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HIGH COURT OF JUDICATURE AT ALLAHABAD

CAPITAL CASES No. - 20 of 2022

with

Reference No. 15 of 2022

Amzad and 2 others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Arvind Kumar Singh, Devesh Vikram, Dinesh Kumar, Gaurav Kakkar
Counsel for Respondent(s)	:	G.A.

Along with:

1. Criminal Appeal No. 8766 of 2022:
Smt. Shakeela

Versus

State of U.P.

Court No. – 43

HON'BLE SIDDHARTH, J.
HON'BLE VINAI KUMAR DWIVEDI, J.

(Delivered by Hon'ble Vinai Kumar Dwivedi, J.)

1. Heard Mr. Gaurav Kakkar, learned Senior Counsel, assisted by Mr. Raghvendra Prakash, learned counsel for the appellants in both the appeals; Mr. Dinesh Kumar, learned *Amicus Curiae* for appellant no. 2 (in Capital Cases No. 20 of 2022); Mr. Arvind Kumar Singh, learned *Amicus Curiae* for appellant no. 3 (in Capital Cases No. 20 of 2022); Mr. Thakur Azad Singh, learned A.G.A. for the State-respondent and perused the material on record.

2. The present Capital Criminal Appeal No. 20 of 2022 *(Amzad and others v. State of U.P.)* has been preferred by the death convicts/appellants, namely, Amzad, Ramzan and Arshad, against the judgment and order of capital sentence dated 14.10.2022, passed by the learned Sessions Judge, Varanasi, in Sessions Trial No. 597 of 2012 *(State v. Amzad and others)*, arising out of Case Crime No. 68 of 2012, under Sections 147, 148, 302/34, 307/34, 323/34, 504, 506(II), 149 I.P.C., Police Station Chowk, District Varanasi. By the impugned judgment and order dated 14.10.2022, the appellants have been convicted with death sentence.

3. The Capital Reference No. 15 of 2022 arises out of the same judgment and order dated 14.10.2022, passed by the learned Sessions Judge, Varanasi, in Sessions Trial No. 597 of 2012 (*State v. Amzad and Others*). After imposing the death penalty upon the appellants, namely, Amzad, Ramzan, and Arshad, under Section 302 IPC, the Sessions Judge referred the matter to this Court for confirmation of the death sentence.

4. The Criminal Appeal No. 8766 of 2022 (*Smt. Shakeela v. State of U.P.*) has been preferred by the convict/appellant, Smt. Shakeela, wife of Amzad, against the same judgment and order dated 14.10.2022, passed by the learned Sessions Judge, Varanasi, in Sessions Trial No. 597 of 2012 (*State v. Amzad and Others*), arising out of Case Crime No. 68 of 2012, under Sections 147, 148, 307, 323, 504, 506(II), 302 IPC, at Police Station Chowk, District Varanasi. By the impugned judgment and order, appellant Smt. Shakeela was convicted and sentenced to life imprisonment for the offence punishable under Section 302 IPC.

5. Since Capital Criminal Appeal No. 20 of 2022 (*Amzad and Others v. State of U.P.*), Capital Reference No. 15 of 2022 and Criminal Appeal No. 8766 of 2022 (*Smt. Shakeela v. State of U.P.*) arise out of the same judgment and order dated 14.10.2022, passed by the Sessions Judge, Varanasi, all three matters are being considered and decided together by this common judgment.

6. The facts of the present case as revealed from the written report (Exhibit Ka-1) dated 16.06.2012 are that the informant, Md. Saeed alias Kaju, son of Md. Siddiq, resident of House No. 4/358 Sarai Govardhan, Varanasi, submitted a written report (Exhibit Ka-1) through his brother Salim @ Pappu before the Station House Officer, Police Station Chowk on 16.06.2012 to the effect that on 16.06.2012 at about 8.30 p.m., the informant, his two brothers Md. Shafeeq alias Raju and Md. Shakeel alias Jau, along with his nephews Chand and Shalu, were going towards the *Mazar* from their house.

Just then, Amzad, Iqbal Rain, Arshad, Ramzan, and other members of their family, including Amzad's wife Shakeela and daughter Shabnam, jointly started beating them mercilessly on their head and body with bamboo sticks. Upon hearing the cries of brother Raju for help ('*bachao-bachao*'), Kamil Bhai, who cleans the *Mazar*, and nephew Nate came to rescue them. The accused persons started beating them as well in the same manner, due to which the informant's brother Shafeeq alias Raju and Kamil Bhai succumbed to their injuries on the spot. The local residents rushed the informant and other injured persons to the hospital. Upon reaching the hospital, the informant's brother Jau passed away, while the nephews were admitted to the hospital. Even now, there is a constant threat to the informant and his family members from Iqbal Rain, his brothers, nephews, and the family members of Ramzan.

7. On the basis of the above written report (Exhibit Ka-1), a first information report (Exhibit Ka-7) was registered as Case Crime No. 68 of 2012, under Sections 147, 302, 307, 323, 504, 506 and 34 I.P.C. at Police Station Chowk, District Varanasi, against the named accused persons by Narendra Kumar Rai (PW-7).

8. After registration of the first information report (Exhibit Ka-7), the investigation of the case was taken up by Investigating Officer, Mithilesh Kumar Mishra, (PW-8). The Investigating Officer reached the place of occurrence and recorded the statements of the prosecution witnesses under Section 161 Cr.P.C. He also attempted to record the statements of the injured persons under Section 161 Cr.P.C., who were admitted to

the hospital for treatment, and made efforts to arrest the accused named in the written report (Exhibit Ka-1), however, he was unsuccessful in his attempt. From the place of occurrence, the Investigating Officer collected blood-stained soil and simple soil. He also took into custody four bamboo sticks, measuring about two hands in length, which bore bloodstains, and prepared a recovery memo of the aforesaid articles as Exhibit Ka-10.

9. The Investigating Officer, Mithilesh Kumar Mishra (PW-8), also prepared and got completed other necessary police papers of the deceased persons relating to *panchayatnama* (Inquest) and post-mortem examination, such as, the Inquest Reports of the deceased persons (Exhibit Ka-13, Exhibit Ka-14, Exhibit Ka-15, and Exhibit Ka-16), Police Form No. 379 (Exhibit Ka-17, Exhibit Ka-18, Exhibit Ka-19), *Challan Nash* (Exhibit Ka-20), Police Form No. 33 (Exhibit Ka-21), *Challan Nash* (Exhibit Ka-22, Exhibit Ka-23, Exhibit Ka-24), Police Form No. 33 (Exhibit Ka-25), report for conducting the post-mortem examination of deceased Md. Shafeeq (Exhibit Ka-26), report in respect of the post-mortem examination of deceased Md. Shafeeq sent to P.S. Lanka (Exhibit Ka-27), report sent to P.S. Lanka for post-mortem examination of deceased Kamil (Exhibit Ka-28), and letter to the C.M.O. for post-mortem examination of deceased Kamil (Exhibit Ka-29). The Investigating Officer also inspected the place of occurrence and prepared the site plan as Exhibit Ka-11.

10. After completing all the necessary formalities relating to the investigation, the Investigating Officer, Mithilesh Kumar Mishra (PW-8), submitted a charge-sheet

(Exhibit Ka-12) against the accused persons, namely, Amzad, Iqbal Rain, Arshad, Ramzan, Smt. Shakeela and Kumari Shabnam, under Sections 147, 148, 302, 307, 323, 504, 506 and 34 IPC before the competent Court of the Magistrate having jurisdiction. A separate supplementary charge-sheet was submitted against juvenile Kumari Shabnam before the Juvenile Justice Board.

11. Dr. Ashok Kumar Upadhyay (PW-3) conducted the postmortem examination of the dead body of the deceased, Md. Shafeeq, on 18.06.2012 and prepared the postmortem report as Exhibit Ka-2. According to the postmortem report (Exhibit Ka-2), the following ante-mortem injuries were found on the dead body of the deceased Md. Shafeeq:-

> "**Injury No. 1:** Lacerated wound measuring 2 cm x 2 cm, situated on the right side of the head touching the eyebrow, brain deep.
>
> **Injury No. 2:** Lacerated wound measuring 3 cm x 2 cm x bone deep, situated on the upper right side of the head, 9 cm above the right ear.
>
> **Injury No. 3:** Abraded wound measuring 3 cm x 3 cm, situated on the right arm, 10 cm below the shoulder.
>
> **Injury No. 4:** Multiple abraded contusions measuring 12 cm x 10 cm on the right side of the face extending from the forehead across the face, which covered Injury Nos. 1 and 2. The said wound was depressed and broken at multiple places, resulting in fractures of the frontal head bone and right jaw bone on the right side. Frontal and temporal bones on both sides, parietal bone, occipital bone, and right jaw bone were fractured, and the right eye was crushed. Brain weight was 1,120 grams in a ruptured condition with internal and external blood clotting."

In the opinion of Dr. Ashok Kumar Upadhyay (PW-3), the cause of death was head injuries mentioned above, which were ante-mortem in nature and sufficient to cause death

in the ordinary course of nature, and could have been caused by a hard and blunt object.

12. Dr. Satish Chandra Singh (PW-4) conducted the post-mortem examination of the dead body of the deceased, Kamil, on 17.06.2012 at 6:45 a.m. and prepared the post-mortem report, which was exhibited as Exhibit Ka-3. According to the post-mortem report (Exhibit Ka-3), the following ante-mortem injuries were found on the body of the deceased:

> "**Injury No. 1:** Multiple abraded contusions measuring 15 cm × 6 cm on the front right side of the face.
>
> **Injury No. 2:** An abraded contusion measuring 2 cm × 2 cm on the top of the left shoulder.
>
> **Injury No. 3:** An abraded contusion measuring 3 cm × 1 cm on the outer left side of the neck, 4 cm below the left ear.
>
> **Injury No. 4:** On opening the skull, a contusion measuring 6 cm × 6 cm was found in the occipital region at the back of the skull, along with a fracture of the occipital bone."

According to the opinion of Dr. Satish Chandra Singh (PW-4), the cause of death was head injuries, primarily Injury Nos. 1 and 4, which were sufficient to cause death. He further opined that all the injuries could have been caused by a hard and blunt object. Upon examination of the cranial cavity, blood clots were found on the internal and external surfaces of the brain membranes, and the brain weighed 1,180 grams.

13. Dr. Satish Chandra Singh (PW-4) conducted the postmortem examination of the dead body of the deceased, Md. Shakeel alias Jau, son of Mohd. Siddique Khan, on 17.06.2012 at 5:00 A.M. and prepared the postmortem report as Exhibit Ka-4. According to the postmortem report (Exhibit Ka-4), the following ante-

mortem injuries were found on the dead body of the deceased Jau:

> "**Injury No. 1:** Contusion measuring 5 cm x 5 cm around the left eye, and the left eye conjunctiva was congested.
>
> **Injury No. 2:** Contusion measuring 4 cm x 4 cm around the right eye.
>
> **Injury No. 3:** Stitched wound measuring 7 cm present on the head, 5 cm above the left eyebrow, 10 cm above the left ear, and 5 cm outwards from the midline of the skull. The second end of the stitched wound terminated 10 cm above the left eye.
>
> **Injury No. 4:** Stitched wound measuring 2 cm present on the left side of the face, extending up to the outer part of the left eye.
>
> **Injury No. 5:** Stitched wound measuring 1 cm long present on the left side of the lower lip, extending 2 cm outwards from the center of the lip.
>
> **Injury No. 6:** Multiple stitched wounds in an area measuring 7 cm x 1 cm present on the chin, covering the left side of the face and extending up to the middle of the chin."

In the opinion of Dr. Satish Chandra Singh (PW-4), lower jaw bone was fractured, and on opening the skull, left temporal bone, parietal bone, and middle and frontal left cranial fossa were fractured. Brain membranes were ruptured and congested, brain weight was 1,210 grams in a ruptured condition, and blood clotting was present inside and outside the brain membranes. The cause of death was coma resulting from head injuries.

14. Dr. Vinay Kumar Sharma (PW-5), ENT Surgeon, conducted the postmortem examination of the dead body of the deceased Chand alias Raju, son of Mohd. Shafeeq, on 21.06.2012 at 12:30 A.M. (night) pursuant to the order of the District Magistrate dated 20.06.2012, and prepared the postmortem report as Exhibit Ka-5. According to the postmortem report (Exhibit Ka-5), the

following ante-mortem injuries were found on the dead body of the deceased Chand alias Raju:

> "**Injury No. 1:** Lacerated wound measuring 7 cm x 2 cm x brain deep, touching the middle part of the head over the left eyebrow.
>
> **Injury No. 2:** Lacerated wound measuring 1 cm x 5 cm x brain deep, on the right forehead, situated 2 cm outwards from the midline of the head and 4 cm above the right eyebrow.
>
> **Injury No. 3:** Lacerated wound measuring 0.5 cm x 0.5 cm on the tip of the nose.
>
> **Injury No. 4:** Lacerated wound measuring 3 cm x 1 cm x bone deep, in the middle part of the chin.
>
> **Injury No. 5:** Contusion measuring 7 cm x 6 cm present on the left side and front of the neck.
>
> **Injury No. 6:** Contusion measuring 10 cm x 6 cm on the forehead."

On internal examination, frontal, temporal, and parietal bones on both sides of the skull were fractured. Brain membranes were congested, and nasal bone as well as jaw bone were fractured. Small intestine contained mucus and gas, while large intestine contained fecal matter and gas. The deceased died during treatment at Alaknanda Hospital on 20.06.2012 at 9:45 P.M. In the opinion of Dr. Vinay Kumar Sharma (PW-5), the cause of death was head injury and resulted from the aforementioned injuries.

15. Dr. R.P. Singh (Raghvendra Pratap Singh) (PW-6), Consultant Neurosurgeon at Alaknanda Hospital, Varanasi, testified that the deceased, Chand, was admitted to Alaknanda Hospital on 17.06.2012 with severe head injuries. Multiple blood clots were present inside his brain, blood was present in the cerebrospinal fluid (CSF), and he had suffered a haemorrhage. Despite treatment, the deceased succumbed to his injuries on 20.06.2012 at about 9:45 p.m. The witness identified the

death certificate on record and stated that it had been issued after the deceased was declared dead. He further stated that the death certificate bore the signature of Dr. Ram Singh, who was working at the hospital at the relevant time.

16. Dr. T.N. Verma (PW-9), Emergency Medical Officer (E.M.O.), testified that on 16.06.2012 at 9:30 p.m., the injured, Shalu, was admitted to Singh Medical Surgical Centre, Varanasi, *vide* Registration No. 81, with severe injuries to his head and left eye. Emergency treatment was administered, and life-saving medicines were given. The witness verified the treatment documents and proved them as Exhibits Ka-36 and Ka-37. He further stated that on 27.06.2012 at 11:50 a.m., the injured was referred to a higher medical centre for specialized treatment of his left eye. The witness proved the original referral letter as Exhibit Ka-38 and the photocopy of the operation note as Exhibit Ka-39.

17. Sunil Kumar Shah (PW-10) testified that the injured, Shalu, was brought to his hospital on 27.06.2012 for emergency treatment. The injured had sustained a head injury and lost vision in his left eye. His left eye was protruding outwards, was red, and its pupil was non-reactive. An X-ray examination revealed a fracture of the bone surrounding the left eye. Specialist Dr. Ravindra Mohan was called from Chennai to examine the injured, as mentioned in the report. Dr. Ravindra Mohan advised surgery in view of the fracture of the left orbital bone and the accumulation of blood, which had caused the eye to protrude and resulted in loss of vision.

18. On 07.07.2012, the injured was admitted for surgery, during which the accumulated blood was evacuated and the eye was re-positioned. Optical Coherence Tomography (OCT) of the eyes was also performed. The witness proved the relevant medical reports, collectively marked as Exhibits Ka-40 to Ka-46 as well as the report of Arihant Diagnostics as Exhibit Ka-47.

19. Dr. Virendra Kumar Singh (PW-11) testified that on 17.06.2012 at 11:55 a.m., the injured, Shalu, was brought before him for medical examination. As recorded in the medico-legal report (Exhibit Ka-48), the following injuries were found on the body of injured:

> "**Injury No. 1:** A lacerated wound with swelling, measuring 6 cm × 4 cm, on the left side of the head, situated 3 cm above the left ear, with active bleeding. An X-ray and a CT scan of the head were advised.
>
> **Injury No. 2:** Contused swelling measuring 3 cm × 3 cm over the left eye. The injured was referred to an eye specialist for further evaluation.
>
> **Injury No. 3:** A red contusion measuring 6 cm × 4 cm on the left side of the chest, situated 8 cm below the nipple. An X-ray examination was advised."

20. Dr. Nirmal Kumar Jain (PW-12) of Arihant Diagnostic Centre, Mahmurganj, Varanasi, testified that the injured, Shalu, visited the diagnostic centre on 07.07.2012 for a CT scan. He prepared the report on the basis of the CT scan film and proved the CT scan report as Exhibit Ka-47.

21. After the submission of the charge-sheet (Exhibit Ka-12), the case was committed by the learned Magistrate to the Court of Session for trial. The Trial Court framed charges against the accused persons,

namely, Amzad, Ramzan, Arshad, Smt. Shakeela, and Iqbal Rain on 23.01.2013 under Sections 147, 148, 302 read with Section 34, 307 read with Section 34, 323 read with Section 34, 504, and 506 I.P.C. Further, on 18.10.2013, charge under Section 149 I.P.C. was also framed against the aforesaid accused persons. The accused pleaded not guilty and claimed trial.

22. To substantiate its case, the prosecution examined the informant, Md. Saeed alias Kaju (PW-1), Md. Saif alias Shalu (PW-2) and Smt. Najma (PW-13), as witnesses of fact. Additionally, the prosecution examined Dr. Ashok Kumar Upadhyay (PW-3), Dr. Satish Chandra Singh (PW-4), Dr. Vinay Kumar Sharma (PW-5), Dr. R.P. Singh (PW-6), Sub-Inspector Narendra Kumar Rai (PW-7), Sub-Inspector Mithilesh Kumar Mishra (PW-8), Dr. T.N. Verma (PW-9), Dr. Sunil Kumar Shah (PW-10), Dr. Virendra Kumar Singh (PW-11) and Dr. Nirmal Kumar Jain (PW-12) as formal witnesses. In addition to the aforesaid oral evidence, the prosecution also relied upon documentary evidence marked as Exhibits Ka-1 to Ka-48, as well as material exhibits.

23. The learned Trial Court, after recording the prosecution evidence, examined the accused persons under Section 313 Cr.P.C. In their statements recorded under Section 313 Cr.P.C., the accused persons denied the prosecution narrative as well as the evidence of the prosecution witnesses, stating that they were falsely implicated due to enmity and ill-will. Specifically, accused Iqbal Rain submitted a written statement alleging that Nasir Jamal, Advocate (son of Md. Zafar Khan), harboured enmity against him and had previously lodged

two criminal cases (Case Crime No. 87/2010, under Sections 147, 148, 323, 504, 506 IPC and Case Crime No. 88/2010, under Sections 386, 504 IPC at P.S. Luxa, District Varanasi) against him. He further stated that Nasir Jamal, being an influential political person and advocate, pursued the case at the police station on behalf of the prosecution side and got him falsely implicated in the present FIR out of enmity. The other accused persons also denied the allegations, stating that a false story was concocted to harass them out of enmity and ill-will. However, no witness was examined on behalf of the defense.

24. After hearing the submissions advanced by both the prosecution and the defence and upon thorough appreciation of the oral as well as documentary evidence on record, the learned Trial Court found the prosecution case proved beyond reasonable doubt against the appellants, namely, Amzad, Ramzan and Arshad (in Capital Criminal Appeal No. 20 of 2022) and against the appellant, namely, Smt. Shakeela (in Criminal Appeal No. 8766 of 2022). Consequently, the Trial Court convicted the appellants for the offences charged against them and, accordingly, sentenced the convicts/appellants, namely, Amzad, Ramzan, and Arshad, to death sentence for the offence under Section 302 I.P.C., while the appellant, Smt. Shakeela, was convicted and sentenced to undergo life imprisonment for the offence under Section 302 I.P.C. However, accused, Iqbal Rain was acquitted of all the charges levelled against him by the Trial Court.

25. Aggrieved by the impugned judgment and order dated 14.10.2022 passed by the learned Sessions Judge,

Varanasi, in Sessions Trial No. 597 of 2012, the appellants Amzad, Ramzan, and Arshad have preferred Capital Criminal Appeal No. 20 of 2022 before this Court, while appellant Smt. Shakeela has filed Criminal Appeal No. 8766 of 2022 before this Court. Additionally, the learned Sessions Judge, Varanasi, has referred Capital Reference No. 15 of 2022 to this Court for confirmation of the death sentences awarded to appellants Amzad, Ramzan and Arshad.

26. Learned counsel for the appellants submitted that the appellants are absolutely innocent, have no concern with the alleged crime, and have been falsely implicated in the present case. It is next submitted that from a perusal of the statement of the informant (PW-1), it is clear that seven members of his family, including the deceased persons and their associates, came to the house of Amzad (appellant no. 1) after due consultation. Initially, Amzad was alone when they arrived and a scuffle broke out, following which other family members came to the spot. The alleged incident took place in the heat of passion, without any premeditation of mind, hence, no *prima facie* offence under Section 302 IPC is made out against the appellants. It is further submitted that as per the statement of PW-1, the bamboo sticks were already lying at the place of occurrence, which clearly demonstrates that the appellants had no prior intention or premeditation to commit the alleged offence. Furthermore, although PW-1, PW-2, and PW-13 alleged that the accused persons were armed with bamboo sticks, axe, and spade (*fawda*), no incised or sharp-edged wounds were found on the bodies of the deceased or

injured persons. In the absence of any sharp-cutting weapon injuries, the offence under Section 148 IPC is not made out, and the entire prosecution version regarding the use of deadly weapons appears to be false and concocted.

27. Learned counsel for the appellants also contended that as per the medical evidence regarding injured Mohd. Saif alias Shalu (PW-2), at the most, an offence under Section 325 IPC is made out, as the injuries were opined to be grievous in nature. Attention was also drawn to the fact that co-accused Iqbal Rain, against whom identical allegations were leveled by PW-1, PW-2 and PW-13, has been acquitted by the Trial Court on the same set of evidence. Moreover, nothing incriminating has been recovered from the possession or at the instance of the appellants. Additionally, one of the deceased, Chand Rahimi, remained alive till 20.06.2012, yet no dying declaration was recorded, which creates a serious doubt in the prosecution story. Lastly, it is submitted that Smt. Nazma (PW-13) was not named as an eye-witness in the FIR, her statement appears to be tutored, and even the Trial Court at page 21 of the impugned judgment observed that her testimony cannot be fully relied upon. Thus, the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt.

28. In view of the aforesaid submissions, learned counsel for the appellants submitted that the learned Trial Court has committed a manifest error of law and fact in failing to properly appreciate the material evidence on record. The findings recorded by the Trial Court are perverse, illegal, and contrary to the evidence available

on record. Therefore, the impugned judgment and order of conviction dated 14.10.2022 passed by the Sessions Judge, Varanasi is not sustainable in the eyes of law and is liable to be set aside. Consequently, Capital Criminal Appeal No. 20 of 2022 as well as Criminal Appeal No. 8766 of 2022 deserve to be allowed, the appellants are entitled to be acquitted of all the charges, and the Capital Reference No. 15 of 2022 sent by the Trial Court for confirmation of the death sentence is liable to be rejected.

29. *Per contra*, learned A.G.A. for the State-respondent has submitted that the appellants have been specifically named in the written report (Exhibit Ka-1) as the accused persons responsible for the commission of the alleged crime. It was contended that the appellants surrounded the informant, the deceased persons and the injured prosecution witness and launched a continuous and merciless assault upon them, specifically targeting their heads. All the injuries found on the bodies of the deceased persons as well as the injured witness were confined to their heads. The fact that the appellants specifically targeted the heads of the deceased persons as well as the injured witness clearly demonstrates their intention and common object to commit their murder.

30. It was further submitted that the head is an extremely sensitive and vital part of the human body and that repeatedly inflicting blows upon such a vital part is a significant circumstance indicating the intention to cause death. The location of the injuries, particularly their concentration on the heads of all the deceased persons and the injured witness, clearly establishes that the

appellants had formed an unlawful assembly with the common object of committing their murder and eliminating anyone who came in their way. Learned A.G.A. further submitted that four innocent, unarmed and helpless persons were brutally murdered by the appellants with the common object of grabbing the land of the graveyard (*kabristan*), situated within the compound of *Baba Rahim Shah Mazar*.

31. Learned A.G.A. further submitted that the prosecution witnesses, namely, Md. Saeed alias Kaju (PW-1), the informant, and Md. Saif alias Shalu (PW-2), the injured witness, have fully supported the prosecution case. Their ocular testimony finds corroboration from the medical evidence available on record, particularly the postmortem reports of the deceased persons and the injury report of the injured witness (PW-2). Considering the brutal manner in which the appellants allegedly murdered four persons and injured PW-2, as well as the facts and circumstances of the case and the evidence on record, learned A.G.A. submitted that the Sessions Judge, Varanasi, rightly convicted and sentenced Amzad, Ramzan and Arshad to death and Smt. Shakeela, wife of Amzad, to life imprisonment, *vide* judgment and order dated 14.10.2022.

32. Thus, the Trial Court has properly appreciated the evidence in accordance with law. The findings and reasoning recorded by the Trial Court are based on cogent and reliable evidence of the prosecution witnesses, and are also in accordance with the legal principles settled by law. There is no illegality or perversity in the impugned judgment and order of

conviction and sentence dated 14.10.2022 passed by the Sessions Judge, Varanasi. Therefore, Capital Criminal Appeal No. 20 of 2022 and Criminal Appeal No. 8766 of 2022 deserve to be dismissed, and Capital Reference No. 15 of 2022, referred by the Trial Court for confirmation of the death sentence, is liable to be confirmed.

33. In the light of the arguments and counter-arguments advanced by learned counsel for the parties, and upon perusal of the record of the case and the written report (Exhibit Ka-1), it is clear that the incident in the present case took place on 16.06.2012 at about 8:30 P.M. within the compound of *Baba Rahim Shah Mazar, Beniabagh*. The First Information Report was lodged against the appellants on the same date, i.e., 16.06.2012, at about 11:55 P.M. In the said incident, four persons sustained serious injuries at the hands of the appellants and were immediately taken to different nearby hospitals to save their lives. The informant, Md. Saeed alias Kaju (PW-1), as well as the injured witness, Md. Saif alias Shalu (PW-2), also sustained injuries in the incident. Out of the four injured persons, three succumbed to their injuries on the same night, i.e., 16.06.2012, while the fourth succumbed to his injuries on 20.06.2012.

34. From a perusal of the record, it transpires that deceased Kamil, who was a *sewadar* at *Baba Rahim Shah Mazar* and used to clean the *Mazar*, belonged to a different family, whereas the other three deceased persons belonged to the informant's family. Therefore, it was quite natural and consistent with normal human conduct for the family members and relatives of the

injured persons to first prioritize saving the lives of their injured loved ones by taking them to the hospital in the hope of their recovery. It is evident from the record that after admitting the injured persons to the hospital, the informant (PW-1) lodged the written report (Exhibit Ka-1) through his brother, Salim alias Pappu, to Police Station Chowk, District Varanasi. Hence, we find that there was no inordinate delay in lodging the First Information Report at the concerned police station.

35. From a perusal of the record, the oral testimony of the prosecution witnesses of fact and the evidence of the Investigating Officer, it is clearly established that the place of occurrence, namely, the compound of *Baba Rahim Shah Mazar,* situated in *Beniabagh Mohalla*, is located within the city. Residential houses are situated on all four sides, i.e., East, West, North and South, making it a densely populated locality. It is quite natural that the place of occurrence being situated within the city of Varanasi, electric poles are installed along the roads as well as within the compound of *Baba Rahim Shah Mazar*. A graveyard (*kabristan*) is also situated within the compound, where the dead bodies of Muslim men and women are buried. Therefore, it is natural that electric poles and bulbs would be installed within the compound of *Baba Rahim Shah Mazar* to facilitate the performance of religious rituals by men and women visiting the *Mazar* and to provide sufficient light in the graveyard for carrying out burial ceremonies even during night-time. This fact finds corroboration from the site plan (Exhibit Ka-11) prepared by the Investigating Officer, Mithilesh Kumar Mishra (PW-8). In the said site plan, the

Investigating Officer has shown the petromax lamps as burning and illuminating the place of occurrence, which have been marked with the letter 'L'. A perusal of the site plan further reveals that petromax lamps were illuminating the area at more than one place.

36. It is also noteworthy that the houses of the informant's family and the accused persons are situated close to each other. The appellants were well acquainted with the informant and his family members. Moreover, it is a matter of common human experience that neighbours and persons who are well acquainted with each other can easily recognize one another even in dim light or when their faces are not clearly visible, by their voices, manner of speaking, body posture and gestures. In view of the aforesaid facts and circumstances, it is established that sufficient light was available at the place of occurrence at the time of the incident, which took place at about 8:30 P.M. on 16.06.2012. Hence, we are of the considered opinion that there was sufficient illumination at the place of occurrence, enabling the prosecution witnesses to identify the appellants correctly while they were committing the crime.

37. The prosecution has examined the informant, Md. Saeed alias Kaju (PW-1), as an eyewitness to the incident. We have perused the entire testimony of the informant (PW-1). A perusal of his evidence reveals that his elder brother, Md. Shafeeq alias Raju, who died in the incident, was the *gaddi-nasheen* (head) of *Baba Rahim Shah Mazar, Beniabagh*. He was also responsible for the maintenance of the *Mazar* and the graveyard (*kabristan*) situated within its compound. Appellant Amzad was

engaged in the work of digging graves for the burial of deceased persons. The entire family of the informant was related by blood and shared close familial ties with the deceased Md. Shafeeq alias Raju, the *gaddi-nasheen* of the *Mazar*. Except for the acquitted accused, Iqbal Rain, all the other appellants, including Smt. Shakeela, belong to the family of appellant Amzad.

38. The testimony of the informant (PW-1) further reveals that there was a dispute between the informant's side and appellant Amzad concerning the land of the graveyard (*kabristan*). Appellant Amzad and his sons had allegedly abused the female members of the deceased Shafeeq's family, as well as the informant, using vulgar and indecent language. It is also an admitted fact that all the members of the informant's family were residing together in a joint household. It further emerges from the evidence that, upon receiving information that appellant Amzad, along with his sons, had come to the informant's house and was hurling vulgar and indecent abuses at the female members of the family, the informant and all the deceased persons, except deceased Kamil, confronted appellant Amzad and questioned him as to why he and his sons were abusing the female members of their family. According to the testimony of this witness, when the informant's side questioned appellant Amzad about his conduct, he became infuriated, once again started hurling vulgar abuses and threatened to kill all the members of the informant's side.

39. The appellants took green (*kaccha*) bamboo sticks, which were lying at the graveyard (*kabristan*) and are normally used for placing the dead body inside the grave

during the burial. The appellants picked up these green (*kaccha*) bamboo sticks, measuring about two arms in length, in their hands and started brutally assaulting the deceased and injured persons, specifically targeting their vital parts, particularly their heads. The appellants used these green (*kaccha*) bamboo sticks as weapons of murder, surrounded the members of the informant's side, along with the deceased and injured persons, and began beating them continuously and mercilessly on their heads. The appellants stopped the assault only when all the deceased and injured persons fell to the ground and became unconscious.

40. From a perusal of the evidence of this witness, the informant, Md. Saeed alias Kaju (PW-1), it is revealed that although the informant (PW-1) could neither place his injury report on record nor submit the same to the Investigating Officer, his testimony reveals that, after the brutal death of three members of his family, PW-1 was left as the sole elder male member of the family. He remained completely engaged in arranging transportation and ensuring that the deceased and injured persons were rushed to the hospital to secure immediate medical assistance so that the lives of the injured persons could be saved. In this state of utter chaos and urgency, he could not collect his injury report from the hospital concerned.

41. It is also a notable fact that when three members of a family are killed in such a brutal manner, a surviving member who is the elder of the family, such as the informant (PW-1) in the present case, would naturally become completely bewildered and shell-shocked. Under

such extraordinary circumstances of grief and trauma, a man like PW-1 could hardly be expected to remain composed or be in the proper frame of mind to meticulously decide what procedural steps ought to be taken by him at that point in time. This was the main reason, and it was also in accordance with human nature and conduct that minor contradictions and variations crept into the evidence of the informant, Md. Saeed alias Kaju (PW-1), during his examination-in-chief as well as during his lengthy cross-examination by the defence.

42. The argument advanced by the learned counsel for the appellants that the informant (PW-1) is not an eyewitness to the incident merely because he could not place his injury report on record or because of certain contradictions and variations in his testimony does not find any support and corroboration in view of the reasons and detailed discussions recorded hereinabove.

43. From a perusal of the cross-examination of PW-1, we find that the defence cross-examined this witness at great length, repeatedly putting questions to PW-1 on the same points with the deliberate design of confusing and bewildering him, thereby eliciting inconsistent answers so that the defence could take advantage of such minor discrepancies. Hence, we reject the argument of the learned counsel for the appellants in this regard and hold that the informant, Md. Saeed alias Kaju (PW-1), is a fully reliable eyewitness to the incident. Whatever minor contradictions and variations appear in his cross-examination are solely attributable to the tactics of the defence in repeatedly questioning the witness on the same points to elicit contradictory responses.

44. It is also a settled principle of law that the present case is one of direct evidence, resting upon the ocular testimony of eyewitnesses, namely, PW-1 and PW-2. Motive for the commission of a crime assumes significance primarily in cases resting entirely on circumstantial evidence. However, the case at hand is not based on circumstantial evidence, rather, it is a case of direct evidence in which the informant (PW-1) and the injured witness (PW-2) were present at the scene of occurrence along with their deceased family members when the incident occurred. Therefore, under such circumstances, the question of motive loses its significance.

45. Consequently, we are of the considered opinion that the appellants are not entitled to any benefit whatsoever on the ground of minor variations and contradictions appearing in the cross-examination of the informant, Md. Saeed alias Kaju (PW-1). It is quite natural that when a witness, such as the informant (PW-1) in the present case, is subjected to a barrage of repetitive questions on identical points, slight variations in expression are bound to occur. The informant, Md. Saeed alias Kaju (PW-1), has also stated in his cross-examination that he could not state certain facts to the Investigating Officer because his mind was not working properly at that time.

46. From a perusal of the evidence of PW-1, this fact is clearly revealed that during his cross-examination, the deposition had to be deferred for other dates due to the unfit mental condition and illness of this witness. Further, it is revealed that the cross-examination of this witness was first recorded on 10.07.2013, whereupon the defence

cross-examined this witness only briefly in four lines, and the cross-examination was deferred to 12.07.2013. Thereafter, on 12.07.2013, 01.08.2013, 09.09.2013, 31.01.2014, 02.12.2014, 27.11.2014, 09.02.2015, 25.02.2016, 27.04.2016, 01.06.2016, and 07.09.2016, spanning across 13 dates over a prolonged period of approximately four years starting from 10.07.2013 to 07.09.2016, the defence subjected PW-1 to a very lengthy, grueling, and exhaustive cross-examination. Due to this exceptionally long duration and repetitive questioning over years, minor contradictions and variations have naturally crept into the deposition of this witness. However, such variations and contradictions cannot give any benefit to the appellants in any manner. Upon due consideration of the aforesaid discussions and the entire evidence on record, we find no force in any of the arguments advanced by the learned counsel for the appellants in this regard.

47. The next star witness adduced by the prosecution is Md. Saif alias Shalu (PW-2). This witness is presently the *gadi-nasheen* (head) of the *Baba Rahim Shah Mazar*, following the death of Md. Shaeeq alias Raju in this incident. This witness, Md. Saif alias Shalu (PW-2), had also received grievous and fatal injuries to his head, inflicted by the appellants. Therefore, this witness (PW-2) is an injured eyewitness to the incident, hence, his presence at the place of occurrence at the time of the incident cannot be doubted on any ground whatsoever.

48. We have also gone through and perused the entire evidence of this witness. From a perusal of the evidence of this witness, it is revealed that the incident in the

present case started over the issue of appellant Amzad, accompanied with his sons, abusing the female members of the informant's family in vulgar and indecent language. When the members of the informant's side tried to question why appellant Amzad, along with his sons, was abusing the female members of their family, appellant Amzad became infuriated, began hurling abuses, and threatened to kill them all. The appellants surrounded the members of the informant's side, picked up green (*kaccha*) bamboo sticks in their hands, which were lying in the graveyard (*kabristan*) and were normally used for placing inside the grave during the burial of dead bodies, and began assaulting them continuously and brutally, specifically targeting the heads of the deceased as well as the injured persons. The appellants left the place of occurrence only after all the injured persons had fallen unconscious.

49. According to this witness, after the incident, all the injured persons were taken to different hospitals. However, Md. Shafeeq alias Raju and Kamil died at Kabir Chaura Hospital, while Md. Shakeel alias Jau was taken to BHU Hospital, where he succumbed to his injuries, and Chand was taken to Alaknanda Hospital, where he passed away after a few days. This witness (PW-2) had also received grievous and fatal injuries to his head and other parts of his body, became unconscious, and was taken to Singh Medical Hospital for treatment.

50. The defence has also cross-examined this witness (PW-2) at great length and in a grueling manner. Due to this reason, many minor contradictions and variations have also crept into the evidence of this witness.

However, those minor variations and contradictions have no relevance and do not cast any adverse shadow against the deposition of this witness or against the prosecution story.

51. This fact is also proved from the statement of this witness during cross-examination that in this incident, no unknown persons were involved. This statement as deposed by this witness indicates and proves the fact that the accused appellants who committed this crime were well-known persons to the informant's side and were familiar and acquainted with them. This witness has also received grievous injuries on his head and other vital parts of his body. Dr. Virendra Kumar Singh (PW-11) prepared the medico-legal injury report, marked as Exhibit Ka-48, in respect of this witness and found the following injuries:

> "**Injury No. 1:** A lacerated wound with swelling, measuring 6 cm × 4 cm, on the left side of the head, situated 3 cm above the left ear, with active bleeding. An X-ray and a CT scan of the head were advised.
>
> **Injury No. 2:** Contused swelling measuring 3 cm × 3 cm over the left eye. The injured was referred to an eye specialist for further evaluation.
>
> **Injury No. 3:** A red contusion measuring 6 cm × 4 cm on the left side of the chest, situated 8 cm below the nipple. An X-ray examination was advised."

52. Thereafter, Dr. T.N. Verma (PW-9) of Singh Medical Research Centre, Varanasi, provided medical treatment and assistance to this witness, who found severe injuries on the head and left eye of PW-2, and prepared treatment documents marked as Exhibit Ka-36 and Exhibit Ka-37. Dr. Sunil Kumar Shah (PW-10) of Shah Maternity and Eye Hospital also provided emergency treatment to the injured Shalu (PW-2). According to Dr.

Sunil Kumar Shah (PW-10), the injured Shalu (PW-2) had sustained a head injury and lost vision in his left eye. He found a fracture during X-ray examination of the bones surrounding the left eye of PW-2. A surgery was also conducted for the treatment of Shalu (PW-2). Thereafter, Dr. Sunil Kumar Shah (PW-10) proved the relevant medical reports of Shalu marked as Exhibit Ka-46, as well as the report of Arihant Diagnostic Centre marked as Exhibit Ka-47.

53. Dr. Nirmal Kumar Jain of Arihant Diagnostic Centre, Maruaganj, Varanasi, conducted a CT scan of the injured Shalu (PW-2), prepared a report on the basis of the CT scan films, and proved the CT scan report as Exhibit Ka-47. Thus, the treatment of the injured Md. Saif alias Shalu (PW-2) was conducted at several hospitals due to the fatal and grievous injuries caused to his head and left eye. Md. Saif alias Shalu (PW-2) survived the injuries caused by the appellants only after receiving treatment at several hospitals in Varanasi.

54. Accordingly, from the facts mentioned above and in view of our detailed discussion, it is clearly proved beyond all reasonable doubt that the injured Md. Saif alias Shalu (PW-2) was present at the place of occurrence when the incident occurred. He had seen with his own eyes the commission of the crime by the accused appellants and had also sustained serious injuries during the commission of the crime by the appellants. For this reason, the evidence of the injured witness, Md. Saif alias Shalu (PW-2), is found to be wholly reliable and trustworthy. Apart from that, when we appreciate the evidence of this witness (PW-2) and read it in conjunction

with the evidence of the informant, Md. Saeed alias Kaju (PW-1), we find that a conjoint reading of the depositions of PW-1 and PW-2 mutually corroborates and supports each other.

55. Further, the ocular testimony of the eye-witnesses, namely the informant, Md. Saeed alias Kaju (PW-1), and the injured witness, Md. Saif alias Shalu (PW-2), also finds firm corroboration and support from the medical evidence adduced by Dr. Ashok Kumar Upadhyay (PW-3), who prepared the postmortem report of the deceased Md. Shafeeq (Exhibit Ka-2); Dr. Satish Chandra Singh (PW-4), who prepared the postmortem report of the deceased Kamil (Exhibit Ka-3) as well as the postmortem report of the deceased Md. Shakeel alias Jau (Exhibit Ka-4); and Dr. Vinay Kumar Sharma (PW-5), who prepared the postmortem report of the deceased Chand. The oral testimony is further corroborated by the evidence of Dr. R.P. Singh (PW-6), Consultant Neurosurgeon at Alaknanda Hospital, Varanasi, who had treated the deceased Chand at the said hospital. Thus, the oral testimony of the informant (PW-1) and the injured witness (PW-2) stands fully supported and corroborated by the medical evidence on record, while also mutually corroborating and reinforcing each other.

56. It is the written submission of the appellants, as stated in paragraph 'F' of the grounds taken in the memo of appeal that "Because believing upon the prosecution story, if it is to be relied upon for the sake of the argument, the alleged incident is said to have taken place without pre-meditation of mind and in the heat of the events, hence no *prima facie* offence under section 302

IPC is made out against the appellants". By the aforesaid submissions, the appellants have admitted the occurrence of the incident as well as their presence at the place of occurrence. So far as the aforesaid contention that the incident took place without premeditation and in the heat of the events is concerned, we find that Exception-4 to Section 300 IPC provides as follows:

> *"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."*

57. The explanation of Exception-4 also provides that it is immaterial in such cases as to which party offers the provocation or commits the first assault. Thus, for the applicability of Exception 4 to Section 300 IPC, it is clear that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, provided that the offender has not taken undue advantage or acted in a cruel or unusual manner. In order to bring a case under Exception 4 to Section 300 IPC, the evidence must show that the accused, without any premeditation and in the heat of passion and without having taken any undue advantage, had not acted in a cruel and unusual manner.

58. In the light of the aforesaid legal provisions contained in Exception 4 to Section 300 IPC, from a perusal of the post-mortem report (Exhibit Ka-2) of the deceased Md. Shafeeq, prepared by Dr. Ashok Kumar Upadhyay (PW-3), we find that as many as four injuries were found on the body of the deceased. All the four injuries were confined to the head, face, shoulder and eye regions. Depressed and multiple fractures of the

frontal bone of the skull and the right jaw bone were found. The frontal and temporal bones on both sides, the parietal bone, the occipital bone and the right jaw bone were found fractured. The right eye was also found crushed. Similarly, from a perusal of the postmortem report (Exhibit Ka-3) of the deceased Kamil, prepared by Dr. Satish Chandra Singh (PW-4), we find that four injuries were found on his body, out of which three were located on the head. The occipital bone of the deceased Kamil was also found fractured. Further, from a perusal of the postmortem report (Exhibit Ka-4) of the deceased Md. Shakeel alias Jau, also prepared by Dr. Satish Chandra Singh (PW-4), we find that a total of six injuries were found on his body. All the six injuries were confined to the head, which is an extremely sensitive and vital part of the human body. The lower jaw bone, left temporal bone, parietal bone and the middle and frontal cranial fossae on the left side were found fractured. Likewise, from a perusal of the postmortem report (Exhibit Ka-5) of the deceased Chand alias Raju, prepared by Dr. Vinay Kumar Sharma (PW-5), we find that six injuries were found on his body. All the six injuries were confined to the head, nose, chin, neck and forehead. Furthermore, the frontal, temporal and parietal bones on both sides of the skull, as well as the nasal bone and the jaw bone, were found fractured.

59. From a perusal of the aforesaid postmortem reports (Exhibit Ka-2 to Exhibit Ka-5), it is amply clear that the appellants brutally, mercilessly, and continuously assaulted the deceased, aiming exclusively at their heads. More than one injury was caused by the

appellants. This fact clearly shows and proves that the appellants took undue advantage and acted in a very cruel and unusual manner by assaulting the deceased exclusively on their heads continuously, causing more than one head injury, alongside fractures of the frontal, parietal, temporal, and jaw bones of the deceased. Apart from that, the injury report and medical documents of the injured witness, Md. Saif alias Shalu (PW-2), which have been proved by Dr. T.N. Verma (PW-9), Dr. Sunil Kumar Shah (PW-10), Dr. Virendra Kumar Singh (PW-11), and Dr. Nirmal Kumar Jain (PW-12) who treated and proved the medical documents of the injured witness, establish that the injured witness (PW-2) also received grievous injuries on his head, coupled with a fracture of the left orbital bone and the accumulation of blood, which caused the eye to protrude and resulted in the loss of his vision.

60. Thus, the aforesaid facts, as revealed from the postmortem reports of the deceased and the injury report of the injured witness, Md. Saif alias Shalu (PW-2), prove beyond all reasonable doubt that the appellants had the intention to kill the deceased. With this intention, as well as in furtherance of the common object of the unlawful assembly formed by them with pre-meditation at the place of occurrence, all the appellants, sharing the common object to kill all the members of the informant's side, began to assault them mercilessly, brutally, and continuously, aiming exclusively at the heads of the deceased and the injured witness, Md. Saif alias Shalu (PW-2), so that their death under any circumstances could be made sure and certain.

61. In such view of the matter, the number of injuries on the heads of the deceased and the injured witness, Md. Saif alias Shalu (PW-2), coupled with the site of the injuries which is confined solely to the heads of the victims, clearly and unequivocally demonstrates that the appellants, as members of an unlawful assembly formed by them, shared a common object to kill all the members of the informant's side, and they successfully achieved the common object of causing the death of the deceased. Therefore, in view of the aforesaid facts and circumstances, the appellants cannot be granted any benefit of Exception 4 to Section 300 IPC, as they are not eligible or entitled to any benefit thereunder.

62. At this stage, we have perused the judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the appellants in the cases of ***Sunny alias Santosh Dharmu Bhosale v. State of Maharashtra***, **(2024) 11 SCR 1440**, and ***Jugat Ram v. State of Chhattisgarh***, **AIR 2020 SC 4350.**

63. From a perusal of ***Sunny alias Santosh Dharmu Bhosale (supra)*** and ***Jugat Ram (supra)***, it appears that, in those cases, only one person was assaulted with a *lathi* and subsequently he succumbed to the injuries sustained. Having regard to the facts and circumstances of that cases, the Hon'ble Supreme Court altered the conviction of the appellants therein from Section 302 IPC to Section 304 IPC. However, in the present case, we have discussed the postmortem reports of four deceased persons and the testimony of the injured witness, Md. Saif alias Shalu (PW-2), which reveal that multiple injuries were inflicted upon the deceased persons as well

as the injured witness, including injuries on vital parts of their bodies. In the present case, four persons lost their lives, while one other person, namely, Md. Saif alias Shalu (PW-2), sustained serious injuries. Thus, the facts and circumstances of the present case are entirely distinct from those involved in the judgments relied upon by the learned counsel for the appellants. Therefore, the present case is clearly distinguishable from the precedents cited. Consequently, in view of the discussion made hereinabove, the appellants are not entitled to any benefit from the aforesaid judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the appellants.

64. Hon'ble Supreme Court in the case of ***Virsa Singh v. State of Punjab*, AIR 1958 SC 465** has held:

> *"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, so far as the intention is concerned, is neither here nor there. The question, or to inflict an injury of a particular degree of seriousness, is not whether he intended to kill, he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion……..The test laid down in Virsa Singh's case for the applicability of clause Thirdly is now ingrained in our legal system and has become part of the rule of law. Under clause Thirdly of Section 300 of the Code, culpable homicide is murder if both the following conditions are satisfied: (a) that the act which causes death is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz. that the*

injury found to be present was the injury that was intended to be inflicted."

65. Hon'ble Supreme Court in the case of ***Suresh Sitaram Surve v. State of Maharashtra*, (2002) 10 SCC 28** has held:

"The evidence of the injured eyewitnesses cannot be discarded in toto on the ground of inimical disposition towards the accused or the improbability of narrating the details of actual attack. True, their evidence has to be scrutinised with caution taking into account the factum of previous enmity and the tendency to exaggerate and to implicate as many as possible. But on a perusal of the evidence tested in the light of the broad probabilities, the High Court was justified in reaching the conclusion that the prosecution witnesses are natural witnesses and they could not have concocted the case against the accused without any basis. The fact that the FIR was lodged almost immediately after the occurrence naming the appellant as the main assailant lends positive assurance to the credibility of the prosecution case as unfolded by the eyewitnesses, most of whom were injured. Both the trial court and the High Court found that there was sufficient light emitted by the tubelight in front of the house to identify the accused who were known persons. The fact that the incident occurred outside and inside the house cannot be doubted as there was blood both at the steps where the dead body lay and inside the house and weapons stained with human blood were found lying in the adjoining narrow lane and the injuries were found on almost all the inmates of the house. It is highly unlikely that within a short time of the occurrence the prosecution party could have come forward with a false version implicating the persons who were not at all seen, while leaving out the real culprits. The eyewitnesses' account of the attack by the appellant is quite consistent. Though certain doubts are sought to be created as to the genesis of the incident and the manner of attack, but the prosecution case is not belied on account of such factors."

66. Thus, in light of the law laid down by the Hon'ble Supreme Court in *Virsa Singh (supra)* and *Suresh Sitaram Surve (supra)*, we find that the testimony of the informant, Md. Saeed alias Kaju (PW-1), and the injured witness, Md. Saif alias Shalu (PW-2), is wholly reliable, as their statements find full corroboration from the medical evidence. The common object of the appellants to annihilate and kill all the members of the informant's side

is clearly established from the postmortem reports of the deceased and the injury report and medical documents of the injured witness, Md. Saif alias Shalu (PW-2). In view of the above discussion and the settled principles enunciated by the Hon'ble Supreme Court in the aforesaid precedents, we find no force in the arguments advanced by the learned counsel for the appellants in this regard.

67. The appellants also cannot be extended the benefit of right of private defence in the present case, since the deceased and the injured eyewitness, Md. Saif alias Shalu (PW-2), along with the informant, Md. Saeed alias Kaju (PW-1), were completely unarmed and helpless, carrying no weapons, sticks, or other objects in their hands. Furthermore, the appellants have failed to bring on record any injury report to establish that they sustained any injuries whatsoever during the incident. Therefore, in the facts and circumstances of the present case, no ground for private defence is made out in favour of the appellants.

68. As regards the argument advanced by the appellants to the effect that the informant, Md. Saeed alias Kaju (PW-1), and the injured witness, Md. Saif alias Shalu (PW-2), stated that axes, spades, and other weapons were also used by the appellants in the incident, yet no incised wound was found on the bodies of the deceased or the injured witness, and further that on the basis of this very prosecution evidence, the co-accused Iqbal Rain has already been acquitted of all charges by the Trial Court, we find from a perusal of the postmortem reports and the injury report of the injured witness (PW-2) that

no incised wounds were indeed present. However, merely on the ground that no incised wound was detected on the bodies of the victims, the entire and trustworthy testimony of the eyewitnesses, namely Md. Saeed alias Kaju (PW-1) and Md. Saif alias Shalu (PW-2), cannot be rejected in toto.

69. From a perusal of the record, the evidence of the prosecution witnesses, and the findings and reasoning recorded by the Court of Session, we find that the Trial Court, acquitted the accused Iqbal Rain of all the charges leveled against him solely on the ground that presence of accused Iqbal Rain on the place of occurrence was found doubtful by the Trial Court. However, on the basis of the same prosecution evidence, the entire testimony of the eyewitnesses, namely, the informant, Md. Saeed alias Kaju (PW-1), and the injured witness, Md. Saif alias Shalu (PW-2), cannot be rejected or disbelieved in toto, particularly in light of the **three-judge Bench** decisions of the Hon'ble Supreme Court in ***Gurcharan Singh and Another v. State of Punjab,*** **(1955) 2 SCC 424** and ***Nisar Ali v. State of Uttar Pradesh, (1957) 1 SCC 350*****.**

70. In ***Gurcharan Singh (supra)***, the Hon'ble Supreme Court, while dealing with the same issue, held in paragraph-9 as follows:-

> *"**9.** The case in hand is similar to the case reported as Dalip Singh v. State of Punjab, (1953) 2 SCC 36, insofar as it was found in that case, as we are inclined to hold in this case, that the acquittal of the other two accused by the High Court may not have been entirely correct. Reference to that reported case is only by way of illustration and not by way of an appeal to precedent, because on facts no two cases can be similar. Each case has its own peculiar facts and it is therefore always risky to appeal to precedents on questions of fact. The highest that can be or has been said on behalf of the appellants in this case is that two of the four accused have been*

acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the appellants also; but it does not follow as a necessary corollary that, because the other two accused have been acquitted by the High Court the appellant also must be similarly acquitted."

71. Similarly, the Hon'ble Supreme Court, in ***Nisar Ali (Supra)***, has held on the same point in paragraph nos. 8 and 9 as follows:-

"8. It was next contended that the witnesses had falsely implicated Qudrat Ullah and because of that the Court should have rejected the testimony of these witnesses as against the appellant also. The well-known maxim falsus in uno falsus in omnibus was relied upon by the appellant. The argument raised was that because the witnesses who had also deposed against Qudrat Ullah by saying that he had handed over the knife to the appellant had not been believed by the courts below as against him, the High Court should not have accepted the evidence of these witnesses to convict the appellant. This maxim has not received general acceptance in different jurisdictions in India, nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases, the testimony may be disregarded and not that it must be disregarded. One American author has stated:

> *'... the maxim is in itself worthless; first in point of validity ... and secondly, in point of utility because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore, it is a superfluous form of words. It is also in practice pernicious...'*

9. The doctrine merely involves the questions of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'."

72. Thus, in light of the legal principles laid down by the Hon'ble Supreme Court in the aforementioned case laws of three-Judge Benches, it is not necessary to reject the evidence of witnesses whose testimony, in respect of some accused persons, is found reliable, while in respect of others, it is found unreliable.

73. According to the law as enunciated by the Hon'ble Supreme Court in case laws of this nature, the Court should cautiously and carefully analyze and appreciate the evidence of prosecution witnesses. If the evidence of prosecution witnesses is found reliable and trustworthy in respect of some accused persons, but unreliable in respect of other accused persons, the evidence shall not be rejected outright. Meaning thereby, the part and portion of evidence of the prosecution witnesses that is found trustworthy and reliable shall be read into evidence. In light of such reliable and trustworthy prosecution evidence, accused persons can be legally held guilty and convicted. If, upon appreciation of the prosecution evidence, there is no trustworthiness or creditworthiness regarding the evidence of the prosecution witnesses in respect of other co-accused persons, then, on the basis of the same evidence, those accused persons could be legally acquitted. Thus, it is merely a rule of caution and not a mandatory rule of evidence, in light of the legal principles enunciated by the Hon'ble Supreme Court in the case laws referred above.

74. Thus, in light of the aforesaid discussion and the settled legal principles enunciated by the Hon'ble Supreme Court in the aforementioned precedents, we find no force in the arguments advanced by the learned counsel for the appellants in this regard. From a meticulous appreciation of the entire evidence on record, both oral and documentary, we find that the testimonies of the informant, Md. Saeed alias Kaju (PW-1), and the injured witness, Md. Saif alias Shalu (PW-2), are wholly trustworthy, credible, and reliable, which conclusively

prove the prosecution case beyond all reasonable doubt against the appellants.

75. Now we consider the point as to whether the capital punishment awarded by the learned Sessions Judge, Varanasi, against the appellants, Amzad, Arshad and Ramzan, is based on evidence and in accordance with the settled principles enunciated by the Hon'ble Supreme Court from time to time, and whether this case falls within the category of the rarest of rare cases. To determine this aspect, we have gone through the landmark judgments of the Hon'ble Supreme Court in ***Jagmohan Singh v. State of U.P.***, **(1973) 1 SCC 20,** ***Bachan Singh v. State of Punjab***, **AIR 1980 SC 898,** ***Machhi Singh v. State of Punjab***, **(1983) 3 SCC 470,** ***Swami Shraddananda v. State of Karnataka,*** **(2008) 13 SCC 767,** and ***Santosh Kumar Satibhushan Bariyar v. State of Maharashtra,*** **(2009) 6 SCC 498**.

76. We have also perused the judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the appellants in the cases of ***Chhannu Lal Verma v. State of Chhattisgarh***, **AIR 2019 SC 243;** ***Machhi Singh and Others v. State of Punjab***, **(1983) 3 SCC 470;** ***Mohd. Firoz v. State of Madhya Pradesh***, **AIR 2022 SC 1967**; and ***Byluru Thippaiah @ Byaluru Thippaiah @ Nayakara Thippaiah v. State of Karnataka***, **2025 SCC OnLine SC 1455.**

77. From a perusal of the above-mentioned pronouncements of the Hon'ble Supreme Court, including the judgments relied upon by learned counsel for the appellants, we find that capital punishment under Section 302 IPC should be awarded only in the rarest of rare cases, and ordinarily, imprisonment for life is the rule

while the death sentence is an exception, being a proper and sufficient punishment to serve the ends of the criminal justice delivery system. Before awarding capital punishment to any convict, the Court is duty-bound to weigh and draw up a balance sheet / chart of aggravating and mitigating circumstances while strictly applying the doctrine of the rarest of rare cases.

78. However, when we have perused and gone through the reasoning and findings of the learned Sessions Judge, Varanasi, we find that the Sessions Judge has not prepared any balance sheet or chart of aggravating and mitigating circumstances based on the evidence available on record for categorising the present case in the category of the rarest of rare cases. Since it is a settled proposition of law that life imprisonment is the rule and the death sentence is an exception, a perusal of the findings and reasoning given by the learned Sessions Judge reveals that merely by referring to the injuries of the deceased persons in their postmortem reports and noting that the appellants have killed four persons, the Sessions Judge concluded that this case falls within the category of the rarest of rare cases and awarded the extreme penalty of capital punishment to the appellants, Amzad, Ramzan and Arshad.

79. From a perusal of the record and the evidence of the prosecution witnesses, we find that in this incident, four green (*kaccha*) bamboo sticks, measuring two hands in length, were used by the appellants as the weapon of murder in the commission of the alleged crime. Thus, we find that the appellants did not use any lethal weapon, any firearm, or any deadly sharp-edged weapon such as

a sword, *farsa*, or axe for the commission of the alleged crime. The appellants only used green (*kaccha*) bamboo sticks, which were lying on the ground of the graveyard (*kabristan*).

80. From a perusal of the record of the present case, we also find that there is no evidence of any nature which could show that the appellants are habitual and hard-core criminals, or that they are a menace to society at large. There is no documentary evidence regarding any criminal history of the appellants to establish that they are habitual offenders in the habit of committing heinous offences like murder. Thus, the prosecution was unsuccessful and unable to produce any documentary evidence in the Trial Court to show and prove that the appellants are hard-core criminals, professional hired killers, dangerous, or a menace to society at large. Capital punishment can be awarded in the rarest of rare category only after preparing a chart or balance sheet of aggravating and mitigating circumstances, and particularly when the accused persons are found to be hired killers and a grave danger or menace to society at large.

81. However, the learned Sessions Judge, Varanasi, without keeping in mind the aforesaid legal aspects and contrary to the settled principles of law, has erroneously categorized the present case under the category of the rarest of rare cases and awarded the death sentence to the appellants, Amzad, Arshad and Ramzan, for the commission of the alleged crime. Hence, we are unable to affirm the findings of the learned Trial Court recorded in this regard on the point of sentence, by which the said

appellants have been awarded the extreme penalty. In other words, we are not in agreement with the finding of the Trial Court sentencing the appellants to death.

82. Therefore, after a meticulous perusal of the entire evidence on record, both oral as well as documentary, and keeping in view the law enunciated by the Hon'ble Supreme Court from time to time, we find that the case at hand does not fall within the category of the rarest of rare cases. We are of the considered opinion that in the present case, sentencing the appellants to imprisonment for life would serve the ends of justice far better than awarding them capital punishment.

83. In view of the above facts and circumstances of the case and the law laid down by the Hon'ble Supreme Court, we are of the firm view that the death sentence awarded to the appellants is neither proper nor judicious. Instead, the appellants deserve to be sentenced to imprisonment for life, which would best serve the ends of justice and the interests of society.

84. Consequently, we set aside the findings and reasoning given by the Trial Court awarding the death sentence, and in place thereof, we sentence the appellants, Amzad, Arshad and Ramzan, to imprisonment for life for the offence under Section 302 IPC. Accordingly, we modify and convert the punishment of the appellants under Section 302 IPC from the death sentence to imprisonment for life.

85. Thus, from a perusal of the entire evidence on record, both oral and documentary, it stands established that the appellants, Amzad, Arshad, and Ramzan (in

Capital Criminal Appeal No. 20 of 2022), along with the appellant Smt. Shakeela, wife of Amzad (in Criminal Appeal No. 8766 of 2022), formed an unlawful assembly on 16.06.2012 at about 8:30 PM at the graveyard (*kabristan*) situated within the compound of *Baba Rahim Shah Mazar*. In execution of their common object and with intention to kill the family members of the informant's side, the said appellants, by a continuous and brutal assault targeted exclusively at the heads of the victims, caused the death of four persons and grievously injured, Md. Saif alias Shalu (PW-2).

86. It is also a notable fact that three of the deceased belonged to the family of the informant, meaning thereby that informant (PW-1) tragically lost three of his family members in this incident. At the time of the occurrence, the deceased Kamil, who was a *sewadar* performing cleaning duties at the *Mazar*, intervened and rushed to rescue the members of the informant's side. The appellants brutally assaulted Kamil on his head as well, inflicted multiple severe injuries, which resulted in his succumbing to them within a few hours at the hospital. Thus, all the appellants, Amzad, Arshad and Ramzan (in Capital Criminal Appeal No. 20 of 2022), and Smt. Shakeela (in Criminal Appeal No. 8766 of 2022), with a common object, common intention and knowledge, committed this brutal crime in which four persons lost their lives.

87. The law is well settled that membership of an unlawful assembly is sufficient to hold such participating member vicariously liable. For fastening liability on the members of an unlawful assembly under Section 149 IPC,

it is not necessary that every member of the unlawful assembly should commit an overt act in prosecution of the common object of the assembly. Mere knowledge of the likelihood of the commission of such an offence by the members of the assembly is sufficient to hold any member of an unlawful assembly guilty of the commission of the crime. Once membership of an unlawful assembly is established, it is not incumbent upon the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient, and every member is vicariously liable for the acts done by others, either in prosecution of the common object of the unlawful assembly or such as the members of the unlawful assembly knew were likely to be committed.

88. Therefore, in the light of the above discussions, we *reject* the **Reference No. 15 of 2022** referred by the Trial Court for confirmation of the death sentence awarded to the appellants, namely, Amzad, Arshad, and Ramzan.

89. Accordingly, we alter and commute the death sentence of **appellants, namely, Amzad, Arshad** and **Ramzan** from capital punishment to life imprisonment under Section 302 IPC, while affirming the findings and reasoning recorded by the Trial Court in respect of other offences, which shall remain unchanged. Thus, we partly *allow* the **Capital Criminal Appeal No. 20 of 2022 (*Amzad and 2 Others v. State of U.P.*).** So far as **Criminal Appeal No. 8766 of 2022 (*Smt. Shakeela v. State of U.P.*)** is concerned, we affirm and maintain the judgment and order of conviction and sentence dated 14.10.2022 passed by the Trial Court in respect of **appellant, Smt.**

Shakeela, in its entirety. Accordingly, ***Criminal Appeal No. 8766 of 2022*** is hereby ***dismissed***.

90. Let a copy of this judgment and order be communicated to the Trial Court along with the Trial Court Record for necessary compliance ***forthwith***.

(Vinai Kumar Dwivedi,J.) (Siddharth,J.)

November 5, 2026
Aditya

Digitally signed by :-
ADITYA KUSHWAHA
High Court of Judicature at Allahabad