

*

IN THE HIGH COURT OF DELHI

%

Judgment Reserved on : 25.08.2009

Judgment Delivered on : 31.08.2009

+

DEATH REF. NO.1/2009

STATE

Through: Ms.Richa Kapoor, A.P.P.

AND

SHREE GOPAL @ MANI GOPAL

(CONVICT)

Through : Pt.R.K.Naseem, Advocate

Mr.Nitin Tittal, Advocate and

Mr.Manish Kumar, Advocate

+

CRL. A. 528/2009

SHREE GOPAL @ MANI GOPAL

..APPELLANT

Through : Pt.R.K.Naseem, Advocate

Mr.Nitin Tittal, Advocate and

Mr.Manish Kumar, Advocate

VERSUS

STATE

....RESPONDENT

Through : Ms.Richa Kapoor, A.P.P.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed
to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether judgment should be reported in Digest? Yes

PRADEEP NANDRAJOG, J.

1. The entire case of the prosecution is to be found in the statement Ex.PW-2/A of HC Ajit Singh PW-2 and the endorsement Ex.PW-22/A made thereunder by SI Sanjay Bhardwaj PW-22. The statement Ex.PW-2/A has formed the basis of the FIR No.98/2003, Ex.PW-1/A. The endorsement Ex.PW-22/A records the recoveries effected at the place where the crime was committed as also the fact that the convict Shree Gopal was apprehended at the spot by HC Ajit Singh PW-2.

2. As recorded in the endorsement Ex.PW-22/A, the rukka was dispatched from LNJP Hospital at 6:15 PM on 28.4.2003; a fact recorded beneath the endorsement Ex.PW-22/A. It may be noted at the outset, that as deposed to by SI Sanjay Bhardwaj PW-22, after recording the statement Ex.PW-2/A of HC Ajit Singh and after effecting recoveries at the spot where the crime was committed, he went to LNJP Hospital, where the injured Neelam and Const.Nand Kishore PW-5 were removed from the place of the crime and after collecting the MLC Ex.PW-14/A of Neelam, which recorded that she was declared dead when brought to the hospital and the MLC Ex.PW-14/B of Const.Nand Kishore, he dispatched the statement Ex.PW-2/A after making an endorsement Ex.PW-22/A through Const.Triloka to the police station for FIR to be registered. It

was recorded that the time when the crime was committed was about 3:00 PM and the place where the crime was committed was the gallery between Court No.119 and 122 on the first floor of the Tis Hazari Court Complex.

2. The statement Ex.PW-2/A made by HC Ajit Singh PW-2 and recorded by SI Sanjay Bhardwaj PW-22 reads as under:-

“Statement dated 28.04.2003 made by Head Constable Ajit Singh No.33/N, PIS No.28840413 P.P. Tis Hazari, P.S. Subzi Mandi, New Delhi.

I am posted at P.P. Tis Hazari P.S. Subzi Mandi as Head Constable and I am deputed as office PSO of Sh.J.P.Singh, District Judge. Today in the noon at about 3:00 PM, I was coming from the Office of the District Judge at the First Floor and was proceeding towards the police post and when I reached near Court No.119 I heard a sound of fire. When I looked ahead I saw a boy, whose name I later on learnt, on interrogation, as Mani Gopal S/o Harish Chander, R/o RZ-50, Todarmal Colony, Najafgarh, Delhi, firing with a pistol in his right hand at an eunuch whose name, on interrogation, I learnt was Neelam R/o D-251, Raghibir Nagar, Rajouri Garden, Delhi. At the same time Const.Nand Kishore posted at the police post immediately grappled with the aforesaid boy whereupon the said boy fired a bullet on the thigh of constable Nand Kishore. I immediately ran towards Mani Gopal, who pointed his pistol towards me but I immediately grappled with him before he could shoot and I snatched the pistol from the said boy and over powered him. In the meantime, you also came over there and I handed over the aforesaid Mani Gopal and the said pistol recovered from him, to you. The injured eunuch namely Neelam has been taken to Hospital by Inspector Surrender Sand whereas the injured constable Nand Kishore has been taken to Hospital by Const.Aman Kumar. Legal action may be taken. I have heard the statement and the same is correct.

Sd/-
'A' (Ajit Singh)
(In English)
Dated 28.04.2003"

3. The endorsement Ex.PW-22/A made by Inspector Sanjay Bhardwaj beneath the afore-noted statement Ex.PW-2/A, reads as under:-

"To
The Duty Officer
PS Subji Mandi,
New Delhi.

Sir,

It is submitted that today at 3:00 PM in the noon, I the SI along with staff 'checking' was present at the Central Hall, Tis Hazari Courts. In the meantime, I heard the firing sound from Sessions side whereupon I rushed and when I reached in the gallery near the stairs situated adjacent to Court room No.119, I found that a eunuch named Neelam was lying in a pool of blood near the stairs and Const.Nand Kishore while holding his leg was also sitting there and I also found that Ajit Singh Head Constable had over-powered Mani Gopal. He handed over to me a pistol snatched from the aforesaid Mani Gopal. In the meantime, Inspector Surrender Sand, SHO, Civil Lines, removed injured eunuch Neelam to the hospital whereas the injured constable Nand Kishore was taken to Hospital by Constable Aman Kumar. After that, I recorded the foregoing statement of HC Ajit Singh and I got inspected the aforesaid recovered pistol from Head Constable Onkar Nath, the finger prints proficient and checked its magazine. There were three live rounds (cartridges) and one round (cartridge) was present in its chamber. On conducting a personal search cursorily of the aforesaid Mani Gopal two live rounds (cartridges) were also recovered from the right pocket of his pant. After that, I took over all the four live rounds (cartridges) from its magazine and chamber and prepared a sketch of the aforesaid pistol on a piece of paper. On taking measurement of the

aforesaid recovered pistol, its total length was found to be 19.4 cms, height 12.7 cms, diagonal length 22.4. The words "Cal.....30 MAUSER MADE AS CHINA BY NORNICO" and a figure '66' was found written in a triangle on its butt. Black colour plastic was found fitted on its grip and in the middle, it was star shaped. The aforesaid recovered pistol was having foresight Tip as well as the back side Tip along with a hammer. It is also having a pistol locking button and a release button and a figure '11' was found written on its barrel and some characters were found written thereon in Chinese language. After that, the sketch of the magazine was also prepared on that very paper. There were six holes on the upper side of the magazine through which spring coil was visible. The length of the aforesaid magazine from one side was 11 cm and from the cut side its length was 10 cm and the width of its base was found to be 4 cm. Thereafter, the sketch of the aforesaid recovered six live rounds, (cartridges) was also sketched on that very paper. The length of every round (cartridge) was found to be 3.5 cms, and the circumference of its base was found to be 0.8 cms and two English alphabets and a figure i.e. "S&B & 762 x 25" were found written on its bottom. The magazine was fitted with the aforesaid recovered pistol and it was converted into a cloth parcel with the help of a thread and needle and it was allotted serial No.1 and sealed with the seal of S.B. After that, all the six live rounds (cartridges) were kept in a plastic bottle, converted into a cloth parcel with the help of a thread and needle, sealed with the seal of 'S.B.' and it was allotted serial No.2. After that, both the aforesaid parcels were taken into police possession by means of a memo. The covers of the used cartridges, its lead and bullet pieces which were found lying on the spot were kept in a plastic box, converted into a cloth parcel with the help of a thread and needle and it was allotted serial No.3 after having been sealed the same with the seal of S.B. and thereafter, the same was taken into police possession by means of a memo. The blood lying on the spot was also lifted there-from with the help of a cotton swab, kept in a small plastic box, converted into a cloth parcel with the help of a thread and needle, sealed with the seal of S.B., allotted serial No.4 and taken into police possession by means of a memo. Three ladies sandals, one black and white coloured Head cloth

(chunni), one lady's hair elastic and seven election cards of Sanjeev Goyal were kept in a polythene, tied the same with a knot thereon, converted into a cloth parcel with the help of a thread and needle, allotted serial No.5, sealed with the seal of 'SB' and taken into police possession by means of a memo. I, the SI, after handing over the accused Mani Gopal to Const. Ramesh No.1601/N and ASI Gopal Singh, reached Trauma Centre along with Constable Rajender No.815/N and Constable Trilok No.1605/N where, I obtained the MLC No.39957 belonging to the aforesaid eunuch namely Neelam on which the doctor mentioned "Pt. declared brought dead" and I also collected the MLC No.39959 of and Nand Kishore Singh. On inspecting the spot, MLC and the contents of the foregoing statement reveal the commission of offences, punishable under Section 302/307/186/353/332 of IPC and Section 25/27 of the Arms Act. Hence, this writing is being sent to police station through Constable Trilok No.1605/N for the purpose of registration of a case (FIR). After registration of the case, its further investigation be entrusted to Inspector Rajvir Sharma, SHO PS Subzi Mandi. As per the instructions of the SHO, the special report may please be sent to the Senior Officers through special messenger.

Date of hour of occurrence: 28.04.2003 at 3:00 PM approx.

Place of occurrence : 28.04.2003, 1st Floor Gallery near Court Room No.119, Tis Hazari Courts, Delhi.

Date and hour of dispatch of writing : 28.04.2003 at 06.15 PM

Sd/-
Sanjay Bhardwaj
(In English)
(Sanjay Bhardwaj)
Sub Inspector
No.D/3428
PIS#16940301
Dated 28.04.2003"

4. It is apparent, that to prove its case, the prosecution had to prove that the appellant was apprehended at the spot and fired bullets at Neelam and HC Nand Kishore and that the weapon of offence was taken possession of from his hand by SI Sanjay Bhardwaj as also that the live ammunition was recovered from his person and that the used cartridges were recovered at the spot. The witnesses to which, were obviously, HC Nand Kishore PW-5 who received a bullet injury on his right thigh and HC Ajit Singh PW-2 who witnessed the incident as also SI Sanjay Bhardwaj PW-22 who effected the recoveries and ASI Baldev Singh PW-8 who witnessed the recoveries. We may also note that HC Ajit Singh PW-2 is also a witness to the recoveries i.e. is a co-signatory along with ASI Baldev Singh to the various recovery memos. Further evidence would be of the ballistic expert to connect the four fired cartridges recovered from the spot where the crime was committed, entry whereof stands recorded in the memo Ex.PW-2/C. We may note that as per the report Ex.PW-21/L, the four fired cartridges recovered from the spot were opined to be fired from the pistol Ex.P-1 recovered from Shree Gopal when he was apprehended at the spot itself.

5. SI Sanjay Bhardwaj PW-22, ASI Baldev Singh PW-8 and HC Ajit Singh PW-2, while deposing as witnesses of the prosecution have proved that the seizure memo Ex.PW-2/B,

Ex.PW-2/C, Ex.PW-2/D and Ex.PW-2/E were prepared pursuant to the recoveries effected at the spot. SI Sanjay Bhardwaj deposed that he prepared the seizure memos after effecting the recoveries. ASI Baldev Singh and HC Ajit Singh deposed that the recoveries were effected in their presence and they had witnessed the same and that the seizure memos were prepared in their presence and they had signed the same as witnesses.

6. Seizure memo Ex.PW-2/B dated 28.4.2003 records the seizure of the pistol Ex.P-1 and six live cartridges; three from the magazine of the pistol, one from the chamber of the pistol and two from the right side pant pocket of the accused. The memo Ex.PW-2/C dated 28.4.2003 records the seizure of four used cartridges, one lead piece and broken pieces of bullet from the spot. The memo Ex.PW-2/D records blood sample being lifted on a cotton swab from the place of occurrence i.e. the gallery space near Court No.119, First Floor, Tis Hazari Courts Complex. The memo Ex.PW-2/E records the seizure of three ladies sandles, a head-cloth (chunni) black and white in colour, one ladies elastic hair band and seven election cards of Sanjeev Goyal.

7. The sketch Ex.PW-8/A of the pistol and the six live cartridges seized as recorded in the memo Ex.PW-2/B has

been proved by all the three witnesses i.e. PW-2, PW-8 and PW-22.

8. Thus, the prosecution has successfully proved the recoveries through the testimony of PW-2, PW-8 and PW-22. During arguments in the death reference and the appeal filed by the convict, after going through the testimony of the three police officers, Pt.R.K.Naseem, learned counsel for the convict, very fairly conceded that there was no blemish in the recoveries and the testimony of the three police officers.

9. The motive for the crime has been proved through the testimony of ASI Baldev Singh, SI Sanjay Bhardwaj and by means of a certified copy of the judgment and order dated 1.5.2008 acquitting all the accused in FIR No.808/2002 under Sections 302/436/108/120-B IPC PS Rajouri Garden in which FIR, Dharampal, Parvesh Kumar, Mordhwaj and Geeta were accused.

10. In a nutshell, the judgment and order dated 1.5.2008 shows that the accused of said case were charged with a conspiracy to murder Neelam, the eunuch who has been murdered by the convict Shree Gopal in the instant case. In furtherance of their conspiracy, the accused in FIR No.808/2002 gave effect to their design, but failed due to mistaken identity. Thinking that Zareena, the deceased in said case, was Neelam i.e. the deceased in the instant case, the

contract killer, Parvesh killed Zareena. The deceased Neelam was a witness in the said case. After Neelam was shot dead, the witnesses in the Sessions Trial pertaining to FIR No.808/2002 turned hostile resulting in the accused thereof being acquitted.

11. As per the testimony of ASI Baldev Singh PW-8 and the testimony of SI Sanjay Bhardwaj PW-22, both of them were posted at the police post Tis Hazari Court Complex on 28.4.2003 and at around 12:40 PM on said date, the deceased Neelam, submitted a complaint Ex.PW-8/B in writing as per which she i.e. Neelam stated that she and one Gopal (examined as PW-17 in the instant case) were witnesses in a murder case pending in the Court of Shri V.P.Vaish, A.S.J., Delhi and used to attend the Court proceedings in said case. The accused of the said case, through the relatives were threatening them and she i.e. Neelam requested for police protection in the Court premises. On receipt of the complaint, ASI Baldev Singh PW-8 deputed Const.Nand Kishore PW-5 to accompany Neelam and Gopal and give them protection.

12. It is apparent that the motive for the crime was to intimidate and kill a witness in the Sessions Trial pertaining to FIR No.808/2002, and in the process, intimidate other witnesses.

13. That Const.Nand Kishore PW-5 received a bullet injury on his right thigh has been proved by him while deposing in Court and independent corroboration to said fact is to be found in his MLC Ex.PW-14/B which records the fact that Const.Nand Kishore was got admitted at LNJP Hospital at 3:35 PM on 28.4.2003 with a firearm wound on his right thigh. HC Ajit Singh PW-2 has also deposed that Const. Nand Kishore was fired on his thigh in his presence. Both have deposed that the convict Shree Gopal had fired the fatal shot. Both the witnesses i.e. PW-2 and PW-5 have deposed that they saw Shree Gopal firing at the deceased. There is further proof of Const.Nand Kishore being present at the spot of the crime. The proof is Ex.PW-8/B which contains an endorsement by ASI Baldev Singh that an escort be provided to Neelam. Further proof is in the form of the DD Entry No.22, Ex.PW-11/A recorded in the daily diary at the police post Tis Hazari that Const.Nand Kishore No.1674-N has been sent to Court No.119, Tis Hazari to provide protection to Neelam.

14. Courts have always given credence to the testimony of injured witnesses since their presence at the scene of the crime is seldom doubtful. Courts have held that it mitigates against human conduct that a person would let go the real assailant and would falsely implicate an innocent person.

15. After going through the testimonies of Const.Nand Kishore PW-5 and HC Ajit Singh PW-2, learned counsel for the convict could not point out any blemish in their testimonies.

16. We accordingly concur with the view taken by the learned Trial Judge that there is no reason why the Court should not believe the said two witnesses who have given an eye-witness account of the manner in which the crime was committed.

17. The convict, Shree Gopal, when examined under Section 313 Cr.P.C. did not deny his presence at the place where the crime was committed, and the time when the crime was committed. In answer to Question No.129, as to whether he wanted to say anything else, he replied:-

“I am innocent and have been falsely implicated in this case. I had come to the Court, on the day of the incident along with Neelam Hijra since I used to assist her in the case. I was also prosecution witness in the case of Zareena murder case. I heard the sounds of gunshots and there was stampede. The actual assailant in the melee ran away. I being present at the spot was falsely implicated and the recoveries were planted upon me. My signatures were taken on many papers under pressure. The witnesses are false and by the police in order to save their face and action against them since a murder had taken place in high security court premises.”

18. In view of the testimony of PW-2 and PW-5 as also the testimony of PW-22 and PW-8 and especially the fact that the same are without any blemish and in spite of cross-examination nothing has been brought out to discredit the

witnesses, short of actually conceding to the point, Pt.R.K.Naseem, learned counsel for the accused virtually so conceded i.e. that the prosecution had successfully established its case against the convict Shree Gopal.

19. The motive for the crime has been successfully proved, being to liquidate Neelam, so that she could not depose in FIR No.808/2002 as a witness of the prosecution.

20. The commission of the offence by Shree Gopal has been proved through the testimony of PW-2 and PW-5. The recoveries at the spot from the person of Shree Gopal have been proved through the testimony of PW-22, PW-2 and PW-8. The report Ex.PW-21/L of the ballistic expert proves that the four used cartridges seized from the spot were fired through the pistol Ex.P-1 snatched from the hand of Shree Gopal by HC Ajit Singh. That the deceased Neelam suffered firearm injuries; eight in number, four entry and four exit wounds, stands proved through her post-mortem report Ex.PW-13/A and the testimony of Dr.Ashok Jaiswal PW-13 who proved the same and gave a clarification that one bullet had entered the body through the arm and made an exit on the opposite side of the arm and re-entered the body at the chest and made an exit wound at the back and that the same could have happened if Neelam had kept her arm abreast her chest. Thus, the four entry and four exit wounds on the body of

Neelam stand proved as the result of being hit by three firearm projectiles. This accounts for the three used cartridges recovered at the spot. The fourth used cartridge gets accounted for with reference to the injury on the thigh of Const.Nand Kishore and his MLC Ex.PW-14/B.

21. Thus, we hold that the prosecution has successfully proved its case against Shree Gopal and the impugned judgment and order dated 27.5.2009 correctly holds qua the guilt of the convict Shree Gopal.

22. We note that Geeta and Mordhwaj who were also charged as co-accused have been acquitted by the learned Trial Judge for the reason there was no evidence against them of having entered into a conspiracy to murder Neelam and in furtherance thereof, Shree Gopal executed the plan. The only evidence against Geeta and Mordhwaj is that they were accused in FIR No.808/2002 PS Rajouri Garden and that deceased Neelam was a witness of the prosecution in said case and that Geeta and Mordhwaj had a motive to kill Neelam. Needless to state, adverse inference against an accused on proof of motive is the result of a presumptive logic and by its very nature, presumptive logic is weak logic.

23. The vexed question which now arises for consideration is: Whether the facts of the instant case warrants the imposition of the extreme penalty of death?

24. To attract the penalty of death, it has to be established that the case falls in the category of *the rarest of the rare*. Thus, the Court has not to stop if it finds the offence to be in the category of being rare. The Court has to see further; whether it is in the category of *the rarest of the rare* i.e. an extreme form of being extremely rare, within the larger category of rare has to be seen for.

25. In the decision reported as 1983 (3) SCC 470 *Machhi Singh vs. State of Punjab* it was held that while considering the imposition of penalty in an offence punishable with death, mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances.

26. Courts are required to draw up a virtual balance sheet, listing the mitigating and the aggravating circumstances against each other and then forming an opinion as to where does the fulcrum rest.

27. A Division Bench of this Court, of which one of us, namely, Pradeep Nandrajog, J. was a member of, drew up a chart with reference to various judicial pronouncements of what have been considered as mitigating factors and aggravating factors. The decision is dated 8.5.2009 in Death Ref. No.1/2008 *'State vs. Raj Kumar Khandelwal'*. This very Bench Coram: Pradeep Nandrajog, J. and Indermeet Kaur, J.

had summarized the said tabular chart in the decision dated 6.8.2009 disposing of Crl.Appeal No.635/2007 'Rajesh Kumar vs. State' and the connected Death Ref. No.2/2007 'State vs. Rajesh Kumar'. In para 72 and 73 of said decision, it was summarized as under:-

"72. A bird's eye view of various judicial decisions reveal that Courts have considered the undernoted circumstances, as mitigating: lack of any prior criminal record as held in the decision reported as 2006 EWHC 1555 (QB) In Re. Butters'; the age of the offender being too young or too old as held in the decision reported as AIR 1974 SC 799 Ediga Anamma vs. State of Andhra Pradesh; the character of the offender i.e. how the offender is perceived in the society by men of social standing; the probability of the offenders' rehabilitation, reformation and re-adaptation in the society; whether the offence was committed under a belief by the assailant that he was morally justified in doing so; or that the accused acted under the duress or domination of another person as held in the decision reported as 1982 (3) SCC 24 Bachan Singh Vs. State of Punjab; commission of the offence at the spur of the moment without any pre-meditation; or the offender being provoked (for instance by prolonged stress) in a way not amounting to the defence of provocation, as held in the decisions reported as 2008 EWHC 36 (QB) Re. Rahman and AIR 1998 SC 2821 A.Devendran vs. State of Tamil Nadu; a belief by the offender that the murder was an act of mercy as held in the decision reported as 1994 (Supply) 3 SCC 143 Janki Dass Vs. State (Delhi Administration); a guilty plea by the offender or his voluntarily surrendering before the authorities and his being genuinely remorseful as held in the decisions reported as (2008) EWHC 92 (QB) In Re. Rock and (2006) EWHC 1555 (QB) In Re. Butters'; that the offender acted to any extent in self defence; that his intention was merely to cause serious bodily harm rather than to kill; that the victim provoked or in any way contributed to the crime, as held in the decision reported as AIR 1999 SC 1699 Kumudi Lal vs. State of

U.P. Lastly, in the decisions reported as AIR 2007 SC 2531 Swami Shradhanand @Murali Manohar Mishra vs. State of Karnataka and 2007 Cri.L.J. 1806 Shivu & Anr. vs. High Court of Karnataka & Anr. it was held that in cases of conviction being based on circumstantial evidence a lenient view should be taken on the issue of sentence.

73. Aggravating factors/circumstances have been opined to be; the accused having undergone previous convictions and his proving to be a future danger/threat or menace to the society considering aspects like criminal tendencies, vagabond lifestyle, drug abuse etc. as per the decision reported as (2008) EWHC 719 (QB) In Re. Miller; offender being in a dominating position to the victim or in a position of trust and has abused the trust; anti social or socially abhorrent nature of the crime i.e. where the offence arouses social wroth and shakes the confidence of the people in any social institution; a crime committed for a motive which evinces total depravity and meanness for instance, a financial gain; where the magnitude of the crime is large i.e. there are more than one victims; where the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse extreme indignation of the community as held in the decision reported as 1983 (3) SCC 470 Machhi Singh Vs. State of Punjab; significant degree of planning or premeditation and lack of remorse as held in the decision reported as AIR 2005 SC 2059 Holiram Bordoli Vs. State of Assam; the victim being vulnerable due to age or physical infirmity as held in the decision reported as 2008 (110) Bom.LR. 373 State of Maharashtra Vs. Haresh Mohandass Rajput; mental or physical suffering inflicted on the victim before the death; victim being a public service provider or performing a public duty at the time when the crime was committed, as held in the decision reported as (1977) 431 US 633 Roberts Vs. Louisiana. Lastly, the offender attacking sovereign democratic institutions as held in the decision reported as 2003 (6) SCC 641 Navjyot Sandhu @ Afsan Guru Vs. State."

28. Vide order dated 5.6.2009, the learned Trial Judge has held that the instant case falls in the category of the rarest

of the rare, justifying imposition of the extreme penalty of death.

29. Four mitigating circumstances have been noted by the learned Trial Judge as under:-

I. There are no alleged bad antecedents of the accused as he was not known to be previously involved in any other offence.

II. The accused is aged about 34 years and at the time of commission of offence he was married having a family comprising his mother, unmarried sister, wife and elder brother.

III. There is probability that the accused would not commit criminal acts of violence and would not be a continuing threat to the society.

IV. There is probability that the accused can be reformed and rehabilitated.”

30. Eleven aggravating circumstances have been noted against the appellant as under:-

I. The offender has committed the offence of murder for the purpose of receiving money and is thus proved to be a hired killer.

II. The murder has been committed in gruesome and diabolic manner without any immediate instigation because the deceased was shot at three times from a point blank range and because of his acquaintance and intimacy with the deceased, he succeeded in coming so close to the deceased for the purpose of perpetrating the crime.

III. While committing murder, the accused knowingly created a great risk of death to the general public present outside the court room or in the court premises, by means of a weapon hazardous to the life of more than one person.

IV. The murder has been committed in a pre-meditated and planned manner because the accused was armed with the deadly weapon and after killing the deceased by causing three gunshot injuries to her, the weapon was still having one loaded cartridge in its chamber, two live cartridges in its magazine and two live cartridges were in the pocket of the trouser of the accused.

V. The deceased was a material witness of the murder trial in case FIR No.808/02 Police Station Rajouri Garden under Section 302/356/120-B IPC. In that case the deceased Zareena was an acquaintance of Neelam eunuch and was residing at her residence for the last about one month and was killed because of her mistaken identity as the assailant had come to murder Neelam eunuch.

VI. The murder of Zareena in the above case took place at the residence of Neelam eunuch (deceased in the present case) and the material eye-witness was Veena who was working as domestic servant with Neelam eunuch.

VII. By committing murder of Neelam eunuch the accused persons in the above case (two of whom are also accused in the present case Geeta Hazi and Mordhwaj) have succeeded in terrorizing all the witnesses of the said case because all of them including material eye witness Veena had turned hostile and the accused persons succeeded in ensuring their acquittal vide judgment Ex.C-1 dated 1/5/2008.

VIII. The murder has been committed for a material witness of a murder trial outside the Court room when she had come out the court room after opposing the bail applications of the accused persons in case FIR No.808/02 under Section 302/356/120-B IPC Police Station Rajouri Garden.

IX. While committing murder of the said witness, the accused had also caused gunshot injury to Const.Nand Kishore who was deputed to protect deceased Neelam because about three hours before the incident she had approached the police post Tis Hazari, Delhi and sought protection apprehending threat to her security.

X. After committing murder of Neelam eunuch and injuring Const.Nand Kishore, the accused was well prepared and determined for causing danger to lives of public persons present outside/inside the court room including lawyers and litigants and in case HC Ajit Singh had not timely intervened and snatched the pistol from his hand, the accused might have killed some more persons present there.

XI. The act of the accused is such which shows that he has no concern for law and human life because he has committed murder for money, of a witness without having any enmity with the deceased and just outside the court room which shall adversely affect the faith of a common man in the administration of the justice and a common man would be discouraged and dissuaded from approaching the court of law or to depose against criminals.”

31. Though eleven aggravating circumstances have been noted by the learned Trial Judge, but a meaningful reading thereof would reveal that the learned Trial Judge has actually found four aggravating circumstance; being: (a) that the crime was committed for a monetary consideration i.e. the accused was a contract killer; (b) the murder was committed in a gruesome and diabolic manner without any instigation; (c) the crime was committed with full planning; and (d) by killing a witness the accused had polluted the stream of justice and that the crime was committed in a building where justice was administered.

32. Every case of homicide is deplorable and is also morally depraving. To be gruesome and diabolic there has to

be something more than mere homicide. The body of the deceased being chopped to pieces; ten to fifteen stab wounds being inflicted i.e. the victim being treated with bestiality and cruelty and subjected to pain are instances of what can be classified as gruesome and diabolic nature of crime. To be labeled as a gruesome and diabolic murder, the features of the murder must be such that he who sees the crime or hears about the same, grimaces. An ugly, twisted expression on the face of the person witnessing or hearing about the crime, expressing disgust and pain must instantaneously be formed, if the murder is to be labeled as gruesome and diabolic. The bones of the listener of the crime must chill. Tested on the anvil aforesaid, the instant murder has no such specific feature. It is akin to every murder where a firearm is used. The manner of commission of the crime is of the general category of all such crimes of murder by use of a firearm. Thus, one aggravating circumstance noted by the learned Trial Judge i.e. that the crime is diabolical is non-existent. Since the charge of conspiracy has failed and there is no evidence that Shree Gopal was paid money by co-accused Mordhwaj and Geeta, who have been acquitted, there is no evidence that Shree Gopal has acted as a contract killer. He may well have acted as a friend or a sympathizer of the accused of FIR No.808/2002 PS Rajouri Garden. Thus, another incriminating

circumstance i.e. the crime being the result of a financial gain as held by the learned Trial Judge is also not established.

33. That Shree Gopal has polluted the stream of justice by murdering Neelam who was a witness of the prosecution in FIR No.808/2002 is indeed a serious matter. Witnesses are the eyes and the ears of a Court.

34. The Constitution of India is the solemn pledge of its citizens to secure justice, liberty, equality and fraternity to all the citizens. Justice, liberty, equality and fraternity are four of the many values held in reverence by the citizens of India. Rightly, the Preamble to the Constitution lists the four in the priority of Justice being first, followed by Liberty, Equality and Fraternity in the said order. We have used the expression '*rightly*', for the reason, unless justice is secured the other three values i.e. liberty, equality and fraternity can never be achieved. So high has the society placed justice as a value, that whenever it comes into conflict with other values recognized by the society, primacy has been accorded to justice. For example, in the law pertaining to defamation, absolute privilege has been recognized as a defence, to protect witnesses to speak without fear while deposing in Court at the cost of sacrificing a competing value i.e. the dignity of an individual. Even defamatory statements made by witnesses in Court, subject to the statement being relevant to

the inquiry before the Court, have been held to be non-actionable, even if the maker of the statement cannot make good the same. The right to tell through print and visual media as also the radio and the right of the citizens to know; i.e. the freedom of speech and expression, recognized as a value by the society, has been treated as subservient to the right of the citizens to have access to justice without fear and without being polluted as also a decision by a Judge, on evidence properly brought before the Judge and admissible as per law, in the form of the law of contempt by making actionable press reportings on matters which are sub-judice and tend to interfere in the administration of justice. Jurisprudence pertaining to administration of justice shows the concern of the citizens to secure for themselves unpolluted justice and wherever other values, equally cherished by the society, have come into conflict with the value of securing justice, primacy has been accorded to the latter.

35. Witnesses being suborned, threatened, intimidated or bought over has been plaguing the criminal justice delivery system in India to such an extent, that in the eyes of the public, the system itself has come under trial. The existence of the State is dependent upon a good, effective and efficient criminal justice delivery system, for if the same fails, the citizens would settle their disputes in private and the rule of

law would cease to exist. Lawlessness would prevail and the State shall perish.

36. It is indeed an aggravating circumstance to be weighed appropriately where the offence of murder relates to a victim who is a witness in a pending trial. By killing the witness, the eyes and ears of a Court are under attack. The stream of justice gets polluted.

37. The latest decision of the Supreme Court pertaining to imposition of a sentence of death i.e. JT 2009 (7) SC 249 Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra, decided on 13.5.2009 has highlighted another important facet pertaining to the sentencing procedure; being the consideration of alternative options.

38. Discussing the nature of the content of the *rarest of rare* dictum, the Supreme Court observed, that a real and abiding concern for the dignity of human life postulates resistance to taking a life through the instrumentality of law. That ought not to be done, save in the rarest of rare cases, *when the alternative option is unquestionably foreclosed*.

39. Imprisonment for life as a penalty entails that the accused must remain in prison till his life i.e. would never be set free from jail. However, the executive has the power of remission under Section 433 Cr.P.C., which is subject to the restriction imposed by Section 433-A Cr.P.C. as per which a

person sentenced to imprisonment for life or one whose sentence of death has been commuted to imprisonment for life cannot be released from prison unless he/she has served at least 14 years of imprisonment.

40. The alternative option considered by the Courts, is to pass a direction that the accused, who has been held guilty would not be released from prison, till a sentence more than 14 years imprisonment has been suffered by the accused, who has been sentenced to undergo imprisonment for life.

41. We need not note many and varied authorities taking resort to said alternatively; save and except a few. The option was exercised in the decision reported as AIR 2002 SC 143 Jayawant Dattatrayasuryarao & Ors. vs. State of Maharashtra. The decision pertains to the infamous shooting by gangsters at J.J.Hospital, Mumbai. Lethal firearms were procured; being AK-47 rifles, hand grenades, revolvers etc. At midnight, shooting took place at J.J. Hospital, a government hospital, having 1500 beds in Mumbai. The target was one Shailesh Haldenkar under police protection. Rival gangs were involved. Shailesh Haldenkar belonged to one such gang and was in judicial custody. Three persons were shot dead; being, Shailesh Haldenkar, HC Chaintaman Gajanan Javsen and Const. Kawalsingh Baddu Bhanawat. Six other persons, being a patient and his relatives, the ward watchman and two other

policemen were grievously injured. The Supreme Court, while upholding the conviction of the accused, did not concur with the sentence of death which was imposed, and under the alternative option, directed that the accused would not be entitled to any commutation or premature release. In the decision reported as 2008 (13) SCC 767 Swami Shraddhanand vs. State of Karnataka same alternative option was availed of i.e. it was directed that the convict would not be released from prison till the rest of his life.

42. In some of the decisions, noted in Swami Shraddhanand's case (supra), in paras 60 to 63 of the said decision, i.e. the decisions reported as Shri Bhagwan vs. State of Rajasthan 2001 (6) SCC 296, Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra 2002 (2) SCC 35, Ram Anoop Singh vs. State of Bihar 2002 (6) SCC 686 and Mohd. Munna vs. Union of India 2005 (7) SCC 417, it was directed that the accused shall not be released before completing an actual term of 20 years' imprisonment.

43. We may only add that the said decisions throw light of drawing distinctions between what would be rare and what would be the rarest of the rare. A sentence of life imprisonment can thus be classified in two categories i.e. the ordinary category whereby the Court leaves the exercise of executive power at the discretion of the executive, to be so

exercised after 14 years of imprisonment and grant remission; and a higher category, where the Court, in a rare case, but not the rarest of the rare, would clip said benefit being extended by directing that the accused shall undergo an actual sentence for a higher period or even for the remainder of his life. Such kinds of cases can be put in the category of rare cases with appropriate direction of not being entitled to the benefit of remission till a fixed term of imprisonment is undergone. Only after carrying out such an exercise should the Court take resort to the extreme action in a case which would be in the category of the rarest of the rare.

44. Tested on the anvil aforesaid and keeping in view the fact that the crime committed by Shree Gopal is more than a murder of an ordinary category; having an aggravated content of polluting the stream of justice and noting the primacy placed by the society to the value of justice, we hold that the instant case falls in the category midway between i.e. of a category where the appropriate sentence to be imposed is of imprisonment for life with a direction that Shree Gopal would not be considered for being granted remission till he undergoes an actual sentence of 20 years.

45. The appeal and the death reference stand disposed of confirming the conviction of Shree Gopal but modifying the sentence of death imposed upon him. We impose the

sentence to undergo imprisonment for life with further direction that Shree Gopal would not be considered for being granted remission till he undergoes an actual sentence for 20 years.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

August 31, 2009
Dharmender