

THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

DR 2 of 2022
State of West Bengal
Vs.
Sovan Sarkar

For the Appellants : Mr. Arindam Sen, Adv.
Mr. Sagnik Bhattacharya, Adv.
Md. Sahinurzaman, Adv.
Mr. Rishav Gupta, Adv.

For the State : Mr. Rudradipta Nandy, Ld. APP
Ms. Sonali Das, Adv.

Hearing Concluded on : February 28, 2023
Judgement on : March 24, 2023

DEBANGSU BASAK, J.:-

1. This death reference has arisen from the judgement of conviction dated July 28, 2022 and the order of sentence dated August 1, 2022 passed by the learned Additional Sessions Judge, 15th Court, Alipore, 24 Parganas South in Sessions Trial No. 01 (09) 2014.
2. By the impugned judgement of conviction dated July 28, 2022, the learned judge has found the accused to be

guilty of murder and causing disappearance of evidence of murder. By the impugned order of sentence, the learned judge has awarded a sentence of death to the convict for the offence of murder under Section 302 of the Indian Penal Code, 1860. The learned judge has sentenced the convict to rigorous imprisonment for 7 years and to pay a fine of Rs. 25,000 and in default for the simple imprisonment for 6 months for the offence punishable under Section 201 of the Indian Penal Code, 1860.

- 3.** Prosecution witness (PW) No. 1 had lodged a written complaint with the police on July 16, 2013. Police had registered a First Information Report dated July 16, 2013 with regard to the complaint of PW 1. Police had submitted a charge sheet on the conclusion of the investigation.
- 4.** The case of the prosecution at the trial had been that, the convict murdered his parents and caused certain evidence of such offence to disappear with the intention to save himself from legal punishment in between 21:00 hours of July 15, 2013 and 8:30 hours of July 16, 2013 at 161, Talpukur Road, Kolkata 700061.
- 5.** Charges against the convicted had been framed on September 2, 2014 under Sections 302/201 of the Indian

Penal Code, 1860. The convict had pleaded not guilty and claimed to be tried.

- 6.** At the trial, the prosecution had relied upon 16 witnesses and various documentary and material evidences to prove the charges as against the convict. On conclusion of the evidence of the prosecution, the convict had been examined under Section 313 of the Criminal Procedure Code when the convict pleaded to be not guilty.
- 7.** Learned advocate appearing for the convict has submitted that, the case of the prosecution was based upon circumstantial evidence. The prosecution had failed to examine any eyewitness to the crime. According to him, the prosecution had failed to complete the chain of evidence for the case of the prosecution. He has pointed out that, no bloodstain had been found from the wearing apparel of the convict. He has pointed out that, although, both the victims were fit and active, the prosecution did not show that, the victim had put up any resistance to prevent the convict from committing the crime.
- 8.** Learned advocate appearing for the convict has submitted that, the dead bodies of the victims were not identified by any of the relatives or the local people. The

alleged offending weapon had been seized from the place of occurrence but there was no identification mark put on such alleged offending weapon. He has referred to the report of the Serologist and submitted that, the so-called blood on the alleged offending weapon had already disintegrated and that the blood group could not be detected.

- 9.** Learned advocate appearing for the convict has submitted that, although, two labourers were said to be present in the vicinity of the alleged place of occurrence, but they were not arrested by the police although, it is the claim of the prosecution that, such labourers were hired by the convict.
- 10.** Learned advocate appearing for the convict has referred to the deposition of the prosecution witnesses and submitted that, none of the prosecution witnesses proved any of the charges as against the convict beyond reasonable doubt.
- 11.** Learned advocate appearing for the convict has submitted that, the convict, during his examination under Section 313 of the Criminal Procedure Code denied all facts and circumstances alleged by the prosecution.

- 12.** Learned advocate appearing for the convict has relied upon **2000 Volume 6 Supreme Court Cases 286 (Vaasa Chandrashekar Rao versus Ponna Satyanarayana and another)**, **2009 Volume 12 Supreme Court Cases 603 (Ramesh Bhai and another versus State of Rajasthan)**, **2022 SCC Online TS 311 (Janapally Anjilaiah versus State of Andhra Pradesh)** on the proposition as to when a conviction can be based on circumstantial evidence. Learned advocate appearing for the convict has also relied upon **2008 Volume 9 Supreme Court Cases 674 (State of Andhra Pradesh versus P Satyanarayana Murthy)** on the aspect of extra-judicial confessional statement.
- 13.** Learned advocate appearing for the State has submitted that, the prosecution was able to prove the charges as against the convict beyond reasonable doubt. Evidence of prosecution witnesses has been referred to and it was contended that, the convict was seen with his deceased parents after the incident in a locked room by PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, and PW 8. PW 1 had stated that the relationship between the convict and his parents was not good. PW 3 had stated that, the convict made a confessional statement that his parents used to

disturb him which proved the intention of the convict to commit such a heinous offence.

14. Learned advocate appearing for the State has pointed out the nature of injuries that the victims had suffered in the hands of the convict by a sharp cutting weapon. In the case of the mother of the convict, the injury was caused from behind and in the case of the father of the convict, the injury had been caused from the front. In the case of the father of the convict, apart from various incised wounds, he had injuries on the right thumb and right index finger. In both the cases the death had been caused due to the effects of homicidal cutthroat injury as would appear from the evidence of the post-mortem Doctor, PW 12.

15. Learned advocate appearing for the State has submitted that, the convict, with the intention to kill his parents, inflicted assault on vital parts of the body, being fully aware about the consequence of such assault and that the prosecution has proved the case beyond reasonable doubt. The brutal nature of the crime was shocking and definitely came under the bracket of rarest of rare case where the parents had been brutally murdered by their son. Therefore, the death reference should be answered by

upholding the penalty of death as had been awarded by the learned Trial Judge.

16. PW 1 had stated that, he was an auto driver. He had known both the victims. On July 16, 2013, the convict was digging a ditch with 2 labourers. While he had gone there and found the doors and windows of the house to be bolted from inside and nobody responded to his calls and as such he had thought that something had happened. Thereafter, he had called the neighbours. At that time, the convict came out from the room by opening the door and when they had entered the house and found the victims were lying on the ground and their bodies were covered with a cloth. Thereafter, on being informed, police had come and looked into everything and removed the cloth and found both the victims to be beheaded and in a dead condition. The convict had told everybody that he killed them with the help of a sharp cutting weapon. He had killed his mother in the room situated on the roof and also killed his father while he was viewing television.

17. PW 1 had identified the convict in court. He had said that, except the victims, who were parents of the convict, no other person was residing at that place. The elder brother of

the convict was residing at Delhi with his family members. The victims had a daughter who was residing at a different place.

18. PW 1 had identified the written complaint and his signature thereon which were marked as Exhibit 1 and 1/1. He had stated that, the police seized the sharp cutting weapon and various other articles including the garments of the victims under different seizure list. It had taken 3 to 4 hours to seize the articles and complete other formalities. He had identified his signatures on the 2 seizure list containing 4 signatures in 4 pages. Such signatures had been marked as Exhibit 2, 2/1, 2/2 and 2/3.

19. PW 1 had stated that the police took the bodies of the 2 victims to the hospital. On receiving the information, the elder brother and sister of the convict had come at the place of occurrence. The elder son had come in the night of the following day.

20. In cross-examination, PW 1 had stated that, he usually kept his auto in the house of the victims at about 10 PM to 11 PM. At about 10:30 PM on July 15, 2013 he did not get any notice about the occurrence of the incident. He had no idea about the incident prior to July 16, 2013. He had

stated that, the offending weapon had been handed over to the police by the convict himself.

21. The son-in-law of the victims had deposed as PW 2. He had stated that, the convict was his younger brother-in-law. He had stated that PW 1 was an auto driver. During afternoon when he was taking rest and reading newspaper at his house, PW 1 had told him that when PW 1 went to the house of the victims for keeping his auto, he noticed 2 rooms, one of the father-in-law and the other of the mother-in-law to be locked from outside and the ceiling fans in both the rooms to be running. PW 1 had asked the convict about the same when the convict told PW 1 that both his parents had left for Bardhaman for a visit.

22. PW 2 had stated that, on hearing such information, he along with his wife and daughter went to his in-laws house by rickshaw. On reaching there, he had noticed that 2 persons were digging the earth. On a query, such questions are answered that they were doing so for implanting trees. He had not found anything around the house about plantation of the trees. He had suddenly noticed the convict entering into the house whereupon, he locked the convict from outside and called on police. After arrival of the police,

he had handed over the key of the house to them. After opening the lock, police had entered into the house and found the convict along with some articles such as sharp cutting weapon. They had found the dead body of the victims. Police had taken away the convict after arresting him. Police had sent the dead bodies of the parent in-laws for post-mortem.

23. PW 2 had stated that he had seen the dead body of his father-in-law lying with the cut throat injury along with other injuries on the back and hand. He had also seen the dead body of his mother-in-law lying with cut injury on the neck. Both the dead bodies had been lying within the room with the ceiling fan running. He had stated that, there was good relationship between the convict and his parents like others. He had no knowledge about the reason why the convict killed his parents. He had identified the convict in court.

24. The younger brother of PW 2 had deposed as PW 3. He had stated that, on July 16, 2013 at about 7:30 to 7:45 after receiving a phone call from PW 2, he went to the in-laws house of PW 2 and found that the convict had been moving in and around in that house. In answer to a query,

the convict had told him that his parents went for a tour of North Bengal. They had informed the police. Police had arrived. PW 3 had asked the convict as to why he killed his parents. In reply to that, the convict had answered that his parents were disturbing him. Thereafter, the police had unlocked the padlock of the ground floor and after entering into that room, he notice that both the parents of the convict had been lying on the floor surface side-by-side with their hands and legs tied in a knot. He had also noticed one ditch within the house outside the room. He had not seen the digging of the ditch. He had identified the convict in court.

25. PW 3 had stated that, police had examined him at the place of occurrence. One sharp cutting weapon with wooden handle had been recovered by the police from the room. Such sharp cutting weapon had been seized by the police along with one T-shirt. Police had prepared a seizure list on that date. He had identified his signature on the seizure list which was marked as Exhibit 3. PW 3 had on re-examination identified the seized articles in court.

26. A neighbour of the convict had deposed as PW 4. He had stated that on July 16, 2013 after being informed by

PW 1 about missing wife of the victim, on the previous day, he had rushed to the house of the convict. After reaching the place he had seen through the Veranda some black spot along with tuft of hair on the staircase up to the gate. He had also seen one bloodspot along with tuft of hair on one corner of curtain at the landing of the staircase on the ground floor. After much query when the convict had come out and responded to the window of one of the ground floor rooms, the convict had said that his parents had left for North Bengal to visit their relatives place. After hearing that, he along with PW 1 and other local people had pressurised the convict to state about the exact whereabouts of his parents. After that, ultimately the convict had confessed that he had killed his parents. After hearing that, PW 2 had informed the police over telephone. After arrival of the police, they had managed to enter into the house through the backside passage since front side passage was under lock and key and in spite of several requests, the convict did not unlock the padlock of the front passage. When the police had entered the house, the convict came out from the room. After that they had entered into the room along with the police and found 2 dead bodies of the victims lying

covered with bed cover and that there were many blood spots all around the room. He had noticed one ditch of 6 feet into 4 feet with four feet depth approximately outside but within the premises. He had been interrogated by the police. He had stated that the convict committed the offence of killing his parents with the consideration that the convict would be deprived of his father's property as his father may be giving it to his elder brother and elder sister. He had identified the appellant in court.

27. A passer-by had deposed as PW 5. He had stated that, when he was passing through the residence of the convict after his work, he noticed a huge gathering of police, local people and press media. After noticing the same, he had enquired about the incident. He had heard about the murder from a person whose name he could not recollect at the trial. He had stated that, during his presence, he noticed that the main gate of the house was closed from inside and that police personnel were shouting for opening the gate. After staying there for a short span of time, he had left the place. At the time of leaving the place one police officer took his name and address along with 23 other persons who had assembled there. Since then he had never

been enquired or examined by the police. After that date, for the first time he had come to the court being summoned by the court.

28. At this stage, PW 5 had been declared hostile by the prosecution. On cross examination by the prosecution, he had denied the suggestions put to him by the prosecution.

29. PW 6 had claimed that he went to the place of occurrence finding a large number of people to be assembled there, while he was going for his job. Police had taken his name and address. He did not add any substance to the case of the prosecution. The defence had declined to cross-examine him.

30. One of the labourers who was digging the ditch at the residence of the convict had deposed as PW 7. He had stated that, he and another person were engaged by the convict for digging the earth within the compound of the house of the convict with the promise of a sum of Rs. 800 to both of them at the rate of Rs. 400 each. When they had been digging the earth within the compound of the house, one female person entered into the house coming from outside enquired as to the effect that who had engaged them and for what purpose. In reply to that, they had answer to

her that the convict engaged them to do the digging. Thereafter, that female person had left the house. After her departure, few persons had started to enter the house. Seeing that, they had stopped the work and sat down there. Thereafter, police had interrogated them when they said about the details of their engagement and their work within the compound of the house. After shouting and activities by the police within the compound of that house, the convict had come out from inside the house. Police had interrogated the convict. He had identified the convict as the person who had engaged them for digging the earth within the compound and who had come out from inside the house due to the shouting of the police personnel assembled there.

31. The daughter of the victims and the sister of the convict had deposed as PW 8. She had stated that, on July 16, 2013 at about 7 to 7:30 AM, PW 1 came to her place and informed her about the lock and key condition of the room of her parents and one ditch being in existence within the boundary of their house. After getting that information, she had gone to her paternal house with her husband, daughter and PW 1. They had noticed that the house was under lock and key and that there was a ditch being dug. At

that time, the convict was within the room of that house. Her husband had blocked it from outside. The room of her parents had been under lock and key from outside even before the arrival at the place. After reaching the place, her husband had informed the police of the local police station. Police after arrival had unlocked the padlock of the main entrance of the house as well as the room inside. After opening the door they had come to know that her parents were dead. On a query of the police, the convict had admitted to them that he committed the murder of their parents. She had identified the convict in court.

32. A police constable who had taken the photographs on July 16, 2013 had deposed as PW 9. He had produced 14 photographs along with the negatives of such photographs in court. Such photographs had been marked as material exhibits at the trial.

33. The police personnel who had prepared the sketch map of the place of occurrence had deposed as PW 10. He had stated that, he had prepared a rough sketch map which was attended in evidence and marked as exhibit 4 and his signature was marked as exhibit 4/1. On July 21, 2013, he had prepared a computerised final plan of the premises and

its surroundings on the basis of the rough sketch map. He had tendered such computerised final plan of the place of occurrence as Exhibit 5 and his signature was marked as Exhibit 5/1.

34. The doctor who had examined both the victims for the first time deposed as PW 11. She had stated that she found both the victims to be brought dead. She had tendered the injury report of the female victim as Exhibit 6 and that of the male victim as Exhibit 7. She had also examined the convict and found a cut mark injury on his left palm. She had tendered the injury report of the convict which was marked as Exhibit 8.

35. The doctor who had performed the post-mortem on the dead bodies of the victims had deposed as PW 12. He had narrated the injuries that he found on the body of the male victim. He had opined that the death of the male victim was due to the effects of homicidal cut throat injury caused by sharp cutting heavy weapon and antemortem in nature. He had tendered the post-mortem report of the male victim which was marked as Exhibit 9. He had narrated the injuries that he found on the dead body of the female victim. He had opined that the death of the female victim was due

to the effects of homicidal cutthroat injury. He had tendered the post-mortem report of the female victim which was marked as Exhibit 10.

36. An acquaintance of the victims had deposed as PW 13. He had stated that on getting information about digging of a ditch at the residence of the victim he had gone there and found a ditch there. He had found the presence of PW 2 and PW 8 of the convict and many other people including PW 1 PW 3 and PW 4. After the arrival of the police personnel at the premises when summoned by the police, he had entered inside the house along with the police. He had noticed 2 dead bodies lying within the house. He had identified his signature on the two seizure lists dated July 16, 2013. He had identified the appellant in court although could not recollect his name.

37. The police personnel who had performed the inquest of the dead bodies of the victims had deposed as PW 14. He had tendered the inquest report of the male victim as Exhibit 11 and that of the female victim as Exhibit 12 in evidence.

- 38.** Another seizure list witness had deposed as PW 15. He had identified the seized articles in court. He had identified the appellant in court.
- 39.** The police personnel who had received telephonic information from PW 1 about the incident had deposed as PW 16. He had stated that, he lodged a general diary being GD entry No. 1715 dated July 16, 2013. Such GD entry had been tendered in evidence and marked as Exhibit 13. He had stated that after leaving the Police Station he went to the place of occurrence, and after he returning to the police station he lodged another general diary entry being No. 1768 dated July 17, 2013 at 16:05 hours. Such GD entry had been tendered in evidence and marked as Exhibit 14. He had narrated the conduct of the police subsequent to the first GD entry and the happenings at the place of occurrence. He had stated that, after arrival at the place of occurrence, PW 1 came to them and narrated the incident which he had recorded. He had written such narration in Bengali in separate pages. Such recorded statement of PW 1 had been treated as the written complaint. The contents of the written complaint had been read over and explained to PW 1 and after understanding the same, PW 1 put his

signature on 2 separate pages. After receiving the written complaint and after conducting part of investigations at the place of occurrence he had returned to the police station. He prepared the formal First Information Report by his own hand under the order of the officer in charge.

40. PW 16 had been entrusted with the charge of investigation in respect of the police case. He had narrated about the course of his investigations. He had identified the seized articles in court. He had collected the information sent by the hospital in respect of the death of the victims. Such information had been tendered and marked as Exhibit 16 and 17. He had stated that after arresting the convict, he got medically examined. The consent form for medico legal examination had been tendered in evidence and marked as Exhibit 18. The medical examination report of the convict had been tendered in evidence and marked as Exhibit 19. He had collected the report from the forensic science laboratory which was tendered and marked as Exhibit 20 on consent. On completion of the investigation he had submitted the charge sheet on October 6, 2013 against the convict. He had identified the convict in court. In cross-examination, he had stated that, he had seized the sharp

cutting weapon with the assistance of the convict from the projection from the inside wall of the room on which the articles were kept of the room of the convict.

- 41.** On the completion of the evidence of the prosecution, the convict had been examined under Section 313 of the Criminal Procedure Code. He had denied the knowledge of the incriminating materials as against him. He had declined to adduce any defence witness.
- 42.** Two persons had been found dead on July 16, 2013 at premises No. 161, Talpukur Road, Kolkata 700061. Such persons had been identified as the parents of the convict. Post-mortem of the two dead bodies had been performed by PW 12. PW 12 had tendered the post-mortem report of the dead body of the father of the convict as Exhibit 9. He had noted 11 injuries on such dead body. He had tabulated the injuries noted on the dead body of the father of the convict in Exhibit 9. He had opined that the death of the father of the convict was due to the effects of homicidal cutthroat injury caused by sharp cutting heavy weapon and antemortem in nature.
- 43.** So far as the post-mortem on the dead body of the mother of the convict is concerned, PW 12 had conducted

the post-mortem and tendered the report as Exhibit 10. He had tabulated 6 injuries that he had found on the dead body of the mother of the convict. He had opined that, the death of the mother of the convict was due to the effect of homicidal cutthroat injury.

44. Therefore, the prosecution had established conclusively that, both the deceased were murdered.

45. *Vasa Chandrashekar Rao (supra)* has held that, where the prosecution wants to prove the guilt of the accused by circumstantial evidence, it is necessary to establish that the circumstances from which a conclusion is drawn, should be fully proved; the circumstances should be conclusive in nature; all the facts established should be consistent only with the hypothesis of guilt and inconsistent with innocence; and the circumstances should exclude the possibility of guilt of any person other than the accused. In order to justify any furtherance of guilt, the circumstances from which such an inference is sought to be drawn, must be incompatible with the innocence of the accused. The community for effect of the circumstances must be such as to negate the innocence of the accused and to bring home the offence beyond any reasonable doubt.

46. Ramesh Bhai (supra) has held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. It has noticed **1984 Volume 4 Supreme Court Cases 116 (Sharad Birdhichand Sarda versus State of Maharashtra)**.

47. Janapally Anjilaiah (supra) has noticed the authorities of the Supreme Court on circumstantial evidence and in the facts and circumstances of such case, found the case of the prosecution not being proved.

48. PW 1 had found a ditch being dug at the premises by 2 labourers. He had found the doors and windows of the house to be locked from inside and nobody responding to his calls. He had called the neighbours thinking that something was foul. PW 2 had arrived at the place of occurrence and locked the convict from outside. He had called the police. PW 3 and PW 8 had also been present when the police unlocked the padlock of the ground floor and entered into the premises. All along the convict had been present inside the building. He had responded to the calls of the prosecution witnesses giving out that, the

deceased were not available inside the building having gone somewhere else.

49. Prosecution had also established that, the convict was found with the dead bodies of his parents at the place of occurrence. PW 1, PW 2, PW 3 and PW 8 had corroborated each other and stated that, the convict was present at the place of occurrence along with the 2 dead bodies of his parents. Prosecution had established that, no other family members other than the convict and his parents used to reside at the premises from where the dead bodies had been recovered, at the material point of time.

50. The convict in his examination under Section 313 of the Criminal Procedure Code did not offer any explanation as to how his parents came to be murdered at the premises at which they usually resided.

51. PW 1, PW 2 PW 3 and PW 8 had stated that, the convict made confessional statements as to his guilt to them and to the police. According to them, the convict had admitted that he murdered his parents. The convict had shown the murder weapon to the police upon which, the police seized the same.

52. In *P Satyanarayana Murthy (supra)* the Supreme Court has reversed the judgement of acquittal of the High Court and restored the judgement of conviction of the Trial Court observing that, the claim of the accused that the bribe was forced onto his hands, made in the statement under Section 313 of the Criminal Procedure Code was unacceptable. The facts and circumstances of the present case are different. The confessional statements had been made by the convict at the place of occurrence prior to the police arriving and before the police also.

53. It has also come in evidence that the convict had moved the dead bodies after committing the murder. The convict had engaged 2 labourers for the purpose of digging a ditch.

54. On the conspectus of the facts established at the trial by the prosecution, it has to be held that, the prosecution proved conclusively that, the parents of the convict had been murdered by the convict. The convict had caused and attempted to cause disappearance of the evidences of the murder. Therefore, the learned Trial Judge had correctly held the convict to be guilty of murder and causing disappearance of the evidence of his crime.

- 55.** The convict is guilty of murder of both of his parents. He murdered both the parents by a sharp cutting weapon. The victims had suffered multiple injuries at the hands of the convict. The father of the convict died due to cutthroat injury. The mother of the convicted had died due to the injuries suffered by her. The learned Trial Judge has awarded death penalty to the convict for the murder of his parents.
- 56.** The quantum of sentence that the learned Trial Judge had awarded requires consideration. The learned Trial Judge had drawn up a balance sheet of the mitigating and aggravating circumstances governing the convict and arrived at the finding that, the aggravating circumstances outweighed the mitigating circumstances in favour of the convict. The learned Trial Judge had also observed that, the crime was of the rarest of rare case.
- 57.** It would be apposite to take into consideration the pronouncement of the Supreme Court with regard to death penalty as reported in **2023 Volume 2 Supreme Court Cases 383 (Manoj and Others vs. State of Madhya Pradesh)**. It has reviewed various authorities on the subject of death penalty and the criteria with regard to the award

thereof. It was observed that, the Supreme Court laid down a two-step process to determine whether an accused deserves the death penalty or not. A Court has to decide firstly, that the case belongs to the rarest of rare category and secondly, that the option of life imprisonment would simply not suffice. For the first step, the aggravating and mitigating circumstances would have to be considered equally. For the second test the Court has to consider whether the alternative of life imprisonment was unquestionably foreclosed as the sentencing aim of reformation was unachievable, for which the State must provide material.

58. *Manoj and Others (supra)* has noted that the Supreme Court in **2013 Volume 5 Supreme Court Cases 546 (*Shankar Kisanrao Khade vs. State of Maharashtra*)** developed yet another framework of the crime test, criminal test and the rarest of rare test. It has noted paragraph 52 of ***Shankar Kisanrao Khade (supra)*** which is as follows:-

“52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are

“crime test”, “criminal test” and the “R-R test” and not the “balancing test”. To award death sentence, the “crime test” has to be fully satisfied, that is, 100% and “criminal test” 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the “criminal test” may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is “society-centric” and not “Judge-centric”, that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.”

- 59.** While considering a crime where death penalty is prescribed, a Court has to find out as to whether life imprisonment as a sentence was completely ruled out. It has to apply the crime test, criminal test and the rarest of

rare test. It has to arrive at a finding that the aggravating circumstances were 100 per cent and that there were no mitigating circumstances in favour of the accused. If there is any mitigating circumstances in favour of the accused then, award of death penalty should not be awarded. Even if it is found in a given case that, there are aggravating circumstances to the fullest extent and that there is no mitigating circumstance in favour of the accused, then also, the rarest of rare test has to be satisfied. Rarest of rare test does not depend upon the perception of the Judge but of the society.

60. *Manoj and Others (supra)* has noted that, mitigating factors play an important role in deciding whether the punishment should be death penalty or a life imprisonment. It has observed as follows :-

“204. Mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstances of the criminal to enable the Judge to decide between the death penalty or life imprisonment. An illustrative list of indicators first recognised in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684, para 206 : 1980 SCC (Cri) 580] itself : (SCC p. 750, para 206)

“206. ... Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(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.”*

These are hardly exhaustive; subsequently, this Court in several judgments has recognised, and considered commutation to life imprisonment, on grounds such as young age [Mahesh Dhanaji Shinde v. State of Maharashtra, (2014) 4 SCC 292 : (2014) 2 SCC (Cri) 321; Gurvail Singh v. State of Punjab, (2013) 2 SCC 713 : (2013) 2 SCC (Cri) 864] , socio-economic conditions [Mulla v. State of U.P., (2010) 3 SCC 508 : (2010) 2 SCC (Cri) 1150; Kamleshwar Paswan v. State (UT of Chandigarh), (2011) 11 SCC 564 : (2011) 3 SCC (Cri) 409; Sunil Damodar Gaikwad v. State of Maharashtra, (2014) 1 SCC 129 : (2013) 4 SCC (Cri) 83] , mental illness [Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1 : (2014) 2 SCC (Cri) 1] , criminal antecedents

[Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775 : (2010) 1 SCC (Cri) 925] , as relevant indicators on the questions of sentence. Many of these factors reflect demonstrable ability or merely the possibility even, of the accused to reform [i.e. (3) and (4) of the Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] list], which make them important indicators when it comes to sentencing.”

61. *Manoj and Others (supra)* has noted that the Supreme Court in **1980 Volume 2 Supreme Court Cases 684 (Bachan Singh vs. State of Punjab)** has noted Section 235(2) of the Code of Criminal Procedure and also noted the fact that, sentencing contemplated under Section 235(2) of the Criminal Procedure Code was not confined merely to oral hearing but intended to afford a real opportunity to the prosecution as well as the accused to place on record facts and materials relating to various factors on question of sentence.

62. *Manoj and Others (supra)* has noted the constraints of an accused to bring forth the mitigating circumstances. It has observed that various authorities of the Supreme Court require the State to place the mitigating circumstances before the Court. It has issued practical guidelines to collect mitigating circumstances. It has observed as follows :-

“214. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] . Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

215. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

(a) Age

(b) Early family background (siblings, protection of parents, any history of violence or neglect)

(c) Present family background (surviving family members, whether married, has children, etc.)

(d) Type and level of education

(e) Socio-economic background (including conditions of poverty or deprivation, if any)

(f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(g) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

216. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformatory progress, and reveal post-conviction mental illness, if any.

217. It is pertinent to point out that this Court in Anil v. State of Maharashtra [Anil v. State of Maharashtra, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] has in fact directed criminal courts to call for additional material : (SCC p. 86, para 33)

“33. ... Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of

reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.”

(emphasis supplied)

We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence.”

- 63.** The award of death penalty by the learned Trial Judge has to be assessed on the parameters as has been noted in ***Manoj and Others (supra)***.
- 64.** In deciding as to whether the crime committed by the convict fell within the criteria of rarest of rare cases or not, learned Judge has taken into consideration the pronouncement of the Supreme Court in ***AIR 1983 Supreme Court 957 (Machhi Singh and Others vs. State of Punjab)***. The learned judge has noted that ***Machhi Singh (supra)*** prescribes that where motive of commission

of murder evince total depravity and meanness, death penalty can be awarded. He has taken into consideration an instance of depravity and meanness, noted in ***Machhi Singh (supra)*** to be a cold blooded murder with a deliberate design in order to inherit property or to gain control over property.

65. PW 2 is the son-in-law of the victims and had stated in his examination-in-chief that there was a good relationship between the convict and the parents of the convict like others. He had stated that he was not aware of the reason why the convict murdered his parents.

66. PW 4 who is a neighbour had stated that, the victim committed the offence with the consideration that he would be deprived of his father's property as his father may be giving it away to the elder brother and elder sister of the victim. Learned Trial Judge had held that the convict committed the crime for property.

67. Elder sister of the victim had deposed as PW 8. She did not allude to any motive for the convict to murder his parents. She did not claim that the convict had murdered his parents for property.

- 68.** Therefore, in our view, it would be improper to hold that, the victim had murdered his parents with a deliberate design in order to inherit property or to gain control over a property. Moreover, it has not come out in evidence that, the convict was in a position to dominate the victims. Nothing has been placed on record to suggest, let alone establish that, the convict had stood benefitted by the murder of his parents property wise or financially.
- 69.** In such circumstances, we are unable to classify the crime as one falling within the rarest of rare category on the basis of the instance noted in ***Machhi Singh (supra)*** and as alluded to by the learned Trial Judge.
- 70.** The learned Trial Judge in the impugned order of sentence stated August 1, 2022 has recorded that, a report from the Superintendent, Dum Dum Correctional Home and of Superintendent of Pavlov Hospital, Kolkata were considered. He has recorded that, from the report of the medical board constituted by the Superintendent of Pavlov Hospital, Kolkata, it appeared that the mental state examination and psychometric assessment was done by clinical psychologist and the report suggested that the

possibility of committing future crime and to become danger to society could not be ruled out.

71. The convict had been examined under Section 313 of the Criminal Procedure Code on April 20, 2022 when he claimed that he was 47 years of age. The incident had occurred on July 16, 2013 when he was about 36 years of age going by his claim as to his age on the date of his examination under Section 313 of the Criminal Procedure Code. Age of the convict at the time of the commission of the offence is a factor that has to be taken into consideration while drawing up the balance sheet of mitigating and aggravating circumstances.

72. By an order dated February 16, 2023, we had called upon the State to submit a report as to the conduct of the convict subsequent to the judgement of conviction. State was directed to place materials on record if any, necessitating confirmation of the death penalty awarded against the convict.

73. Pursuant to such order dated February 16, 2023, State submitted a report dated February 27, 2023 which was taken on record by the order of February 27, 2023. The report dated February 27, 2023 stated that the behaviour of

the convict was submissive and co-operative. The Superintendent of the Correctional Home where the convict was lodged stated that, he found no objection from the conduct of the convict during his stay in the Correctional Home from any corner. He had stated that, it was reported by the Welfare Officer that the convict was very much interested to draw picture and the Correctional Home Authorities inspired him to do so. He had referred to the report of the clinical psychologist with regard to the convict.

74. It appears that the clinical psychologist of the Correctional Home where, the convict was lodged, submitted a report dated January 13, 2023 to the Superintendent of such Correctional Home. In such report, it had been stated that, no active psychopathology nor any symptom of anxiety or depression was found at present. Convict had appeared to be mentally fit at present and has the awareness about his future legal movement.

75. The report of the clinical psychologist dated January 13, 2023 and the statement of the convict recorded under Section 313 of the Criminal Procedure Code states that the convict was an Auto driver prior to the incident. His age and his economic condition deduced from his occupation as

noted above, has to be considered as mitigating factors in his favour. His conduct subsequent to his arrest is another factor which has to be considered as a mitigating circumstance in favour of the convict. State has not produced any material establishing any criminal antecedent so far as the convict is concerned. Again the same has to be taken as a mitigating circumstance in favour of the convict. Furthermore, the last clinical examination report dated January 13, 2023 has not ruled out the possibility of awarding life imprisonment.

76. In such circumstances, we commute the death penalty awarded to the convict to one of life imprisonment. However, the principles enunciated in **2016 Volume 7 Supreme Court Cases 1 (Union of Indian vs. V. Sriharan @ Murugan and Others)** should be applied. **V. Sriharan (supra)** has held that, the power to impose a modified punishment providing for specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not any other inferior Court.

77. The Constitutional Court can award a life sentence without any remission. This aspect has to be considered in

light of the report of Pavlov Hospital taken note of by the learned Trial Judge where, such hospital had done psychometric assessment of the convict by clinical psychologist who reported that there was a possibility of the convict committing future crime and becoming a danger to the society.

78. In view of such report, it would be appropriate to direct that the life sentence awarded to the convict shall be without remission for the entirety of the natural life of the convict.

79. DR 2 of 2022 is disposed of accordingly.

80. Trial Court records along with a copy of this judgement and order be remitted to the appropriate court forthwith for necessary steps.

81. A copy of this judgement along with the Trial Court records be remitted to the appropriate Court forthwith. In view of the commutation of the death penalty of Shovan Sarkar, any warrant issued by the appropriate Court with regard thereto in respect of Shovan Sarkar stands modified in terms of this judgement and order. Department will inform the Correctional Home, where the appellant is lodged, as to this judgement and order. The Correctional

Home will record the fact of commutation of death penalty to the sentence awarded by this judgement and order in respect of Shovan Sarkar, in their records.

- 82.** Urgent Photostat certified copy of this judgement and order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

- 83.** I agree.

[MD. SHABBAR RASHIDI, J]