SUNDER SINGH

v.

STATE OF UTTARANCHAL

(Criminal Appeal No. 1164 of 2005)

SEPTEMBER 16, 2010

[V.S. SIRPURKAR AND A.K. PATNAIK, JJ.]

Penal Code, 1860: s.302 – Gruesome murders – Accused allegedly put house on fire, when victim family was having dinner inside, and locked the house from outside – When one victim tried to escape, accused gave sword attack on his neck – All the victims except one succumbed to burn injuries – Dying declaration – Surviving victim suffered 70% burn injuries – Accused remaining absconded – Found after 12 years – Trial court convicted accused u/s.302 and awarded death sentence – High Court affirmed the same – On appeal, held: No reason to interfere with the order of conviction and sentence – The dying declaration was found to be voluntary and truthful – Surviving victim was a natural witness and she herself was injured – The accused was her husband's cousin thus no scope for mistaken identity moreso when the house was on fire and there was ample light available for identifying the accused – Her evidence was accepted by courts below and was found to be reliable – There were some contradictions and omissions in her evidence but they were not substantial enough so as to affect the credibility of her evidence – Sentence/Sentencing – Evidence – Dying declaration.

Sentence/Sentencing: Death sentence – House set on fire while victim family was having dinner inside – Door bolted from outside – Sword blow given on neck of one victim who tried to escape – Entire family except one succumbed to burn injures – Accused held guilty of murder – Courts below held that it was rarest of rare case and awarded death sentence – Held: No reason to interfere with the order of sentence – The

A *offence was committed with pre-meditated mind and in a cruel and cold blooded manner – There was no immediate provocation and all this was only due to previous enmity over property – Out of five persons who lost their life, two were barely 16 and 19 years of age – All of them were without any*
B *arms and were helpless – The accused showed scant respect for the law by absconding for about 12 years – Circumstances of the case not sufficient to mitigate the horrible crime – Penal Code, 1860 – s.302.*

Code of Criminal Procedure, 1973: s.313 – Trial courts
C *ought to be extremely careful about the questions to be put to the accused persons in examination u/s.313 – Record must show that meticulous care is taken to put all the incriminating circumstances to the accused – Trial courts sometimes are extremely casual about this aspect – They are*
D *expected to be extremely careful in this behalf – Administration of criminal justice – Criminal trial.*

Evidence:

Contradictory statement – Held: If the witness is not
E *specifically given an opportunity to explain contradiction, it cannot be taken note of.*

Dying declaration – When a witness making dying declaration survives, the said declaration does not become
F *substantive evidence and it can only be corroborative evidence of oral testimony.*

Investigation-Duty of investigating agency – Held: Investigation should not be conducted in casual and careless
G *or slipshod manner – Incompetent investigation should not result in the accused getting an unfair advantage – Need to give regular police service to distant villages – Policing system.*

The prosecution case was that on the fateful day, the
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victim family was taking dinner on the ground floor of their house. The accused came there with jerry cans filled with petrol and a burning torch and after pouring petrol inside the room and after setting fire with the torch, closed the door from outside. When one of the victim managed to come out, the accused gave him a sword blow on the neck. As a result, the victim fell down and died outside the house. The other five family members also sustained severe burn injuries. PW-2 informed the patwari, PW-13, about the incident. When PW-13 reached the spot along with the other witnesses, PW-3 and PW-4, two victims narrated the incident to them. The dying declaration of two victims were recorded by the magistrate. One of the victim who gave dying declaration died while the other who suffered 70% burn survived. The injured victims were rushed to the hospital. Some victims died on the way and some in the hospital. The accused remained absconded and was found after 12 years. The matter was then committed to Sessions.

The trial court convicted the accused under Sections 302, 307 and 436 IPC on the basis of the evidence of PW-1, the dying declaration and the other substantive evidence and awarded death sentence. The High Court confirmed the conviction and the sentence. The instant appeal was filed challenging the conviction and the sentence.

Dismissing the appeal, the Court

HELD: 1.1. PW-1 was a natural witness and there could be no dispute about her presence on the spot. She was also an injured witness having suffered 70% burns. Considering the overall evidence which was accepted by the trial court and the High Court, PW-1 was found reliable and the courts below committed no error in accepting her evidence. There were undoubtedly some contradictions

A and omissions in her evidence but they were not substantial enough so as to affect the credibility of her evidence. Unless a contradiction is proved by putting it to the person who records the original statement, such contradiction is of no consequence. If the witness is not
B specifically given an opportunity to explain such contradiction, it cannot be taken note of. The seizure-panchnamas duly proved by PW-4 showed that there were three jerry cans found which were cut from the above, and as such, were open and they were smelling
C of petrol. Therefore, there can be no dispute that actually the accused had carried the three jerry cans full of petrol and the witness had seen the accused pouring petrol from one of them. It can also be that the accused might have utilized the two jerry cans in sprinkling the petrol
D on the roof from outside and then opening the door, threw the petrol from the third jerry can remaining with him. The witness had after all seen the three jerry cans being presented in the court and had, therefore, tried to improve upon the story. However, if the three jerry cans were actually found by PW-13 immediately on the spot in
E a semi-burnt condition, the so-called contradiction loses all its rigor. PW-1 was very candid when she admitted before the court that she had not stated that her husband was cut by the accused and that she had not, therefore, referred to the pistol in her statement. She was also
F candid in saying that she had not seen the accused assaulting her husband. She then asserted that the accused assaulted her husband on his neck only once. She also asserted that besides the accused, she did not see anyone else on the spot. All this suggested her
G truthfulness. She did not implicate anybody else than the accused. Therefore, the fact that the accused was alone and further that one of the victim after opening the door, ran out and was thereafter immediately found cut would lead to the only inference that it was the accused alone

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who assaulted him. At that time, the whole house was burning. The witness explained that the other people came and extinguished the fire, otherwise the whole house would have burnt. There was, therefore, enough light for the witness to see the accused. There was nothing to disbelieve this witness on account of the so-called contradictions. In fact, the presence of PW-1 alongwith the other victims on the spot, was not challenged. Had she not been present there, she would not have suffered 70% burns. She thus had the best opportunity to watch everything. She herself had lost all her kith and kin including her husband and, therefore, she would not be interested in screening the real accused. She cannot be viewed as the interested person. In fact, the doctor, PW-12, in his first medical statement specifically mentioned that she was fully conscious when she was examined at the hospital. Therefore, it cannot be said that she was not able to see and comprehend. [Paras 11, 12, 13] [943-E-F-H; 944-A-B; 945-B-E; 946-D-H; 947-A-H]

1.2. There can be no dispute that the dying declaration can be made a basis of conviction. For basing the conviction on the dying declaration, the declaration must pass all the tests of voluntariness, the fit condition of mind of the declarant and the declarant was not being influenced by any other factors. The critical examination of the dying declaration showed that it was voluntary, truthful and uninfluenced by any other factor. The only criticism against this dying declaration was that the magistrate had not got it certified by the doctor to the effect that the witness was in a fit state of mind to make the dying declaration. However, the magistrate (PW-9) very specifically asserted that he had obtained the opinion of the doctor, but there was no cross-examination at all on this very vital aspect. Therefore, the assertion that he had asked the doctor and was

A convinced that the injured was in a fit position to make a dying declaration had gone unchallenged. This witness very specifically stated that he completed all the formalities and had taken all the cautions. After examining all the circumstances, particularly, the evidence of the B magistrate, the dying declarations of PW-1 and the other victim did pass the test of credibility. There can be no dispute that when a witness making a dying declaration survives, the said dying declaration does not remain substantive evidence. Of course, the dying declaration C of PW-1 cannot be substantive evidence and it can only be corroborative evidence of oral testimony since she survived. However, the evidence of the other declarant did become substantive evidence and wholly reliable. The trial court and the appellate court committed no error D in relying on that dying declaration. [Paras 12, 18, 19] [945-E-H; 946-A-C; 950-D-F; 951-B-D]

Laxman v. State of Maharashtra 2002 (6) SCC 710 – relied on.

E *Shanmugham @ Kulandaivelu v. State of Tamil Nadu* (2002) 10 SCC 4; *P.V. Radhakrishnan v. State of Karnataka.* (2003) 6 SCC 443; *Ramprasad v. State of Maharashtra* 1999 (5) SCC 30 – referred to.

1.3. The assertion of PW-3 in the examination-in-chief F that one of the victim had told him that when they were having their food at that time the accused had poured the petrol and had put the house on fire, was not challenged in the cross-examination. The only challenge in the cross-examination was that he had himself not seen the G incident. The evidence of this witness also thus went unchallenged. Though the Panchnamas on which these two witnesses have put their signatures, were put to the accused, however, this fact of oral dying declaration to both of them was not put to the accused. It is really a H matter of concern that even the trial Judge did not frame

the question in Section 313 Cr.P.C. examination specifically putting the names of these two witnesses. Thereby a very important circumstance is lost. The trial courts ought to be extremely careful about the questions to be put to the accused persons in examination under Section 313 Cr.P.C. Record must show that meticulous care is taken to put all the incriminating circumstances to the accused. It is found that the trial courts sometimes are extremely casual about this aspect and fail to put all the incriminating circumstances to the accused. The trial courts are expected to be extremely careful in this behalf. [Para 21] [951-G-H; 952-A-G]

1.4. Nothing was brought in the cross-examination of the doctors excepting the suggestion to practically all of them that if there was an accidental fall of a can containing oil or petrol in the hearth, there could be a possibility of the witnesses receiving burn injuries. Such possibility was merely an imagination and there was no material whatsoever to see any such possibility. This is all the more true considering that one of the victim was given a blow by a sword resulting in his instantaneous death. The defence thus could not get any advantage from the medical evidence. [Para 23] [954-B-C]

2. The investigation in the instant case was not up to the mark. In the distant hilly areas in the State of Uttarakhand, the investigation is conducted by village police through a Patwari who is the lowest officer in the revenue department. Much more could have been done in the case. Some of the victims were alive when the investigating officer allegedly reached the spot as per his own evidence. He could have recorded their dying declarations. That was not done. Even the FSL report was not obtained and filed. The trial was started only after the arrest of the accused after 12 years. All this suggested that the investigation was conducted in a very casual and

careless manner. Same was the story of prosecution. The prosecuting agency did not even bother to look into the questions before they were asked to the accused in his Section 313 Cr.P.C. examination. Merely because this heinous offence took place in the remote corner of District Bageshwar which at the time when the offence took place was Almora District, it did not mean that the investigating agency could do some slipshod investigation and thereafter the prosecution could be allowed to be equally casual as it appears to have been in conducting the prosecution. This also speaks about the duty of the trial court judge who cannot be a mere spectator to what goes on in the name of the trial. The trial judge has to control the trial by active application of mind. A time has come when the village police system prevalent in the State of Uttaranchal in respect of distant areas should be changed and the distant villagers be given the protection and services of the regular police. It is really strange that the four Districts which are in the plains have had advantage of the police system while in the remaining Districts, the distant part of those Districts are deprived of a police system. Such deprivation undoubtedly results in affecting the law and order situation, the detection of crimes and the protection of the poor villagers. In fact effective policing is the need of the whole society, urban as also rural. However, all these factors have not prejudiced the accused. Even with these factors, the prosecution fully proved the heinous offence committed by him. The incompetent investigation should not result in the accused getting any unfair advantage. [Para 24] [954-D-H; 955-A-E]

3. As regards the sentence, it must be said that the instant case is one of the rarest of the rare cases, in which the whole family was wiped out. Five persons lost their life while the sixth person, a helpless lady, who is

now left to be the only member of the family, has to live her life with 70% burn injuries. The murder was committed in a cruel, grotesque and diabolical manner. The act of pouring petrol when all the family members were together in a room and setting it to fire and then closing the door from outside was the most fouled act, by which the accused actually intended to burn all the persons inside the room. Barring PW-1, everyone in that room was burnt. When one of the victim somehow, was able to open the room and come out, even he was not spared and almost beheaded by the accused. It is clear that the accused had done this with pre-meditated and cold-blooded mind, as he had taken the trouble of carrying petrol to his own cousin's house. He was also carrying a sword, and probably prepared himself to fire on the complainant party, as a pistol with two bullets in it was also found on the spot. The accused had shown extreme depravity of mind in causing a sword blow on the neck of the victim who himself was burnt and was trying to escape. A murder by burning, by itself, would be a very cruel act. The agony caused to the dying victims because of their burn injuries would be enormous. Again, when it is seen that there was no immediate provocation to the accused and all this only was on account of the enmity going on in respect of the family lands, the enormousness of the crime is increased by many folds. Out of the five persons who lost their life, two were barely 16 and 19 years old. Their life was nipped in the bud. All the victims were without any arms and were helpless. They could not have even saved themselves and did succumb to the burn injuries. The balance sheet of the aggravating circumstances thus exceeds the mitigating circumstances. In fact, there was no mitigating circumstance in this case. The accused showed scant respect for the law by remaining absconding for about 12 years and only because of that

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he could not be brought to books. It is only his accidental arrest and being lodged in another jail that the prosecuting agency was able to prosecute him. The age is not on the side of the accused. Insofar as the other circumstance of the accused remaining under the shadow of death sentence right from 2004 is concerned, the circumstance, by itself, is not sufficient to mitigate his horrible crime. [Para 35] [965-D-H; 966-A-H]

Bachan Singh v. State of Punjab **AIR 1980 SC 898**; *Machhi Singh & Ors. v. State of Punjab* **AIR 1983 SC 957**; *Devender Pal Singh v. State of NCT of Delhi* **AIR 2002 SC 1661**; *Atbir v. Govt. of NCT of Delhi* **JT 2010 (8) SC 372**; *Ravji Alias Ram Chandra v. State of Rajasthan* **1996 (2) SCC 175**; *Dhananjoy Chatterjee v. State of West Bengal* **1994 (2) SCC 220**; *State of U.P. v. Dharmendra Singh & Anr.* **1999 (8) SCC 325**; *Triveniben v. State of Gujarat* **1988 (4) SCC 574**; *Sushil Murmu v. State of Jharkhand* AIR 2004 SC 394; *Ediga Anamma v. State of A.P.* **AIR 1974 SC 799**; *Gurdev Singh & Anr. v. State of Punjab* with *Piara Singh & Anr. v. State of.Punjab* **AIR 2003 SC 4187**; *Rajendra Prasad v. State of Uttar Pradesh* **1979 (3) SCC 646**; *A. Devendran v. State of Tamil Nadu* **1997 (11) SCC 720**; *Kumudi Lal v. State of U.P.* **1999 (4) SCC 108**; *Om Prakash v. State of Haryana* **1999 (3) SCC 19**; *Mohd. Chaman v. State (NCT of Delhi)* **2001 (2) SCC 28**; *Lehna v. State of Haryana* **2002 (3) SCC 76**; *Haru Ghosh v. State of West Bengal* **2009 (15) SCC 551**; *Dilip Premnarayan Tiwari & Anr. v. State of Maharashtra etc.* **2010 (1) SCC 775**; *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* **AIR 2008 SC 3040– referred to.**

Case Law Reference:

1999 (5) SCC 30	**referred to**	**Para 12**
2002 (6) SCC 710	**relied on**	**Para 18**
(2002) 10 SCC 4	**referred to**	**Para 18**

(2003) 6 SCC 443	**referred to**	**Para 18**	A
AIR 1980 SC 898	**referred to**	**Para 30, 32**	
AIR 1983 SC 957	**referred to**	**Para 30**	
AIR 2002 SC 1661	**referred to**	**Para 30**	B
JT 2010 (8) SC 372	**referred to**	**Para 30, 32, 35**	
1996 (2) SCC 175	**referred to**	**Para 31**	
1994 (2) SCC 220	**referred to**	**Para 31**	
1999 (8) SCC 325	**referred to**	**Para 31**	C
1988 (4) SCC 574	**referred to**	**Para 31**	
AIR 2004 SC 394	**referred to**	**Para 32**	
AIR 1974 SC 799	**referred to**	**Para 32**	D
AIR 2003 SC 4187	**referred to**	**Para 33**	
1979 (3) SCC 646	**referred to**	**Para 33**	
1997 (11) SCC 720	**referred to**	**Para 33**	E
1999 (4) SCC 108	**referred to**	**Para 33**	
1999 (3) SCC 19	**referred to**	**Para 33**	
2001 (2) SCC 28	**referred to**	**Para 33**	F
2002 (3) SCC 76	**referred to**	**Para 33**	
2009 (15) SCC 551	**referred to**	**Para 34**	
2010 (1) SCC 775	**referred to**	**Para 34**	
AIR 2008 SC 3040	**referred to**	**Para 34**	G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1164 of 2005.

From the Judgment and order dated 20.07.2005 of the H

A High Court of Uttaranchal at Nainital in CRLR No. 7 of 2004 and CRLJA No. 249 of 2004.

Y.P. Singh, C. Siddharth and P. Purudura for the Appellant.

S.S. Shamshery and Jatinnder Kumar Bhatia for the B Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Appellant herein challenges the C judgment of the High Court affirming the judgment passed by the Sessions Court. The Sessions Judge convicted the appellant/accused Sunder Singh for offences under Sections 302, 307 and 436, Indian Penal Code (IPC). While he was awarded the death sentence along with a fine of Rs.5,000/- and in default to suffer further rigorous imprisonment for one D year, he was given the punishment of seven years along with fine of Rs. 5,000/- and in default to suffer further rigorous imprisonment for one year separately on the other two counts.

2. The incident in this case had taken place on 30.6.1989 E in village Mahargheti, Patwari Circle Dangoli in the newly formed District Bageshwar (which was part of District Almora at the time of incident). In this ghastly incident, Pratap Singh, his wife Nandi Devi, his elder son Balwant Singh (aged about 28 years), another son Prem Singh (aged about 19 years), F daughter Kamla (aged about 16 years) lost their lives while wife of Balwant Singh, namely, Vimla Devi (PW-1) sustained grievous burn injuries. Five victims who lost their lives including Balwant Singh were roasted alive and died either on the spot or while being taken to the hospital or in the hospital. Balwant G Singh, however, was almost beheaded while he also suffered the burn injuries. The prosecution alleged that this incident took place at about 10 p.m. when all the victims were taking their dinner in the ground floor room of their house. The appellant/accused came there with jerry can containing petrol and burning torch and threw the petrol in the room and after H

setting fire by torch, he shut the door of the room. Though Balwant Singh was in flames he managed to come out of the room by opening the door. However, as soon as he came out of the room, the accused who was still waiting there gave him a sword blow on the neck because of which he fell down dead out side the house. The other five family members who sustained severe burns also died barring Vimla Devi who alone survived. Nandi Devi died on the way to the Primary Health Centre at Baijnath while Pratap Singh also died there itself. Kamla and Prem Singh died in the District hospital, Almora later on, where they were shifted from Baijnath.

3. Informant Kheem Singh (PW-2) prepared a written report and handed over to the Circle Patwari, Hyat Singh (PW-13). In fact Hyat Singh (PW-13) came almost immediately after the incident and so did the other witnesses like Chanar Singh (PW-3) and Rewadhar (PW-4). At the time when they reached the spot almost simultaneously, Pratap Singh was alive, who told these witnesses that accused Sunder Singh had burned them by throwing petrol from jerry can and by torching the house thereafter. Even Vimla Devi (PW-1), the wife of Balwant Singh told Hyat Singh (PW-13) about the incident and also about the attack on Balwant Singh by the accused. Hyat Singh (PW-13) started the investigation. He inspected the burnt house and the spot where Balwant Singh's body was lying. He found that Balwant Singh was dead and had suffered a serious injury on his neck. The other injured barring Balwant Singh were sent first to the Primary Health Centre, Baijnath. Nandi Devi, however, died even before reaching the Primary Health Centre, Baijnath, while Pratap Singh is said to have died after reaching the Health Centre. Dr. K.C. Joshi (PW-12) examined Vimla Devi (PW-1) and noted the injuries suffered by her, so also Kamla and Prem Singh were examined by him, and he noted their injuries in the medical certificates (Exhibits Ka-9, Ka-10 and Ka-11). Thereafter, the injured were sent to District Hospital, Almora in view of the seriousness of their injuries. When the three injured were at District Hospital, Almora, the

A dying declarations of Prem Singh and Vimla Devi (PW-1) were recorded on 1.7.1989 by Narender Singh Patel (PW-9), Sub-Divisional Magistrate, Baramandal, District Almora. Before this, Hyat Singh (PW-13) had completed his inspection of all the spots and had attached burnt radio, damaged plastic gallons, B burnt breads and cut pieces of can from the scene of offence. He also found a cover of the sword (described as 'Khol') and also a pistol which had two bullets in it. He also held the inquest on the dead body of Balwant Singh and thereafter on the body of Pratap Singh and Nandi Devi. These bodies were C sent for post mortem. In the District Hospital, Almora, Prem Singh died on 1.7.1989 itself while Kamla died later on after the treatment. Vimla Devi (PW-1), however, miraculously survived. The inquests and the post mortem on the dead bodies of Kamla and Prem Singh were also conducted later on by the D doctors. All the five dead bodies had suffered extensive burn injuries, almost to the extent of 70% or 80%. Vimla Devi (PW-1), however, miraculously escaped and survived, though she had also suffered 70% of the burn injuries. After the preliminary investigation was completed by Hyat Singh (PW-13), the same E was entrusted to C.B.C.I.D. and Inspector K.R. Tamta (PW-14), who completed the remaining formalities of the investigation. The accused was absconding. He was found only in July, 2002 after a lapse of 12 years. It was then that the matter was committed to Sessions on the basis of the chargesheet already filed.

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4. The chargesheet was for the offences under Sections 302, 307 and 436, IPC. The Sessions Judge framed charges. Fourteen witnesses were examined in support of the charges including Vimla Devi (PW-1) who was the injured eye witness. G Kheem Singh (PW-2), who was the author of the First Information Report (FIR), was examined to prove the same. Chanar Singh (PW-3) and Rewadhar (PW-4) were the witnesses who reached the spot almost immediately after the incident. They were examined as the panch witnesses. Dan H Singh (PW-5) also acted as a panch on the inquest, so also

Daya Krishna (PW-7) and Ramesh Singh Rotella (PW-8) were examined to prove the inquest panchnamas on the dead bodies. Narender Singh Patel (PW-9), Sub-Divisional Magistrate, Baramandal, District Almora was examined to prove the dying declarations of Vimla Devi (PW-1) and Prem Singh, which was recorded by him on 1.7.1989. Dr. N.D. Punetha (PW-6), Dr. H.G.S. Manral (PW-10) and Dr. Nanda Vallabh Sharma (PW-11) were the doctors conducting the post mortem, while Dr. K.C. Joshi (PW-12) was the doctor who had examined Vimla Devi (PW-1) and Prem Singh and had issued medical certificates to them. Hyat Singh (PW-13), the investigating Patwari and Inspector K.R. Tamta (PW-14) were examined as the investigating witnesses.

5. The accused abjured his guilt. He raised the defence of false implication on account of the enmity due to land. However, learned Sessions Judge came to the conclusion on the basis of the evidence of Vimla Devi (PW-1) and the dying declaration of Prem Singh and the other substantive evidence that it was accused Sunder Singh who had torched the ground floor room on the fateful day resulting in the victims being roasted alive. It was also held that the prosecution had proved that the accused had dealt a sword blow on Balwant Singh almost beheading him and on that count proceeded to convict the accused and awarded the sentences which have already been mentioned.

6. Since the death sentence was ordered there was a death reference made in the High Court. The accused also filed an appeal challenging his conviction. The High Court came to the conclusion that the Sessions Judge was right in convicting the accused. The High Court also endorsed the opinion of the Sessions Judge that this was a rarest of rare case and, therefore, affirmed the death sentence awarded to the accused by the Sessions Judge. The judgment affirmed by the High Court has now fallen for our consideration.

A 7. Shri Y.P. Singh who was appointed as Amicus Curiae urged before us that it could not be said that it was the accused who was the perpetrator of this crime. According to the learned Counsel, the prosecution was not able to prove the guilt. He contended that the evidence of Vimla Devi (PW-1) could not B be accepted as there were inherent pitfalls in her evidence. Firstly, she was an interested witness and secondly, her ability to see at night at 10 O'clock was suspect. We have been taken through the whole evidence to show that there were contradictions and material omissions in her evidence. The C learned Counsel further argued that the so-called dying declaration by Prem Singh was also a suspect document and was not creditworthy. He pointed out that the said dying declaration of Prem Singh did not have the endorsement of the doctor about Prem Singh being in fit condition to make a D dying declaration.

8. Lastly, learned Counsel suggested that this could not be said to be a rarest of rare case and the High Court has erred in affirming the death sentence.

E 9. As against this, the learned Counsel appearing on behalf of the State supported the judgment and contended that the evidence of Vimla Devi (PW-1) was extremely important and credible and she was herself an injured witness. He pointed out that being a relative and having lost her near F and dear ones she is not likely to screen the real offender. She had all the opportunity to see and since the accused was the real uncle of her husband, there was no question of any mis-identification also. He pointed out that the evidence is extremely natural and she had not tried to rope in other persons. It was further pointed out that there was nothing to suspect the G dying declaration of Prem Singh. As regards the absence of the endorsement of the doctor, the learned Counsel suggested that it cannot be forgotten that the said dying declaration is recorded by an independent witness. He also pointed out that the victim was fully conscious and had survived after the dying H

declaration for substantial time which would suggest that he was completely conscious at the time when the dying declaration was recorded. It was further argued by the learned Counsel that this was the most dastardly act on the part of the accused that he not only set the house to fire but also closed the door thereby he displayed his foul intention to eliminate the whole family and he was successful in eliminating the whole family. Learned Counsel pointed out that two of the victims were extremely young being 16 years and 19 years old and had not even seen their lives. The learned Counsel brought to our notice the fact that the accused remained absconding for 12 long years. His being remaining absconding for 12 years was also a clear cut circumstance against him. According to the learned Counsel, therefore, this was a rarest of rare case.

10. It has to be borne in mind in this case that there is no scope of a mistaken identity for the simple reason that the accused was the real brother of Pratap Singh. Again, because the house was set to fire there was ample light available for identifying the accused.

11. The prosecution basically relied on the evidence of Smt. Vimla Devi (PW-1) whose evidence was examined by us very closely. She is a natural witness and there can be no dispute about her presence on the spot. She is also an injured witness as she has herself suffered 70% burns. She was very fortunate to survive. Learned counsel criticized the evidence by saying that she had obviously deposed in an unnatural manner by claiming that the accused was carrying three Jerry cans, opened them one by one and poured petrol. It was also pointed out that initially in her statement which was recorded as dying declaration, she had suggested that the room was set to fire by a match stick. In her cross examination, however, she refuted that claim. A fantastic theory was introduced in her cross-examination that her husband died because he dashed against sharp stone. Considering the overall evidence which has been accepted by the Trial Court and the High Court, we

A are of the clear opinion that this witness is reliable and the Courts below committed no error in accepting the evidence of Vimla Devi (PW-1). It cannot be forgotten that the witness has identified the jerry cans, the sword etc. which were lying in her courtyard. There were undoubtedly some contradictions and B omissions in her evidence and the dying declaration but in our opinion they were not substantial enough so as to affect the credibility of her evidence. She undoubtedly suggested in her Examination-in-Chief that the accused was carrying jerry cans. She has referred 'jerry cans' in plurals- "*Uske hath me petrol* C *va diesel k jerry can thhe*". She then identified the three jerry cans when the three jerry cans, which were attached, were produced in the Court. She also identified the cover of the sword and also the pistol which was left behind and was found by Hyat Singh (PW-13). She has then identified all the other material objects like radio etc. In her Cross-Examination, she D again asserted that the accused had three jerry cans, which she described as gallons. She then described that the caps of these jerry cans were cut. She could not, however, tell as to the capacity of the said jerry cans nor could she speak about their colour. She accepted the suggestion that the accused E first threw the petrol from one jerry can and then from the second and the other. She then asserted that they were not set to fire with the match box on which she was contradicted with her previous statement, wherein she had suggested that the accused had set fire by the match stick. This was, by far, F the only contradiction which was brought in her Cross-Examination.

12. Very strangely, a suggestion was put to her that since the accused threw the petrol from three jerry cans one after G the other, they could run out and catch the accused. In her further Cross-Examination, however, she admitted that her statement was properly recorded by Narender Singh Patel (PW-9), Sub-Divisional Magistrate, Baramandal, District Almora. She also admitted that she had stated in her dying H declaration that there was one jerry can. In our opinion, the

witness, in her dying declaration dated 1.7.1989, mentioned about one jerry can as she had seen the accused throwing the petrol from one jerry can. Very strangely, this contradiction was not got proved from Narender Singh Patel (PW-9), Sub-Divisional Magistrate, Baramandal, District Almora nor was it put to him. Unless a contradiction is proved by putting it to the person who records the original statement, such contradiction is of no consequence. The only Cross-Examination of Narender Singh Patel (PW-9), Sub-Divisional Magistrate was to the effect that there was no certification on the dying declarations to the effect that both the witnesses were in fit condition to give the statement When we see again the evidence of Vimla Devi (PW-1), even she was not specifically questioned about her previous statement nor was she given an opportunity to explain as to why she had made the statement in her evidence that there were three jerry cans as in her statement in dying declaration that there was one jerry can. Unless the witness is specifically given an opportunity to explain such contradiction, it cannot be taken note of. The very purpose of putting the contradiction to the witness is to give an opportunity to him/her to explain a contradictory statement, if any. There can be no dispute that when a witness making a dying declaration survives, the said dying declaration does not remain substantive evidence. However, as held in *Ramprasad v. State of Maharashtra* [1999 (5) SCC 30] when such dying declaration has been recorded by a Magistrate then it can be used as a corroboration to the oral evidence of such witness. This Court in the aforementioned decision of *Ram Prasad (cited supra)* specifically held that where such statement is recorded by a Police Officer, its user is barred under Section 162 Cr.P.C. However, where it is recorded by a Magistrate under Section 164, Cr.P.C. it becomes usable to corroborate the witness as proved under Section 157 of the Evidence Act. That is precisely the case here. We have very critically examined the dying declaration and we are of the clear opinion that the dying declaration was voluntary, truthful and uninfluenced by any other

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A factor. We have considered the dying declaration vis-à-vis the substantive evidence given by this witness. The only criticism against this dying declaration was that the Magistrate had not got it certified by the doctor to the effect that the witness was in a fit state of mind to make the dying declaration. That really B appears to be the case. However, it can not be forgotten that in his evidence, the Magistrate Narender Singh Patel (PW-9) very specifically asserted that he had obtained the opinion of the doctor. Very surprisingly, there was no cross-examination at all on this very vital aspect. Therefore, the assertion that he C had asked the doctor and was convinced that the injured was in a fit position to make a dying declaration has gone unchallenged. This witness has very specifically stated that he completed all the formalities and had taken all the cautions.

13. When we see the Exhibits Ka-30 and 31, which are D seizure Panchnamas duly proved by Rewadhar (PW-4), it is seen that there were three jerry cans found which were cut from the above, and as such, were open. Out of these three jerry cans, one was white and the others were black. It is specifically stated in the panchnama that all the jerry cans E were smelling of petrol. In Exhibit Ka-31, the cut parts of the jerry cans were shown, which were found lying on some distance on the Western side of the spot of incident. Therefore, there can be no dispute that actually the accused had carried the three jerry cans full of petrol and the witness had seen the F accused pouring petrol from one of them. It can also be that the accused might have utilized the two jerry cans in sprinkling the petrol on the roof from outside and then opening the door, threw the petrol from the third jerry can remaining with him. The witness had after all seen the three jerry cans being G presented in the Court and had, therefore, tried to improve upon the story. However, if the three burnt jerry cans were actually found by Hyat Singh (PW-13) immediately on the spot in a semi-burnt condition, the so-called contradiction loses all its rigor. The witness was very candid when she admitted H before the Court that she had not stated that her husband was

cut by the accused and that she had not, therefore, referred to the pistol in her statement. She was also candid in saying that she had not seen the accused assaulting her husband. She then asserted that the accused assaulted her husband on his neck only once. She also asserted that besides the accused, she did not see anyone else on the spot. All this suggests her truthfulness. She did not implicate anybody else than the accused. Therefore, the fact that the accused was alone and further that Balwant Singh (deceased), after opening the door, ran out and was thereafter immediately found cut, leads to the only inference that it was the accused alone who assaulted Balwant Singh. It has to be kept in mind that at that time, the whole house was burning. The witness has explained that the other people came and extinguished the fire; otherwise the whole house would have burnt. There was, therefore, enough light for the witness to see the accused. We, therefore, do not find anything to disbelieve this witness on account of the so-called contradictions. In fact, the presence of this lady alongwith the other victims on the spot, goes without challenge. Had she not been present there, she would not have suffered 70% burns. She thus had the best opportunity to watch everything. It was suggested that she was an interested witness as the accused had enmity with her father-in-law Pratap Singh. It must be remembered that she herself had lost all her kith and kin including her husband and, therefore, she would not be interested in screening the real accused. We cannot view her evidence as the evidence of an interested person. In fact, Dr. K.C. Joshi (PW-12), in his first medical statement (Exhibit Ka-9), has specifically mentioned that she was conscious when she was examined at the Primary Health Centre, Baijnath. The certificate describes her condition "patient fully conscious, needs urgent (probably treatment), referred to Hospital, Almora for management". Therefore, even at Primary Health Centre, Baijnath, where she was examined at 9.30 A.M. on the next day, the patient was fully conscious, thereby it cannot be said that was not able to see and comprehend.

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A 14. In fact, the way this lady was sitting in the room which was 10 cubic long and 5 cubic wide she would have had the best opportunity to see the accused. The High Court has also taken stock of her inability to tell the colour of the container, length etc. of the blade of the sword and the omission in her B statement as regards the pistol which was found lying in the courtyard after the incident. However, the Sessions Judge as well as the High court have chosen to accept the evidence of the witness who has survived 70 % burns. The High Court also endorsed view of the Sessions Judge that she was wholly C reliable witness and there was no requirement of corroboration to her evidence from any other witness. We are, therefore, of the opinion that the dying declaration is reliable and properly recorded and truthful and corroborates the oral evidence of Vimla Devi (PW-1). That is a very strong circumstance in favour D of the prosecution.

15. This takes us to the other material circumstance and that is the dying declaration of Prem Singh. This dying declaration was recorded on 01.07.1989 i.e. on the next day at 3.45 p.m. in the District Hospital, Almora by Narender Singh E Patel (PW-9). The said dying declaration is Exhibit Ka-6. In fact this was a witness who had recorded the dying declaration of Vimla Devi (PW-1) also. In his evidence, Narender Singh Patel (PW-9) asserted that before recording the dying declaration of Prem Singh, he had sought the opinion of the F doctor about the witness being in fit state of mind to make a dying declaration. He also asserted that the witness was not in any kind of mental pressure nor was he depressed and was fully conscious and in possession of the mental faculties. The witness also asserted that before recording the dying G declaration he had taken all the precautions and the dying declaration was written in the language of the witness himself. There is practically no Cross Examination of this witness. The only thing that was brought out was that he did not obtain the endorsement certification by the Doctor that they were in a

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position to make a statement. We have seen the dying declaration itself. It is true that the dying declaration is not endorsed by the doctor but for the same comments for dying declaration of Vimla Devi (PW-1) we would accept the dying declaration of Prem Singh which would become substantive evidence.

16. In his dying declaration, Prem Singh had specifically alleged that while he along with other members of his family like father, mother, sister-in-law, elder brother and younger sister were having food, at that time accused Sunder Singh who was his uncle was coming towards his house with a torch and he was carrying a jerry can (named as 'gallons' by witness) and he poured the petrol and closed the door. After throwing the torch he closed the door resulting in the room catching fire. He then said that his elder brother Balwant Singh pushed the door though his body had also caught fire. He then asserted that Sunder Singh cut him with some sharp weapon. He also explains that they could not go out because the whole room had caught fire. The witness further stated in his dying declaration that the other villagers came. However, he could not recognize them as he had suffered burn injuries. He was specific that Sunder Singh alone had come to set the house on fire. This declaration was recorded on 1.7.1989 at 3.45 p.m. as is recorded in the dying declaration itself. The dying declaration bears the thumb impression on both the pages. When this dying declaration is considered in the light of the evidence of Narender Singh Patel (PW-9), it is established that the dying declaration was not only voluntary but it was the correct depiction of the facts of which took place. There is no reason for us to reject the dying declaration again solely for *the* reason that there was no endorsement of the doctor on the dying declaration regarding the fit condition of the injured to make the statement. We have already, while discussing the dying declaration of Vimla Devi (PW-1), held that the Magistrate, Narender Singh Patel (PW-9) had specifically asserted that he had got himself satisfied by asking the doctor

A that the injured witness were in a fit mental and physical condition to make a statement.

17. Hyat Singh did not specifically name Vimla Devi (PW-1) having made oral dying declaration to him but asserted that the *injured victims* had told him about Sunder Singh's B involvement. We would use this circumstance only as corroboration to Vimla Devi's evidence. It is true that Vimla Devi (PW-1) had specifically not stated that she made a statement to Hyat Singh. However, we are of the clear opinion that the evidence of Vimla Devi (PW-1) as corroborated by C dying declaration (Exhibit Ka-5) was totally acceptable and was rightly relied upon by the Trial and the appellate Court.

18. There can be no dispute that the dying declaration can be made a basis of conviction. There again can be no D dispute that for basing the conviction on the dying declaration, the dying declaration must pass all the tests of voluntariness, the fit condition of mind of the maker of the dying declaration and the witness not being influenced by any other factors and the truthfulness of the declaration. The law is settled by this E Court in the decision of *Laxman Vs. State of Maharashtra* [2002 (6) SCC 710]. There, of course, the Court has discussed implication of the doctor's statement. The Court has further considered the subject in *Shanmugham @ Kulandaivelu v. State of Tamil Nadu* [(2002) 10 SCC 4] as also in *P.V. Radhakrishnan v. State of Karnataka* [(2003) 6 SCC 443]. F We hasten to add that we do not want to understate the importance of the evidence of doctors. However, there could be cases where though there is no certification by the doctor, still the dying declaration can be accepted and in our opinion present is such a case. In *Laxman's case (cited supra)*, the G court had observed in paragraph 3:

> "normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where

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the eye witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable."

19. This decision was by the Constitution Bench of this Court and has taken stock of all the earlier decisions. It has been through out followed by this Court in the later cases. After examining all the circumstances, particularly, the evidence of the Magistrate, we are of the clear opinion that the dying declarations of Vimla Devi and Prem Singh do pass the test of credibility. Of course, the dying declaration of Vimla Devi cannot be substantive evidence and it can only be corroborative evidence of oral testimony since she survived. However, the evidence of Prem Singh does become substantive evidence and in our opinion, wholly reliable. We, therefore, hold that the Trial Court and the appellate Court have committed no error in relying on that dying declaration.

20. There is immediate disclosure of the name of the accused in the FIR. This report was in the same night at 3.30 a.m. where it is specifically stated that at 10 O'clock Sunder Singh had set the house on fire when the family members of Prem Singh were having food. It is also asserted therein that even Balwant Singh's neck was cut by him. The FIR is not substantive evidence. However, it corroborates the assertion of Kheem Singh that Hyat Singh came on the spot and had enquired into the matter. Therefore, the name of the accused was reported almost immediately without any waste of time.

21. Chanar Singh (PW-2) asserted that he was told by injured Pratap Singh that Sunder Singh had set the house on fire and he had injured Balwant Singh . This assertion on the part of Chanar Singh has not been challenged in the cross-examination at all. In fact Chanar Singh is the brother of the accused. It is true that in cross-examination he admitted that

A he had not seen Sunder Singh setting the house on fire nor did he see him assaulting Balwant Singh with a sword. Even this witness was told by Vimla Devi that it was Sunder Singh who had set the house on fire. His evidence, therefore, corroborates the evidence of Vimla Devi. It is relevant as a B previous statement made to other witness and usable as such. Similarly, Rewadhar (PW-3) also asserted that Pratap Singh had told him that when they were having their food at that time Sunder Singh had poured the petrol and had put the house on fire. Even this assertion in the examination-in-chief was not C challenged in the cross-examination. The only challenge in the cross examination was that he had himself not seen the incident. The evidence of this witness also thus went unchallenged. Very unfortunately, though the Panchnamas on which these two witnesses have put their signatures were put D to the accused. However, this fact of oral dying declaration by Pratap Singh to both of them was not put to the accused. It is really a matter of concern that even the trial Judge did not frame the question in Section 313 Cr.P.C. examination specifically putting the names of these two witnesses. Thereby a very important circumstance is lost. We have not allowed E ourselves to be influenced by these two oral dying declarations. However, we are mentioning these facts only with a view to caution the Trial Courts to be extremely careful about the questions to be put to the accused persons in examination under Section 313 Cr.P.C. Record must show that meticulous F care is taken to put all the incriminating circumstances to the accused. It is found that the Trial Courts sometimes are extremely casual about this aspect and fail to put all the incriminating circumstances to the accused. We would expect the Trial Courts to be extremely careful in this behalf. It is only G with this idea that we are mentioning these facts.

22. However, the fact remains that even ignoring these oral dying declaration allegedly made by Pratap Singh to the two witnesses, namely, Chanar Singh (PW- 3) and Rewadhar H (PW-4) the prosecution still is successful in proving its case

on the basis of the oral evidence of Vimla Devi and the dying declaration by Prem Singh. A

23. The evidence of four doctors was led. It is obvious from the evidence that only two victims when they were alive, namely, Vimla Devi (PW-1) and Prem Singh were examined by Dr. K.C. Joshi (PW-12). The other doctors were namely Dr. N.D. Punetha (PW-6) who conducted the post-mortem on Balwant Singh's dead body. He has specifically proved the injury No.1 on the neck of Balwant Singh which was bone deep. He also described that all the body was burnt. He also confirmed the opinion that the injury No.1 on the neck could have been possible by a sharp weapon like a sword. He also conducted the post-mortem of Smt. Nandi Devi who had died almost immediately after she was burnt. He opined that she had died of the burn injuries. Both these post-mortem reports have been proved as Exhibits Ka-2 and Ka-3 respectively. He also conducted the post-mortem of Pratap Singh on 02.07.1989 and opined that the deceased had died on account of the shock of the burn injuries. He proved the post-mortem report at Exhibit Ka-5. Dr.H.G.S. Manral was examined as PW-10. He conducted the post-mortem of body of Prem Singh. He opined that Prem Singh had suffered 90% of second and third degree burns. The whole body was blackened and the black soots were found in the respiratory track up to his lungs. He also opined that Prem Singh had died on account of the burn injuries and shock. Dr Nanda Ballabh Sharma was examined as PW-11. He conducted the post-mortem on 13.10.1989 on the body of Kamla. Thus, Kamla had survived for almost three and a half months. However, ultimately she succumbed on 12.10.1989. According to this witness, the deceased had died after substantially long period after she was burnt on account of the shock, paucity of blood and on account of extensive weakness on account of burns. Thus, it is clear that all the deceased persons had died on account of the burn injuries. Dr. K.C. Joshi who was examined as PW-12, had medially examined Vimla Devi and Prem Singh on 1.7.1989. He had B C D E F G H

A described as many as five burn injuries on the body of Vimla Devi. He had also examined Kamla Devi and noted her burn injuries as also Prem Singh for his burn injuries. All the three witnesses were alive when he examined them. He proved the injury reports at Ka-9, Ka-10 and Ka-11, respectively. Nothing
B has been brought in the cross-examination of these doctors excepting the suggestion to practically all of them that if there was an accidental fall of a can containing oil or petrol in the hearth, there could be a possibility of the witnesses receiving burn injuries. We have already pointed out that such
C possibility was merely an imagination and there is no material whatsoever to see any such possibility. This is all the more true considering that Balwant Singh was given a blow by a sword resulting in his instantaneous death. The defence thus could not get any advantage from the medical evidence.

D 24. This takes us to the quality of investigation. We must say that the investigation in this case was not up to the mark. In the distant hilly areas in the State of Uttarakhand, the investigation is conducted by village Police through a Patwari who is the lowest officer in the revenue department. Much
E more could have been done in this case. For example, the investigation officer could have recorded the dying declaration of Pratap Singh, Nandi Devi, Kamla, Vimla Devi and Prem Singh. They were alive when the investigating officer allegedly reached the spot as per his own evidence. That was not done.
F We also fail to understand as to why K.R. Tamta (PW-14), the investigating officer did not even bother to get the dying declaration of Kamla recorded. Even Hyat Singh (PW-13) could have got the said dying declaration recorded. Even that was not done. We again fail to understand as to why the FSL
G report was not obtained and filed. The trial was started only after the arrest of the accused after 12 years. All this suggests that the investigation was conducted in a very casual and careless manner. Same is the story of prosecution. We have already commented on proper questions not being put to the
H accused. It is obvious that the prosecuting agency did not

even bother to look into the questions before they were asked to the accused in his Section 313 Cr.P.C. examination. Merely because this heinous offence took place in the remote corner of District Bageshwar which - at the time when the offence took place was Almora District - it did not mean that the investigating agency could do some slipshod investigation and thereafter the prosecution could be allowed to be equally casual as it appears to have been in conducting the prosecution. This also speaks about the duty of the Trial Court Judge who cannot be a mere spectator to what goes on in the name of the trial. The Trial Judge has to control the trial by active application of mind. A time has come when the village police system prevalent in the State of Uttaranchal in respect of distant areas would have to be changed and the distant villagers would have to be given the protection and services of the regular police. It is really strange that the four Districts which are in the plains have had advantage of the police system while in the remaining Districts, the distant part of those Districts should be deprived of a police system. Such deprivation undoubtedly results in affecting the law and order situation, the detection of crimes and the protection of the poor villagers. In fact effective policing is the need of the whole society, urban as also rural. However, all these factors have not prejudiced the accused. Even with these factors, the prosecution has fully proved the heinous offence committed by him. This Court has time and again held that incompetent investigation should not result in the accused getting any unfair advantage. We reiterate the same principle.

25. Considering overall situation the evidence led by the prosecution through Vimla Devi which has been corroborated by her dying declaration as also the dying declaration (Exhibit Ka-6) of Prem Singh and the other circumstances proved on record through the evidence of Panchas and the Panchnamas. It must be said that it was the accused and accused alone whose guilt has been proved beyond all reasonable doubts. We, therefore, endorse the judgments of the Trial Court and the High Court and confirm their findings on conviction.

A 26. This takes us to the sentencing part. Both the Trial Court and the High Court have confirmed the death sentence. It was urged by the learned Amicus Curiae that this could not be the case which can be described as the rarest of rare case. It was urged that long standing enmity has resulted in B the accused committing this offence. It was also urged that merely because the accused set the house on fire, it cannot be said that it was his intention to commit murder of all inmates as the accused might not have been able to foresee the horrible results that were likely to follow from his act of setting the C house on fire and, therefore, at the most it could be described as indiscretion on the part of the accused. The learned Amicus Curiae further urged that this incident had taken place in the year 1989 and to send the accused to gallows after 21 years of the incident would be inhuman. Further it was pointed out D that the first judgment of the Trial Court came in the year 2004 and for six years thereafter, the accused is under the shadow of death and, therefore, it would not be proper to confirm his death sentence.

27. As against this, the learned counsel appearing on E behalf of the State pointed out that this act of burning the house and as a result of roasting of six persons alive appears to have been committed by the accused with cool mind and in a cold blooded manner. The learned counsel was at pains to point out that there was no immediate provocation by any of F the deceased persons which could drive the accused to take such a horrible step. Learned counsel pointed out that secondly, the accused came with full preparation to eliminate as many persons as possible as he had come with the sword and also a pistol. The counsel invited our attention to the fact that the G pistol was found lying in the courtyard which had two bullets. He further pointed out that as many as three jerry cans were also found in the same condition and it was obvious that the accused had used the petrol to bathe the house with petrol. Otherwise, the room which was 10 cubic long and 5 cubic H wide could not be burnt so extensively. The learned counsel

further pointed out that thirdly, after pouring the petrol and setting the house on fire by a torch, the accused closed the door which fact was proved by the evidence of Vimla Devi which was corroborated by her dying declaration and also the dying declaration of Prem Singh. According to the learned counsel when the whole room was aflame, to close the door was a definite pointer towards the evil intention of the accused who must have seen the six family members burning. As if all this was not sufficient, according to the leaned counsel forthly, as Balwant Singh was able to open the door and run out, though he himself was in flames at that time, the accused almost beheaded him.

28. Our attention was invited to the injury No.1 proved in the post-mortem report of Balwant Singh (Ka-2). The learned counsel then urged that as a result of his assault Balwant Singh died on the spot while the remaining five members of the same family were extensively burnt though Vimla Devi miraculously escaped death though she had suffered 70 % burns. The learned counsel further invited our attention to the fact that all those who died had suffered extensive burns which suggests the quantity of petrol used by the accused. According to the counsel, therefore, the quantity of petrol used from three jerry cans was itself another definite pointer to the evil intention of the accused. As regards the lapse of 21 years, the learned Counsel pointed out that showing scant respect to law the accused absconded and remained absconding for 12 years. Unfortunately, it has not come in the evidence of Hyat Singh or K.R. Tamta as to how or in what manner the accused was apprehended, nor has it been put to the accused in his examination that he was absconding for 12 years. However, the learned counsel further submitted that the accused was undoubtedly apprehended only when he was found to have been arrested for offences under Sections 323, 504 and 506 IPC registered in police station Karnprayag. He was in Pursadhi jail of Chamoli District. Learned counsel, therefore, urged that it was because the accused himself remained

absconding for good long almost 12 years, that the time of 21 years has elapsed. Learned counsel then pointed out that the accused cannot take advantage of his own wrong of remaining absconding for 12 years. Lastly, learned Counsel urged that because of this cruel and inhuman act as many as six persons of the same family were burnt and five of them died resulting in the family of Pratap Singh completely being wiped out excepting for his daughter-in-law Vimla Devi who has to spend rest of her life with extensive burn injuries. The learned government pleader, therefore, urged that considering the balance-sheet of circumstances for and against the accused, the Court should confirm the death sentence.

29. On these rival contentions, we would have to take stock of few rulings of this Court.

30. The law is now well settled in the decision in *Bachan Singh Vs. State of Punjab* [AIR 1980 SC 898], where it was held that the death penalty can be inflicted only in the gravest of the grave cases. It was also held that such death penalty can be imposed only when the life imprisonment appears to be inadequate punishment. Again it was cautioned that while imposing the death sentence, there must be balance between circumstances regarding the accused and the mitigating circumstances and that there has to be overall consideration of the circumstances regarding the accused as also the offence. Some aggravating circumstances were also culled out, they being:-

(a) where the murder has been committed after previous planning and involves extreme brutality; or

(b) where the murder involves exceptional depravity.

The mitigating circumstances which were mentioned in that judgment were:-

(a) That the offence was committed under the influence

of extreme mental or emotional disturbance;

(b) The age of the accused. If the accused is young or old, he shall not be sentenced to death;

(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;

(d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above;

(e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;

(f) That the accused acted under the duress or domination of another person; and

(g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

The law was further settled in the decision in *Machhi Singh & Ors. Vs. State of Punjab* [AIR 1983 SC 957], where this Court insisted upon the mitigating circumstances being balanced against the aggravating circumstances. The aggravating circumstances were described as under:-

(a) When the murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.

(b) When the murder of a large number of persons of a particular caste, community, or locality is committed.

A (c) When the murder of an innocent child, a helpless woman is committed.

The matter was further considered in *Devender Pal Singh Vs. State of NCT of Delhi* [AIR 2002 SC 1661], wherein, after examining both the aforementioned cases, it was held that when a murder is committed in an extremely brutal manner, or for a motive which suggests total depravity and meanness or where the murder is by hired assassin for money or reward, or a cold blooded murder for gains, the death sentence is justified. Similar such observation was made even in the decision in *Atbir Vs. Govt. of NCT of Delhi* [JT 2010 (8) SC 372]. Relying on all these cases, this Court, in Criminal Appeal Nos. 127-130 of 2008 (*C. Muniappan & Ors. Vs. State of Tamil Nadu*) decided on 30.8.2010, confirmed the death sentence. That was a case where the accused persons, while demonstrating against the arrest of their leader, started damaging public transport vehicles. Some girl students of a University were travelling in a bus. The three accused persons attacked the bus and sprinkled petrol in the bus full of girl and boy students and set it on fire with the students still inside the bus. As a result, the inmates started escaping; however, three of the girls could not escape and were roasted alive. The unprovoked attack on the bus and the burning of the bus by sprinkling petrol on the bus, and the death of three students as a result of such burning was viewed by this Court as a barbaric and inhuman act of the highest degree. The offence was viewed as brutal, diabolical, grotesque and cruel, shocking the collective conscience of society. It was on that account that the death sentence was confirmed. Several comments have also been made by this Court on the inaction shown by the general public and the police who remained passive and did not try to help the unfortunate victims.

31. In *Ravji Alias Ram Chandra Vs. State of Rajasthan* [1996 (2) SCC 175], relying on the decision in *Dhananjoy Chatterjee Vs. State of West Bengal* [1994 (2) SCC 220],

this Court confirmed the death sentence, where the murder by the accused of his wife in the advanced stage of pregnancy and of his three minor children was viewed as rarest of the rare cases. The Court observed that the accused has not even spared his mother, who very rightly tried to prevent him, and the accused assaulted her with the same axe with which he killed his wife and minor children. The accused was described as blood-thirsty demon. In *Dhananjoy Chatterjee Vs. State of West Bengal (cited supra)*, the murder was of a helpless girl who was raped and then murdered. That was viewed as the rarest of the rare cases. In *State of U.P. Vs. Dharmendra Singh & Anr.* [1999 (8) SCC 325], it was held that the High Court was not right in avoiding the death sentence on the ground that the convict was languishing in death cell for more than 3 years. In that case, the accused had committed murder of 5 persons including an old man of 75 years, a woman aged 32 years, two boys aged 12 years and a girl aged 15 years when they were asleep only to wreak vengeance on the part of the accused. The High Court considered the act on the part of the accused in denuding the lower part of the body of the girl. This Court observed that the High Court had misdirected itself in refusing to confirm the death sentence on account of the so-called 3 years of languishing in death cell. For this proposition, the Court relied on the decision in *Triveniben Vs. State of Gujarat* [1988 (4) SCC 574], where it was held that the delay in executing the sentence was of no consequence.

32. In *Atbir Vs. Govt. of NCT of Delhi (cited supra)*, which was a case dependant upon a dying declaration, the allegation was that the accused had stabbed all the three persons of a family so that he and his brother could enjoy the entire property and money. The repeated stabbing of the deceased was viewed as the act for which the accused could be legitimately awarded death sentence. The incident therein had occurred on 22.1.1996 while the Sessions Judge had awarded the death sentence on 27.9.2004. The High Court had confirmed the

A death sentence on 13.1.2006 while this Court affirmed this sentence by its judgment dated 9.8.2010. This Court, after taking the stock of the aggravating circumstances and mitigating circumstances, as pointed out in *Bachan Singh Vs. State of Punjab (cited supra)* and *Machhi Singh & Ors. Vs.* B *State of Punjab (cited supra)*, came to the conclusion that though Atbir was a young person of 25 years of age and had already spent 10 years in jail, that was not a mitigating circumstance in his favour. The three murders were held to be extremely brutal and diabolical, committed with deliberate C design in order to inherit the entire property of Jaswant Singh without waiting for his death. In *Sushil Murmu Vs. State of Jharkhand [AIR 2004 SC 394]*, which was a case of human sacrifice of a 9 years old child, this Court found the accused guilty on the basis of circumstantial evidence. While culling out D the aggravating circumstances, this Court named five circumstances on the basis of the earlier case law in *Machhi Singh & Ors. Vs. State of Punjab (cited supra)*, *Bachan Singh Vs. State of Punjab (cited supra)* and *Ediga Anamma Vs. State of A.P.* [AIR 1974 SC 799]. Two of the said circumstances E are as follows:-

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

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2. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.

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In this case, the Court recorded that the murder was a dastardly murder by sacrificing a hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity or was a brutal act which is

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amplified by the grotesque and revolting manner in which it was committed. This case was even relied upon by the High Court while confirming the death sentence. A

33. In another decision in *Gurdev Singh & Anr. Vs. State of Punjab* with *Piara Singh & Anr. Vs. State of Punjab* [AIR 2003 SC 4187], this Court specifically held in Para 19 that there could be no fixed or rigid formula or standard for invoking extreme penalty of death sentence. This was a case where this Court took notice of the decision in *Rajendra Prasad Vs. State of Uttar Pradesh [1979 (3) SCC 646],* where this Court had held that the focus had shifted from crime to criminal and the special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. The Court, however, noted that this was overruled in *Bachan Singh Vs. State of Punjab (cited supra)* later on. The Court also referred to various cases like (i) *A. Devendran Vs. State of Tamil Nadu* [1997 (11) SCC 720], which was a case of triple murder, where the Court had refused to pass the death sentence, (ii) *Kumudi Lal Vs. State of U.P.* [1999 (4) SCC 108], which was a case of rape and murder of a young girl aged 14 years and where this Court had refused to confirm the death sentence on the ground that the death of the girl must not had been intended by the accused, and (iii) *Om Prakash Vs. State of Haryana* [1999 (3) SCC 19], which was a case where a BSF Jawan had murdered as many as 7 persons. This was also a case where the Court refused to confirm the death sentence on the ground that the bitterness in the mind of the accused had increased to a boiling point and the agony suffered by the accused and his family members at the hands of the other party, and for not getting protection from the police officers concerned and the total inaction on their part inspite of repeated written prayers, had goaded or compelled the accused to take law in his own hands. Two other cases where the death sentence was not confirmed were also referred to in *Gurdev Singh & Anr. Vs. State of Punjab* with *Piara Singh & Anr. Vs. State of Punjab (cited supra).* They were *Mohd.* B C D E F G H

A *Chaman Vs. State (NCT of Delhi)* [2001 (2) SCC 28] and *Lehna Vs. State of Haryana* [2002 (3) SCC 76]. However, this Court then took notice of the facts and noted that the accused in that case had fired at the marriage party as he knew that there was going to be a marriage on the next day
B in the house of the complainant. The accused had fired at the time when the feast was going on and 13 persons were killed on the spot and 8 persons were seriously injured. Out of all those 13 persons, one was 7 years' child. This Court, under the circumstances, refused to convert the death sentence into
C the sentence for life.

34. There are three other cases which we must mention. In *Haru Ghosh Vs. State of West Bengal* [2009 (15) SCC 551], where one of us was a party (V.S. Sirpurkar, J.), there was a murder of a helpless lady and a child by a person who
D was already suffering death sentence. However, that act was not found to be a pre-meditated act. It was found that the accused had acted on account of the previous enmity and since he thought that his livelihood was being attacked by the husband of the deceased, though in an incorrect manner. It
E was found that he had not come armed to the scene of offence. It was also found that though he was not justified in eking out his livelihood by selling liquor, but the fact of the matter was that he and his family was surviving only on that, and the effort on the part of the husband of the deceased to stop the activity
F of the accused was sufficient to nurture deep hatred in his mind on account of which the accused acted. Such is not the case here. In *Dilip Premnarayan Tiwari & Anr. Vs. State of Maharashtra etc.* [2010 (1) SCC 775], again where one of us (V.S. Sirpurkar, J.) was a party, this Court refused to confirm
G the death sentence, where the accused was guilty of committing multiple murders (4 in number). However, considering the fact that the sister of the accused was married to the deceased out of a love affair, which marriage was not approved at all by the family of the accused being an inter-caste marriage and

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further they being neighbours and the accused having to suffer the ignominy because of the so-called marriage on day to day basis, this Court took the view that this was not a case where the death sentence was to be awarded. The Court considered the psychology of the accused, the taunts that he had suffered on account of his sister's marriage with a person of different community and further the fact that the situation had gone out of his hand as his sister was on the family way. The Court, therefore, viewed that this could not be the rarest of the rare cases. Lastly, in *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka* [AIR 2008 SC 3040], though there was one of the most cold-blooded murder for gains, the Court recorded that considering the absolute irrevocability of the death penalty, sentencing accused to death would not be proper. We do not find anything in this decision, which will be helpful to the accused in the present matter.

35. Considering all these cases, on the backdrop of the facts, which have taken place and provided in this case, it must be said that this is one of the rarest of the rare cases. Here is a case where the whole family is wiped out. Five persons have lost their life while the sixth person, a helpless lady, who has now been left to be the only member of the family, has to live her life with 70% burn injuries. The murder was committed in a cruel, grotesque and diabolical manner. When all the members of the family were having their food, the accused poured petrol in the room and set it to fire and went to the extent of closing the door also. He closed the door as established by Vimla Devi (PW-1) and Prem Singh in the dying declaration. This was the most fouled act, by which the accused actually intended to burn all the persons inside the room and precisely that had happened. Barring Vimla Devi (PW-1), everybody in that room was burnt with the exception of Balwant Singh, who somehow, was able to open the room and come out. Even he was not spared and almost beheaded by the accused. It was clear that the accused had done this with pre-meditated and cold-blooded mind, as he had taken

A the trouble of carrying petrol to his own cousin's house. As if all this was not sufficient, he was also carrying a sword, and probably prepared himself to fire on the complainant party, as a pistol with two bullets in it was also found on the spot. The accused shown extreme depravity of mind in causing a sword B blow on the neck of Balwant Singh, who himself was burnt and was trying to escape. A murder by burning, by itself, would be a very cruel act. The agony caused to the dying witnesses because of their burn injuries would be enormous. Again, when it is seen that there was no immediate provocation to the C accused and all this only was on account of the enmity going on in respect of the family lands, the enormousness of the crime is increased by many folds. The accused showed scant respect for the law by remaining absconding for about 12 years and only because of that he could not be brought to D books. It is only his accidental arrest and being lodged in other jail that the prosecuting agency was able to prosecute him. Out of the five persons who lost their life, Kamla was barely 16 years old while Prem Singh was 19 years old only. Their life was nipped in bud. Both the ladies who lost their life, as also the other three persons who lost their life were without E any arms and were helpless. They could not have even saved themselves and did succumb to the burn injuries. The balance sheet of the aggravating circumstances thus exceeds the mitigating circumstances. In fact, there is no mitigating circumstance in this case. The age is not on the side of the F accused. We cannot appreciate the argument that it was only a rash act on the part of the accused without an intention to commit the murder. That does not appear to be the case at all. Pouring of the petrol extensively would rule out the intention on the part of the accused only to burn the house. Again, his G act of closing the door after setting the house to fire, would speak completely against him. Insofar as the other circumstance of the accused remaining under the shadow of death sentence right from 2004 is concerned, we do not think that that circumstance, by itself, is sufficient to mitigate his H horrible crime as the time factor is identical with the case of

Atbir Vs. Govt. of NCT of Delhi (cited supra). A

36. Considering the overall circumstances, we are of the opinion that the death sentence was rightly awarded by the Trial Court and was rightly confirmed by the High Court. We find no reasons to interfere in this appeal. The appeal is dismissed. B

D.G Appeal dismissed.