A ALLAUDDIN MIAN & ORS. SHARIF MIAN & ANR.

v.

STATE OF BIHAR

APRIL 13, 1989

B [S. NATARAJAN AND A.M. AHMADI, JJ.]

Criminal Procedure Code, 1973: Section 235 and section 354(3)—Sentence—Decision—Sentencing court to approach question seriously—Endeavour to see that all relevant facts and circumstances bearing on sentence brought on record—Sentence of severity imposed—
C *Imperative for Judge to indicate basis—'Special reason clause' in death sentence cases indicates obligation to explain choice of sentence.*

Indian Penal Code, 1860: Sections 34, 141, 149—Unlawful assembly—Fastening of vicarious responsibility on a member—Prosecution to prove act was done in prosecution of common object of
D *assembly.*

Accused Nos. 1 to 6, constituting an unlawful assembly the common intention of which was to kill Baharan Mian, came to his house armed with deadly weapons. Baharan Mian, apprehending trouble, ran inside to arm himself but his wife prevented him from coming out again.
E **At that time, Baharan Mian's two infant daughters, Sahana Khatoon aged about seven years and Chand Tara aged about seven months, were playing in the 'dalan' of his house. Failing in their object to kill Baharan Mian, accused No. 1 gave farsa blows on the head, abdomen and left thumb of Sahana Khatoon causing serious injuries, and accused No. 2 gave one farsa blow on the head of infant Chand Tara. As**
F **a result of these injuries, Sahana Khatoon died the same day while Chand Tara died after 28 days.**

Accused Nos. 1 and 2 were charged under sections 302, 452 and 148 I.P.C., whereas accused Nos. 3 to 6 were sought to be held vicariously liable under section 302/149 I.P.C. Accused Nos. 3 and 4 were
G **further charged under sections 447 and 148, I.P.C. and accused Nos. 5 & 6 were charged under sections 447 and 147, I.P.C. The Trial Court convicted accused Nos. 1 and 2 on all the three counts and awarded the sentence of death to both of them for the commission of the offence punishable under section 302, I.P.C. Accused Nos. 3 and 4 were convicted under sections 302/149, 447 and 148, I.P.C. and for the offence**
H **under section 302/149, each of them was directed to suffer imprison-**

ment for life. Accused Nos. 5 and 6 were convicted under sections 302/149, 447 and 147, I.P.C. For the offence under sections 302/149, I.P.C., they were sentenced to undergo imprisonment for life. A

The High Court dismissed the appeal of accused Nos. 1 and 2 and, while accepting the reference, confirmed the sentence of death awarded to them for the murder of the two infant girls. The conviction of the remaining four accused under section 302/149 was, however, altered to sections 326/149 and the sentence of imprisonment for life given to each of them was substituted by a sentence of rigorous imprisonment for seven years. Their convictions and sentences on the other counts were, however, maintained. B

Before this Court it was contended on behalf of the appellants that (1) the evidence adduced by the prosecution was not reliable; (2) Even on the facts found proved by the courts below, accused Nos. 1 to 6 could not be held guilty of murder with the aid of section 149, I.P.C. as the killings of the two girls was outside the common object of the unlawful assembly; (3) the facts of the case did not warrant a death penalty in the case of accused Nos. 1 and 2, more so because the procedural requirement of section 235(2) of the Cr. P.C. was not followed in letter and spirit; and (4) section 302, I.P.C., and section 354(3), Cr.P.C., insofar as they permit the imposition of the death penalty were violative of Articles 14, 19 and 21 of the Constitution of India. C D

While partly allowing the appeals by converting the sentence of death in the case of accused nos. 1 and 2 to imprisonment for life under section 302, I.P.C., and setting aside the conviction of accused nos. 3 to 6 under section 326/149 I.P.C., the Court, E

HELD: (1) There is no substance in the contention that the prosecution evidence is unreliable and should not be acted upon for confirming the conviction of the accused persons. [508B-C] F

(2) If the prosecution did not examine some persons who were admittedly present at the scene of occurrence, on learning that they were won over, it cannot be said that the prosecution was unfair to the accused persons. The non-examination of these persons cannot affect the probative value of the evidence of other prosecution witnesses. [508F] G

(3) Section 149, I.P.C., creates a specific offence. Since this section imposes a constructive penal liability, it must be strictly construed. [509G] H

A (4) It is not the intention of the legislature in enacting section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke section 149 it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the B common object of the unlawful assembly, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object they would be liable for the same under section 149, I.P.C. [510F-H]

C (5) What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed, and if it is found that the same was committed to accomplish the D common object, every member of the assembly will become liable for the same. [509H; 510A-B]

(6) In the instant case, the common object of the unlawful assembly, as alleged in the charge, was to kill Baharan Mian. When accused Nos. 1 and 2 realised that Baharan Mian was beyond their E reach, they, frustrated at their failure to accomplish their mission, wielded their weapons on the innocent girls, which was no part of the common object of the unlawful assembly. For accomplishing their common object it was not necessary to kill the two girls who were not a hinderance to accused Nos. 1 and 2 accomplishing their common object. Accused Nos. 3 to 6 cannot, therefore, be convicted for the injuries F caused to the two minor girls by accused Nos. 1 and 2, with the aid of section 149. [511A-B]

(7) Section 302, I.P.C, casts a heavy duty on the Court to choose between death and imprisonment for life. When the Court is called upon to choose between the convict's cry 'I want to live' and the pro- G secutor's demand 'he deserves to die', it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence. [511D-E]

(8) In our justice delivery system several difficult decisions are left to the presiding officer, sometimes without providing the scales or H the weights for the same. In cases of murder, however, since the choice

is between capital punishment and life imprisonment, the legislature has provided a guideline in the form of sub-section (3) of section 354 of the Code of Criminal Procedure, 1973. [511E-F] A

(9) When the law casts a duty on the Judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so but the existence of the 'special reason clause' in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be. [512A-C] B C

(10) Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment, the Judge would not award the death sentence. If a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences, his choice should fall on the lower sentence. [512D-E] D

(11) The choice of the sentence has to be made after following the procedure set out in sub-section (2) of section 235 of the Code. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence, there can be no doubt that the provision is salutary and must be strictly followed. [513D, H; 514A] E

(12) The requirement of hearing the accused is intended to satisfy the rule of natural justice. In the case of life or death, the presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of the sentence. If the choice is made without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc. before the Court, the Court's decision on the sentence would be vulnerable. [514C] F G

(13) A sentencing decision taken without following the requirements of sub-section (2) of section 235 of the Code in letter and spirit may have to be replaced by an appropriate order. In the instant case, the Trial Court actually treated it as a mere formality as is evident from H

A the fact that it recorded the finding of guilt on 31st March, 1987, and on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence. Immediately thereafter the decision imposing the death penalty on the two accused was pronounced. [514B, E]

B (14) As a general rule, the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. [514F-G]

C (15) In the instant case, the Trial Court did not attach sufficient importance to the mandatory requirement of sub-section (2) of section 235 of the Code. The High Court also had before it only the scanty material placed before the Sessions Judge when it confirmed the death penalty. Absence of particulars of antcedents of accused, their socio economic conditions, the impact of their crime on the community, etc. D makes the choice of punishment difficult. [514G-H]

(16) It is necessary that the maximum sentence prescribed by law should be reserved for 'the rarest of rare' cases which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punish- E ment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. [515G]

(17) In the instant case, unfortunately the material for choice of sentence is scanty. The motive for the crime is obscure, the one stated, namely, the quarrel between two infants of both sides, does not seem to F be correct. The killings were not for gain. The change shows that the target was Baharan Mian, the father, and not the two infants. The killing of the two infants was not in the contemplation of any of the accused. Both the girls were the victims of the offenders' ire resulting from frustration at the escape of their target. There is nothing so uncommon about the crime as to make the case an exceptional one. The G mere fact that infants are killed, without more, is not sufficient to bring the case within the category of 'the rarest of rare' cases. [516C-E]

Bachan Singh v. *State of Punjab*, [1980] 2 SCC 684; and *Machhi Singh* v. *State of Punjab*, [1983] 3 SCC 470, referred to.

H CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 343 and 446 of 1988.

From the Judgment and Order dated 8.4.1988 of the Patna High Court in Crl. A. No. 140 of 1987 and Death Ref. No. 3 of 1987 and Crl. A. No. 136 of 1987.

R.K. Garg, Salman Khurshid, Rakesh Luthra, Irshad Ahmad, Vinayak D. Phadke, Mrs. Bimla Sinha and Gopal Singh for the Appellants.

A. Sharan, D. Goburdhan, D.N. Goburdhan and B.B. Singh for the Respondent.

The Judgment of the Court was delivered by

AHMADI, J. The appellants in these two appeals by special leave are the six accused persons who were arraigned before the learned Third Additional Sessions Judge, Siwan, for trial. Criminal Appeal No. 343 of 1988 is by original accused Nos. 1, 2, 3 and 5 (Allauddin Mian, Keyamuddin Mian, Saheb Hussain and Afzal Mian) and Criminal Appeal No. 466 of 1988 is by original accused Nos. 4 and 6 (Sarif Mian and Mainuddin Mian). For the sake of convenience we will refer to them by their original positions in the Trial Court.

Accused Nos. 1 and 2 were charged with the commission of offences punishable under Sections 302, 452 and 148, I.P.C. The prosecution case was that accused Nos. 1 and 2 along with accused Nos. 3 to 6 constituted an unlawful assembly, the common object of which was to kill PW 6 Baharan Mian and in pursuance of the said object accused No. 1 caused the death of Sahana Khatoon aged about seven years and accused No. 2 caused the death of Chand Tara aged about seven months. Accused Nos. 1 and 2 were substantively charged under Section 302, I.P.C., whereas accused Nos. 3 to 6 were sought to be held vicariously liable under Section 302/149, I.P.C. Accused Nos. 3 and 4 were further charged under Sections 447 and 148, I.P.C., and accused Nos. 5 and 6 were charged under Sections 447 and 147, I.P.C. The Trial Court convicted accused Nos. 1 and 2 on all the three counts and awarded the sentence of death to both of them for the commission of the offence punishable under Section 302, I.P.C. Each of them was also sentenced to suffer rigorous imprisonment for one year on each count under Sections 148 and 452, I.P.C. The substantive sentences were directed to run concurrently. Accused Nos. 3 and 4 were convicted under Sections 302/149, 447 and 148, IPC and for the offence under Section 302/149 each of them was directed to suffer imprisonment for life. For the offences under Sections 148 and 447, I.P.C., they

were directed to suffer rigorous imprisonments for one year and three months, respectively. The substantive sentences were ordered to run concurrently. Accussed Nos. 5 and 6 were convicted under Sections 302/149, 447 and 147, I.P.C. For the offence under Section 302/149, I.P.C., they were sentenced to undergo imprisonment for life whereas for the offences punishable under Sections 447 and 147, I.P.C., they were directed to suffer rigorous imprisonments for three months and six months, respectively. The substantive sentences were ordered to run concurrently. Since accused Nos. 1 and 2 were awarded the death penalty a reference was made to the High Court which came to be numbered as Reference No. 3 of 1987. Accused Nos. 1, 2, 3 and 5 preferred an appeal, Criminal Appeal No. 140 of 1987, challenging their convictions and sentences awarded to them by the Trial Court. Accused Nos. 4 and 6 preferred a separate appeal, Criminal Appeal No. 136 of 1987, against their convictions and sentences by the Trial Court. The said reference and both the appeals were disposed of by the High Court by a common judgment. The High Court dismissed the appeal insofar as accused Nos. 1 and 2 are concerned and, while accepting the reference, confirmed the sentence of death awarded to them for the murder of two the infant girls. The conviction of the remaining four accused under Section 302/149 was, however, altered to Section 326/149 and the sentence of imprisonment for life given to each of them was substituted by a sentence of rigorous imprisonment for seven years. Their convictions and sentences on the other counts were, however, maintained. Feeling aggrieved by the convictions and sentences awarded to them on different counts all the six accused persons have preferred the present two appeals by special leave.

Briefly stated the prosecution case is that on the afternoon of 25th July, 1985 around 4.30 p.m. when PW 6 Baharan Mian was sitting at the entrance of his house, the aforesaid six accused persons came from the west armed with deadly weapons; accused Nos. 1 and 2 were carrying 'farsas', accused Nos. 3 and 4 were armed with spears (bhalas) and accused Nos. 5 and 6 were armed with sticks (Lathis). On seeing them PW 6 got up and went to the 'osra' (verandah) of his house. Accused No. 3 began to untie the buffalo tethered in front of the house while the other accused persons showered abuses on PW 6, to which the latter objected. Thereupon, accused Nos. 4 and 6 shouted 'Sale ko jan se mar do'. Immediately thereafter, accused Nos. 1 and 2 moved menacingly towards PW 6. The two infants Sahana Khatoon and Chand Tara were then playing in the 'dalan' outside the western room. On seeing accused Nos. 1 and 2 approaching him duly armed with farsas PW 6 apprehended trouble and ran into the adjoining room to

arm himself with a spear. His wife, PW 5 Laila Khatun, who was in the room, however, prevented him from going out for fear that he may be done to death by the accused persons. Realising that PW 6 has entered the inner room and was prevented by his wife from coming out, accused No. 1 gave farsa blows on the head, abdomen and left thumb of Sahana Khatoon causing serious injuries. Accused No. 2 gave one farsa blow on the head of infant Chand Tara. The neighbours PW 2 Ful Mohammad Mian, PW 3 Ali Asgar, PW 4 Vidya Giri and others, namely, Jalaluddin Ahmad, Sadik Mian, Ram Chandra Prasad, Bhikhari Mian, etc. intervened, pacified the assailants and sent them away. After the assailants had left the scene of occurrence the two injured girls were removed to the city dispensary where the First Information Report of PW 6 was recorded at about 6.45 p.m. Unfortunately, Sahana Khatoon died shortly after she was admitted to the dispensary. Her younger sister Chand Tara succumbed to her injuries on 23rd August, 1985. Immediately after the two injured were removed to the dispensary for treatment, PW 7 Dr. Haliwant Singh who examined Sahana Khatoon noted that she had a sharp cutting injury on the anterior half of the head causing a fracture of cranial bone with the brain substance protruding out, a sharp cutting injury on the left illiao fossa and a sharp cutting injury on the left thumb and left index finger. PW 1 Dr. Anil Kumar Verma, the Senior Assistant Surgeon in Siwan Sadar Hospital, performed the autopsy on the dead body of Sahana Khatoon on the afternoon of 26th July, 1985. Since the fact that Sahana Khatoon died a homicidal death is not in dispute, we need not set out the findings recorded by PW 1 in his postmortem report. Suffice it to say that in the opinion of PW 1 death was due to shock and haemorrhage resulting from the injuries caused to the victim with the farsa.

The injured Chand Tara was examined on the same day by PW 7. He had noticed a sharp cutting injury on the anterior half of the head slightly to the right of the mid-line with the brain matter coming out from the posterior half. She was admitted as an indoor patient but was discharged on 13th August, 1985. A few days later she died on 23rd August, 1985. PW 10 Dr. Ahmad performed the autopsy on the dead body of Chand Tara and he found that she had an infected ulcer 3" x 1-1/4" by cranial cavity deep communicated with brain on the anterio-frontal portion of the head. On dissection the meninges and the brain matter were found to be congested. In his view, the meningitis and encephalitis which had resulted due to infection resulting from the injury caused by a sharp cutting weapon like a farsa were the cause of death. It is evident from the above evidence that Chand Tara also died a homicidal death.

A The finding that both the girls died a homicidal death is unassailable in view of the clear evidence of the aforesaid three medicalmen, namely, PW 1, PW 7, and PW 10. The question then is whether the appellants are responsible for their deaths and if so, to what extent? To bring home the guilt against the six accused persons, the prosecution examined five eye witnesses to the occurrence, namely, PWs 2 to B 6. These five eye witnesses have unfolded the prosecution case that the six accused persons had formed an unlawful assembly the common object whereof was to kill PW 6 Baharan Mian. In pursuance of that common object they, duly armed with weapons such as farsas, bhalas and lathis, entered the residential premises of PW 6 on the evening of 25th July, 1985 and committed the acts set out earlier. The courts below found that the presence of PWs 5 and 6 in the house at that point C of time could not be doubted. In fact these accused persons had come to the house to kill PW 6. PWs 2, 3 and 4 who can be said to be dependable witnesses have also supported the prosecution case as narrated by PWs 5 and 6. The evidence of these prosecution witnesses stands further corroborated by the evidence of PW 7 who had seen the D wounds on the two injured soon after the incident. PWs 1 and 10 who performed the post-mortem examination on the dead bodies also lend corroboration to the testimony of the eye witnesses. The courts below, therefore, recorded the convictions relying on the evidence of the aforesaid witnesses as set out earlier. In the backdrop of these facts, the learned counsel for the accused made the following submissions:

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1. The evidence adduced by the prosecution to bring home the guilt against the accused, particularly the evidence of PWs 2 to 6, is not reliable and should not be acted upon.

2. Even on the facts found proved by the courts below, the four F accused persons, namely, accused Nos. 3 to 6 cannot be held guilty of murder with the aid of Section 149, I.P.C. as the killings of the two girls was outside the common object of the unlawful assembly

3. Even if the conviction of accused Nos. 1 and 2 for the murder G of the two girls is confirmed, the facts of the case do not warrant a death penalty, more so because the procedural requirement of Section 235(2) of the Cr. P.C. was not followed in letter and spirit, and

4. Section 302, I.P.C., and Section 354(3), Cr. P.C., insofar as H they permit the imposition of the death penalty are violative of

Articles 14, 19 and 21 of the Constitution of India. A

We will immediately proceed to deal with these contentions.

The learned counsel Shri Garg took us through the evidence of the five eye witnesses with a view to satisfying us that their version regarding the incident was not free from blemish and it would be B highly unsafe to place implicit reliance on their evidence. We have carefully scrutinised the evidence of the aforesaid five eye witnesses and we are inclined to think that their evidence was correctly appreciated by both the Courts below. The presence of PWs 5 and 6, the parents of the two victim girls, in the house at that point of time cannot be disputed. In fact, the accused persons had constituted an C unlawful assembly with a view to killing PW 6, the father of the two girls. With that avowed object they went, duly armed with lethal weapons, to launch an attack on PW 6. After accused No. 3 had untied the bufallo notwithstanding the protest from PW 6, accused Nos. 4 and 6 gave the call to kill PW 6. Encouraged by this call accused Nos. 1 and 2 moved menacingly towards PW 6 who was then standing in 'osra'. D Realising that accused nos. 1 and 2 were out to kill him, PW 6 went inside the room to fetch a bhala to defend himself. His wife PW 5 who was in the room sensing danger to his life stood in his way and did not permit him to go out and face accused Nos. 1 and 2. PWs 2, 3 and 4 who were neighbours saw the incident from close quarters when accused Nos. 1 and 2 dealt fatal blows with their farsas to the two girls E who were playing in the 'dalan'. PW 2 who is the brother of PW 6 was in the field to the east of the house and was, therefore, in a position to see the incident. PW 3 was returning from the bazar when he saw the accused persons at the door of PW 6. He heard the accused persons uttering abuses and the call given by accused Nos. 4 and 6 to kill PW 6. He also saw the accused persons entering the house and going towards F the room which PW 6 had entered to fetch a bhala. In the end he saw accused Nos. 1 and 2 inflicting farsa blows on the two girls. He was cross-examined at length but except for minor contradictions here and there which are only to be expected when a witness gives evidence after a lapse of time, nothing substantial shaking the substratum of the prosecution case has surfaced to discredit him. PW 4 was at the saw G mill of Ram Chandra Prasad when he saw the accused persons coming from the west and proceeding towards the east. He saw these persons going to the house of PW 6 and heard them showering abuses. In his cross-examination an attempt was made to show that he could not be present at Ram Chandra Prasad's saw mill at that hours since he was a Government Servant and admittedly his normal duty hours were from H

A 10 a.m. to 5 p.m. Further effort was to show that he was connected with a case between Bhikhari Dass and Sita Ram Prasad pending under Section 145, Cr. P.C. in respect of possession of some land. He has also disowned knowledge of any dispute between Bhikhari Dass and Mainuddin Mian in respect of another parcel of land. He was cross-examined at length to prove that he was an interested and a B biased witness. Even if the evidence of this witness is ignored, there is sufficient evidence on record to support the findings recorded by both the courts below. We are, therefore, of the opinion that there is no substance in the contention of the learned counsel for the accused that the prosecution evidence is not reliable and should not be acted upon for confirming the conviction of the accused persons.

C It was next submitted by learned counsel for the accused that some of the prosecution witnesses, namely, Jallaluddin, Bhikhari Mian and Ram Chandra Prasad who were admittedly present at the scene of occurrence according to the prosecution and had witnessed the entire incident were deliberately dropped with a view to suppres- D sing the truth. We cannot accept this contention for the simple reason that apart from both PW 5 and PW 6 having deposed that they were pressurised by the defence the High Court has found in paragraph 36 of its judgment that efforts were made by the defence to scare away the witnessess from giving evidence. There is ample material on record to conclude that considerable pressure was exerted on the prosecution E witnesses to stay away from the witness box. Some succumbed to the threats and pressure while some others did not and displayed courage to give evidence and state the truth. In this backdrop, if the prosecution did not examine Jallaluddin, Ram Chandra Prasad and Bhikhari Mian on learning that they were won over it cannot be said that the prosecution was unfair to the accused persons. Mr. Garg submitted F that there was nothing to show that the accused persons were in any way guilty of pressurising or threatening the witnesses. That is besides the point. What is relevant is the fact it so happened. Therefore, the non-examination of the aforesaid witnesses cannot affect the probative value of the evidence of other prosecution witnesses.

G We now proceed to consider whether accused Nos. 3 to 6 have been rightly convicted with the aid of Section 149 for the acts of accused Nos. 1 and 2. Section 141, I.P.C., defines an unlawful assembly as an assembly of five or more persons whose common object is to commit any one of the five acts enumerated therein. The explanation to that section makes it clear that an assembly which was not unlawful H when it assembled, may subsequently become an unlawful assembly.

Section 142 states: whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Section 143 sets out the punishment for being a member of an unlawful assembly. Section 144 prescribes the punishment for joining an unlawful assembly armed with deadly weapons. Section 145 prescribes the punishment for joining or continuing in an unlawful assembly which has been commanded to disperse. Section 146 defines rioting. It says that whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. Section 147 then prescribes the punishment for rioting. Section 148 prescribes the punishment for rioting by members of an unlawfully assembly armed with deadly weapons. Then comes Section 149 which reads as under:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to

A find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by B a member of an unlawful assembly in prosecution of anyone or more of the five objects mentioned in Section 141 will render his companies constituting the unlawful assembly liable for that offence with the aid of Section 149, I.P.C. In the present case, the common object of the unlawful assembly as alleged in the charge was to kill PW 6 Baharan Mian. To accomplish that objective accused Nos. 1 and 2 went after PW 6. Sensing danger PW 6 ran into the adjoining room to fetch a C spear to defend himself. His wife PW 5, however, blocked his way and did not permit him to go out. When accused Nos. 1 and 2 realised that PW 6 was beyond their reach, they, frustated at their failure to accomplish their mission, wielded their weapons on the innocent girls who were playing in the Dalan. The common object having thus been D frustrated, accused Nos. 1 and 2 took out their wrath on the innocent girls which was no part of the common object of the unlawful assembly. It was not necessary to kill these girls to accomplish their object of killing PW 6 as these two girls had not prevented them from reaching PW 6. The learned counsel for the accused, therefore, rightly submitted that while accused Nos. 1 and 2 can be punished for their individual E acts committed after the common object stood frustrated and abandoned on PW 6 placing himself beyond their reach, the other members of the unlawful assembly could not be punished for the acts of accused Nos. 1 and 2 as the killing of the girls was no part of the common object of the assembly. Once PW 6 was beyond the reach of his two tormenters, the common object to kill him stood frustrated and F whatever the individual members did thereafter could not be said to have been done in prosecution of the common object of the assembly. It is not the intention of the legislature in enacting Section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke Section 149 it must be shown that the incriminating act was G done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed H in prosecution of the common object they would be liable for the same

under Section 149, I.P.C. In the instant case, however, the members constituting the unlawful assembly had gone to the house of PW 6 to kill him. That was the common object of the unlawful assembly. For accomplishing that common object it was not necessary to kill the two girls who were not an hinderance to accused Nos. 1 and 2 accomplishing their common object. We are, therefore, of the opinion that accused Nos. 3 to 6 cannot be convicted for the injuries caused to the two minor girls by accused Nos. 1 and 2 with the aid of Section 149, I.P.C. We, therefore, set aside the conviction under Section 326/149, I.P.C., and also the sentence imposed on accused Nos. 3 to 6 on that count. We, however, hold accused Nos. 3 and 4 guilty under Sections 447 and 148, I.P.C., and confirm the sentences awarded to them on those counts. So also we hold accused Nos. 5 and 6 guilty under Sections 447 and 147, IPC and confirm their sentences for the said offences.

Having come to the conclusion that Allauddin Mian and Keyambuddin Mian are guilty of murder, the next question is what punishment should be awarded to them, namely, whether extinction of life or incarceration for life. Section 302, IPC casts a heavy duty on the Court to choose between death and imprisonment for life. When the Court is called upon to choose between the convicts cry 'I want to live' and the prosecutor's demand 'he deserves to die' it goes without saying that the Court must show a high degree of concern and sensitiveness in the choice of sentence. In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of Subsection (3) of Section 354 of the Code of Criminal Procedure, 1973 ("the Code") which reads as under:

> "When the conviction for an offence is punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty, "special reasons" for such sentence shall be stated in the

judgment. When the law casts a duty on the Judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the 'special reasons clause' in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be. Basing his submission on what is described as the humanitarian ideology or the rehabilitarian philosophy, Mr. Garg submitted that any law which permits the supreme right to life being sacrificed for the failure of the State to establish a social order in which such crimes are not committed must be struck down as offending Articles 14, 19 and 21 of the Constitution. While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the 'special reasons clause' should be a sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the Judge would not award the death sentence. It may be stated that if a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence. In all such cases the law casts an obligation on the Judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bridge burning, it may be necessary for the Courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. In the face of this statutory provision which is consistent with Article 21 of the Constitution which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, we are unable to countenance counsel's extreme submission of death in no

case. The submission that the death penalty violates Articles 14, 19 and 21 of the Constitution was negatived by this Court in *Bachan Singh* v. *State of Punjab*, [1980] 2 SCC 684. Mr. Garg, however, submitted that the said decision needs re-consideration as the learned Judges constituting the majority did not have the benefit of the views of Bhagwati, J. who ruled to the contrary. We are not impressed by this submission for the simple reason that the reasons which prevailed with Bhagwati, J., could not have been unknown to the learned Judges constituting the majoirty.

Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:

> "If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fairplay that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the

A question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr. Garg was, therefore, justified in making a grievance that the Trial Court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31st March, 1987, on the same day before the accused could absorb B and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this C case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the Court, the Court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on D the offender and his family members than in the case of a purely administrative decision; *a fortiori,* therefore, the principle of fairplay must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following E the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the F aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present G case, as pointed out earlier, we are afraid that the learned Trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty.

H Apart from what we have said earlier, we may now proceed to

consider whether the imposition of death penalty on the two accused persons found guilty of murder is justified. The Trial Court has dealt with the question of sentence in paragraphs 42 to 44 of its judgment. The reason which weighed with the Trial Court is: it is one of the gravest cases of extreme culpability in which two innocent and helpless babies were butchered in a barbarous manner. After taking note of the mitigating circumstances that both the offenders were married young men with children, the Trial Court found that since the murders were committed without provocation and in cold blood there was no room for leniency as the crime was so abhorrent that it shocked the conscience of the court. The High Court while maintaining the conviction of the said two accused persons proceeded to deal with the question of sentence thus:

> "The conviction of Allauddin Mian and Keyamuddin Mian having been upheld the question is whether the reference should be accepted and the sentence of death against them be upheld. In my view Allauddin Mian and Keyamuddin Mian have shown extreme mental depravity in causing serious fatal injuries to helpless girls of the age of 7/8 years and 7 months. In my view, therefore, this murder can be characterised as rarest of the rare cases. the extreme mental depravity exhibited by Allauddin Mian and Keyamuddin Mian impels me to uphold the sentence imposed on Allauddin Mian and Keyamuddin Mian by the learned Additional Sessions Judge."

It will be seen from the above, that the courts below were considerably moved by the fact that the victims were innocent and helpless infants who had not provided any provocation for the ruthless manner in which they were killed. No one can deny the fact that the murders were ghastly. However, in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in *Bachan Singh's* case (supra), be reserved for 'the rarest of rare' cases which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose (i) punitive (ii) deterrent and (iii) protective. That is why this Court in *Bachan Singh's* case observed that when the question of choice of sentence is under consideration the Court must not only look to the crime and the victim but also the

A circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lessor punishment and not the extreme punishment of death which should be reserved for exceptional B cases only. In the subsequent decision of *Machhi Singh* v. *State of Punjab*, [1983] 3 SCC 470 this Court, after culling out the guidelines laid down in *Bachan Singh's* case, observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence. In the present case, unfortunately the material for choice of sentence is scanty. The motive for the C crime is obscure, the one stated, namely, the quarrel between two infants of both sides, does not seem to be correct. The killings were not for gain. The charge shows that the target was PW 6, the father, and not the two infants. The killing of the two infants was not in the contemplation of any of the accused. Both the girls were the victims of D the offenders' ire resulting from frustration at the escape of their target. There is nothing so uncommon about the crime as to make the case an exceptional one. The mere fact that infants are killed, without more, is not sufficient to bring the case within the category of 'the rarest of rare' cases.

E In *Bachan Singh's* case the question of laying down standards for categorising cases in which the death penalty could be imposed was considered and it was felt that it would be desirable to indicate the broad guidelines consistent with section 354(3) of the Code without attempting to formulate rigid standards. That was because it was felt that standardisation of the sentencing process would leave little room F for judicial discretion to take account of variations in culpability even withim the same category of cases. After referring to the aggravating circumstances (Para 202) and the mitigating circumstances (Para 206) pointed out by counsel, the Court observed that while these were relevant factors it would not be desirable to fetter judicial discretion. It pointed out that these factors were not exhaustive and cautioned: G 'courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and human concern' consistent with Section 354(3) of the Code. In the subsequent decision in *Machhi Singh's* case, the Court tried to indicate the type of cases which may fall within the exceptional class without attempting to introduce rigidity. It would not be fair to read the deci- H sion as an attempt to fetter judicial discretion. Even in cases of the

type indicated in that case, circumstances may vary, which would necessitate a different approach. For example, the circumstances of this case show that the offenders had killed the two girls not because of any hatred for them or to accomplish their objective but out of frustration and anger at having lost their target. Unfortunately as the trial Judge did not give time to the convicts to reflect on the question of sentence, the chance, however remote, of the true motive for the crime surfacing was lost. The antecedents of the accused, their socio-economic conditions, the impact of their crime on the community etc., have not come on record. The absence of these particulars makes the choice of punishment difficult. In view of what we have observed earlier and having regard to the circumstances in which the murders took place, we think the extreme punishment of death is not warranted.

In the result both the appeals are partly allowed. The conviction of accused Nos. 1 and 2 under all the heads is confirmed but their sentence of death for killing Shahna Khatoon and Chand Tara, respectively, is converted to imprisonment for life. So far as accused Nos. 3 to 6 are concerned, their conviction and sentence under Section 326/149, I.P.C. is set aside; however, their conviction and sentence under the other heads is maintained. Their bail bonds will stand cancelled if they have already served out their sentences; otherwise they will surrender to their bail and serve out the remaining sentence. The appeals will stand disposed of accordingly.

R.S.S. Appeals allowed partly.