

Virender @ Mintu Vs. State

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Court : Delhi

Decided On : Jul-23-2014

Judge : Mukta Gupta

Appellant : Virender @ Mintu

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: July 11 , 2014 Judgment Delivered on: July 23 , 2014 % + DEATH SENTENCE REF. 4/2013 STATE Represented by: Petitioner Mr.Varun Goswami, APP for the State with Inspector V.N.Jha, ATO/South Rohini Versus SURENDER @ KALWA & ORS. Represented by: Respondents Mr.Shubham Asri, Advocate for (A-1) and (A-2) Mr.Pradeep Norula, Ms.Pruna Mehta and Ms.Urmila Verma, Advocates for (A-3) WITH + CRL.A. 1269/2013 VIRENDER @ MINTU Represented by: Appellant Mr.Pradeep Norula, Ms.Pruna Mehta, Advocates for (A-3) Versus STATE Represented by: Respondent Mr.Varun Goswami, APP for the State with Inspector V.N.Jha, ATO/South Rohini WITH + CRL.A. 1445/2013 & CrI.M.B. 2256/2013 SURENDER @ KALWA & ANR. Represented by: Appellants Mr.Shubham Asri, Advocate for (A-1) and (A-2) Versus STATE OF DELHI Represented by: Respondent Mr.Varun Goswami, APP for the State with Inspector V.N.Jha, ATO/South Rohini CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

1. By Death Sentence Reference 4/2013, the State seeks confirmation of the sentence of death awarded to the respondents. Vide CrI. A. No.1269/2013, appellant Virender @ Mintu and CrI.A. No.1445/2013 appellants Surender @ Kalwa and Vijay Pal respectively challenge the judgment dated August 03, 2013 convicting the appellants for offences punishable under Sections 302, 392 read with 394/34 IPC. Vide order on sentence dated September 12, 2013, the appellants were awarded rigorous imprisonment for a period of 10 years and a fine of `10,000/- for offence punishable under Section 392 read with Section 394 IPC and for offence punishable under Section 302 IPC, the appellants were awarded capital punishment, subject to the confirmation by this Court.

2. Opening the Reference, learned APP for the State submitted that the present case is one of strong circumstantial evidence involving the murder of three members of the family i.e. Mridula Kishore, her son Rajesh Kishore and grandson Ankit Kishore. PW-1 Jugal Kishore, husband of deceased Mridula Kishore though not an eye-witness had a talk with Mridula Kishore at about 1 O'clock in the noon when the deceased Mridula Kishore stated that Surender @ Kalwa, Virender @ Mintu and Vijay Pal had come to their house and she was cooking meal for them and thus she would talk to him later on. Jugal Kishore, while being at Mathura, made another call at 2.30 at his residence at Delhi, however nobody picked up the same. At about 10.45 PM, his Boss called him on the telephone about some mis-happening, which he witnessed on the television and thus dropped him at the bus stop to board a bus for Delhi. Learned APP for the State submits that Jugal Kishore gave the first lead in the case. His evidence is corroborated by PW-21 M.S. Jatav. Further, there is recovery of jewellery of the deceased from the pockets and at the instance of the appellants, which have been duly identified. Blood stained clothes of the three appellants have also been recovered and the blood group thereon tallied with that of the deceased. In the cross-examination of the prosecution witnesses, there is no challenge to the recoveries made. The main attack is on the Jugal Kishore and delay in recording his statement. Thus, from the circumstantial evidence, the prosecution has proved the case beyond reasonable doubt and the conviction of the appellants be upheld and the sentence be confirmed.

3. Learned counsel for the appellant Virender @ Mintu assailing the prosecution case contends that the version of Jugal Kishore which is the basis of the prosecution case is highly unnatural. Though M.S.Jatav states that Jugal Kishore worked in all the three shifts, however Jugal Kishore stated that he went home to sleep in the afternoon. It is highly improbable that after making two calls to Delhi at about 2.30 PM and 7.30 PM and despite there being no reply, he made no effort to contact the family members or relatives to find as to whether everything was all right at Delhi. The report of the post-mortem regarding Ankit is contrary to the disclosure statement of the accused. The entire prosecution case is based on the fact that Jugal Kishore made a call to the deceased Mridula at about 1 PM on the fateful day however, the prosecution has failed to prove the call details. No authentic evidence has been produced by PW-18 Balbir Singh to show that the data relating to call details of February 05, 2004 had got corrupted and thus an adverse inference be drawn against the prosecution. It is highly improbable that on the same day, the Police despite starting in the afternoon, drove to the villages of all the three appellants and made recoveries from their houses. No D.D. entries were made in the local Police Stations at the villages of the appellants nor were any public witnesses associated. There is discrepancy in the statement of the witnesses with regard to the recovery and the number of vehicles on which they went to the villages of the appellants. The recoveries have been planted on the appellants and actually the Police did not go to their house. No recovery has been attributed to Virender @ Mintu from his pocket and only in cross-examination by the learned APP, this fact has been put to the witness.

4. Learned counsel for Surender @ Kalwa and Vijay Pal submitted that Jugal Kishore is a planted witness as his statement was recorded belatedly on 7th February, 2004. There is delay in lodging the FIR. Despite the fact that Jugal Kishore was carrying the mobile, he stated that he called from the landline in the office, STD number. Though it is stated that credit card of Jugal Kishore was recovered from the appellant Surender however, the same was neither seized nor entered into the seizure memo. The whole case of the prosecution rests upon the phone call made by Jugal Kishore to his wife which the prosecution is required to prove beyond reasonable doubt and in the absence thereof, the prosecution case should fail. Though PW-5 Ct. Dinesh Kumar states that the special report was

taken at 11.05, however the learned Magistrate received the same at 7.30 AM on 6th February, 2004 and thus showing that the FIR was ante-timed. Four fingerprints were lifted from the locker however they were not developed to rule out the presence of the appellants. It is highly unnatural that the appellants would be carrying the looted articles in their pockets. Rest of the recovery was made after two days casting doubt on the recoveries made. Jugal Kishore was not aware of the missing articles and admittedly he did not give the details of the entire looted articles to the Police. In view of the discrepancies, the appellants be acquitted.

5. Being a death reference we have perused the entire record of the trial court.

6. Registration of FIR and Crime Scene. 6.1 The prosecution case starts from PW-9 Kaushal Kishore, the son of the deceased Mridula, and brother and uncle of Rajesh Kishore and Ankit Kishore respectively, who stated that on February 05, 2004 at about 9.30 AM he had gone to the computer centre at Shalimar Bagh and at about 6.45 PM he returned to his house. He found his brother Rajesh Kishore lying in a pool of blood in the drawing room, his throat was slit and one blood stained knife was also lying there. He raised alarm and called his mother however, when he entered into the adjoining room, he saw his mother lying in a pool of blood, around her neck one string had been tied and there was blood on the floor. Thereafter, he went into the adjoining room and saw his nephew Ankit lying in a pool of blood on the floor and saw injury marks on his neck. In the meantime, his brother PW-8 Magender Kishore also reached there and thinking that his mother and nephew Ankit were alive, they took them to the hospital in the PCR Van. 6.2 Similarly, Magender Kishore, father of Ankit Kishore states that in the month of January, 2004 he had gone to appear in an interview at Azadpur at 8.00 AM. When he returned to the house at 7.00 PM he saw his brother Rajesh Kishore lying on the bed, his mother on the double bed and in the adjoining room, his son was lying on the floor. 6.3 The first PCR call was received at Police Station Rohini vide DD No.21A at 7.22 PM wherein a message was received with regard to murder of a boy and a woman in house No.H-19/131, Sector-7. On receipt of the call, PW-20, Inspector Ram Chandar Sangwan, the investigating officer reached house No.19/131, Sector-7 Rohini accompanied by SI Daya Nand, Head Constable Rajbir Singh and driver Sushil where SI Virender Singh from Police

Station was already there. On entering the house they found Rajesh Kishore S/o Jugal Kishore lying in a silent condition in a pool of blood on the bed whose throat had been found slit and an old rusted blood stained kitchen knife was lying near the scene. On enquiry it was found that Mridula Kishore, and Ankit Kishore had already been taken to BSA hospital in an injured condition. Blood was found in the two other bed rooms as well. The locker of the steel almirah was lying broken and two empty boxes of the jewellery were also lying in the open condition on the bed.

6.4 In the meantime, ASI Virender Singh who was sent to BSA hospital brought MLC of Mridula Kishore and Ankit Kishore wherein the doctor had declared them brought dead. On the basis of this rukka, FIR No.119/2004 under Section 302/394/397 IPC was registered at 10.20 PM on February 05, 2004. It is, thus evident that by the time FIR was registered, there was no clue with any of the persons present at the spot with regard to the assailants and no description of the assailants had been mentioned in the FIR. Further, both Kaushal Kishore and Magender Kishore reached the home at around 7.00 PM when they found the three members of the family injured. Immediately they took Mridula Kishore and Ankit to the hospital. On the basis of spot inspection, the FIR is registered. As per the MLC of Ankit Kishore Ex.PW-7/A and Mridula Kishore Ex.PW-3/A they were admitted in the hospital at 8 and 8.15 PM. Thus, we find no merit in the contention of learned counsel for the appellants that there is delay in registration of FIR. Nobody had seen the incident which happened in the afternoon and only when Kaushal Kishore and Magender Kishore came to their house, information was given to the PCR which took Mridula Kishore and Ankit Kishore to the hospital where they were declared brought dead. Even PW-2 Constable Chunny Lal and PW-12 ASI Madan Gautam, members of the crime team have stated that on PCR's information, the crime team reached the spot at 8.15 PM where Police was already present and they found one dead body lying.

7. Presence of the appellants at the scene 7.1 The blind triple murder case with no clues left behind, the dog squad also not being able to trace, the first lead came from Jugal Kishore. He stated that he was working in the Indian Oil Corporation and on 5 th February, 2004 he was posted as Operation Officer at Mathura. He used to visit his house once in a week. In his house, wife Mridula, sons Magender Kishore, Rajesh Kishore and Kaushal Kishore and grandson Ankit were residing.

His grandson Ankit was son of Magender who had differences with his wife and thus his wife was residing separately with the other son of Magender i.e. Vaibhav. On February 05, 2004 at about 1.00 Noon he spoke over the telephone to his wife at Delhi from Mathura when she stated that Surender @ Kalwa, Vijay Pal and Virender @ Mintu who were of her village, had come to their house and she was cooking meal for them. He clarified that Surender @ Kalwa belongs to the village of his in-laws and Vijay Pal and Virender @ Mintu were relatives of Surender @ Kalwa. His wife told him that she will talk to him later, as her meal was burning. Thereafter at about 2.30 PM, he again rang up, however none responded. He went to his house at Mathura and slept for some time. In the meantime, his emergency duty was fixed from 10 PM to 6 AM next day and so he went for his emergency duty at 10 PM. At about 10.45 PM his Boss telephoned him that some mishap had taken place at his house at Delhi and thus he boarded a bus for Delhi and reached his house at 3.30 AM. On reaching his home he found number of relatives there and on learning about the incident he became unconscious and was consoled by the relatives. When he became conscious, he found that the locker of almirah kept in the bedroom were broken and empty jewellery boxes were lying on the bed. He checked the other almirah but found missing approximately `40,000/- as cash and some jewellery consisting of four gold kangan, one bangle, one neckless, one golden chain, four pairs of tops, one Om in gold in a black thread and four bangles of silver having golden polish, one silver chain polished in gold, one artificial mangal-sutra, one kara of brass. On February 07, 2004 his statement was recorded. He also identified the dead bodies of his wife, son and grandson at Sanjay Gandhi Hospital on February 06, 2004. He identified Surender @ Kalwa, Virender @ Mintu and Vijay Pal.

7.2 The version of Jugal Kishore is corroborated by M.S.Jatav, who stated that on February 05, 2004 he was posted at Mathura Refinery as Refinery Coordinator and Jugal Kishore was working under him. On that date Jugal Kishore was on duty and he did A + B shift and C shift extra duty. In A shift the duty hours were from 6 AM to 2 PM, in B shift from 2 PM to 10 PM and in C shift from 10 PM to 6 AM the next day. Jugal Kishore performed duties in A & B shift at Bitumen Drum filling plant and in C shift he did emergency duty in Oil Movement and Storage. On February 05, 2004 Jugal Kishore took one hour leave from him at about 11.30 AM during A shift for looking

after his friend, who was sick and residing in his room No.5/22 at Township area of Mathura and he came back after about one hour. Thereafter, he again visited his friend and to change his shirt, which became dirty during the filling process at about 2 or 2.30 PM and came after about one hour. After working in B shift he left the duty 2-3 hours before 10 PM which was a general practice, if a person continuously did double shift. Since the other official concerned fell sick, he had to request Jugal Kishore to perform a duty in C shift as well at about 8 PM. On his oral order he came for emergency duty at 10 PM. While having dinner, he was watching TV. He saw some news related to Jugal Kishore was being flashed regarding some murder in his family at Delhi at about 10/10.15 PM. After repeatedly watching the said news, he took the landline number of the residence of Jugal Kishore. However, at the residence of Jugal Kishore, no one responded. Then he called at the residence of Chetan at Delhi and confirmed the news of murder in the family of Jugal Kishore. After confirming the news at about 10.45 PM he informed Jugal Kishore through intercom and asked him to reach his home at Delhi as somebody was seriously sick in his family at Delhi. Thereafter, he went to Mathura Refinery gate to pick him up and made him board a bus to Delhi. Nothing material has been elicited in the cross-examination of this witness who has stood by his testimony. 7.3 Thus, M.S. Jatav has corroborated the version of Jugal Kishore being present at Mathura on the fateful day and that though he was on duty the whole day, he took off in the noon and around 2.30 PM as well for some time. He also corroborated that Jugal Kishore left for Delhi on his information at 10.45 PM. The testimony of Jugal Kishore has been assailed on the ground that though he had mobile phone, he made call from the landline phone. It is not unusual for people to make calls from the official phone, even when they have mobile phones with them. Spending government money to save a few personnel pennies is common. The testimony of Jugal Kishore is also attacked on the ground that he made no efforts to verify what was wrong in his house when there was no response to his call at 2.30 PM. However, this is not unnatural since he had already spoken to his wife at about noon. No enmity has been suggested to this witness qua the appellants and hence there is no reason to disbelieve this witness. Testimony of this witness is further assailed on the ground that the prosecution ought to have proved the phone call details made to Delhi. The prosecution has

examined PW-18 Balbir Singh working as Assistant General Manager (Legal) in BSNL, Mathura U.P. He stated that he received the request letter from the investigating officer with regard to call details of telephone number 2431472 and 2430895 dated February 05, 2004. However, the call details of the relevant period could not be given as due to technical fault of the software, the data had been corrupted. He also stated that generally in a year, three-four times call details get corrupted due to aforesaid fault. No enmity has been suggested to this witness as to why he would be deposing falsely. Thus, from the testimony of Jugal Kishore duly corroborated by M.S. Jatav, the fact that the deceased wife of Jugal Kishore told him about the presence of the appellants at their house soon before the incident has been established on record.

8. Medical Evidence 8.1 PW-11 Dr.V.K.Jha conducted the post-mortem on the body of Mridula Kishore and proved the report Ex.PW-11/A. He noted the following injuries:

1. Horizontally placed ligature marks present over front and side of neck at its lower part (lower 1/3) measuring 8 cm X .5 cm. Skin over ligature mark was soft and red. On dissection of neck tissue underneath the ligature mark show extra vacation of blood.

2. Two incised wound present on front of neck upper one was 2 cm X .4 cm X muscle deep lower one was 2 cm X .4 X muscle deep lower one was 2 cm X .4 cm X muscle deep 1.5 cm apart to each other situated over thyroid cartilage. One angle is acute and other blunt. Margins were bruise.

8.2 As per the report Ex.PW-11/A the cause of death was due to asphyxia as a result of ligature strangulation which was ante-mortem in nature. He further opined that the ligature was sufficient to cause death. He also opined that the incised wound was ante-mortem in nature and time since death was 24 hours. The post-mortem of the deceased Mridula was conducted at about 3.00 PM on February 06, 2004 and thus the time of death was around 2-3 PM on February 05, 2004. Dr. V.K. Jha also opined that injury No.1 which was a ligature mark could be caused by nara and injury No.2 could be caused by the knife, the weapon of offences shown to him. 8.3 Dr. V.K. Jha also conducted the post-mortem of Rajesh Kishore

and exhibited his opinion as Ex.11/B. Deceased Rajesh Kishore had one external injury i.e. cut throat injury present over front of neck over thyroid. As per his opinion, the cause of death was respiratory embarrassment and hemorrhagic shock as a result of cut throat injury, which was ante-mortem in nature, and sufficient to cause death in the ordinary course of nature. The time of his death was approximately 24 hours and was thus relatable to the same time when Mridula Kishore had died. He also opined that injury to deceased Rajesh Kishore could be caused by the knife or similar such weapon. 8.4 Dr. V.K. Jha also conducted post-mortem on the body of deceased Ankit Kishore aged 9 years and noted the following:

Cut throat injury present over front of neck present over thyroid cartilage, placed transversally length 8 cm and the breadth 4 cm. Cutting all the muscles vessels, connective tissues, trachea up to C6 vertebrae.

8.5 He exhibited his post-mortem report as Ex.PW-11/C and opined that cause of death was respiratory embarrassment and haemorrhagic shock as a result of cut throat injury which was ante-mortem in nature and sufficient to cause death in ordinary course of nature. He also opined that the injury could have been caused by the knife lying at the spot. 8.6 Thus, from the medical evidence it is proved that all the three deceased were injured by the knife which was found lying at the spot besides Mridula was strangled by a nara and the time of death was around 2 - 3 PM on February 05, 2004. 8.7 Learned counsel for the appellants have stated that the learned Trial Court has held that after deceased Ankit returned home from school he had his meal and then the incident took place whereas in the disclosure statement it is stated that the moment Ankit entered the house his throat was slit. The reliance of the learned counsel for the appellant on the disclosure statement is mis-conceived as the disclosure statement to the extent it states as to how and when the throat of Ankit was slit is not admissible in evidence and cannot be looked into. Further whether Ankit had some food on coming at home or late at the school is not really relevant as it is not unnatural for the children to be eating their tiffins while coming back from the school.

9. Arrest and recoveries 9.1 Inspector Ram Chander Sangwan, the investigating officer has stated that on February 05, 2004 while posted as Additional SHO PS Rohini he received the information about the incident. He went to the spot with the other staff where he found the dead body of Rajesh Kishore and that of Mridula Kishore and Ankit Kishore had already been taken to BSA hospital, Rohini. At the spot as well as in the hospital he made enquiries from the public persons present, however none could give any clue of the incident and no eye-witness was found. He seized the blood stained bed sheets, earth control, knife, nara and all incriminating items from the spot. On February 06, 2004 he went to the mortuary, where Kiran Babu and Jugal Kishore identified the dead bodies. On February 07, 2004 he recorded the statement of Jugal Kishore as noted above informing the presence of the appellants at his house. He also gave details of the robbed articles and cash which were in his knowledge. Thereafter, he organized a raiding party and went to village Salempur Colony, PS Kakor, District Bulandshehar, U.P. There he came to know that all the three accused had visited the village but had left for village Pachota, District Bulandshehar of appellant Vijay Pal. At village Pachota also it was informed that the three appellants had come there for some time but left for village Sara, District Ghaziabad. From enquiries made from the relatives it was revealed that the appellants would be going to Delhi at village Khera Kala, New Mangolpuri and village Dhirpur. On February 08, 2004 a raiding party was constituted with Police officials and they visited Khera Kala where two sisters Meena and Kavita of appellant Surender @ Kalwa were residing. They informed that all the three accused had come to their residence but had left. They stated that appellants would probably go to New Mangolpuri where their third sister was residing. Even at New Mangolpuri the appellants were not found, however a clue was given that they would visit village Khera Kala at 7-8 PM. Thus, staff was deputed at GT Karnal Bypass, Delhi and every bus which was going towards Khera Kala was checked. During the checking, all the three appellants were apprehended. They were made to alight from the bus and interrogated. 9.2 At the time of apprehension, appellant Surender @ Kalwa was holding a black colour rexine bag in his hand which was opened and checked. It was found containing one credit card of ICICI bank in the name of Jugal Kishore, cash of `10,050/-, two screw drivers having green colour plastic handles and 85 coins of one rupee each

lying in a small cloth bag. Appellant Surender was not able to give any satisfactory reply for the possession of these articles. Appellant Vijay Pal of his own took out one ear ring, one hexagonal shape locket of golden colour having Om engraved on it. Appellant Virender @ Mintu produced one pair of golden colour ear tops from his pant pocket. All these articles were separately seized and sealed and taken into possession vide Ex.PW-20/Q, Ex.PW-20/R and Ex.PW-15/S respectively. Thereafter, the appellants were arrested and taken to the Police Station. Appellants made their disclosure statements Ex.PW-15/A, Ex.PW15/B & Ex.PW-15/C respectively. On February 10, 2004 the appellants at Salempur Colony, Village Pachota and Village Sara got recovered the remaining robbed articles and their blood stained clothes vide memos Ex.PW-14/A, Ex.PW-14/B and Ex.PW-14/C. The evidence of this witness is corroborated by PW-14 Inspector Krishan Kumar and PW-15 HC Rajbir Singh, who also testified about the recoveries made at the instance of the appellants. 9.3 The appellants have assailed the recovery on the ground that it is not possible for the raiding team to have got recovered articles at the instance of the three appellants from three different places on one day. Appellant Virender led the Police party to his house at Village Sara at Ghaziabad, appellant Surender led Police party to Village Salempur in District Bulandshehar, U.P. and appellant Vijay Pal led the Police party to village Pachota, District Bulandshehar, U.P. Thus, the two Villages of appellant Surender and Vijay Pal are in the same district of Bulandshehar and Virender in the adjoining district of Ghaziabad. The Villages not being too far off, it was possible for the investigating agency to have made the recoveries on the same day. 9.4 The Appellants have also assailed their implication on the ground that but for the statement of Jugal Kishore there was no evidence with the investigating agency to arrest the appellants and the statement of Jugal Kishore implicating the appellants was recorded belatedly i.e. on February 07, 2004. On cross-examination, Inspector Ram Chander Sangwan has stated that he recorded statement of Jugal Kishore on February 07, 2004 at his residence at 7.00 AM. From the evidence on record, it is evident that Jugal Kishore left Mathura after 10.30 PM on the night of February 05, 2004 and reached his residence at Delhi around 3.30 AM when he came to know about the incident involving the murder of his wife, son and grandson. Jugal Kishore has stated that on hearing this he felt perplexed and unconscious. Rightly

so, anybody in his position finding three members of the family murdered would be in a state of shock and not in a position to make any statement. Thus, the investigating officer did nothing wrong in giving time to this witness, as on the said date last rites of the deceased persons had also to be performed and recorded his statement on the next day in the morning itself. Thus, it cannot be said that there is an unexplained delay in recording the statement of Jugal Kishore. No motive has been attributed to Jugal Kishore for falsely implicating the appellants. Further there is recovery of the jewellery, cash, credit card of Jugal Kishore from the appellants and at their instance, which have been duly identified. The recovery of credit card is further assailed on the ground that the same was not sealed and instead kept in a transparent polythene. A credit card is like a document which has inscriptions so that it can be identified and thus there is no requirement to seal the same. The recoveries are also assailed on the ground that Jugal Kishore did not give the details of all the missing articles and he stated that his wife would be knowing about the rest of the missing articles. There is nothing uncommon in it. Jugal Kishore was residing at Mathura and used to come to Delhi only on the weekend. In such a situation it would be only his wife, who would be knowing about all the articles. Jugal Kishore provided list of most of the articles, however his failure to give a complete list would not discredit his version. The recoveries are also assailed on the ground that the appellants would not be carrying the looted articles in their pockets and thus the recovery was planted on them. Though appellants were carrying some jewellery, however it was basically the credit card and the cash they were carrying. Further most of the jewellery was concealed by them and some which were in their pocket could have been for the purposes of selling etc., which would be in the specific knowledge of the appellants and it is not for the prosecution to prove the same.

10. Test Identification Parade 10.1 PW-17 Manoj Kumar Nagpal the then Metropolitan Magistrate appeared as a witness and testified about TIP proceedings of the case property. According to this witness, 5 cloth pullandas of case property were produced, 2 sealed with the seal of RCS and 3 with the seal of KKS. The said 5 pullandas contained jewellery articles as mentioned in the TIP proceedings. The articles were mixed with other similar jewellery on the table. Jugal Kishore identified the jewellery items and thus TIP proceedings were

conducted vide Ex.PW-1/E. This witness has not been cross- examined. Thus, it has been duly established vide TIP proceedings that the jewellery recovered from the appellants and at their instance has been duly identified by Jugal Kishore to be belonging to him.

11. FSL Report 11.1 Besides the clothes of the three deceased persons, a blood stained knife, a blood stained nara, blood stained floor earth control, bed sheets, gadda cover and blood soaked cotton gauze were seized from the spot. Even at the instance of the appellants their blood stained clothes were recovered. Surender @ Kalwa got recovered blood stained pant, Vijay Pal and Virender @ Mintu got recovered blood stained pants & shirts respectively. The articles abovementioned were seized from the spot and tested positive of human blood vide Ex.PW-19/I. Vide Ex.PW-19/F the knife showed the presence of human blood of A group, nara B group, the blood stained floor of AB group, the bed sheets B group, gadda cover cutting A group. Clothes got recovered by appellant Surender @ Kalwa could not give the groupings, however clothes got recovered by appellant Virender @ Mintu gave group A origin. Blood of three deceased was spread in different rooms in the house. The knife had human blood of A group on it. Further the blood gauze of Rajesh Kishore gave group A, blood gauze of Ankit Kishore gave group AB and blood gauze of Mridula Kishore gave group B. Thus, the FSL report clearly connects that the appellants got recovered clothes having blood matching the blood group of the deceaseds.

12. Fingerprints 12.1 Learned counsel for the appellants have assailed the conviction on the ground that despite the fact fingerprints were taken from the spot, no fingerprints of the appellants were recovered and hence they were not connected with the offence they have been convicted for. PW-12 ASI Madan Gautam, from the Finger Prints Bureau, said that on February 05, 2004 they developed four chance prints using florescent powder in UV light. However, there is no material that the said chance prints tally with that of the appellants. Merely because the four chance prints did not tallied with the appellants, does not rule out the presence of the appellants at the spot or their not having touched the locker. The presence of chance prints of the appellants though would have connected them with the offence, however the absence of their chance prints is not consistent

with the hypothesis that they are not guilty.

13. Findings 13.1. On the basis of the evidence noted above, the prosecution has been able to establish the following circumstances beyond reasonable doubt: (i) Mridula W/o Jugal Kishore, Rajesh Kishore S/o Jugal Kishore and Ankit S/o Magender Kishore were found dead at around 7.00 PM on February 05, 2004 by Kaushal Kishore and Magender Kishore. (ii) On February 05, 2004 at about 12.00 Noon Jugal Kishore made a telephone call to Mridula Kishore from Mathura who told him that Surender @ Kalwa, Vijay Pal and Virender @ Mintu had come to their house from her village and she was cooking meal for them and would talk to him later as her meal was burning. Jugal Kishore again called up his residence from Mathura at 2.30 PM, however there was no response. (iii) Jugal Kishore who was on emergency duty was informed by M.S. Jatav at about 10.30 PM that somebody was sick in his house and sent him to Delhi. Jugal Kishore reached Delhi at his residence at Delhi about 3.30 AM where he found all relatives present. Jugal Kishore was shocked and became unconscious and when he regained consciousness he found locker of the almirah kept in the bedroom broken and two empty boxes lying on the bed. Jugal Kishore checked almirah and found approx. `20,000/- in cash, some jewellery consisting of four gold kangan, one bangle, one necklace, one golden chain, four pair of tops, one Om locked in gold in black thread, four bangles of silver having golden polish, one silver chain polished in gold, one artificial mangal-sutra and one kara of brass missing. (iv) On February 07, 2004 Jugal Kishore got recorded his statement about the presence of Surender @ Kalwa, Vijay Pal and Virender at his house at 12.00 O'clock in the noon when he made a telephone call to his wife. (v) Recovery of credit card of Jugal Kishore, cash and other jewellery items from and at the instance of the appellants. (vi) In the TIP proceedings Jugal Kishore identified all the jewellery articles. (vii) Recovery of blood stained clothes at the instance of the appellants. (viii) As per the FSL report blood found on the knife, blood on the articles seized from the spot, and the blood of the deceased tallied with that on the clothes got recovered by the accused. (ix) Recovery of credit card of Jugal Kishore from appellant Surender @ Kalwa. (x) As per the post-mortem report the cause of death of Mridula Kishore was due to asphyxia as a result of strangulation and that injury No.1 was possible by the nara recovered and injury No.2 was possible by the knife

recovered which was sufficient to cause death in the ordinary course of nature. Death of Rajesh Kishore was due to respiratory embarrassment and haemorrhagic shock as a result of cutthroat injury which was sufficient to cause death in the ordinary course of nature and injury No.1 was possible by knife. Post-mortem of Ankit Kishore as per which death was on account of respiratory and haemorrhagic shock as a result of cut-throat injury which injury was sufficient to cause death in the ordinary course of nature and was possible by a knife Ex.PW-16.

14. The above noted circumstances, as proved by the prosecution, lead to the only inference of guilt of the appellants. The chain formed is complete and there is no escape from the conclusion that within all human probability the crime was committed by the appellants and none else. Thus, on the basis of overwhelming evidence against the appellants, we have no hesitation in coming to the conclusion that the appellants are guilty of offences punishable under Section 302 IPC and Section 392 read with 394/34 IPC. Thus, we find no infirmity in the impugned judgment convicting the appellants.

15. SENTENCE¹⁵¹ The learned Trial Court considered the following aggravated circumstances against the appellants while awarding the death sentence i.e. deceased Mridula Kishore was a helpless house wife and the convicts took advantage of her goodness, Ankit was a helpless child, aged nine years who had just returned from the school and Rajesh Kumar was a young boy brilliant in studies and was preparing for PSC, Uttar Pradesh. The act involved multiple murders. It was a pre-planned and pre-meditated act. The manner of killing was extremely brutal, grotesque, diabolic and revolting; mental and physical sufferings were inflicted on the deceased before the death. After committing the murders, the convicts robbed cash and jewellery belonging to the victims. The appellants showed no remorse. Threats were extended to the victim family during the trial of the case which however, could not be established during police inquiry. There is no act of instigation by any of the victims. The convicts were known to the family of the victims. The nature of evidence though circumstantial was cogent and not shaky. The mitigating factors in favour of the appellants noted were: no previous involvement, Surrender @ Kalwas family comprises of aged parents, one elder and two younger brothers, that of Vijay Pal three elder brothers and one elder sister

and of Virender @ Mintu three younger brother, three younger sisters and wife.

15.2 The legal position with regard to the awarding capital punishment as laid down in three judges Bench in AIR 1983 SC957Macchi Singh vs. State of Punjab is that the Court may award extreme penalty of death sentence in the rarest of rare cases when society's collective conscience is so shocked that it will expect the holders of the judicial power to inflict the death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty. The following instances were noted:

I Manner of Commission of Murder When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner. II Motive for Commission of murder When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for betrayal of the motherland. III Anti Social or socially abhorrent nature of the crime (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of 'bride burning' and what are known as 'dowrydeaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. IV Magnitude of Crime 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. V Personality

of Victim of murder When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity. (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust. (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

15.3 The two Judges Bench in (2013) 2 SCC452 Sangeet vs. State of Haryana held that despite AIR 1982 SC1325 Bachan Singh vs. State of Punjab, Constitution Bench Judgment the primacy still appears to be given to nature of crime and the circumstances of the criminal as referred therein appeared to have taken a bit of a backseat in the sentencing process. It further held that the standardisation and the categorisation of the crime, in Macchi Singh has not received further importance from this court although it is referred to from time to time. A two Judges bench in (2013) 5 SCC546 Shankar Kisanrao Khade vs. State of Maharashtra held that while awarding the death sentence, the crime test, the criminal test and the R-R test has to be looked into and not the balancing test. However, this view was not approved by a three Judges bench in 2014 (3) SCALE9 Mahesh Dhanaji Shinde vs. State of Maharashtra wherein it was held that the 100% crime test and the 0% criminal test may create situations which may go well beyond what was laid down in Bachan Singh. 15.4 Thus in view of the larger Bench decision of the Supreme Court after applying the crime test, the criminal test and the R-R test, this court is required to determine whether the option of life sentence is unquestionably foreclosed in the present case. The mitigating circumstance in favour of the appellants is that they have roots in the society. Further no material has been placed on record by the State to show that the appellants Surender @ Kalwa, Vijay Pal and Virender Kumar @ Mintu are persons who cannot be reformed or are a menace to the society. In view of this position while following (2008) 13 SCC767 Swamy Shraddananda (2) vs. State of Karnataka we would like to consider the alternative submission of the learned APP for the state to award sentence of imprisonment to the appellants without remission beyond the period of 14 years actual. 15.5 In Swamy Shraddananda a three judges bench of the Supreme Court discussed the power of the Court to

direct that an actual period of incarceration be undergone by the convict without remissions/commutations by the executive, so that the convict serves out imprisonment for the remainder of the natural term of his life. It was noted that the formalisation of a special category of sentence though for an extremely few number of cases shall have the great advantage of having the death penalty on the Statute book but to actually use it as little as possible really in the rarest of rare cases. This was held to be a reassertion of the Constitution Bench decision in Bachan Singh. The observations in Sangeet v. State of Haryana doubting the correctness of Swamy Shraddananda (2) have been held by a later Bench in (2013) 10 SCALE671Gurvail Singh vs. State of Punjab to be per incuriam. In (2013) 9 SCC778Sahib Hussain vs. State of Rajasthan the Supreme Court upheld the power of the High Court in directing the convict to 20 years of actual imprisonment without remissions. The Supreme Court took judicial notice of the fact that remissions are allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the earlier release of a particular convict on the society. It was noted:

92. 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 subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court 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 emphasised that 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.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC684 1980 SCC (Cri) 580]. besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the 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.

15.6 Even in the later decision in 2014 (2) SCALE301Birju vs. State of M.P. and 2014 (3) SCALE344Ashok Debbarma @ Achak Debbarma v. State of Tripura while reiterating the triple test i.e. Crime Test, Criminal Test, and R-R Test the Supreme Court following the principle laid down in Swamy Shraddananda awarded the sentence of imprisonment for a period of 20 years. 15.7 In view of the legal position and the fact that there is no material before this court to come to the conclusion that the reformation of the appellants is impossible and that the option of life sentence is not unquestionably foreclosed, we are not inclined to confirm the death sentence awarded to the appellants. However, in view of the aggravating circumstances and the nature and manner of offence committed, we are of the considered view that the sentence of imprisonment for life wherein they would spend at least 25 years actual in custody would serve the ends of justice. Consequently the reference seeking confirmation of the death sentence of the respondents is turned down. The appeals are disposed of upholding the judgment dated 03, August, 2013 convicting the appellants for offence punishable under Sections 302 IPC and 392 read with 394/34 IPC. However, the order on sentence

is modified. The appellants are now directed to undergo life imprisonment subject to the condition that they would not be released on remission prior to 25 years of actual custody. Reference, appeals and application are accordingly disposed of. (MUKTA GUPTA) JUDGE (PRADEEP NANDRAJOG) JUDGE JULY23 2014 ga

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