agrawal insofar as they pertained to the evidence of the eye witnesses as also the other aspects of the case. However, Shri Raj invited our attention to the fact that after reaching the Hospital, the deceased Prabhu had made a dying declaration which was recorded by Doctor Shri S.S. Anakal (PW-5). He pointed out that the said dying declaration was counter signed by the Investigating Officers and the said dying declaration also bore

- A the thumb impression of deceased Prabhu Krishnan Nochil. Learned counsel further pointed out that this dying declaration formed part of the charge-sheet and was supplied to the accused persons along with the same. He further pointed out that though this dying declaration was not put to the witness,
- B Dr. Anakal (PW-5) during the Trial before the Sessions Judge, an application to that effect was filed before the High Court and the High Court rejected the same. Learned counsel issued a notice under Section 294 (2) Cr.P.C. to the Public Prosecutor to admit this document whereupon the Public Prosecution has
- C admitted the said document. According to the learned counsel, therefore, the non-consideration of the said dying declaration very seriously prejudiced at least accused No.2, Sunil whose name was not to be found in the said dying declaration. Learned counsel, therefore, urged that the participation of Sunil
- D (accused No.2) was highly suspicious, more particularly, in view of the fact that the identity of Sunil was not established by the prosecution either by holding Test Identification Parade or even in the Court hall as the witnesses had not specifically identified the accused persons individually. Shri Raj also urged that the absence of Sunil's name in the First Information Report given
- E by Balan (PW-1) speaks volumes and was not realized by the Courts below. Shri Raj further urged that there was no reason for the Courts below to presume that Sunil Yadav was a friend of Dilip and Manoj as there was no evidence brought on record regarding their acquaintance and even the prosecution had not
- F collected any evidence to establish the nexus between accused No.2, Sunil and the other two accused persons. Shri Raj, therefore, argued that accused Sunil was bound to be given the benefit of doubt.
- G 13. It has come in evidence of Deepa (PW-4) that immediately after the incident, though injured seriously, she managed to call Balan (PW-1) on his landline and narrated the incident to him. She undoubtedly claims that she had taken the names of Dilip (A1), Manoj (A-3) and Sunil (A-2) as also one
- H more person as the persons who had assaulted her family

members and herself. Because of the presence of mind of A
Deepa to call Balan, Balan immediately went into action and
firstly contacted Shashidharan (PW-2), also a resident of
Andheri as Balan. Both these witnesses were related to the
family inasmuch as while Balan is the husband of PW-8, Indira's B
sister, Shashidharan is the husband of Balan's wife's sister
meaning that she is the third sister of Indira though Balan does
not specifically say so in his evidence. Shashidharan deposed
that he was woken up by Balan at about 1.30 a.m. and was
told that Dilip, Manoj and Sunil along with their associate had
assaulted the members of Nochil family. Significantly enough, C
Sushma, wife of deceased Prabhu was also at that time present
in his household, she having come to his house for staying
allegedly on account of the threats given to her by Dilip.
Shashidharan then seems to have contacted his brother Gopal
Krishnan and with his help contacted Vasai Police Station and
informed about the incident. However, he was informed by D
Vasai Police Station that Waliv Kherpada where incident had
taken place comes within the jurisdiction of Manikpur Police
Station. According to this witness, he narrated this incident to
Manikpur Police Station by calling them but they refused and
instead asked them to contact Waliv Police Station. Thus, they E
left Andheri at about 3 a.m. and reached the spot of occurrence
Waliv at about 4 a.m. After reaching there they came to know
that the injured Deepa and Indira along with injured Prabhu had
been sent to the Primary Health Centre of Wasai. The claim of
Shashidharan (PW-2) is that he and Balan reached Manikpur F
Police Station at about 5 a.m. where Balan lodged the
complaint. We have seen the said report made by Balan vide
Exbt. P-27. It is to be seen specifically that in that report he
informed that Deepa Nochil had informed him at about 1.15
a.m. on 17.05.2004 that Dilip who was the brother of her sister- G
in-law Sushma and his three associates had trespassed into
the house and had beaten all the inmates and had also given
knife blows to them and they still were engaged in assault and,
therefore, Balan should come as early as possible to Vasai.

A Significantly enough, the names of accused Manoj and accused
 Sunil are not to be seen in this report. It has also come in the
 report that since Dilip and his family members did not approve
 of love marriage of Sushma with Prabhu and inspite of their
 opposition Sushma had married Prabhu; hence Dilip and his
 B associates had given blows with sharp weapon to his brother-
 in-law Krishnan, sister-in-law Indira, her daughter Deepa, her
 son Prabhu and his son, Bijit. It was also pointed out that
 Krishnan and Bijit had died in the attack and Indira, her daughter
 C Deepa and her son Prabhu were seriously injured and were
 taken to the dispensary. Though in his evidence Balan (PW-1)
 insisted that he had also told the names of Dilip (A-1), Manoj
 (A-3) and Sunil (A-2), the names of Manoj and Sunil are not to
 be found in the FIR. Though there was a reference that Dilip
 (A-1) was accompanying three other associates, the witness
 D was specific in asserting that from the spot of occurrence he
 did not go directly to the dispensary but went to the Police
 Station first.

14. The further significant thing about the FIR is that there
 is no reference to the death of Abhayraj who had also lost his
 E life. It is slightly unusual that though this witness as per his
 admission knew Abhayraj, there is no reference of the name
 of Abhayraj in the FIR. Shri Gaurav Agrawal, learned counsel
 tried to take advantage of this and pointed out that the name
 of Manoj (A-3) was not to be found in the FIR and that
 F advantage must go to Manoj on that account. It is also seen
 that the witness had also failed to speak about the body of
 Abhayraj. In our opinion, though the omission of names of
 Manoj and Sunil is significant, much importance cannot be
 given to this omission. The FIR was after all given by a person
 G who had seen the body of his young son having been brutally
 murdered. He had also seen the dead body of his brother-in-
 law and had also come to know that the other three members
 of the family of Krishnan were also seriously injured in the
 incident. The witness is bound to be excited and some scope
 H would have to be given to the mental state of the witness at

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that time. The significance of this omission will be considered when we individually consider the case of each accused. The Trial Court as well as the High Court have not attached much importance to this omission and rightly so. However, the fact must be noted at this juncture that though this witness PW-1, Balan had come to know about the role played by Manoj (A-3) and Sunil (A-2), their names were not mentioned in the report. After these two persons went to the Primary Health Centre from the Police Station an Ambulance was called as all the three injured persons were in a serious condition and possibly could not have been treated in the Primary Health Centre and, therefore, they had to be shifted to the other Hospital.

15. At that time, during the journey to the hospital, Prabhu is stated to be conscious and had told the names of Dilip, Manoj and Sunil to Shashidharan who was accompanying the injured in the Ambulance Van. That is the claim of Shashidharan (PW-2). As per his claim, Prabhu had taken the names of Dilip, Manoj and Sunil and one more person as the persons who had inflicted blows with knife on Prabhu. The witness described Manoj (A-3) and Sunil (A-2) as the friends of Dilip (A-1). The witness was candid enough to tell that he did not know them personally and further claimed that Prabhu had told him that they were Dilip's friends. His statement was recorded on 17.05.2004 in the evening. He denied and was contradicted on the question of Balan's wife accompanying them. However, he asserted further that the wife of Balan was not accompanying them. That, in our opinion, is an insignificant contradiction. Other omissions were also proved in the evidence but they are all insignificant omissions. Sushma was allegedly present at the time when Balan came to her house and a suggestion was given to him that they enquired from Sushma about the names of Manoj and Sunil. He, of course, refuted this suggestion. He was candid enough to admit that he did not know the names of fathers and surnames of Manoj and Sunil. He had not even seen Manoj and Sunil till then. He deposed in the Court that he had never gone to the house of Dilip at any time nor talked to

- A any of his family members. There is a significant omission in his statement to the effect that he admitted that he had not stated before the police that Sushma's brother Dilip, Manoj, Sunil and one more person inflicted blows with knife. He also asserted that he had not stated that Prabhu had told him that
- B Manoj and Sunil were Dilip's friends. It was specifically suggested that Prabhu had never disclosed him about Manoj and Sunil being Dilip's friends. It was also suggested that Prabhu had not disclosed about the assault by these three persons on Prabhu's family members. He obviously refuted those suggestions.
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16. From the evidence of these two important witnesses one of whom was the author of the FIR what transpires is that while the role played by Dilip has been reflected in the FIR, the roles played by Manoj and Sunil are not to be seen as reflected in the FIR. Even as regards the alleged disclosure by deceased Prabhu to this witness in the Ambulance Van would depend upon the evidence of Deepa and Indira who were also present in the same van.

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17. When we see the evidence of Deepa, it is seen that she was an injured witness. As per the evidence of PW-9, Dr. Mahendra Chandak, Deepa had suffered as many as four contused lacerated wounds over right side of upper and lower lip, left shoulder, left lumber region with omentum protruding out and over left gluteal region.

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18. All the injuries and, more particularly, the injury Nos. 3 and 4 do appear to be serious injuries which have been reflected in medical Exbt.57 and the injuries were stated to be possible with sharp edged weapon like articles 6, 17 and 19. Therefore, there can be no dispute about the presence of Deepa on the scene. In her evidence Deepa asserted that she also knew the accused in the case and then points out that she heard the knocking of the door at about 1.15.-1.30 a.m. She then saw the door being opened by the father after putting on

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the electric light and the further fact that as soon as the door was opened accused Manoj, Dilip and Sunil and one unknown person entered the house and they were all armed with knife. She asserted that accused Dilip (A-1) and Manoj (A-3) started stabbing her father. She was terrified and, therefore, shouted and her brother Prabhu also came and when he intervened accused Dilip (A-1) and Manoj (A-3) stabbed him also on his stomach and chest. She then claims that she tried to intervene to save her brother. Accused Dilip told accused Sunil and the unknown person to take Prabhu outside and accordingly Sunil and the other unknown person took Prabhu outside. She then claimed that Dilip and Manoj then rushed towards her. However, Bijit came out and caught hold of Manoj and urged him not to assault Deepa and, therefore, accused Manoj started inflicting blows with knife on the stomach and chest of Bijit also. It is further stated that Dilip and Manoj rushed towards her and inflicted knife blows on face, stomach and other parts of her body. She shouted and it is at that time her mother Indira came and she was also given blows by Manoj and Dilip because of which her mother fell down. She then adds that afterwards accused Sunil entered the room and deceased Abhayraj also entered the room and Sunil inflicted the blow with knife on him and he ran away and was followed by Sunil. At that point of time, according to her, Manoj dropped the knife in his hands and then accused Dilip and Manoj left. She also asserted that she had told the names of Manoj, Dilip and Sunil and one more unknown person when she telephoned her uncle Balan (PW-1). According to her, she heard her brother Prabhu who was lying outside the front door calling 'mummy mummy'. She, thereafter became unconscious and regained her consciousness only on the next day in Bhagwati Hospital where she was admitted for about 1-1/2 months. A statement came to be recorded only on 18.05.2004. In her examination-in-chief, she has asserted that she knew Manoj and accused Sunil as Dilip's friends. She was extensively cross-examined as regards the topography of the place and the topography of her house as also the role played by him.

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A 19. Before we consider her evidence, it must be noted that
 though she did not know the father's name of accused Manoj
 Paswan and further though she did not know about his job,
 business or service she asserted that prior to the marriage of
 Prabhu with Sushma, accused Manoj had interacted with her
 B on many occasions. She also asserted that Manoj lived in the
 house of accused Dilip only. She also asserted that after the
 marriage between Prabhu and Sushma, she had not gone to
 the house of Dilip. She also denied the suggestion that Dilip
 had never come to their house after the marriage of Sushma.
 C She asserted that accused Dilip had come to their house and
 given threats. In her cross-examination, it has come that
 Abhayraj was her next door neighbour and used to exchange
 the messages between Prabhu and Sushma. She has also
 spoken about the efforts on the part of Dilip's sister Kalpana
 and Dilip's mother to persuade Sushma to come back to her
 D house even after the marriage.

20. Significantly enough, in her lengthy cross-examination,
 very little is asked to her about the actual incident of assault.
 This witness was the most natural witness and had also the
 E opportunity to watch the dastardly attack and she had withstood
 her cross-examination extremely well insofar as the attack by
 accused Dilip and Manoj was concerned. She was not injured
 till her father, deceased brother Prabhu and Bijit were attacked
 by the accused persons. A wild suggestion was thrown to her
 F about the fact that she had not seen the incident as she was
 also being assaulted with her mother, which Deepa has, of
 course, refuted. Again a wild suggestion was thrown at her that
 the unknown person had disconnected the electric supply and
 the telephone connection and thereafter, the incident took place.
 G Again one fantastic suggestion was given to her that on the
 night of incident her brother and Abhayraj had gone to Shivaji
 Nagar and consumed liquor and they quarreled there and
 Abhayraj was killed at Shivaji Nagar and thereafter those
 unknown persons chased her brother up to their house. Some
 H omissions were shown in her evidence and she admitted that

she had not stated that all the four persons were armed with knife. She also accepted that she had not given the description of knife since she was not asked. Insofar as the cross-examination at the instance of accused No.2, Sunil is concerned, one very significant fact has come in her evidence to the effect that she asserted that she had told the names of Sunil and Manoj as Dilip's friends. She had accepted that such fact was not written in her statement. She had also stated before the police that accused Sunil and the unknown person took Prabhu out of the room and she did not know as to why this fact is not written in her statement before police. She stated that it was not true to say that she made a false statement that Sunil was Dilip's friend. She further stated it was not true to say that she made a false statement that her father opened the door and accused Sunil and others entered the house armed with knives. She also stated that it was not true to say that she made a false statement that accused Sunil and one unknown person took Prabhu out of the room as stated.

21. In spite of all these omissions which have been proved, we are convinced that Deepa had seen all the three accused persons. Not only that, she had also identified all the three accused persons. She had no reason not to identify Dilip and Manoj who were staying almost in her neighbourhood. Her assertion that Manoj was residing in Dilip's house has come in her cross-examination and has not been explained anywhere. As far as accused No. 2, Sunil is concerned, it must be noted that a poor attempt was made that Yogita who was her friend had also a brother called Sunil. Merely because the witness had not stated that Sunil and Manoj were the friends of Dilip, it cannot be said that Sunil was not identified. Her claim that she knew all the accused persons could not be demolished in spite of the lengthy cross-examination.

22. Shri Raj, learned counsel tried to submit that she had not identified the accused persons individually in the Court. The argument is clearly incorrect. If she had claimed that she had

- A known all the accused persons that could have been challenged in the cross-examination by asking her to identify the accused persons. The defence backtracked on that issue and did not choose to ask her to identify the accused individually. It was obvious that if she very well knew Dilip and Manoj, which claim cannot be disputed, the remaining third accused would be Sunil and she would be in a position to identify him individually and probably that is why the defence did not take the chance. The other two accused were also related to Dilip, being father and mother of Dilip. Therefore, it was obvious that the witness had meant only accused No. 2 as Sunil. The evidence of the witness about the role played by Dilip and Manoj, to begin with, and thereafter by Sunil in assaulting Abhayraj has gone almost unchallenged. There is practically nothing in the cross-examination and the whole cross-examination was only on fringes. She also went to the extent of telling the colours of the clothes which were worn by Bijit and her father as also described the clothes worn by Prabhu. That claim has also not been disputed nor demolished in cross-examination. Very strangely, the cross-examination was directed at the omissions of the claims which the witness had not made in her examination-in-chief and on the basis of the answers given in cross-examination which was not permissible. The whole evidence of the witness is extremely natural and the witness has not tried to unnecessarily implicate anybody else. She has not assigned any role to the unknown person. She has also not exaggerated by stating that Sunil also assaulted herself, Indira or Bijit. It is only as regards Abhayraj that she has attributed the assault to Sunil against him. Her whole evidence being the evidence of injured eye-witness was wholly credible as has been held by the Trial Court as well as the High Court. Even her evidence, insofar as the assault on herself and her father and Bijit is concerned, is supported by the medical evidence which evidence we will consider in the latter part of the judgment. We, therefore, cannot accept the contention raised by Shri Agrawal that Manoj was not identified merely because
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his name did not appear specifically in the FIR. We also reject the contention of Shri Raj to the effect that Sunil was not identified at all by this witness. This takes us to the evidence of Indira, another witness injured during the assault.

23. Indira also asserted in her evidence that she knew the accused persons including Sunil (accused No.2) and accused Manoj (accused No.3). She was woken up owing to the shrieks of Deepa and Krishnan. She saw that Deepa and her husband were in the injured condition when she entered the TV room. It is significant that at that time, accused Dilip and accused Manoj rushed towards her and inflicted blows with knife over her neck, chest, face and hands. She has also seen accused Sunil (accused No.2) entering the room at that time which version completely tallies with the version of Deepa. She also attributed the neck injury of Abhayraj to accused Sunil. It is significant that she has not referred to deceased Prabhu who had been dragged outside. She then asserted that accused Sunil chased Abhayraj who ran outside the house from the back door. She asserted that Prabhu disclosed to her that Dilip (accused No.1), Manoj (accused No.3) and Sunil (accused No.2) and one more person had assaulted him with knife. She has also extensively been cross-examined. In her cross-examination, she had rightly asserted that when she entered the room, Prabhu was not present in the room and Deepa had also fallen down. She was asked about Deepa Kakad who resided adjacent to their house. There is an important omission about Prabhu's having stated to her that it was accused Dilip, Manoj and Sunil who had assaulted him. In spite of that omission, it cannot be forgotten that Indira is an injured eye-witness herself and had seen assault on deceased Abhayraj by Sunil (accused No.2). She has also seen Dilip and Manoj. Her claim in the examination-in-chief that she knew accused Dilip (accused No.1), Manoj (accused No.3) and Sunil (accused No.2) and further claim that Sunil and Manoj were friends of Dilip has not been demolished at all in the cross-examination. In fact there does not appear to be any challenge

A to that claim. It must be noted that both Deepa (PW-4) and
 B Indira (PW-8) have not spoken about any dying declaration
 having been made by Prabhu to PW-2, Shashidharan while they
 were being taken to the Hospital, probably because both
 C Deepa and this witness, Indira were unconscious while Deepa
 D regained her consciousness only in the Hospital. This witness
 was very seriously injured and regained her consciousness after
 quite some time. The only cross-examination on behalf of
 E accused No.2 was that there were a few persons with the name
 Sunil in their locality. She also had not stated that Sunil was a
 friend of Dilip. In our opinion, these omissions do not help the
 defence as there was no reason for these witnesses to falsely
 implicate Sunil. There is really no strained relationship of this
 witness with Sunil at least shown in their cross-examination.
 Under these circumstances, the witnesses would gain nothing
 by falsely implicating Sunil and Manoj. There is absolutely no
 cross-examination in respect of the identity. Therefore, the
 evidence of these two witnesses was rightly believed by the
 Trial Court as also by the High Court. In our opinion, this clear
 cut eye-witness account by Deepa and Indira is enough to
 convict Dilip (accused No.1), Manoj (accused No.3) and
 accused Sunil (accused No.2).

24. During the arguments before us Shri Raj gave a notice
 under Section 294 (2), Cr.P.C. to the State counsel to admit
 the document which is so-called dying declaration of Prabhu
 F dated 17.05.2004. This dying declaration was a part of the
 charge-sheet and the copy thereof was supplied to the accused
 persons. Very strangely, this dying declaration was not brought
 forth on record by the prosecution. The said dying declaration
 now having been admitted by the Public Prosecutor can be read
 G in evidence. It is counter signed by Dr. S.S. Anakal (PW-5). It
 is also counter signed by the Investigating Officer Kailash
 Bharve. It bears a thumb mark. This was made by deceased
 Prabhu wherein it has been stated that at about 1.30 a.m.
 H Prabhu's father was assaulted by 2-3 persons with knife and
 when he came out, he was also assaulted. At that time accused

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Dilip and accused Manoj inflicted knife blows on him and at that time two more persons entered the house and started assaulting them. Further it is stated that while Dilip and Manoj were trying to assault his mother, he tried to stop them. He has also suggested that since he had married Dilip's sister Sushma, Dilip, Manoj and their other associates had entered their house and assaulted them. In fact when the matter was pending before the High Court for confirmation, the accused filed an application under Section 391 of the Code of Criminal Procedure to take on record this dying declaration. We have seen that application. In that application production of additional evidence under Section 391, Cr.P.C. was suggested on the ground that though such a dying declaration was given to Dr. S.S. Anakal by deceased Prabhu, the same was not brought on record by the prosecution and the same was suppressed from the defence before the Trial Court. It was stated to be a vital omission on the part of the prosecution and it was further claimed that it went to the root of the matter as far as the culpability of accused Sunil is concerned. It was also pointed out that in the said dying declaration, the name of Sunil Yadav was not mentioned and that due to inadvertence, the said dying declaration was not confronted during the evidence of PW-5, Dr.S.S.Anakal. The application was rejected by the High Court. Very strangely, this application was opposed by the Public Prosecutor as also the learned counsel appearing for Dilip (accused No.1) and Manoj (accused No.3). The High Court observed in its order dated 01.09.2007 that though Dr. Anakal was examined as witness and though the copy of this dying declaration was furnished to all the accused persons during the trial, no question was put with regard to Prabhu's dying declaration by the counsel for accused No.2, Sunil before the Trial Court. It was on these grounds that the High Court observed that in view of the strong opposition by Dilip (accused No.1) and Manoj (accused No.3) to the application, the High Court was not inclined to exercise its discretion in favour of the appellant and on that ground the application stood rejected.

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A 25. To say the least, we are surprised by the order passed
 by the High Court. In fact the proceedings before the High Court
 were in the nature of an extended trial. The confirmational
 proceedings are always the original proceedings. The High
 Court was dealing with the accused who was facing death
 B sentence. Therefore, merely because no question was asked
 to Dr. S.S. Anakal (PW-5), the document could not have been
 held back and an opportunity was bound to be given by getting
 the document proved if necessary by re-calling Dr. Anakal by
 the High Court itself. The task of the Public Prosecutor is not
 C only to secure the conviction, he has a duty to the Court. He is
 an officer of the Court and, therefore, in all fairness, firstly the
 document should have been brought on record and secondly,
 even if Dr. Anakal who recorded the dying declaration was not
 confronted with that dying declaration, that opportunity could not
 D have been denied before the High Court since the proceedings
 before the High Court were in the nature of original proceedings
 and an extended trial. We are surprised that the Public
 Prosecutor opposed the application. Fairness of the trial is the
 basic requirement in the criminal law. We think that the Public
 Prosecutor ought not to have opposed the production of the
 E document. We, therefore, allowed the production of the
 document.

26. In a reported judgment *Rampal Pithwa Rahidas &*
Others. v. State of Maharashtra [1994 Supp (2) SCC 73]
 F somewhat similar situation occurred where this Court reiterated
 the duty of the investigating agency to act honestly and fairly.
 In that case a communication-cum-application by an approver,
 before he was made approver wherein he had claimed the bail
 on the ground that he knew nothing about the offence and he
 G was unnecessarily being incarcerated, was not confronted to
 him at the time of trial. The Court took the view that though the
 witness was not confronted with that statement and in a strict
 sense it was not brought before the Court, yet the same
 communication could be looked into by the Courts. The Court

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also observed in paragraph 37 as under:

"The quality of a nation's civilization," it is said, "can be largely measured by the methods it uses in the enforcement of criminal law" and going by the manner in which the investigating agency acted in this case causes concern to us. In every civilized society the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. Let no guilty man go unpunished but let the end not justify the means! The Courts must remain ever alive to this truism. Proper results must be obtained by recourse to proper means – otherwise it would be an invitation to anarchy."

27. Shri Raj urged that we should send back the matter for further examination of Dr. S.S. Anakal and, if necessary, the other witnesses like the Investigating Officer who has also counter signed the said dying declaration. Shri Gaurav Agrawal also urged that in case the dying declaration is sent back then further opportunity will have to be given even to accused Nos. 1 and 3 to further cross-examine the witnesses as the dying declaration clearly goes against at least accused Nos. 1 and 3.

28. Ordinarily, we would have sent back the matter. However, we cannot ignore the fact that all the three accused persons are facing death sentence awarded by the Trial Court and confirmed by the High Court. We would not, therefore, increase the agonies of the accused persons by sending back the matter to the High Court; in stead, since accused No.1 and 3 did not have opportunity to cross-examine the witnesses

A about the document, we will not consider the documents
against accused Nos. 1 and 3. Insofar as accused No.2, Sunil
is concerned, it is true that his name does not appear in the
said dying declaration but in our considered opinion that would
be of no consequence for the simple reason that the evidence
B of the eye-witness completely fixes the criminal liability on the
part of accused No.2, Sunil. Therefore, even if the said dying
declaration is somewhat helpful to Sunil, that by itself will not
wipe out the evidence of the two eye-witnesses whose
evidence was credible as held by the Trial Court as well as the
C Appellate Court.

29. Thus in our view, the conviction of all the three
appellants before us as ordered by the Sessions Judge and
confirmed by the High court is correct and we confirm the same.

D 30. This, however, takes us to the question of sentence.
This is a case where the death sentence has been ordered by
the Sessions Judge which has been confirmed by the High
Court. We must, at this juncture, take the overall circumstances
while taking into consideration the death sentence awarded by
E the Courts below. As held in *Machhi Singh v. State of Punjab*
[1983 (3) SCC 470] as also in *Bachchan Singh v. State of*
Punjab [1980 (2) SCC 684], we must weigh the circumstances
justifying the grant of death sentence vis-à-vis the mitigating
circumstances. The High Court considered the following
F circumstances justifying the imposition of death penalty”

“(a) Helpless victims

(b) Unarmed victims

G (c) Victims woken from sleep at midnight

(d) Manner of inflicting injuries, 20-30 serious injuries on
death of the deceased, whereas even a single injury would
have been sufficient to kill, shows the barbarous attitude;

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(e) Attacking ruthlessly six persons, Deepa and Indira were let off presumed to be dead, seeking to wipe off the entire family; A

(f) Attack on every vital organ;

(g) Young boy Bijit was brutally assaulted; B

(h) Not only Prabhu, even the messenger boy Abhayraj was brutally assaulted;

(i) The time chosen was past midnite hence clearly premeditated; C

(j) Assault on lower caste based on caste hatred:

(k) Marriage took place on 29.10.2003 and the assault was on 17.05.2004 i.e. after a lapse of seven months. As Dilip was totally opposed to the marriage, the above attack was highly premeditated and not at the heat of moment. D

31. The High Court relied on the judgment of *Dhananjay Chatterjee @ Dhana v. State of West Bengal* [2004 (9) SCC 751] and quoted extensively therefrom. One other case *Ronny alias Ronald James Alwaris & Ors. v. State of Maharashtra* [1998 (3) SCC 625] was also relied on by the High Court. The High Court extensively quoted from the judgment in *Ediga Anamma v. State of Andhra Pradesh* [1974 (4) SCC 443] and *State of U.P. v. Dharmendra Singh & Anr.* [1999 (8) SCC 325] as also *Lehna v. State of Haryana* [2002 (3) SCC 76]. E F

32. However, even a close scrutiny of the judgment does not show any effort on the part of the High Court to consider the mitigating circumstances, though such exercise has been done by the Trial Court in paragraph 42 of its judgment. The mitigating circumstances considered by the Sessions Court are: G

"(1) The age of the accused persons being between 20- H

A 25 years;

(2) Their clean past, in the sense they were not involved in any offence previously”

B 33. Shri Raj and Shri Gaurav Agrawal addressed us extensively on the mitigating circumstances. As far as accused No.1, Dilip and accused No.3 Manoj are concerned, the learned counsel first pointed out that apart from the two circumstances considered by the Sessions Judge, namely, the young age of the accused persons and there being no criminal antecedents, C there were number of other mitigating circumstances which the Courts below had not considered. It was submitted that accused No.1, Dilip must have felt morally justified in attacking the family members due to the fact that his younger sister had D Keralaite. Therefore, to preserve the family honour, Dilip had taken the revenge of the so-called insult of his family. It was also pointed out that since Manoj was the resident of the same house, he also may have been persuaded to join the crime as also Sunil who was all through described as the friend of Dilip.

E 34. Learned counsel further argues that insofar as Manoj was concerned, he apparently had no enmity though he might have felt it necessary to display the loyalty to the family in whose house he was living and it could have been only out of that, that the murders took place. Learned counsel further argued that the F deaths of Bijit and Abhayraj were in reality not the intended deaths but they became the victims of the circumstances since Bijit tried to stop the assailants. He was not supposed to be present there but his fate drew him in the house and he became the prey of the murderous assault. Perhaps nothing would have G happened had he not come to the room. He not only came in the room but also tried the stop the assailants from assaulting.

H 35. As regards Abhayraj, learned counsel pointed out that he was not there in the beginning but he being the immediate neighbour must have come attracted by the shrieks and lost his

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life. According to the learned counsel, there is very little or almost no evidence available as to how Abhayraj was killed and by whom. The counsel pointed out that the only allegation was that Sunil (A-2) dealt a blow on his neck and when he ran away he was followed by Sunil and the unknown person. Learned counsel also highlighted that the possibility of the said unknown person being responsible for the death of Abhayraj and Prabhu could not be ruled out since, as per the evidence of Deepa, Sunil and that unknown person took Prabhu out and then it is not established as to how many blows were dealt on Prabhu and, therefore, Sunil alone could not be held to be responsible. There may be a substantive contribution on the part of that unknown person to the crime, at least for the murder of Prabhu and Abhayraj. Learned counsel further highlighted the role of the unknown person and the fact that the said unknown person remained a mysterious part of the investigation and trial. Therefore, it was ultimately urged that it could not be deemed to be an assault with a common intention to wipe out the whole family as has been tried to be suggested by the prosecution.

36. Learned counsel further submitted that it could not be said that the accused could not be reformed, particularly, because their antecedents were clean or at least the prosecution was unable to point out any criminal activity in the past on the part of the accused persons.

37. Shri Raj, appearing for accused No.2, Sunil also supported these arguments and added that, in reality, Sunil could not be attributed with the brutal attack. Undoubtedly, Sunil did not assault either Krishnan Nochil or Prabhu, to begin with, he was merely attributed assault on Prabhu after Prabhu was dragged out for which there was no evidence as to whether it was he or other unknown person who had given blows to him. As far as the allegation regarding Abhayraj is concerned, learned counsel pointed out that like Prabhu, there was no evidence available as to how many blows had been given on Abhayraj's body and by whom. Learned counsel pointed out that

A it was only one blow which was given to Abhayraj. Learned
counsel also urged that it must have been because of the
friendship between the other accused and Sunil that Sunil had
accompanied the accused persons but it could not be said that
Sunil also shared the common intention to wipe out the whole
B family. In fact, Sunil did not act, to begin with, insofar as the
assaults on Krishnan and Prabhu were concerned. It was further
pointed out that Sunil was merely 19 years of age at the time
of incident.

C 38. The Trial Court has made some exercise in weighing
the mitigating circumstances though such conscious effort does
not seem to have been made by the High Court. In terms of
the law laid down in *Bachan Singh's* case (cited supra) as also
in *Machhi Singh's* case (cited supra) and number of
subsequent decisions of this Court thereafter, it would be now
D our task to weigh those circumstances.

E 39. All murders are foul, however, the degree of brutality,
depravity and diabolic nature, differ in each case. It has been
held in the earlier decisions of this Court which we may not
repeat that the circumstance under which the murders took
place, differ from case to case and there cannot be a
straightjacket formula for deciding upon the circumstances
under which the death penalty is a must.

F 40. Insofar as the accused No. 1, Dilip is concerned, there
can be no doubt that he was the chief architect of the crime.
There can also be no doubt that he entered the house of the
victims in the dead of night. Obviously, the visit was not intended
to be a courtesy call. It was obvious that he had visited being
duly armed and in company of three other friends. What was
G then the psychology of Dilip, accused No.1 and why did he wait
for seven months are the relevant questions which must attract
our attention.

H 41. Sushma was the younger sister of this accused. It is a

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common experience that when the younger sister commits something unusual and in this case it was an intercaste, intercommunity marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. Dilip, therefore, must have been a prey of the so-called insult which his younger sister had imposed upon his family and that must have been in his mind for seven long months. It has come in the evidence that even if the marriage was performed with Prabhu, there were efforts made by the family members of Dilip to bring Sushma back. It has come in evidence that mother of Dilip tried to lure back Sushma and so did her other married sister Kalpana who actually went on to meet Sushma in her college. Those efforts paid no dividends. In stead, Sushma kept on attending the college thereby openly mixing with the society. This must have added insult to the injury felt by the family members and more particularly, accused Dilip. Why did he wait for seven months? The answer lies in the fact that Sushma became pregnant and thus reached a point of no return. Till such time as she became pregnant, there might have been some hopes in the family to win her back but once she became pregnant, even that distant hope faded away and, in our opinion, that is the reason why this ghastly episode took place. As if all this was not sufficient, Dilip himself must have had the feeling of being cheated. It is not that Dilip did not know Prabhu who was living only three houses away from his house. The secret love affair which went on between Sushma and Prabhu for which Abhayraj acted as a messenger must have raised the feeling of being cheated by Prabhu. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so-called non-Brahmin status of Prabhu. It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly

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A was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

D 42. No doubt, the murder was brutal. However, it has been pointed out by Shri Gaurav Agrawal as also Shri Raj that this was not a diabolic murder nor had the murderers acted in depravity of their minds by disfiguring the bodies. The incident must have taken place barely within 10-15 minutes when they came, assaulted the family members and left. True it is that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana* [1999 (3) SCC 19] where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In fact in one other case reported as *Ram Pal v. State of U.P.* [2003 (7) SCC 141] total 21 persons were killed as the accused trapped them in a house and burnt the house. Shri Karanjkar, appearing on behalf of the State very strongly contended as against this, that in the present case while four

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persons were killed, two helpless ladies were also assaulted and very seriously injured and it is only because the accused thought that those two ladies had died and left, that the lives of Deepa and Indira were spared. Therefore, in the circumstances of this case, we must lean in favour of the death sentence. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. No doubt in *Ravji alias Ram Chandra v. State of Rajasthan* [1996 (2) SCC 175], this Court held as under:

“...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society’s cry for justice against the criminal”....”

43. It is also true that this case was followed in as many as six cases where the death sentence was approved of. However, in his judgment reported as *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [JT 2009 (7) SC 248] Hon. Sinha, J. pointed out that this judgment is *per incuriam* as the law laid down therein is contrary to the law laid down in *Bachan Singh’s* case (cited supra) where the principle has fallen out to the effect that the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime but also give due

A consideration to the circumstances of the criminal. It is because of this that we have ventured to consider the mindset of accused No.1, Dilip and the vicious caste grip that might have catapulted the crime committed by him. We would, thus, follow *Bachan Singh's* case (cited supra) and the principles therein rather than following the narrow approach given in *Ravji's* case (cited supra).

44. Once we decide not to award the death sentence to accused No.1, Dilip, the accused No.3, Manoj also deserves not to be given death sentence. Even he is a person without any criminal antecedents and he appears to have joined the company of Dilip only out of his commitment as he was shown to be a resident of the same house. We, therefore, do not think that even he deserves death penalty. Accused No.2, Sunil has comparatively a lesser role. Admittedly, he has not assaulted Krishnan or Prabhu, to begin with. Who has assaulted Prabhu and Abhayraj is still not clear, as it could also be that in the assaults the leading role could have been taken by the unknown accused. In that view, he also does not deserve the death sentence. The question is then how are these accused persons to be dealt with. Ordinarily, they would be liable to be awarded the life imprisonment.

45. However, in the peculiar circumstances of this case, mere life imprisonment which is capable of resulting into 20 years of imprisonment or 14 years of actual imprisonment may not be adequate punishment for these accused persons. Considering the overall circumstances, we feel that accused No.1, Dilip and accused No.3, Manoj who assaulted Krishnan, Prabhu and the two helpless ladies would deserve the life imprisonment. But we direct that they shall not be released unless they complete 25 years of actual imprisonment. In case of Sunil, however, since he had not assaulted the helpless ladies nor had he taken part in the assault on Krishnan, he deserves the life imprisonment in the ordinary sense. He shall have to undergo the 20 years of actual punishment. Such a

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course has been held to be permissible in *Haru Ghosh v. State of West Bengal* [JT 2009 (11) SC 240] pronounced by this Bench, authored by V.S.Sirpurkar, J. This view was taken on the basis of the law laid down in *Swami Shradhanand @ Murali Manohar Mishra v. State of Kamataka* [JT 2008 (8) SC 27] where this Court after considering several cases held that such a course was permissible. We accordingly dismiss these appeals, however, modifying the sentences as shown above. The appeals are disposed off accordingly.

D.G.

Appeals dismissed.

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