REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. ..... OF 2020
[Arising out of SLP (Crl.) No. 8682 of 2014]

Manoj Suryavanshi .. Appellant

Versus

State of Chhattisgarh .. Respondent

J U D G M E N T

M. R. Shah, J.

Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 08.08.2013 passed by the Division Bench of the High Court of Chhatisgarh at Bilaspur in Criminal Appeal No. 550 of 2013 and Criminal Reference No. 05 of 2013, by which the Division Bench of the High Court has dismissed the said appeal preferred by the appellant-original accused and has confirmed the judgment and order of conviction and death sentence

awarded by the learned Trial Court for the offences punishable under Section 302 of the IPC for having killed the three minor children of the complainant Shivlal – P.W.18 and also for the offences punishable under Section 364 of the IPC, the original accused has preferred the present appeal.

3. As per the case of the prosecution, at 7.00 AM on 11.02.2011, two sons of one Shivlal-original complainant – Vijay aged about 8 years, Ajay aged about 6 years and Kumari Sakshi aged about 4 years left their home in Darripara to attend the school at Karaihapara and reached the school. On the school getting over at 11.30 AM, the three minors left the school for home on foot. When they did not reach home, Shivlal-P.W.18 looked for the children in the vicinity and went to school and enquired about the children. On enquiry at the school, the teachers of the minor children told Shivlal that the three minors had come to the school and on the school getting over they had left the school for home on foot. That, thereafter Shivlal and others looked for the three minors. On not finding the three minor children, Shivlal-P.W.18 went to the police station, Raipur and lodged the Missing Person Report. The missing

person report was registered in the Daily Journal (Ex. P-18) by the Head Constable Krishna Kumar Koshle-P.W.17. During the search of three minor children, one Ashok Patel-P.W.8 stated that he had seen the minor children along with the appellant-accused near the school. As per the case of the prosecution, on 11.02.2011, Rameshwar-P.W.11 contacted the accused on cell-phone and talked with him and the accused asked Shivlal-P.W.18 how he was feeling when his children are missing. According to the prosecution, the accused was working as labourer in the house of Shivlal. It was alleged that the wife of the accused, namely Sumrit Bai, eloped with the younger brother of the complainant, namely Shivnath Dhiwar and with the view to take revenge, the appellant abducted the minors and thereafter killed them. The FIR-Ex.24 was lodged against the accused initially for the offences under Sections 363 and 364 IPC. According to the prosecution, after the FIR was lodged, the accused was contacted on his mobile no. 9179484724. The accused received the call and told that he was 60 kms away. The Investigating Officer-P.W.24 asked the Head Constable Hemant Aditya, Crime Branch to trace the said mobile number and to tell its

location. Then the Head Constable Hemant Aditya traced the location of the said mobile and the location was found near Village Lakhram. That, thereafter the Investigating team went to the house of one Ashok Kumar Madhukar-P.W.13, a relative of the accused. Initially, the accused was not in home. However, thereafter continuing the search, they again went to the house of the said Ashok Kumar Madhukar. According to the case of the prosecution, thereafter the accused was found and brought to the police station. He was interrogated in the presence of the witnesses. A memorandum of statement Ex.P.2 was recorded under Section 20 of the Evidence Act. On the basis of the memorandum Ex.P.2 and at the instance of the accused, in the barren land in Karaihapara – in the field of one Damodar Beldar, the dead bodies of the three minors were recovered from the spot of site. The Investigating Officer collected the incriminating materials during the course of the investigation. The mobile of the accused was also seized. The Investigating Officer conducted the Panchnama of the dead bodies of the three minors. The dead bodies were sent for post-mortem. One Dr. A.M. Srivastava-

P.W.23 conducted the post-mortem. The cause of death of the three minors was strangulation and the deaths were found to be homicidal. During the investigation, the Investigating Officer received the call details – Ex.P.30 of the mobile phone of the accused. During the investigation, the Investigating Officer recorded the statement of the witnesses, including the statement of the original complainant Shivlal and others. That the accused was arrested as per the memorandum dated 13.02.2011. After conclusion of the investigation, it was found that the accused had first abducted and thereafter killed the three minors to take the revenge as his wife eloped with the brother of the complainant Shivlal and thereby committing the offences punishable under Section 302 and Section 364 IPC. The Investigating Officer filed the charge-sheet against the accused for the aforesaid offences. The case was committed to the Court of Sessions. The accused pleaded not guilty and therefore he came to be tried for the aforesaid offences.

4. To prove the charges against the accused, the prosecution examined as many as 24 witnesses as under:

P.W. NO.	NAME AND DATE OF DEPOSITION	
P.W.1	Preetam Dhiwar 15.06.2011	Witness who seen the minor children with the accused for the last time.
P.W.2	Hafiz Ali 16.06.2011	Independent witness
P.W.3	Frukh Khan 16.06.2011	Independent witness
P.W.4	Pooja Tiwari 16.06.2011	Witness of minors leaving the school together for home on foot after the school getting over.
P.W.5	Jilani Baig 17.06.2011	Witness of minors leaving the school together for home on foot after the school getting over.
P.W.6	Krishna Kumar Yadav 17.06.2011	Witness of seizure of Registers concerning the attendance of the minors in school.
P.W.7	Damodar Singh 08.08.2011	Witness of recording the statements of the prosecution witnesses under Section 161 Cr.P.C.
P.W.8	Ashok Patel 08.08.2011	Witness who seen the minor children with the accused for the last time.
P.W.9	Imrat Singh 11.08.2011	Maternal uncle of the minor children.
P.W.10	Shweta Tiwari 12.08.2011	Witness of minors leaving the school together for home on foot after the school getting over.
P.W.11	Rameshwar 12.08.2011	Independent witness
P.W.12	Ashish Kumar Gupta 20.9.2011	Witness who conducted the photography of the dead bodies of the minors.

P.W.13	Ashok Kumar Madhukar 20.09.2011	Witness of the presence of the accused in his house situated in Lakhram and of his being hidden.
P.W.14	Bharat Lal Dewangan 21.09.2011	Witness of the preparation of map of the spot of incident.
P.W.15	Anil Shitlani 21.09.2011	Witness of seizure of mobile phone of the accused.
P.W.16	Bharat Lal Chandravansi 22.09.2011	Witness of the dead bodies of the minors being taken to the doctor for post-mortem
P.W.17	Krishna Kumar Koshle 22.09.2011	The Head-Constable who registered the missing report in the Daily Journal
P.W.18	Shivlal Dhimar 16.11.2011	Father of the minor children.
P.W.19	Santosh Kumar Yadav 17.11.2011	Witness of recording of statements during investigation of missing report.
P.W.20	ISmit Manisha Dhimar 17.11.2011	Mother of the deceased minor children.
P.W.21	Dr. A.K. Shrivastava 18.11.2011	Doctor who conducted the post-mortem and gave the post-mortem report.
P.W.22	Lav Kush Kashyap 09.01.2012	Witness of recording the statements of the prosecution witnesses under Section 161 Cr.P.C.
P.W.23	Dr. A.M. Srivastava 17.02.2012	Doctor who conducted the post-mortem and gave the post-mortem report.
P.W.24	B. Kujur 17.02.2012	The Investigating Officer

4.1 During the trial, the prosecution brought on record as many as 41 documentary evidences. The relevant evidences are as under:

SL. NO.	DESCRIPTION	EX. NO.
4.	Seizure Memo of the attendance register of the deceased dated 17.02.2011 at 3.30 pm	Ex.P1
5.	Memorandum of accused dated 13.02.2011	Ex.P2
8.	Seizure memo of school bags, plastic bottle and soil from where Ajay's body has been found.	Ex.P5
10.	Inquest / Panchnama of deceased Ajay	Ex.P7
12.	Inquest / Panchnama of deceased Vijay	Ex.P9
14.	Inquest / Panchnama of deceased Sakshi	Ex.P11
18.	Site Map prepared by Patwari	Ex.P12
19.	Panchnama of Site Map in presence of witnesses	Ex.P13
20.	Seizure Memo of mobile phone of accused	Ex.P14
23.	Missing Person Complaint dated 12.02.2011 filed by PW18, Shivlal	Ex.P16
24.	Roznamcha	Ex.18C
31.	FIR No. 64/2011 under Section 363, 364 IPC registered by PS Ratanpur	Ex.P25
34.	Arrest Memo dated 13.02.2011	Ex.P28
35.	Intimation of arrest of relative	Ex.P29
36.	CDR	Ex. P30
39.	Report received from FSL Raipur	Ex.P33
41	Village Map	Art. A

4.2 After closure of the evidence by the prosecution, further statement of the accused under Section 313 CrPC was recorded.

The case of the accused was of a total denial. He did not examine any witness in support of his defence. That, thereafter, on appreciation of evidence and giving the fullest opportunity to the accused, the learned Trial Court held the accused guilty for the offences punishable under Sections 302 and 364 IPC. After considering the aggravating and mitigating circumstances and after having heard the accused on the quantum of sentence, the learned Trial Court awarded the death sentence, which was numbered as Reference No. 05 of 2013 before the High Court. Feeling aggrieved and dissatisfied with the judgment and order of conviction passed by the learned Trial Court, the original accused also preferred an appeal before the High Court, being Criminal Appeal No. 550 of 2013. Both, the appeal preferred by the accused as well as the reference case were heard together by the High Court. By the impugned judgment and order, the High Court has dismissed the appeal preferred by the accused and has confirmed the conviction and the death sentence awarded by the learned Trial Court. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court in dismissing the appeal preferred by the

accused and also confirming the death sentence awarded by the learned Trial Court, the original accused has preferred the present appeal.

5. Shri Singh, learned counsel appearing on behalf of the appellant-original accused has vehemently submitted that in the facts and circumstances of the case both, the learned Trial Court and the High Court have committed grave error in holding the appellant-original accused guilty for the offences punishable for the offences under Section 302 and Section 364 IPC.

5.1 It is further submitted on behalf of the appellant-original accused that both the Courts below ought to have appreciated that there was no eye-witness to the incident and the whole conviction was based on the circumstantial evidence. It is submitted that, in a case of circumstantial evidence, unless the entire chain of events is complete, which leads to the only conclusion that it is the accused only who has committed the offence, a person cannot be convicted. It is submitted that in the present case the prosecution has failed to form a complete chain of circumstances and the instance which

leads exclusively to the conclusion that the appellant only was guilty of committing the offence.

5.2 It is further submitted on behalf of the appellant-original accused that both the Courts below have materially erred in holding the appellant-original accused guilty for the offences punishable under Sections 302 and Section 364 IPC for having killed the three minor children relying upon the prosecution witnesses, more particularly, P.W.1, P.W.8, P.W.13, P.W.18 and P.W.24 and other eye-witnesses.

5.3 It is further submitted by the learned counsel appearing on behalf of the appellant-original accused that the case against the appellant is based on three sets of circumstances: (i) last seen evidence; (ii) recovery of bodies pursuant to a disclosure memo and (iii) alleged calls made to the appellant during the search for the missing children. It is further submitted that the prosecution has sought to use the calls made to the appellant and the testimony of P.W.13 as an extra-judicial confession made by the appellant. It is submitted that such an extra-judicial concession is not admissible in law.

5.4 It is further submitted by the learned counsel appearing on behalf of the appellant-original accused that to establish and prove the last seen evidence, the prosecution has relied upon the depositions of P.W.1 and P.W.8, whose evidences are full of material contradictions. It is submitted that as such both the Courts below have materially erred in heavily relying upon the depositions of P.W.1 and P.W.8, insofar as last seen evidence is concerned.

5.5 It is further submitted by the learned counsel appearing on behalf of the appellant-original accused that so far as P.W.1 is concerned, he has specifically stated that he was stating the material evidence for the first time in the court. It is submitted that though another witness – Surya Pratap Dhimar was present with P.W.1 on 11.02.2011, the prosecution had chosen not to examine the said witness. It is submitted that P.W.1 is neither credible nor reliable. It is submitted that dropping of a cited witness Surya Pratap Dhimar has been unexplained by the prosecution. It is submitted that this circumstance will operate as a presumption against the prosecution in terms of Section 114(g) of the Indian Evidence Act.

5.6 Now, so far as the reliance placed upon the deposition of P.W.8, who is the second last seen witness is concerned, it is submitted that P.W.8 states that he communicated that he has seen the accused with the deceased to P.W.9-Imrat Singh @ Mungi Lal. It is submitted that, however, P.W.9 has categorically denied knowing any person named as Ashok, where he resides. It is submitted that he has affirmed that he had no conversation with Ashok.

It is further submitted that as per the prosecution P.W.8 communicated his sighting of the missing children to P.W.18 and his friends - P.W.2 and P.W.3. It is submitted that P.W.2 states that they met Ashok Patel at about 6/6.30 pm near Dholpara, but in his cross, has denied knowing Ashok Patel or having any conversation with him. It is submitted that P.W.18 claimed that he met P.W.8 near Darriparra prior to meeting P.W.2 and P.W.3. It is submitted that though P.W.3 maintains that he met P.W.8 and Dholpara, the testimony of P.W.18 belies the testimony of P.W.3. It is submitted that the testimony of P.W.2, P.W.3 and P.W.18 that they met P.W.8 is belied by P.W.8 himself who has unequivocally

affirmed that P.W.18 and his friends did not come to him searching for the children. It is submitted that therefore it is not safe to rely the testimony of P.W.8 also.

5.7 It is further submitted by the learned counsel appearing on behalf of the appellant-original accused that the prosecution has not proved geographical proximity between the alleged sighting of the appellant and the place of residence of the children; their school or the location where the bodies were recovered. It is submitted that there is no evidence on record to suggest that the fields where the bodies were found were in the same direction as the children were walking when they had been allegedly sighted.

5.8 It is further submitted that furthermore the medical evidence concludes that the time of death of the children was between 12 noon on 11.02.2011 and midnight of the intervening night of 11/12.02.2011. It is submitted that therefore an alleged sighting in the beginning of this period is not proximate to the time of death. It is further submitted that even the missing person complaint dated 11.02.2011 does not refer to last seen evidence. It is submitted that it was entered on the Roznamcha at 9.40 am on 12.02.2011. It

is submitted that the Roznamcha is silent on the suspicion of kidnapping by the appellant. It is submitted that neither the complaint nor the Roznamcha contain any last seen evidence or evidence with respect to the alleged calls between the appellant and P.W.18. It is submitted that the FIR that is lodged on 12.02.2011 at 11.40 pm has a mention of P.W.8. It is submitted that therefore the last seen evidence of P.W.8 is recorded for the first time only on the intervening of 12-13.02.2011, which is also the time of the appellant's arrest. It is submitted that it is the settled law that the circumstance of last seen together cannot by itself form the basis of conviction and can only be an incriminating circumstance. In support thereof, the learned counsel for the appellant has relied upon the decisions of this Court in the cases of ***Digamber Vaishnav v. State of Chhattisgarh*** (2019) 4 SCC 522, ***Anjan Kumar Sarma v. State of Assam*** (2017) 14 SCC 359 and ***Ganpat Singh v. State of Madhya Pradesh*** (2017) 16 SCC 353. It is submitted that in light of the principles stated in the aforesaid decisions, the testimony of P.W.8 does not inspire confidence and cannot be relied upon as last seen evidence.

5.9 It is further submitted by the learned counsel appearing on behalf of the appellant that another circumstances considered by the Courts below against the appellant is the calls and extra-judicial confession.

5.10 It is submitted that the evidence against the appellant refers to two calls involving the appellant. The first call is between the appellant and P.W.11 and the second call is between the appellant and P.W.18. It is submitted that with respect to P.W.11's call, P.W.11 categorically states that the call was on 12.02.2011 at night which is when the appellant was in the custody of the police. It is submitted that he further improved his version when he was re-examined by the Trial Court. It is submitted that neither P.W.2 nor P.W.18 has testified to this call. It is submitted that neither the fact nor the contents of this call were put to the appellant during his examination under Section 313 Cr.P.C.

5.11 It is further submitted that the prosecution has relied upon the extracts of the appellant's CDR-Ex.P30 (Call Details Report), which does not contain any call made or received on 12.02.2011. It is submitted that even otherwise the production of CDR is

through the Investigating Officer who in turn receives it from the Head Constable Hemant Aditya. It is submitted that there is no material on record to show the manner in which the CDR was obtained. It is submitted that even the CDR is not accompanied by a certificate under Section 65-B of the Evidence Act. It is submitted that therefore the calls/call details contained in the CDR-Ex.P30 are neither believable nor has been proved by the prosecution.

5.12 It is further submitted that so far as P.W.18 is concerned, he has alleged a call made by him to the appellant on 11.2.2011. It is submitted that the said call has not been corroborated by any other witness. It is submitted that even it does not find mention in the complaint, Roznamcha or the FIR, which are dated 11.2.2011. It is submitted that there remains a discrepancy in P.W.18's version of when he lodged the missing person complaint.

5.13 It is further submitted that the prosecution has not seized the phone, SIM card or any material with respect to P.W.18's phone records which would have proved the veracity of P.W.18's statement. It is submitted that even there is no material on record to prove the phone number of P.W.18.

5.14 It is further submitted that so far as the confession made by P.W.13-Ashok Kumar Madhukar is concerned, no other document or witness mentions his presence during the alleged recovery proceedings. It is submitted that the statement made by the appellant do not amount to a confession of the offence as a whole, or of any inculpatory fact. It is submitted that since the appellant was in police custody at that time, any confession made by him would be inadmissible in terms of Section 26 of the Evidence Act, irrespective of whom the alleged confession was made to. It is submitted that therefore both, the Trial Court and the High Court have materially erred in convicting the appellant on the basis of such call details and/or the alleged confessions made to the respective witnesses.

6. Now, so far as the conviction based upon the recovery of dead bodies of the deceased minors is concerned, it is submitted that the said recovery was made from an open area that had been searched previously. It is submitted that as per the settled preposition of law the recovery made from an open place, accessible to all and which is not in the exclusive knowledge of the accused cannot be the basis

of conviction. It is submitted that therefore the recovery of the bodies at the instance of the appellant is full of suspicion.

6.1 It is further submitted that neither PW.7 nor P.W.22 who are the independent witnesses to the disclosure memorandum and all other documents relating to recovery proceedings on the intervening night of 11.01.2011 and 12.1.2011, lend support to the recovery. It is submitted that P.W.7 has specifically stated that he signed on blank papers on the asking of the police and that he did not know about the case. It is submitted that he has further stated that the documents were not read over to him by the police and that no notice/summons were given by the police to remain present for seizures.

6.2 It is further submitted that P.W.22 also does not remember the date on which the alleged events took place.

6.3 It is further submitted that all recovery related proceedings are ante-dated and the same is proved from the evidence of P.W.22 himself. It is submitted that P.W.22 states that the interrogation of accused continued till 9.00 pm on 12.02.2011 and that they went to the field at 10.30-11.00 pm. It is submitted that even P.W.18

and P.W.22 testify that all documentation with respect to the recovery was done the next day at 9.00 pm. It is further submitted that even there is a discrepancy with respect to the time and place of arrest of the appellant which renders the recovery doubtful. It is submitted that therefore on the basis of the alleged recovery, the appellant could not have been convicted.

6.4 It is further submitted that even the recovery cannot be said to be voluntary as the appellant was detained in custody without any formal arrest.

6.5 It is further submitted that even the medical and forensic examination does not support the recovery. It is submitted that the post-mortem reports of the victims indicate the presence of incised wounds on the bodies caused by a hard and sharp/blunt object. It is submitted that, however, no such weapon was recovered at the instance of the appellant. It is submitted that the prosecution has not put forth any evidence to show how such wounds were caused by the appellant. It is submitted that there are so many lacunas at the time of the alleged recovery at the instance of the appellant, which creates a serious doubt on the credibility of the recovery. It

is submitted that therefore it is not safe to convict the appellant on the basis of such recovery.

7. It is further submitted by the learned counsel appearing on behalf of the appellant that the Courts below have committed grave error in convicting the appellant solely based on (i) last seen evidence; (ii) recovery of bodies pursuant to a disclosure memo and (iii) alleged calls made to the appellant during the search for the missing children and the so-called extra-judicial confession made by the appellant, more particularly, when it is a case of circumstantial evidence. It is submitted that in a case of circumstantial evidence, even if one link is missing and the chain is not complete which leads to the only conclusion that it is the appellant-accused alone who has committed the offence, the appellant could not have been convicted.

7.1 Now, so far as the judgment and order passed by the learned Trial Court awarding the death sentence and confirmed by the High Court is concerned, it is submitted that both the Courts below have not appreciated and/or considered the mitigating and aggravating factors while awarding the death sentence. It is submitted that

even the learned Trial Court imposed the death penalty/award of sentence on the same day on which the appellant was convicted. It is submitted that after the decision relating to his conviction was given, the learned Trial Court held the hearing of the sentence on the same day when the conviction was recorded i.e. 04.05.2013, thereby violating the right of the accused to be given ample opportunity to adduce the evidence of mitigation and to be heard on the question of quantum of sentence as provided under Section 235(2) Cr.P.C. It is submitted that it has been consistently held by this Court that sufficient time must be given to the accused on the question of sentence, to show the grounds on which he may show that sentence of life imprisonment may be awarded and not the death penalty. In support thereof, the learned counsel for the appellant has relied upon a recent judgment of this Court in the case of ***Chhannu Lal Verma v. State of Chhattisgarh*** (2019) 12 SCC 438. It is submitted that the absence of providing a separate hearing for sentence vitiates the sentencing process. It is submitted that under these circumstances this Court has previously commuted the sentence of death to one of imprisonment for life. In

support, reliance has been placed upon the decisions of this Court in the cases of ***Santa Singh v. State of Punjab*** (1976) 4 SCC 190, ***Rajesh Kumar v. State (NCT of Delhi)*** (2011) 13 SCC 706 and ***Ajay Pandit @ Jagdish v. State of Maharashtra*** (2012) 8 SCC 43.

7.2 It is further submitted that even otherwise the death sentence awarded by the learned Trial Court and affirmed by the High Court is not sustainable. It is submitted that the learned Trial Court has solely looked to the brutality of the crime to impose the death penalty. It is submitted that this Court has rejected the contention that the death penalty can be imposed on the basis of the crime alone. It is submitted that consideration of the brutality or the circumstances surrounding the crime alone renders meaningless the objective of the sentencing exercise envisaged in death penalty cases. Reliance has been placed upon the case of ***Bachan Singh v. State of Punjab*** (1980) 2 SCC 684.

7.3 It is submitted that so far as the High Court is concerned, the High Court has also committed a grave error in confirming the death sentence. It is submitted that the High Court has not

properly appreciated the mitigating circumstances, such as the fact that the accused can be rehabilitated in the society and is capable of being reformed. It is submitted that as held by this Court in the case of ***Ajay Pandit*** (supra), there is a duty on the High Court to elicit the relevant facts while considering mitigating circumstances and awarding sentence.

7.4 It is submitted that both the Courts below have not appreciated and considered the fact that there was no criminal antecedents. It is submitted that the High Court has also not considered the fact that there is a possibility of the appellant being reformed. It is further submitted that at the time when the alleged offence was committed, the appellant was of a young age of 28 years. It is submitted that the young age of the appellant at the time of commission of the offence has not been considered as the relevant mitigating circumstance by the learned Trial Court as well as the High Court, which ought to have been considered, as held by this Court in the cases of ***Gurvail Singh v. State of Punjab*** (2013) 2 SCC 713 and ***Amit v. State of Uttar Pradesh*** (2012) 4 SCC 107.

7.5 It is further submitted that even otherwise in a case of circumstantial evidence, as held by this Court in the case of ***Kalu Ram v. State of Rajasthan*** [2015) 16 SCC 492, the doctrine of prudence requires that a sentence of life be imposed, and ordinarily death penalty should not be awarded. It is further submitted that this Court in several judgments has commuted the death sentence based on the doctrine of "residual doubt". Reliance is placed on the decisions of this Court in the cases of ***Sudam v. State of Maharashtra*** (2019) 9 SCC 388 and ***Baba Vishwakarma v. State of M.P.*** (2019) 9 SCC 689.

7.6 It is further submitted that even the conduct of the appellant in the prison is very good, which is also a relevant consideration to commute the death sentence to that of the life imprisonment.

7.7 It is further submitted that the emotional disturbance of the appellant at the time of the offence is a relevant consideration not to award the death sentence. It is submitted that at the relevant time the appellant was emotionally disturbed due to the elopement of his wife with the uncle of the deceased minors. It is submitted that the appellant's acts were not the product of a long period of cold

blooded planning, but were instead actions committed during a period of extreme emotional turmoil and disturbance after he had come back from Chandigarh to Darripara after trying to find out his wife. It is submitted that the aforesaid aspect has not been considered by the Courts below.

7.8 It is further submitted by the learned counsel appearing on behalf of the appellant that, unfortunately, subsequently the wife of the appellant has died and the liability to maintain the children was/is upon his old aged mother. It is submitted that the appellant's mother is no longer capable of working and the entire family survives on Rs.300/- of old-age pension that she receives. It is submitted that the daughter of the appellant was forced to drop the school after class IX due to poverty. It is submitted that his one daughter is married and the appellant has another daughter Sanjana aged about 16 years. It is submitted that if the death sentence of the appellant is converted to life, in that case, the appellant would be in a position to work in the jail and earn something which would be helpful to his mother and daughter. It

is submitted that while the death sentence is continued, the appellant would not be in a position to do any work in Jail.

7.9 Learned counsel appearing on behalf of the appellant has further submitted that in many cases this Court has commuted the death sentence imposed for heinous crimes. Reliance is placed upon the decisions of this Court in the cases of ***Shaikh Ayub v. State of Maharashtra*** (1998) 9 SCC 521, ***Allaudin Mian v. State of Bihar*** (1989) 3 SCC 5, ***Dharmedrasinh v. State of Gujarat*** (2002) 4 SCC 679, ***Nemu Ram Bora v. State of Assam & Nagaland*** (1975) 1 SC 318, ***Rajesh Kumar*** (supra) and ***Brajendra Singh v. State of M.P.*** (2012) 4 SCC 289.

7.10 Making the above submissions, it is prayed to allow the present appeal and acquit the appellant-accused for the offences for which he was tired. In the alternative, it is prayed to convert the death sentence into the life imprisonment.

8. The present appeal is vehemently opposed by Shri Pranav Sachdeva, learned counsel appearing on behalf of the respondent-State.

8.1 It is vehemently submitted by the learned counsel appearing on behalf of the respondent-State that in the facts and circumstances of the case both, the learned Trial Court and the High Court have rightly convicted the accused for the offence punishable under Section 302 IPC for having killed the three minor children of the complainant and both the Courts below have rightly awarded the death sentence.

8.2 It is vehemently submitted by the learned counsel appearing on behalf of the respondent-State that the impugned judgment and order passed by the High Court is a well-reasoned and has been passed after hearing the parties and considering the entire facts and circumstances and therefore the same is not required to be interfered with by this Court in exercise of powers under Article 136 of the Constitution of India.

8.3 It is further submitted by the learned counsel appearing on behalf of the respondent-State that though the present case is based on circumstantial evidence, however, the prosecution has been successful in completing the chain of events which lead to the

only conclusion that it is the accused alone who had killed the three innocent children.

8.4 It is further submitted by the learned counsel appearing on behalf of the respondent-State that in the present case the prosecution has been successful in proving the motive for the accused to take revenge and killing three minor children of the complainant Shivlal-P.W.18.

8.5 It is further submitted by the learned counsel appearing on behalf of the respondent-State that thereafter the prosecution has been successful in establishing and proving that the accused was last seen together with the three minor children whose dead bodies were found subsequently at the instance of the accused.

8.6 It is further submitted by the learned counsel appearing on behalf of the respondent-State that there are three relevant and material circumstances against the accused, namely, (i) last seen evidence; (ii) recovery of dead bodies pursuant to a disclosure memorandum at the instance of the accused and (iii) call details made to the accused. It is submitted that therefore the aforesaid three sets of circumstances are proved by the prosecution against

the accused by examining P.W.1, P.W.8, P.W.13, P.W.16, P.W.18 and P.W.24.

8.7 It is further submitted by the learned counsel appearing on behalf of the respondent-State that by examining P.W.2, P.W.5 and P.W.10 the prosecution has been successful in proving that all the three deceased-three minor children had gone to the school on that day and thereafter after the school was over, they left the school together for home. It is submitted that the same is supported by the relevant documentary evidence.

8.8 It is further submitted by the learned counsel appearing on behalf of the respondent-State that the minor children were last seen together with the accused, has been established and proved by the prosecution by examining P.W.1 and P.W.8.

8.9 It is submitted that the dead bodies of minors – Ajay, Vijay and Kumari Sakshi – were recovered on the basis of the disclosure memorandum Ex.P-2. It is submitted that Ex.P-2 and the recovery of the dead bodies at the instance of the accused has been established and proved by the prosecution beyond doubt, more particularly, by examining P.W.7, P.W.22 and P.W.24.

8.10 It is further submitted by the learned counsel appearing on behalf of the respondent-State that during the course of the investigation there were phone calls with the accused and the conversation has been established and proved by Ex-P-30 – Phone Call Details. It is submitted that the same have not been explained by the accused.

8.11 It is further submitted by the learned counsel appearing on behalf of the respondent-State that in the present case even the conduct on the part of the accused, more particularly, his absence from the date of missing of the minor children till he was arrested from the house of witness Ashok Kumar Madhukar-P.W.13 is a relevant factor. It is submitted that the accused has failed to explain his absence from the village and from his house.

8.12 It is submitted that in fact the accused was found in the house of his relative Ashok Kumar Madhukar-P.W.13. It is submitted that therefore it is established and proved that after committing the offence the accused had taken the shelter in the house of his relative Ashok Kumar Madhukar-P.W.13. It is submitted that even there was an extra-judicial confession by the accused before Ashok

Kumar Madhukar-P.W.13 which has been established and proved from the deposition of Ashok Kumar Madhukar-P.W.13.

8.13 It is further submitted that the death of the three minors was homicidal deaths, which has been established and proved by examining the doctors who conducted the post-mortem.

8.14 It is submitted that therefore the prosecution has been successful in completing the chain of events. It is submitted that therefore both the Courts below have rightly convicted the accused for having killed the three minor children.

9. Now, so far as the submission on behalf of the accused that there are material contradictions in the depositions of P.W.1, P.W.8, P.W.18 and other witnesses is concerned, it is submitted by the learned counsel for the respondent-State that the alleged contradictions do not affect the case of the prosecution. It is submitted that the aforesaid contradictions cannot be said to be the material contradictions for which the benefit of doubt should be given to the accused. It is submitted that most of the witnesses are consistent with their statements under Section 161 Cr.P.C. recorded by the Investigating Officer during the investigation. It is

submitted that there are no much improvements. It is further submitted by the learned counsel appearing for the respondent-State that the so-called/alleged contradictions in any way do not affect the case of the prosecution and the material evidence with respect to the last seen evidence; recovery of the dead bodies as per the disclosure memorandum at the instance of the accused and the phone call details with the accused and even the motive for the accused to commit the offence.

10. Now, so far as the submission on behalf of the accused that the incriminating circumstances against the accused from the deposition of P.W.1 has not been put to the accused while recording his statement under Section 313 Cr.P.C. is concerned, it is submitted by the learned counsel appearing for the respondent-State that, as such, the said irregularity shall not affect the ultimate case against the accused. It is submitted that in any case the case of the accused in his statement under Section 313 Cr.P.C. is that of total denial. It is submitted that on the aforesaid ground the accused cannot be acquitted.

11. Now, so far as the submission on behalf of the accused that sufficient opportunity was not given to the accused on the sentence inasmuch as the accused was heard on the sentence on the very same day he was convicted is concerned, it is submitted that on the aforesaid ground the judgment and order passed by the learned Trial Court on sentence and confirmed by the High Court is not required to be interfered with. It is submitted that after the accused was held guilty, fullest opportunity was given to the accused on sentence. It is submitted that elaborate submissions were made by the learned Advocate appearing on behalf of the accused on sentence and even on the death sentence also. It is submitted that therefore as such no prejudice has been caused to the accused.

12. Now, so far as the submission on behalf of the accused not to confirm the death sentence and to convert the death sentence into the life imprisonment is concerned, it is submitted by the learned counsel appearing for the respondent-State that on striking the balance between the aggravating circumstances and the mitigating circumstances and considering the fact that the accused killed the

three minor children after abducting them, no sympathy should be shown to such an accused. It is submitted that, therefore, as such this is a fit case to award the death sentence and the case would fall into the rarest of rare cases. Therefore, it is prayed to dismiss the present appeal and confirm the death sentence.

13. Heard the learned counsel appearing for the respective parties at length. We have also gone through and considered in detail the Judgment and order passed by the learned Trial Court as well as the impugned judgment and order passed by the High Court convicting and accused for the offences punishable under Sections 302 and 364 IPC. We have also gone through and considered in detail the evidence on record - both oral and documentary.

13.1 The appellant-accused has been held guilty for having committed the murder/killing of three minor children aged about 8 years, 6 years and 4 years respectively and has been convicted by both the Courts below for the offences punishable under Sections 302 and 364 IPC. The learned Trial Court, after having held the appellant-accused guilty for the aforesaid offences, has imposed the

death sentence, which has been confirmed by the High Court by the impugned judgment and order.

14. We are conscious of the fact that it is a case of circumstantial evidence and therefore before convicting the accused on the basis of circumstantial evidence, the prosecution has to prove beyond doubt and complete the chain of events which lead to the conclusion that it is the accused alone who has committed the offence. Therefore, in the facts and circumstances of the case, it is required to be considered whether the prosecution has been successful in establishing the complete chain of events which lead to the conclusion that it is the appellant-accused alone who has committed the offence?

15. Having gone through the impugned judgment and order passed by the High Court as well as the judgment and order of conviction passed by the learned Trial Court and the case of the prosecution, the appellant-accused has been convicted mainly based on three sets of circumstances: (i) last seen evidence; (ii) recovery of bodies pursuant to a disclosure memo and (iii) alleged

calls made to the appellant during the search for the missing children.

16. Before considering the submissions made on behalf of the accused, few findings recorded by the learned Trial Court and confirmed by the High Court, are required to be first referred to. The prosecution has been successful in establishing and proving that the accused was having enmity with Shivlal-father of the three deceased minor children. The same has been established and proved by the prosecution by examining Shivlal-P.W.18, Manisha-P.W.20 and Rameshwar-P.W.11. The prosecution has been successful in proving that on 11.02.2011 all the minors deceased Ajay, Vijay and Kumari Sakshi went to the school from their house. The prosecution has also been successful in establishing and proving that on 11.02.2011 at about 11.30 hours the deceased minors left for home on foot; that the minors did not return to their home. On 11.02.2011 at about 12.00 noon – 1.00 pm, the deceased were seen going with the accused in school uniform with their school bags. Therefore, the accused was last seen together with the deceased minors. That, after the incident, the accused was

not found at his house and was missing even from the village. During the search by Shivlal-P.W.18 and others and after the accused was not found in the village, there were phone calls on the mobile of the accused. That, thereafter, the accused was found from the house of his relative Ashok Kumar Madhukar-P.W.13. Immediately after his arrest, the dead bodies were recovered/found along with the school bags etc. from the place shown by the accused himself. The aforesaid are the chain of events which led to the conclusion that the accused first kidnapped the three minor children and thereafter killed all of them. The phone-calls made to the accused has been established and proved by the prosecution by examining the Investigating Officer and by producing the call details from the mobile company as Ex.P.30.

17. Now, so far as the evidence of the accused having last seen together with the deceased is concerned, the prosecution has heavily relied upon the depositions of P.W.1 and P.W.8. So far as the reliance placed upon the deposition of P.W.1 is concerned, it is the case on behalf of the accused that while recording his statement under Section 313 Cr.P.C., the incriminating material on the basis

of the deposition of P.W.1 that he saw the accused with the deceased minors at around 1.00 pm on the afternoon of 11.02.2011, was not put to him and therefore, to that extent, the deposition of P.W.1 cannot be relied upon. However, it is required to be noted that while recording the statement of the accused under Section 313 Cr.PC., the deposition of P.W.1 was specifically referred to. Therefore, not asking a specific question arising out of the deposition of P.W.1, in the facts and circumstances of the case, cannot be said to be fatal to the case of the prosecution. Even otherwise, the accused was last seen together with the deceased minors has been established and proved by the prosecution by examining P.W.8-Ashok Patel. P.W.8-Ashok Patel in his deposition has specifically stated that he saw the accused with all the three minors deceased at around 12.00 hours on 11.02.2011. He has identified/recognized the accused present in the court. He has also stated that he knew the complainant Shivlal and he recognized all the three minor children of Shivlal. The said witness has been thoroughly cross-examined by the defence. However, from the cross-examination, the defence has failed to make out any case

which may doubt either the credibility and/or what the said witness has stated in his examination-in-chief. He is an independent witness on the evidence of last seen together. We see no reason to doubt the same. There may be some contradictions, but according to us, those contradictions are not material contradictions, which may doubt the credibility of the said witness and/or may be fatal to the case of the prosecution. Thus, the prosecution has been successful in establishing and proving that the accused was last seen together with all the three minor children at about 12.00 noon on 11.02.2011 after they left the school.

17.1 At this stage, it is required to be noted that the prosecution has proved beyond doubt that all the three minors went to the school in the morning of 11.02.2011 and thereafter they left for the home at about 11.30 hours. That, thereafter, at about 12.00 hours, the accused was seen with all the three minor children. At this stage, it is required to be noted that after Ashok Patel disclosed to Shivlal-P.W.18 and others that he had seen the accused with the three minor children on 11.02.2011 at about 11.30 hours, the name of the accused was specifically mentioned in the missing

report given by Shivlal on 11.02.2011 and the same was also mentioned in the FIR. In the FIR, it was specifically mentioned that during the investigation of missing person No. 3/11, he had enquired the complainant and Ashok Patel and Ashok Patel told that he saw the minor children with the accused. Thus, considering the entire evidence on record, we see no reason to doubt the credibility of P.W.8-Ashok Patel. He is an independent witness and no mala-fides are alleged against him on behalf of the accused.

18. Now, the next important evidence against the accused is the recovery of dead bodies which were found from the places shown by the accused after his arrest. During the course of the investigation, the dead bodies were found from the places shown by the accused, the places which the accused alone could have known. Therefore, there is a recovery of the dead bodies along with the school dress and bags at the instance of the accused. It has been established and proved from the disclosure memo. The disclosure memo has been exhibited. Therefore, the aforesaid circumstance definitely goes against the accused.

19. One another circumstance which goes against the accused is that after the incident of missing of three minor children, the accused was not found in his house and even in the village. He was contacted on his mobile phone. Initially when he was tried to be contacted, his mobile phone was found switched-off. However, thereafter, he could be contacted on mobile when Rameshwar-P.W.11 phoned the accused Manoj on 12.2.2011 at about 11.00 p.m. As per the said witness, at about 11.00 p.m. he phoned the accused Manoj and asked him "Where are you" and the accused told that he is present in his house. According to the said witness, the accused also told when he was asked whether any information about the where-about of Shivlal's children was received, initially the accused replied that he do not know. But, thereafter, he told that "When my children are crying Guddu @ Shivlal was enjoying, now when his children are missing how is he feeling".

19.1 However, it is required to be noted that the accused was not present in his house at all. From the evidence on record, it appears that the concerned witnesses – Shivlal and others found that the accused Manoj was not in his house. Phone calls made at 11.00

pm on the mobile of the accused in the night of 11.02.2011 has been established and proved by the prosecution by producing the call details from the mobile company (produced as Ex.P.30). The accused has failed to give any explanation on the same in his statement under Section 313 Cr.P.C. Non-examination of the officer of the mobile company cannot be said to be fatal to the case of the prosecution, more particularly, when the CDR has been got exhibited, through the deposition of the Investigating Officer and when the same was exhibited, no objection was raised on behalf of the defence. Even otherwise, it is required to be noted that the mobile SIM No. 9179484724 was seized from the accused at the time of his arrest and which is proved as per the seizure memo. Therefore, the prosecution has proved that the mobile SIM No. 9179484724 belonged to the accused.

20. One other important evidence against the accused is the deposition of P.W.13-Ashok Kumar Madhukar. The accused was found hiding in the house of said Ashok Kumar Madhukar situated at village Lakharam which is 5-6 kilometers away. It is true that the said witness has turned hostile. However, in the cross-

examination by the prosecution, P.W. 13 has specifically stated that the accused Manoj told him that the children of Shivlal had gone missing and Shivlal has lodged a report against him and the police is looking for him. He has specifically stated in the cross-examination that he engaged the accused Manoj in conversation and thereafter the police came and took Manoj after arresting him. Therefore, the fact that the accused was found from the house of said Ashok Kumar Madhukar from village Lakharam has been established and proved, despite the said Ashok Kumar Madhukar has turned hostile. As per the settled proposition of law, even the deposition of the hostile witness to the extent it supports the case of the prosecution can be relied upon. The accused has failed to explain his conduct in his statement under Section 313 Cr.P.C. about his missing from the house and even the village after the incident of kidnapping. He has also failed to explain the reason why he was found from the house of Ashok Kumar Madhukar. It may be that there is some doubt created by the defence about the place where the accused was arrested. However, the fact remains that the accused was arrested from village Lakharam on

13.02.2011. According to the defence, the accsued was arrested on 12.02.2011 evening. But the same is not established and proved from the evidence. On the contrary, as per the deposition of Ashok Kumar Madhukar, he was arrested on 13.02.2011. Even as per the arrest memo, the accused was arrested on 13.02.2011. Immediately thereafter, during the course of the investigation and as per the disclosure memo, the dead bodies of the deceased minor children were recovered at the instance of the accused. Therefore, as such, the chain of events established and proved by the prosecution as under:

(1) That all the three minor children went to the school in the morning of 11.02.2011;

(2) That all three minor children left the school at about 11.30 a.m. on 11.02.2011;

(3) That the accused was last seen together with the deceased minors at about 12.00 hours – 1.00 p.m. on 11.02.2011;

(4) That there was a prior enmity between the accused and the complainant Shivlal-father of the deceased minor children

as the wife of the accused ran away with the brother of Shivlal and that the children of the accused were without their mother and therefore he took the revenge how Shivlal would feel if his children are missing;

(5) That the accused was missing from his house and even the village from the time of the incident of kidnapping;

(6) There were phone calls with the accused on his mobile no. 9179484724 on the night of 11.02.2011;

(7) That he was hiding in the house of Ashok Kumar Madhukar and he was arrested from village Lakharam from the house of Ashok Kumar Madhukar on 13.02.2011 and/or at least from Village Lakharam;

(8) Recovery of dead bodies of the minor children from the place shown by the accused, which are recovered from the place/places for which the accused alone could have the knowledge; and

(9) That the death of the minors were homicidal death.

21. As per the learned counsel appearing on behalf of the accused, there are contradictions in the depositions of various witnesses,

more particularly, P.W.1 and P.W.8 having told that they had seen the accused with the minor children on 11.02.2011 and even with respect to the telephonic calls and having talked with the accused after 11.02.2011. However, having considered the so-called contradictions pointed out by the learned counsel appearing on behalf of the accused and other evidences, we are of the opinion that those contradictions are not material contradictions which may ultimately affect the case of the prosecution as a whole. The minor discrepancies and inconsistencies in the statements of the prosecution witnesses and the minor lacuna in the investigation led by the police cannot be a reason for discarding the entire prosecution case, if the evidence is otherwise sufficient and inspiring to bring home the guilt of the accused. As observed by this Court in the case of ***Leema Ram v. State of Haryana*** [AIR 1999 SC 3717], there are bound to be some discrepancies between the narrations of different witnesses, when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. It is further observed that corroboration of evidence with mathematical

niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless; some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. So it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive. Therefore, we are of the opinion that the so-called minor discrepancies/contradictions do not ultimately affect the case of the prosecution. The benefit of such minor discrepancies/ contradictions should not go to the accused, more particularly, when from the other evidences on record the guilt of the accused has been established and proved.

22. Thus, for the reasons sated above, we are of the opinion that the High Court has not committed any error in upholding the conviction of the accused for the offences punishable under Sections 302 and 364 IPC. We are in complete agreement with the view taken by the learned Trial Court as well as the High Court in so far as convicting the accused for the offences punishable under Section 302 and 364 IPC for having killed three minor children aged about 8 years, 6 years and 4 years respectively.

23. Now, so far as the capital punishment imposed by the learned Trial Court and confirmed by the High Court is concerned, it is the case on behalf of the appellant-accused that as the learned Trial Court heard the accused on sentence the very same day on which the conviction was recorded and as such an error has been committed by the learned Trial Court and therefore it vitiates the award of sentence, reliance has been placed upon the decisions of this Court in the cases of ***Santa Singh*** (supra), ***Allaudin Mian*** (supra), ***Rajesh Kumar*** (supra), ***Ajay Pandit @ Jagdish*** (supra) and a recent decision of this Court in ***Chhannu Lal Verma*** (supra). While considering the aforesaid submissions, the object of Section

235(2) Cr.P.C. is required to be considered. The object and purpose of Section 235(2) Cr.P.C. is that the accused must be given an opportunity to make a representation against the sentence to be imposed on him. Sub-section (2) of Section 235 satisfies a dual purpose; it satisfies the rule of natural justice by affording to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. So, what is required to be considered is whether at the time of awarding of sentence, sufficient and proper opportunity has been given to the accused or not and when the capital punishment is awarded, whether the accused has been given the opportunity to point out the aggravating and mitigating circumstances or not? An identical question came to be considered by this Court in a recent decision of this Court in the case of ***Accused 'X' v. State of Maharashtra*** in Review Petition (Criminal) No. 301 of 2008 in Criminal Appeal No. 680 of 2007 dated 12.04.2019. Before this Court the very decisions on which the reliance has been placed now by the learned counsel appearing on behalf of the accused, which are referred to hereinabove, were pressed into service. This Court

had the occasion to consider the very submissions made on behalf of the accused, more particularly, the conviction and the sentence on the very day on which the conviction was recorded. In paragraphs 29 to 34, this Court has observed and held as under:

> "29. Two recent three Judge Bench decisions of this Court on this aspect merit our consideration. Firstly, in the decision dated 28.11.2018 in Chhannu Lal Verma v. State of Chhattisgarh (Criminal Appeal Nos. 14821483 of 2018), this Court observed that not having a separate hearing at the stage of trial was a procedural impropriety. Noting that a bifurcated hearing for conviction and sentencing was a necessary condition laid down in Santosh Kumar Satishbhushan Bariyar, (2009) 6 SCC 498, the Court held that by conducting the hearing for sentencing on the same day, the Trial Court failed to provide necessary time to the appellant therein to furnish evidence relevant to sentencing and mitigation. We find that this cannot be taken to mean that this Court intended to lay down, as a proposition of law, that hearing the accused for sentencing on the same day as for conviction would vitiate the trial. On the contrary, in the said case, it was found on facts that the same was a procedural impropriety because the accused was not given sufficient time to furnish evidence relevant to sentencing and mitigation.
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> 30. Secondly, in the decision dated 12.12.2018 in Rajendra Prahladrao Wasnik v. State of Maharashtra, (Review Petition (Crl.) Nos. 306-307 of 2013), this Court made a general observation that in cases where the death penalty may be awarded, the Trial Court should give an opportunity to the accused after conviction which is adequate for the production of relevant material on the

question of the propriety of the death sentence. This is evidently at best directory in nature and cannot be taken to mean that a pre-sentence hearing on a separate date is mandatory.

31. It may also be noted that in the older three-Judge Bench decision of this Court in Malkiat Singh Case (1991) 4 SCC 341, the Court observed that keeping in mind the two-Judge Bench decisions in Allauddin Mian Case (supra) and Auguswamy v. State of Tamil Nadu, (1989) 3 SCC 33, wherein it had been laid down that a sentence awarded on the same day as the finding of guilt is not in accordance with law, the normal course of action in case of violation of such procedure would be remand for further evidence. However, on a perusal of these two decisions we find that their import has not been correctly appreciated in Malkiat Singh Case (supra), since the observations in Allauddin Mian Case (supra), as relied upon in Anguswamy Case (supra), regarding conduct of hearings on separate dates, were only directory. Be that as it may, it must be noted that the effect of Malkiat Singh Case (supra) has already been considered by this Court in Vasanta Sampat Dupare v. State of Maharashtra (2017) 6 SCC 631, wherein it was already noted that the mere non-conduct of the pre-sentence hearing on a separate date would not per se vitiate the trial if the accused has been afforded sufficient time to place relevant material on record.

32. It may not be out of context to note that in case the minimum sentence is proposed to be imposed upon the accused, the question of providing an opportunity under Section 235(2) would not arise. (See Tarlok Singh v. State of Punjab, (1977) 3 SCC 218; Ramdeo Chauhan v. State of Assam, (2001) 5 SCC 714).

33. There cannot be any doubt that at the stage of hearing on sentence, generally, the accused argues based

on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of the Cr.P.C is to provide an opportunity for accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfill the requirements of Section 235(2) of the Cr.P.C. only by adjourning the matter for one or two days to hear the parties on sentence. If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well.

34. In light of the above discussion, we are of the opinion that as long as the spirit and purpose of Section 235(2) is met, inasmuch as the accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so."

Thus, there is no absolute proposition of law that in no case there can be conviction and sentence on the same day. There is no

absolute proposition of law laid down by this Court in any of the decisions that if the sentence is awarded on the very same day on which the conviction was recorded, the sentencing would be vitiated.

23.1 So far as the reliance placed upon by the learned counsel appearing on behalf the appellant upon the decision of this Court in the case of ***Santa Singh*** (supra) is concerned, on considering the entire judgment and the facts in that case, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand and/or the same shall not be of any assistance to the accused. In that case before this Court, it was found that the learned Trial Court did not give the accused an opportunity to be heard in regard to the sentence to be imposed on him and by one single judgment convicted the accused and also sentenced him to death.

23.2 Similarly, the decision of this Court in the case of ***Allaudin Mian*** (supra) also shall not be applicable to the facts of the case on hand. In the case before this Court, it was found that the death sentence was imposed by the Trial Court without affording proper

opportunity of hearing as contemplated under Section 235(2) Cr.P.C. No reasons were recorded for awarding the death sentence which as such were mandatory and thereafter on merits this Court found that the death sentence was no warranted.

23.3 Applying the law laid down by this Court in the aforesaid decisions, more particularly, in the case of ***Accused 'X'*** (supra) to the facts of the case on hand and on considering the reasoning given by the learned Trial Court as well as the High Court, we are of the opinion that there is sufficient compliance of the provisions of Section 235(2) Cr.P.C. The learned Trial Court heard the accused on the aspect of proposition of sentence separately which is clear from paragraphs 76 to 82 of the judgment of the learned Trial Court. Hence, based on the material on record, we are satisfied that the learned Trial Court fully complied with the requirements of Section 235(2) Cr.P.C. The learned Trial Court had considered the mitigating circumstances pointed out on behalf of the accused and also considered the aggravating circumstances which warranted the death sentence. Thus, it cannot be said that the accused was not given any sufficient opportunity to put forward his case on

sentence. It also cannot be said that the learned Trial Court has not given any special reasons while awarding the death sentence. After considering the aggravating circumstances and the crime i.e. the magnitude and the manner of the commission of the crime in the form of kidnapping and thereafter murdering three minor children, while awarding the death sentence the learned Trial Court has considered the following aggravating circumstances against the accused:

> "A. This point is not disputed that the accused was annoyed with Shivlal (PW-18) because 10 days prior to the incident his wife Sumrit Bai eloped or got eloped by the brother of Shivlal (PW-18) as there was a love affair between Sumrit Bai and uncle of the minors deceased Ajay, Vijay and Sakshi. In this regard evidence is also available on record.
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> B. As well as this point is also considerable that being acquaintance with the accused and having faith on accused all the three minors innocent Ajay, Vijay and Sakshi left the school with the accused and were missing. Hence, breaching the faith of all the three innocent minors the accused has committed the offence of kidnapping.
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> C. It is also considerable that the accused has committed culpable homicide of all the three minors Ajay, Vijay and Sakshi whose age was in between 4 to 8 years. There was 10 days sufficient time gap between the incident of eloping accused's wife with Shivnath, the uncle of the minors and the date of

committing culpable homicide of the minors. Hence, the act of the accused is not the act committed under grave and sudden provocation. On the basis of evidence available on record the act of the accused is afterthought with planned manner.

D. It is also considerable that accused has brutally committed homicidal death of all three minors Ajay, Vijay and Sakshi by processing their neck forcefully who have no concern with the matter of eloping his wife Sumrit Bai.

E. It is also considerable that accused has brutally, mercilessly and cowardly committed murder of all three minors Ajay, Vijay and Sakshi who were tender age of 4-8 years and were completely unable to resist and defend themselves at the time of incident.

F. At the time of committing the said act accused had two children thinking over it the accused did not have to do the said act. In the light of the said act committed by the accused the question of maintaining their minor children is secondary.

G. It is also considerable that the said act of the accused is the act which gives challenge to the social security of the society."

Thus, the submission on behalf of the accused that as the sentence was recorded on the same day on which the conviction was recorded and therefore it has vitiated the award of sentence, cannot

be accepted. As observed hereinabove, there is a total compliance of the provisions of Section 235 (2) as well as Section 354 Cr.P.C.

24. Now, so far as the submission on behalf of the accused that while awarding the capital punishment the learned Trial Court has solely looked to the brutality of the crime is concerned, it is factually incorrect. On considering the rival discussions as well as the reasons given by the learned Trial Court while awarding the capital punishment, it appears that the brutality of the crime was considered to be one of the reasons and not the sole reason.

25. However, at the same time, the prayer on behalf of the accused not to impose the death penalty and to convert the same into life imprisonment, in the facts and circumstances of the case, requires consideration. Therefore, now the question which is posed for consideration of this Court is whether, in the facts and circumstances of the case, the death sentence is warranted?

25.1 While answering the aforesaid questions, few decisions of this Court on when the death sentence is warranted are required to be referred to and considered.

25.2 After analyzing many decisions of this Court on imposition of death sentence, namely, ***Bachan Singh*** (supra); ***Machhi Singh v. State of Punjab*** (1983) 3 SCC 470; ***Mohd. Chaman v. State (NCT of Delhi)*** (2001) 2 SCC 28; ***Aloke Nath Dutta v. State of W.B.*** (2007) 12 SCC 230; ***State of Punjab v. Manjit Singh*** (2009) 14 SCC 31; ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*** (2009) 6 SCC 498; ***Sebastian v. State of Kerala*** (2010) 1 SCC 58; ***Rajesh Kumar*** (supra); ***Ramesh v. State of Rajasthan*** (2011) 3 SCC 685; ***Amit*** (supra); and ***Mohinder Singh v. State of Punjab*** (2013) 3 SCC 294, the decisions which were relied upon on behalf of the accused and after considering few decisions of this Court involving death sentence which were relied upon on behalf of the State, ultimately, this Court in the case of ***Sushil Sharma v. State (NCT) of Delhi*** (2014) 4 SCC 317 in paragraphs 100-104 has observed and held as under:

> **"100.** In light of the above judgments, we would now ascertain what factors which we need to take into consideration while deciding the question of sentence. Undoubtedly, we must locate the aggravating and mitigating circumstances in this case and strike the right balance. We must also consider whether there is

anything uncommon in this case which renders the sentence to life imprisonment inadequate and calls for death sentence. It is also necessary to see whether the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender.

101. We notice from the above judgments that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and it does not have enormous proportion, the option of life imprisonment has been exercised in certain cases. Extreme poverty and social status has also been taken into account amongst other circumstances for not awarding death sentence. In few cases, time spent by the accused in death cell has been taken into consideration along with other circumstances, to commute death sentence into life imprisonment. Where the accused had no criminal antecedents; where the State had not led any evidence to show that the accused is beyond reformation and rehabilitation or that he would revert to similar crimes in future, this Court has leaned in favour of life imprisonment. In such cases, doctrine of proportionality and the theory of deterrence have taken a back seat. The theory of reformation and rehabilitation has prevailed over the idea of retribution.

102. On the other hand, rape followed by a cold-blooded murder of a minor girl and further followed by disrespect to the body of the victim has been often held

to be an offence attracting death penalty. At times, cases exhibiting premeditation and meticulous execution of the plan to murder by levelling a calculated attack on the victim to annihilate him, have been held to be fit cases for imposing death penalty. Where innocent minor children, unarmed persons, hapless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a confirmed criminal and has committed murder in a diabolical manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and sick mind, this Court has acknowledged the need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this Court, amongst other relevant factors. But, one thing is certain that while deciding whether death penalty should be awarded or not, this Court has in each case realising the irreversible nature of the sentence, pondered over the issue many times over. This Court has always kept in mind the caution sounded by the Constitution Bench in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] that Judges should never be bloodthirsty but has wherever necessary in the interest of society located the rarest of the rare case and exercised the tougher option of death penalty.

103. In the nature of things, there can be no hard-and-fast rules which the court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Therefore,

the various factors like the age of the criminal, his social status, his background, whether he is a confirmed criminal or not, whether he had any antecedents, whether there is any possibility of his reformation and rehabilitation or whether it is a case where the reformation is impossible and the accused is likely to revert to such crimes in future and become a threat to the society are factors which the criminal court will have to examine independently in each case. Decision whether to impose death penalty or not must be taken in the light of guiding principles laid down in several authoritative pronouncements of this Court in the facts and attendant circumstances of each case.

104. We must also bear in mind that though, the judicial proceedings do take a long time in attaining finality, that would not be a ground for commuting the death sentence to life imprisonment. Law in this behalf has been well settled in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] . The time taken by the courts till the final verdict is pronounced cannot come to the aid of the accused in canvassing commutation of death sentence to life imprisonment. In *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , the Constitution Bench made it clear that though ordinarily, it is expected that even in this Court, the matters where the capital punishment is involved, will be given top priority and shall be heard and disposed of as expeditiously as possible but it could not be doubted that so long as the matter is pending in any court, before final adjudication, even the person who has been condemned or who has been sentenced to death has a ray of hope. It, therefore, could not be contended that he suffers that mental torture which a person suffers when he knows that he is to be hanged but waits for the doomsday. Therefore, the appellant cannot draw any support from

> the fact that from the day of the crime till the final verdict, a long time has elapsed. It must be remembered that fair trial is the right of an accused. Fair trial involves following the correct procedure and giving opportunity to the accused to probabilise his defence. In a matter such as this, hurried decision may not be in the interest of the appellant."

25.3 In the case of ***Absar Alam v. State of Bihar*** (2012) 2 SCC 728, it is observed and held by this Court that the mental condition of the accused, which led to assault, cannot be lost sight of. It is further observed that the mental condition or state of mind of accused is one of the factors that can be taken into account in considering the question of sentence.

25.4 Thus, from the catena of decisions of this Court, more particularly, the decisions referred to hereinabove, for deciding on the issue of sentence, the aggravating circumstances and mitigating circumstances must be located and the right balance must be adopted. What can be said to be the mitigating circumstances has been dealt with and considered by this Court in the case of ***Bachan Singh*** (supra). As observed by this Court in the case of ***Bachan Singh*** (supra), the following can be said to be the mitigating

circumstances which are required to be considered while deciding on the issue of death sentence.

> "(*1*) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (*2*) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (*3*) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (*4*) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above.
>
> (*5*) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (*6*) That the accused acted under the duress or domination of another person.
>
> (*7*) 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."

25.5 In light of the above judgments, we would now ascertain the factors which we need to take into consideration while deciding on the question of sentence. We must locate the aggravating and mitigating circumstances in this case and strike a right balance. In the present case, the following are the mitigating factors/circumstances:

(i) That the offence was committed under the influence of extreme mental or emotional disturbance. The accused was emotionally disturbed due to the elopement of his wife with the uncle of the deceased and that his children were suffering in absence of their mother with them. The accused was so much disturbed and troubled is also born out from the deposition of one of the witnesses that on mobile the accused told how Shivlal is feeling without his children.

(ii) There are no criminal antecedents.

(iii) At the time of commission of the offence the accused was 28 years of age and his conduct in prison is reported to be good.

(iv) That he belongs to a poor family and is the only son of his parents, and

(v) That he has got an old aged mother who is taking care of two daughters of the accused, out of which one is married now.

25.6 On the other hand, the only aggravating circumstance pointed out by the State is that the manner in which the incident took place

and three minors were brutally killed. Except the above, no other aggravating circumstances are pointed out on behalf of the State. Therefore, striking the balance between aggravating circumstances and mitigating circumstances, we are of the opinion that in the facts and circumstances of the case, more particularly, the mental condition of the accused at the time of the commission of the offence and that the accused was under extreme mental disturbance due to his wife eloped with the uncle of the deceased and his children were deprived of the company of their mother, the mitigating circumstances are in favour of the accused to convert the death sentence to life imprisonment. It is true that the court must respond to the cry of the society and to settle what would be the deterrent punishment for an abominable crime. It is also equally true that a larger number of criminals go unpunished thereby increasing criminals in the society and law losing its deterrent effect. It is also true that the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect; in the ultimate analysis, the society suffers and a criminal get encouraged. Sometimes it is stated that

only rights of criminals are kept in mind, the victims are forgotten. However, at the same time, while imposing the rarest of rare punishment, i.e. death penalty, the Court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case. The mitigating circumstances as observed by this Court in the case of ***Bachan Singh*** (supra) and the mitigating circumstances in the present case, if are considered cumulatively and more particularly, that the accused was under the extreme mental disturbance because of the reasons stated hereinabove, we are of the opinion that, in the peculiar facts and circumstances of the case, the death penalty is not warranted and the same be converted to life imprisonment.

26. In view of the above and for the reasons stated above, the present appeal succeeds in part. The Judgment and Order passed by the learned Trial Court and confirmed by the High Court convicting the accused for the offences punishable under Sections 302 and 364 IPC is hereby confirmed. However, the death sentence imposed by the learned Trial Court, confirmed by the High

Court, is converted into the life imprisonment. It is further observed and directed that the life means till the end of the life with the further observation and direction that there shall not be any remission till the accused completes 25 years of imprisonment.

The present appeal is partly allowed to the aforesaid extent.

.....J.
(UDAY UMESH LALIT)

.....J.
(INDIRA BANERJEE)

.....J.
(M. R. SHAH)

New Delhi;
March 05, 2020.