HARU GHOSH

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1173 of 2008)

AUGUST 27, 2009

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

Penal Code, 1860 – ss.302, 307,326 – Murder of a woman and her young child and also attempt to murder a man aged 60 years – Conviction u/ss.302, 307,326 – Award of death sentence as also rigorous imprisonment for 7 years for offence punishable u/s. 307 and rigorous imprisonment for 5 years for offence punishable u/s. 326 – Upheld by High Court – On appeal held: Direct evidence of eye witnesses describing murderous attack on victim. Thus, courts below rightly held the accused guilty for offence punishable u/s.307 – Conviction u/s. 326 not required and thus, set aside – Not a case of pre meditated murder – Accused acted in a spur of moment – Also accused has two minor children – Death sentence not confirmed – Accused to remain in jail for minimum 35 years – Sentence/Sentencing.

The Sessions Judge convicted the appellant-accused u/s.302 IPC for committing the murder of A, aged 30 years and her son S, aged 12 years and u/ss.307, 326 IPC for attempt to murder J, aged 60 years. It awarded death sentence to the appellant on account of the murder of A and S, and also imposed rigorous imprisonment for seven years for offence punishable u/s. 307 IPC and further rigorous imprisonment for 5 years for the offence punishable u/s.326 IPC. High Court upheld the order. Hence the present appeal.

Disposing of the appeal, the Court

A HELD: 1.1. There is voluminous evidence in respect of both the incidents, namely, the murder of A and S and the attempt to commit murder of J. The witnesses S-PW-1, PW-2, PW-8, PW-3, PW-4, PW-5 and PW-6 were all neighbouring witnesses. All these witnesses graphically B described the murderous attack by the appellant-accused on S and A. In the cross-examination nothing has come from these witnesses which would render the evidence suspicious in any manner. [Para 6] [857-B-C; G]

1.2. From the evidence of the doctor-PW-18, who C performed the post-mortem on the body of A, it is clear that the appellant had no other intention but to commit murder. A had suffered as many as six injuries referable to the sharp cutting weapon on the most vital parts of her body like neck. The other two injuries were on her thigh D and left knee joint. S had suffered 10 injuries on the equally vital parts of the body like head, right eye, face, shoulders, and right arm. His wrist of the right hand was separated from the hand completely. Thus, the appellant-accused was rightly found guilty of murdering these two E helpless and defenceless persons apparently for no fault on their part. [Para 7] [857-H; 858-A-C]

1.3. The submission that appellant was on inimical terms with the witnesses and, therefore, the witnesses F had falsely implicated him, is unsustainable as there does not seem to be any enmity brought out on the cross-examination of these witnesses. Therefore, even if there was enmity between the parties then that would bring a clear cut evidence of the motive. [Para 8] [858-D-E]

G 1.4. The evidence of witnesses PW-10 and PW-12 which was corroborated by other witnesses PW-26, PW-29, PW-30, PW-17 and PW-27 clearly brings out that the appellant, immediately after murdering A and S assaulted J. The evidence of J is seen along with the medical

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evidence regarding the injuries and there is no doubt about the correctness of the findings reached by the Sessions Judge and the High Court. The assault on J was so severe that he lost one of his fingers, being right hand index finger. The trial court and the appellate court correctly concluded that the accused is guilty for the offence punishable u/s. 307 IPC. In fact, on that count it was not necessary for the trial court to additionally convict him for the offence u/s. 326 IPC. That part dealing with the conviction and sentence of the appellant u/s.326 IPC is set aside. [Para 9] [858-F-H; 859-A-C]

2.1. There cannot be a straightjacket formula depending on the number of murders committed or the manner in which the murder was committed or that the appellant was already undergoing the sentence of rigorous imprisonment for life. The appeal of the appellant was already pending in the High Court against his previous conviction u/s.382 IPC. The findings of the rarest of rare case would have to be judged in the light of the circumstances brought about and proved by the prosecution. [Para 12] [861-D-F]

2.2. The incidence was a dastardly murder of two helpless persons, one a woman and another, a child. There was actually no fault on their part. They did not invite any such dastardly action against themselves. The relations between A's husband and the appellant were strained. It cannot be denied that the appellant was given to crimes, inasmuch as, firstly he used to eke out his livelihood by selling illicit liquor, besides he was convicted for an offence of murder and was already facing a sentence of life imprisonment, though his appeal was pending before the High Court. [Para 17] [867-C-E]

2.3. This was not a pre-meditated murder. The appellant who was on bail, did go to the house of A and

A had assaulted the kid. There is no evidence to show under what circumstance the appellant entered the house of A and what prompted him to assault the boy. All the witnesses, who came on the spot, only came hearing the din created because of the shouting in the B house of A, but before that, the appellant had already entered the house. After the neighbours came, all the neighbours were able to extricate S from the hands of the appellant. S had suffered some injuries and he was bleeding and, therefore, A took him to the tubewell. Till C then also, the appellant did not assault the twosome. The appellant had not come armed with any weapon in the house. Therefore, it cannot be said that he had any such idea of assaulting or murdering or using any sharp cutting weapon as against the deceased. It was probably D when he saw the dao in the hands of S-PW-6, the anger in the mind of the appellant exploded and he just took the dao from S, or to put it more correctly, wrested it from his hands and then started assaulting the deceased. The witnesses are silent as to whether A had said anything and further, whether there was any exhortation given by E anybody or whether the appellant had any other reason to act at the spur of the moment. Thus, there was no pre-meditation aspect in the act of the appellant, which was the reason to act at the spur of the moment. [Para 18] [867-F-H; 868-A-E]

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2.4. There was a long standing hatred and enmity between the family of A, her husband and others in the neighbourhood, all who were opposed to the appellant eking out his livelihood by selling the liquor. The G appellant may not be justified in eking out his livelihood by selling the liquor, but the fact of the matter is that he and his family was surviving only on that. If that exercise was tried to be stopped by the husband of A and others, the appellant was bound to nurture deep hatred in his H mind, as a result of which, he acted. There is also a

history that husband of the deceased A had already reported against the appellant that he had cut 75 plants of Banana. The mental state of the appellant can be imagined. He had come back from the jail. He was already under the shadow of life imprisonment. Probably, his liberty was itself in jeopardy because of the report made against him. As a result of all this, he acted in a sudden manner and his deep rooted hatred was exploded. This would not be a case of pre-meditated cold blooded murder. The cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body of the deceased, does not by themselves, become the guiding factor in favour of the death sentence. Accused was nurturing the hatred even against, who was obviously a leader and had joined the hands of the neighbours and the husband of the deceased in trying to throw out the appellant. Therefore, the appellant seems to have proceeded to his house and assaulted him as an expression of his old and well nurtured hatred against the concerned persons. Though wrongly, the appellant probably has the feeling of injustice in his being singled out. The appellant himself has two minor children, which has come in the evidence and in the statement of the appellant/accused. [Paras 18 and 19] [868-E-H; 869-A-E]

2.5. Ordinarily, sentence for imprisonment for life would be passed. However, that would be no punishment to the appellant, as he is already under the shadow of sentence of imprisonment for life, though he has been bailed out by the High Court. There is no proposal to send the appellant for the rest of his life; however, it is observed that the life imprisonment in case of the appellant shall not be less than 35 years of actual jail sentence, meaning thereby, the appellant would have to remain in jail for minimum 35 years. The death sentence is not confirmed

and instead, would be substituted by the sentence indicated. [Para 21] [871-C-F]

Bachan Singh v. State of Punjab **1980 (2) SCC 684;** *Machhi Singh and Ors. vs. State of Punjab* **1983 (3) SCC 470;** *Om Prakash v. State of Haryana* **1999 (3) SCC 19;** *Santosh Kumar Satishbhushan Bariya vs. State of Maharashtra* **JT 2009 7 SC 248;** *Swamy Shraddananda @ Murly Manohar Mishra vs. State of Karnataka* **AIR 2008 SC 3040;** *Alok Nath Dutta vs. State of West Bengal* **2006 (10) Suppl. SCR 662;** *Mahesh S/o Ram Narain and Ors. vs. State of Madhya Pradesh* **1987 (3) SCC 80;** *Sevaka Perumal and Ors. vs. State of Tamil Nadu* **1991 (3) SCC 471;** *Jai Kumar vs. State of Madhya Pradesh* **1999 (5) SCC 1;** *Ramdeo Chauhan Alias Rajnath Chauhan vs. State of Assam* **2007 (7) SCC 455;** *Suresh and Anr. vs. State of Uttar Pradesh etc.* **2001 (3) SCC 673;** *Krishna Mochi and Ors. vs. State of Bihar etc.* **2001 (6) SCC 81;** *Om Prakash @ Raju vs. State of Uttaranchal* **2003 (1) SCC 648;** *Gurdev Singh and Anr. vs. State of Punjab etc.* **2003 (7) SCC 258;** *Praveen Kumar vs. State of Karnataka* **2003 (12) SCC 199;** *Holiram Bordologi vs. State of Assam* **2005 (3) SCC 793;** *Union of India and Ors. vs. Devendra Nath Rai* **2006 (2) SCC 243;** *Babu @ Mubarik Hussain vs. State of Rajasthan* **2006 (13) SCC 116;** *Ram Singh vs. Sonia and Ors.* **2007 (3) SCC 1;** *Shivu Anr. vs. Registrar General, High Court of Karnataka & Anr.* **2007 (4) SCC 713;** *Prajeet Kumar Singh vs. State of Bihar* **2008 (4) SCC 434;** *Mohan Anna Chavan vs. State of Maharashtra* **2008 (7) SCC 561, referred to.**

Case Law Reference:

1980 (2) SCC 684	**Referred to.**	**Para 12**
1983 (3) SCC 470	**Referred to.**	**Para 12**
1999 (3) SCC 19	**Referred to.**	**Para 12**
JT 2009 7 SC 248	**Referred to.**	**Para 12,15**

AIR 2008 SC 3040	**Referred to.**	**Para 12**	A
2006 (10) Suppl. SCR 662	**Referred to.**	**Para 14**	
1987 (3) SCC 80	**Referred to.**	**Para 20**	
1991 (3) SCC 471	**Referred to.**	**Para 20**	B
1999 (5) SCC 1	**Referred to.**	**Para 20**	
2007 (7) SCC 455	**Referred to.**	**Para 20**	
2001 (3) SCC 673	**Referred to.**	**Para 20**	
2001 (6) SCC 81	**Referred to.**	**Para 20**	C
2003 (1) SCC 648	**Referred to.**	**Para 20**	
2003 (7) SCC 258	**Referred to.**	**Para 20**	
2003 (12) SCC199	**Referred to.**	**Para 20**	D
2005 (3) SCC 793	**Referred to.**	**Para 20**	
2006 (2) SCC 243	**Referred to.**	**Para 20**	
2006 (13) SCC 116	**Referred to.**	**Para 20**	E
2007 (3) SCC 1	**Referred to.**	**Para 20**	
2007 (4) SCC 713	**Referred to.**	**Para 20**	
2008 (4) SCC 434	**Referred to.**	**Para 20**	F
2008 (7) SCC 561	**Referred to.**	**Para 20**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1173 of 2008.

From the Judgment & Order dated 27.3.2008 of the High Court of Calcutta in CRA No. 399 of 2006 with Death Reference Case No. 1 of 2006. G

Mata Prasad Singh (A.C.) for the Appellant.

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A Tara Chandra Sharma, Neelam Sharma for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Appellant herein Haru Ghosh has
B come up by way of this appeal, challenging the judgment of the High Court, whereby, the High Court confirmed the verdict of conviction, as also the death sentence awarded by the Sessions Judge. Appellant was tried for having committed murder of one Anima Pramanik, aged about 30 years and her son Subhankar
C Pramanik @ Kebal, aged about 12 years. He was also tried for the offence under Section 307-326 of the Indian Penal Code (hereinafter referred to as "IPC" for short) for attempting to murder one Jeevan Krishna Chakraborty, aged about 60 years.

D 2. The prosecution case was that on 7.5.2005, at about 11.15 hours, a telephonic message was received by N.C. Mondal (PW-37), an Assistant Sub-Inspector of Nawadeep Police Station, informing that between 10.45 Hrs. and 11.10 hrs. on that day, one Haru Ghosh S/o Mohan Ghosh,staying at
E Ramchandrapur Ghoshpara assaulted three persons of the said village by a sharp cutting dao and also tried to assault others and for that, the police help was immediately needed. The message was recorded in the General Diary vide Entry No. 300. One Shri Amitava Ghosh (PW- 39), Inspector-in-Charge,
F reached the spot immediately at about 11.25 hours. The said message was sent by Samir Ghosh (PW-1), who narrated the incident to them. The bodies of a female and a male child were lying near the tubewell of the house of the victims. On this basis, the further investigation was taken up. It came out from the complaint of the complainant Samir Ghosh (PW- 1) that he had
G heard some cries from the house of the deceased and rushed only to find the appellant/accused strangulating Subhankar Pramanik. On the intervention of the complainant, Subhankar was released from the clutches of Haru Ghosh and he was bleeding, therefore, Anima (mother of Subhankar) took him to
H the nearby tubewell and was pouring water on his face. It further

came out that while she was pouring water, at that time one Shyamal Ghosh, a neighbour, was watching the incident with a dao in his hand. Haru snatched the dao from Shyamal and started assaulting Subhankar and Anima with that dao, as a result of which both of them collapsed on the ground with severe bleeding injuries. Thereafter, Haru ran away with the dao and only after few minutes later, the informant-complainant Samir Ghosh (PW-1) came to know that Haru had also gone to Jeevan Krishna Chakraborty's house and hacked him and also to the house of one or two others and had injured them with the aforesaid dao. Prosecution collected the statements of the witnesses, who were Samir Ghosh (PW-1), Sabitri Ghosh (PW-2), Adhir (PW-8) and wife of Adhir namely Bandana (PW-3). It came out from the statements that these persons had intervened when Subhankar was assaulted by Haru and had rescued him. The statement of one Atasi Ghosh (PW-5) and Shyamal Ghosh (PW-6) was also collected. One Namita Ghosh (PW-4), a neighbour, was also questioned by the investigating agency, as also Sikha (PW-10), who was none else, but the daughter-in-law of Jeevan Krishna Chakraborty, who was a member of Gram Panchayat.

3. It transpired further that Jeevan Krishna Chakraborty though was assaulted severally; his statement also came to be recorded. The statements of some others present in the house of Jeevan Krishna Chakraborty were also collected by the prosecution. Thus the prosecution collected the statements of about 36 witnesses. On this basis, the charge sheet was filed.

4. It also turned out during the investigation that Haru Ghosh was already undergoing the sentence of life imprisonment in one other matter and he had come back from the jail on bail. It further transpired that the motive for this dastardly act on the part of the appellant/accused was that the accused used to sell illicit liquor and all persons in the neighbourhood including the husband of the deceased Anima used to ask him not to sell illicit liquor in the locality. It also

A turned out that the appellant/accused had cut down about 75 banana trees and there was a report made, on account of which, it came out that the appellant/accused was a bully in the locality. On this basis, the investigating agency filed a charge sheet against the appellant/accused. The appellant/accused B abjured the guilt. His plea was that of false implication.

5. In support of the prosecution, as many as 36 witnesses came to be examined, the main witnesses being Samir Ghosh (PW-1), Sabitri Ghosh (PW-2), Namita Ghosh (PW-4), Shyamal Ghosh (PW-6), Adhir Ghosh (PW-8) and his wife Bandana C Ghosh (PW-3) and Atasi Ghosh (PW- 5). On the first part of the incident, i.e., about the assault by the appellant/accused on Anima and Subhankar, both of whom died on the spot, and as regards the second part, i.e., about the assault of Jeevan Krishna Chakraborty, he himself was examined as PW-12. The D supporting witnesses to the second assault were Sikha Chakraborty (PW-10), Jayanta Chakraborty (PW-29), Uttam Saha (PW- 30), Nilmoni Ghosh (PW-13), Susanta Chakraborty S/o Jeevan Krishna Chakraborty (PW-27) etc. There are some other witnesses who were examined to corroborate these E witnesses, who were the eye witnesses. The prosecution also led the evidence of Dr. Kanchan Kumar Sarkar (PW-34), Sakshi Ghosh (PW-7), Bahadur Ghosh (PW-9), Biswajit Ghosh (PW-17) and Dr. Jahnunandan Misra. The evidence of police witnesses was also led and after all the evidence, the Sessions F Judge came to the conclusion that it was proved beyond reasonable doubt by the prosecution that the appellant/accused had committed the murder of Anima and Subhankar and also attempted to murder Jeevan Krishna Chakraborty. The appellant/accused was sentenced to death on account of the G murder of Anima and Subhankar and was also convicted to suffer the rigorous imprisonment for seven years and payment of Rs. 5,000/-, and in default, to suffer six months' imprisonment on account of offence punishable under Section 307, IPC. Strangely enough, he was also sentenced to suffer rigorous H imprisonment for 5 years and to pay Rs.5,000/- and in default,

to suffer further rigorous imprisonment for 3 months for the offence punishable under Section 326, IPC. This was confirmed by the High Court, necessitating the present appeal. A

6. Shri Mata Prasad Singh, the Amicus Curiae appointed by this Court took us through the evidence of all the witnesses. All that we can say is that there is voluminous evidence in respect of both the incidents, namely, the murder of Anima and Subhankar and the attempt to commit murder of Jeevan Krishna Chakraborty. The first group of witnesses Samir Ghosh (PW-1), Sabitri Ghosh (PW-2), Adhir Ghosh (PW-8), Bandana Ghosh (PW-3), Namita Ghosh (PW-4), Atasi Ghosh (PW- 5) and Shyamal Ghosh (PW-6) were all neighbouring witnesses. They have all graphically described the attack on Anima and Subhankar. They were the witnesses who actually went on the spot to save Subhankar who was being strangulated by the appellant/accused. They have all, in one tone, described how the appellant/accused tried to strangulate Subhankar and how Anima got injured because of that. They have also described that thereafter, Subhankar was bleeding and was taken near the tube-well by Anima who was trying to wash his mouth and at that time Haru, the present appellant, snatched dao from the hand of Shyamal Ghosh and assaulted them. Shyamal Ghosh (PW-6) has in no uncertain terms supported the prosecution theory. It was he from whose hands the murder weapon was snatched. Sakshi Ghosh (PW-7) was also attracted by the hue and cry and had also seen the whole incident. Adhir Ghosh (PW-8) is husband of Bandana Ghosh whose evidence we have already referred to. He has also seen and graphically described the whole incident. All these witnesses have graphically spoken about the murderous attack by the appellant/ accused on Subhankar and Anima. We have very carefully seen the cross-examination and nothing has come from these witnesses which would render the evidence suspicious in any manner. B C D E F G

7. In that light when we see the evidence of Dr. Rathindra Nath Haldar (PW-18), who performed the post-mortem on the H

A body of Anima and Subhankar, we are convinced that the appellant/accused had no other intention but to commit murder. Anima had suffered as many as six injuries referable to the sharp cutting weapon on the most vital parts of her body like neck. As many as four injuries were found to be on her neck B resulting in cutting of vertebra, the fracture of mandible bone etc. The other two injuries were on her thigh and left knee joint. In comparison, Subhankar had suffered 10 injuries on the equally vital parts of the body like head, right eye, face, shoulders, and right arm by way of injury No. 10. His wrist of C the right hand was separated from the hand completely. All this leaves us with no doubt that the appellant/accused was rightly found guilty of murdering these two unfortunate, helpless and defenceless persons apparently for no fault on their part.

8. Shri Mata Prasad Singh could not find any fault with the D evidence to say that this appellant/accused was on inimical terms with the witnesses and, therefore, the witnesses had falsely implicated him. The argument is clearly unsustainable as there does not seem to be any enmity brought out on the cross-examination of these witnesses. Therefore, even if there E was enmity between the parties then that would bring a clear cut evidence of the motive.

9. The appellant/accused did not stop after hacking the two unfortunate persons but proceeded in the direction of the house F of Jeevan Krishna Chakraborty (PW-12). The evidence of witnesses Sikha Chakraborty (PW-10) and Jeevan Krishan Chakraborty (PW-12) which evidence was corroborated by other witnesses like Prasanta (PW- 26), Nilmoni Ghosh (PW-13), Jayanta Chakraborty (PW-29), Uttam Saha (PW-30), G Biswajit Ghosh (PW-17) and Susanta Chakraborty (PW-27) clearly brings out that this appellant/accused, immediately after murdering Anima and Subhankar, assaulted Jeevan Krishna Chakraborty. We have also seen the evidence of Jeevan Krishna Chakraborty along with the medical evidence regarding the injuries and we have no doubt about the H

correctness of the findings reached by the Sessions Judge and the High Court. The assault on Jeevan Krishna Chakraborty was so severe that he lost one of his fingers, being right hand index finger. We need not go to the other circumstantial evidence like the blood stained clothes etc. in view of this direct evidence of the eye witnesses and in our opinion, the Trial and the Appellate Court have correctly come to the conclusion that the accused is guilty for the offence punishable under Section 307, IPC. In fact, on that count it was not necessary for the Trial Court to additionally convict him for the offence under Section 326, IPC. That part dealing with the conviction and sentence of the appellant/accused under Section 326, IPC would have to be set aside and is set aside.

10. This, however, leaves us with the question as to whether the appellant/accused should be sent to gallows. It was tried to be argued by Shri Tara Chand Sharma on behalf of the Government of West Bengal that this was a rarest of rare case. Shri Sharma pointed out that this was a murder of a defenceless lady and a young child of barely 12 years of age. It was further pointed out that the appellant/accused had shown extreme depravity of his mind in inflicting the dao blows on the defenceless victims and the blows were given with such severity that both the deceased persons lost their lives on the spot. Subhankar's part of the hand was completely separated from the rest of the body. It was pointed out that the appellant/accused did not wait there and immediately thereafter rushed to Jeevan Krishna Chakraborty and assaulted him with severity. It was further pointed out that the appellant/accused was already undergoing conviction and jail sentence in an earlier matter and was released on bail by the High Court and yet he committed all these acts showing extreme depravity. Learned counsel further urged that it will be dangerous to allow the appellant/accused to live in the society. He was described by the learned counsel as a bully who used to sell illicit liquor and the appellant/accused had also admitted that he used to sell liquor. The Sessions Judge, as well as, the High Court have

A accepted all these reasons and have held the case to be rarest of rare case.

11. However, Shri Mata Prasad Singh urged that the appellant/accused had acted only on the spur of the moment and that merely because there were two murders committed B by him that by itself does not become a rarest of rare case. Learned counsel for the defence further urged that the appellant/ accused had two young children and there was nobody to support his family after him and that also is one of the considerations.

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12. The test of rarest of rare case was laid down by this Court for the first time in the case of *Bachan Singh v. State of Punjab* reported in 1980 (2) SCC 684. Thereafter the same was reiterated in *Machhi Singh & Ors. Vs. State of Punjab* D reported in 1983 (3) SCC 470. The test laid down adopted the following five considerations:-

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

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-F blooded murder for gains of a persons vis-a vis whom the murderer is in dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

G (3) When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of `bride burning' or `dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry

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once again or to marry another woman on account of infactuation. A

(4) 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. B

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community." C

Thereafter, however, there are several cases in which this Court considered the question of the rarest of rare case, each time weighing the factual situation obtained in the matter. There can be no dispute that there cannot be a straightjacket formula depending on the numbers of murders committed or the manner in which the murder was committed or the fact that the appellant/accused was already undergoing the sentence of rigorous imprisonment for life. We must hasten to add in this case that the appeal of the appellant/accused was already pending in the Calcutta High court against his previous conviction under Section 382, IPC. The findings of the rarest of rare case would have to be judged in the light of the circumstances brought about and proved by the prosecution. This Court in *Om Prakash v. State of Haryana* reported in 1999 (3) SCC 19, while dealing with the accused who had committed seven murders, observed as under: D E F

"17. Considering the aforesaid background of the matter, the question would be whether the case of the appellant could be one of the "rarest of the rare" cases so that death sentence is required to be imposed. In our view, even though this is a gruesome act on the part of the appellant, yet it is G H

A a result of human mind going astray because of constant harassment of the family members of the appellant as narrated above. It could be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the B accused was feeling morally justifiable on his part. Hence, it would be difficult to term it as the "rarest of the rare" cases. Further this is not a crime committed because of lust for wealth or women, that is to say, murders are neither for money such C as extortion, dacoity or robbery; nor even for lust and rape; it is not an act of anti-social element kidnapping and trafficking in minor girls or of an anti-social element dealing in dangerous drugs which affects the entire moral fibre of the society and kills number of persons; nor is it crime D committed for power or political ambitions or part of organized criminal activities. It is a crime committed by the accused who had a cause to feel aggrieved for injustice meted out to his family members at the hands of the family of the other E party who according to him were strong enough physically as well as economically and having influence with the authority which was required to protect him and his family. The bitterness increased to a boiling point and because of the F agony suffered by him and his family members at the hands of the other party and for not getting protection from the police officers concerned or total inaction despite repeated written prayers goaded or compelled the accused to take law in his own G hands which culminated in gruesome murders; may be that his mind got derailed of the track and went astray or beyond control because of extreme mental disturbances for the constant harassment and disputes. Further considering the facts and H circumstances, it cannot be said that he would be

> menace to the society; there is no reason to believe that he cannot be reformed or rehabilitate and that he is likely to continue criminal acts of violence as would constitute as continuing threat to the society. He was working in BSF as a disciplined member of the armed forces aged about 23 at the relevant time, having no criminal antecedents."

The question of rarest of rare case or the justification for awarding the death sentence was lastly considered by this Court in *Santosh Kumar Satishbhushan Bariya v. State of Maharashtra* [JT 2009 7 SC 248] by Hon'ble Sinha, J. (as His Lordship then was), and in *Swamy Shraddananda @ Murly Manohar Mishra v. State of Karnataka* [AIR 2008 SC 3040] by Hon'ble Aftab Alam, J.

13. In case of *Swamy Shraddananda @ Murly Manohar Mishra v. State of Karnataka* (cited supra), which is a locus classicus, speaking for the Three Judges' Bench of this Court, Hon'ble Aftab Alam, J. has analysed practically the whole case law on this issue in para 29. The Court observed that in case of *Machhi Singh & Ors. v.State of Punjab* (cited supra), the scope for imposing death penalty, which was greatly restricted in the case of *Bachan Singh v. State of Punjab* (cited supra), was enlarged. The test laid down in the case of *Bachan Singh v. State of Punjab* (cited supra) was tested on the backdrop of the language of Section 354(3) of the Criminal Procedure Code. It was observed in the earlier paragraph 26 and we respectfully agree with the expression that :-

> "No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus and that the standardization of the sentencing process tends to sacrifice justice at the altar of blind uniformity."

The Court also observed that in case of *Machhi Singh & Ors. v. State of Punjab* (cited supra), the standardization and

A classification of cases that the two earlier Constitution Benches had resolutely refrained from doing, finally came to be sealed. In Para 28, the Court observed:-

> ".....A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s).....

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Then the Court went on to consider the post *Machhi Singh* situation and commented that:-

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> ".....Then the country was relatively free from organized and professional crime. Abduction for ransom and gang rape and murders committed in course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the penal code. At the time of *Machhi Singh,* Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafias cornering huge Government contracts purely by muscle power. There were no reports of killings of social activists and "whistle blowers". There were no reports of custodial deaths and rape and fake encounters by Police or even by armed forces....."

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The Court then observed:-

> ".....These developments would unquestionably find a more pronounced reflection in any classification if one were to be made to day....."

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The Court, ultimately, observed that:-

> "..... even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those

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cannot be taken as inflexible, absolute or immutable and that there would be scope for flexibility....."

14. In Para 29, the Court noted the various expressions like "special reasons" in the context of the provisions of Section 354(3), "exceptional reasons", "special reasons" etc. Later on, the Court also noted some contrary views on death penalty relying on the decision in *Alok Nath Dutta Vs. State of West Bengal* reported in 2006 (10) Suppl. SCR 662. The observations in that judgment were also quoted. After taking resume of the case law and after deciding that the accused in that case should not be hanged, the Court observed in Para 66 as under:-

"The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the Trial Court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e, the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that

A the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all."

B The Court, ultimately, in that case, awarded the sentence for life imprisonment, but issued a further direction that convict must not be released from the prison for the rest of his life or for the actual term as specified in the Order, as the case may be.

C 15. In another locus classicus *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [JT 2009 (7) SC 248], Hon'ble Sinha, J. observed:-

"When the court is faced with a capital sentencing case, D a comparative analysis of the case before it with other purportedly similar cases would be in the fitness of the scheme of the Constitution. Comparison will presuppose an identification of a pool of equivalently circumstanced capital defendants. The gravity, nature and motive relating E to crime will play a role in this analysis."

It was further observed:-

"Next step would be to deal with the subjectivity involved in capital cases. The imprecision of the identification of F aggravating and mitigating circumstances has to be minimized. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts G but to bring in consistency in identification of various relevant circumstances."

Lastly, the Learned Judge observed:-

"The weight which is accorded by the court to particular H aggravating and mitigating circumstances may vary from

case to case in the name of individualized sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in future." A

16. Considering the principles laid down in all these cases, let us now take the stock of situation in the present case. B

17. There can be no dispute that this was a most dastardly murder of two helpless persons, one a woman and another, a child. There was actually no fault on their part. They did not invite any such dastardly action against themselves. It is obvious that the relations between Anima's husband and the appellant/accused were strained. Again, it cannot be denied that the appellant/accused was given to crimes, inasmuch as, firstly he used to eke out his livelihood by selling illicit liquor, besides he was convicted for an offence of murder and was already facing a sentence of life imprisonment, though his appeal was pending before the High Court. These can be said to be the circumstances in favour of the death sentence being confirmed and indeed, the High Court has also given the additional reasons that the murder was committed in a most foul manner and the appellant/accused had shown extreme depravity of his mind in inflicting grave injuries. C D E

18. As against this, when we start counting the circumstances against the grant of death sentence, the first circumstance that comes to the mind is that this was not a pre-meditated murder. The appellant/accused, who was on bail, did go to the house of Anima and had assaulted the kid. We do not have any evidence to know under what circumstance, did the appellant/accused enter the house of Anima and what prompted him to assault the boy. The evidence is actually wanting on that important aspect. All the witnesses, who came on the spot, only came hearing the din created because of the shouting in the house of Anima, but before that, the appellant/accused had already entered the house. After the neighbours F G H

A came, all the neighbours were able to extricate Subhankar from the hands of the appellant/accused. Undoubtedly, Subhankar had suffered some injuries and he was bleeding and, therefore, Anima took him to the tubewell. Till then also, the appellant/accused did not assault the twosome. In this, we must note that
B the appellant/accused had not come armed with any weapon in the house. Therefore, it cannot be said that he had any such idea of assaulting or murdering or using any sharp cutting weapon as against the deceased. It was probably when he saw the dao in the hands of Shyamal (PW-6), the anger in the mind
C of the appellant/accused exploded and he just took the dao from Shyamal, or to put it more correctly, wrested it from his hands and then started assaulting the deceased. The witnesses are silent as to whether Anima had said anything and further, whether there was any exhortation given by anybody or whether
D the appellant/accused had any other reason to act at the spur of the moment. It was as if a matchstick was applied to the wick of a bomb, resulting in the explosion thereof. Thus, there was no pre-meditation aspect in the act of the appellant/accused, which was at the spur of the moment. This was obviously a
E reason of the long standing hatred and enmity between the family of Anima, more particularly, her husband and others in the neighbourhood, all who were opposed to the appellant/accused eking out his livelihood by selling the liquor. The appellant/accused may not be justified in eking out his livelihood by selling the liquor, but the fact of the matter is that he and his
F family was surviving only on that. If that exercise was tried to be stopped by the husband of Anima and others, the appellant/accused was bound to nurture deep hatred in his mind, as a result of which, he acted. There is also a history that husband of the deceased Anima had already reported against the
G appellant/accused that he had cut 75 plants of Banana. One can imagine the mental state of the appellant/accused. He had come back from the jail. He was already under the shadow of life imprisonment. Probably, his liberty was itself in jeopardy because of the report made against him. As a result of all this,
H he acted in a sudden manner and his deep rooted hatred was

exploded. We do not think that this would be a case of pre-meditated cold blooded murder. Much was said by the High Court on the manner in which the murder was committed, inasmuch as the hands of Subhankar stated to have been chopped. We have found out in the aforementioned cases that the cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body of the deceased, do not by themselves, become the guiding factor in favour of the death sentence. Here, the accused was nurturing the hatred even against Jeevan Krishna Chakraborty, who was obviously a leader and had joined the hands of the neighbours and the husband of the deceased in trying to throw out the appellant/accused. The appellant/accused, therefore, seems to have proceeded to his house and assaulted him as an expression of his old and well nurtured hatred against the concerned persons. Though wrongly, the appellant/accused probably has the feeling of injustice in his being singled out.

19. The further fact, which we would take into consideration is that the appellant/accused himself has two minor children, which has come in the evidence and in the statement of the appellant/accused. Again we have already seen as to how this Court has reacted in the case of *Om Prakash v. State of Haryana* (cited supra), where the accused, under the belief that there was injustice caused to him, had eliminated 7 persons. If we compare that case with the present case, we would not tend in favour of the death sentence.

20. The Learned Counsel appearing on behalf of the prosecution has relied on number of other cases, where the death sentence awarded by the Trial and the Appellate Court was confirmed by this Court. We have seen those cases carefully, however, we do not think that all those cases could be comparable with the facts in the present case. The cases relied on by Shri Tara Chandra Sharma, Learned Counsel for the respondents are:-

A (i) *Mahesh S/o Ram Narain & Ors. Vs. State of Madhya Pradesh* reported in 1987 (3) SCC 80.

(ii) *Sevaka Perumal & Ors. vs. State of Tamil Nadu* reported in 1991 (3) SCC 471.

B (iii) *Jai Kumar vs. State of Madhya Pradesh* reported in 1999 (5) SCC 1.

(iv) *Ramdeo Chauhan Alias Rajnath Chauhan vs. State of Assam* reported in 2007 (7) SCC 455

C (v) *Suresh & Anr. vs. State of Uttar Pradesh etc.* reported in 2001 (3) SCC 673.

(vi) *Krishna Mochi & Ors. vs. State of Bihar etc.* reported in 2001 (6) SCC 81.

D (vii) *Om Prakash @ Raju vs. State of Uttaranchal* reported in 2003 (1) SCC 648.

(viii) *Gurdev Singh & Anr. vs. State of Punjab etc.* reported in 2003 (7) SCC 258.

E (ix) *Praveen Kumar vs. State of Karnataka* reported in 2003 (12) SCC 199.

(x) *Holiram Bordologi vs. State of Assam* reported in F 2005 (3) SCC 793.

(xi) *Union of India & Ors. vs. Devendra Nath Rai* reported in 2006 (2) SCC 243.

(xii) *Babu @ Mubarik Hussain vs. State of Rajasthan* G reported in 2006 (13) SCC 116.

(xiii) *Ram Singh vs. Sonia & Ors.* reported in 2007 (3) SCC 1.

(xiv) *Shivu & Anr. vs. Registrar General, High Court of* H *Karnataka & Anr.* reported in 2007 (4) SCC 713.

(xv) *Prajeet Kumar Singh vs. State of Bihar* reported in 2008 (4) SCC 434. A

(xvi) *Mohan Anna Chavan vs. State of Maharashtra* reported in 2008 (7) SCC 561.

We do not think that we would follow the same course as indicated in the above cases, in view of the factual panorama of this case. B

21. That leaves us with a question as to what sentence should be passed. Ordinarily, it would be the imprisonment for life. However, that would be no punishment to the appellant/accused, as he is already under the shadow of sentence of imprisonment for life, though he has been bailed out by the High Court. Under the circumstance, in our opinion, it will be better to take the course taken by this Court in the case of *Swamy Shraddananda* (cited supra), where the Court referred to the hiatus between the death sentence on one part and the life imprisonment, which actually might come to 14 years' imprisonment. In that case, the Court observed that the convict must not be released from the prison for rest of his life or for the actual term, as specified in the order, as the case may be. We do not propose to send the appellant/accused for the rest of his life; however, we observe that the life imprisonment in case of the appellant/accused shall not be less than 35 years of actual jail sentence, meaning thereby, the appellant/accused would have to remain in jail for minimum 35 years. With this observation, the appeal is disposed of, however, the death sentence is not confirmed and instead, would be substituted by the sentence that we have indicated. C D E F

N.J. Appeal disposed of. G