

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Criminal Death Reference No. 2/2018

State of Rajasthan

----Petitioner

Versus

Prashandeep @ Parra son of Sureshchand Caste- Ahir, aged 25 years, r/o Choudhariyan Mohalla, Ward No.8, Behror, Thana Behror, District – Alwar

----Respondent

Connected With

D.B. Criminal Appeal (DB) No. 143/2018

Prashndeep @ Parra S/o Suresh Chand B/c Ahir, R/o Chodhriyan Mohalla, Ward No.8, Behror, Police Station - Behror, District Alwar, Rajasthan

(At Present Confined in Central Jail, Jaipur)

----Appellant

Versus

State Of Rajasthan Through PP

----Respondent

D.B. Criminal Appeal (DB) No. 163/2018

Ashok @ Dholiya S/o Kurda Ram B/c Aheer, R/o Jatgavda, Police Station Behror, Distt. Alwar, Rajasthan

(At Present in Central Jail, Alwar)

----Appellant

Versus

State Of Rajasthan Through P.P

----Respondent

For Petitioner(s)	:	Mr Vijay Poonia with Mr Anil Kumar for appellant-Prashnadeep @ Parra
		Mr SS Sunda with Mr Vipul Jaiman for accused – Ashok @ Dholia
For Respondent(s)	:	Mrs Sonia Shandilya and

Mr Aladeen Khan, PP – for the State

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI
HON'BLE MR. JUSTICE DINESH CHANDRA SOMANI

JUDGMENT

26/09/2018

A Reference of Death sentence has been made by the Court of Additional Session Judge No.1, Behror, Alwar vide its order dated 9.3.2018 in Sessions Case No.22/2016. The trial court has convicted and sentenced accused – Prashnadeep @ Parra and Ashok @ Dholia. Accused Prashnadeep @ Parra has been convicted for offence under sections 302, 392, 452 IPC and section 3/25 of the Arms Act and sentenced as follows -

Offence u/s 302 IPC – Death sentence

Offence u/s 392 IPC – 10 years rigorous imprisonment with fine of Rs.10,000/-, in default to pay fine, to further undergo three years RI.

Offence u/s 452 IPC -Five years RI with fine of Rs.10,000/-, in default to pay fine, to further undergo one year's RI.

Offence u/s 3/25 Arms Act – three years RI with fine of Rs.3,000/- in default to pay fine, to further undergo six months' RI.

Another accused appellant Ashok @ Dholia has been convicted for offence under sections 302 read with section 34, 452 and 392 IPC and section 3/25 of the Arms Act and sentenced as follows -

Offence u/s 302/34 IPC – life imprisonment with fine of Rs.10,000/-, in default to pay fine, to further undergo three years RI.

Offence u/s 392 IPC – ten years RI and fine of Rs.10,000/-, in default to pay fine, to further undergo three years RI

Offence u/s 452 IPC – five years RI with fine of Rs.10,000/-, in default to pay fine, to further undergo one year's RI.

Offence u/s 3/25 Arms Act – three years RI with fine of Rs.3,000/-, in default to pay fine, to further undergo six months RI.

Since accused Prashnadeep @ Parra has been given death sentence thus sent to this Court for confirmation under section 366 CrPC. The accused have also preferred appeals hence all the cases were taken together for hearing and are disposed of by a common order.

**CASE OF THE PROSECUTION FOR CONFIRMATION OF
DEATH SENTENCE AGAINST ACCUSED PRASHNADEEP @
PARRA**

Learned PP Mr Aladeen Khan submits that a report was made to the Police by one Geegraj in Kailash Hospital, Behror on 4.3.2016. It was stated that at around 4.30 PM, while his son Ghanshyam was sitting in his shop, three persons came on motorcycle. Two accused entered in the shop. One accused remained outside on the motorcycle. The accused entered in the shop forcefully and taken currency lying in a box. When deceased Ghanshyam tried to stop them, accused Prashnadeep @ Parra opened fire on him. Ghanshyam died on the spot. At that time, two servants were present in the shop. They witnessed the incidence. Since the complainant was also available in the market,

he rushed to the shop and saw accused Prashnadeep @ Parra running away on the motorcycle with two other accused.

On the report aforesaid, an FIR bearing No.203/2016 was registered. During the course of investigation, accused Prashnadeep @ Parra and Ashok @ Dholia were arrested. Fire arms were recovered under section 27 of the Evidence Act at the instance of the accused. One pistol was recovered from accused Prashnadeep Singh @ Parra whereas one magazine and bullet was recovered at the instance of other accused Ashok @ Dholia. The statements of witnesses were recorded under section 161 CrPC followed by statements of Geegraj and Ram Niwas under section 164 CrPC. The police recovered motorcycle used in the occurrence apart from one Mahindra Xylo used by the accused after the occurrence. The weapon recovered from the accused were sent for FSL report. The bullet found in the body of the deceased was fired from the arm recovered at the instance of the accused.

After the investigation, charge sheet was filed. The trial court framed charges for the offence under sections 302, 392 and 452 IPC and section 3/25 and 5/27 of the Arms Act against the accused Prashnadeep @ Parra and sections 302, 392 and 452/34 IPC and section 3/25 of the Arms Act against the accused Ashok @ Dholia. The accused did not accept charges, rather, claimed trial.

The prosecution produced 31 witnesses and exhibited 61 documents in support of their case, whereas, accused recorded

their statements under section 313 CrPC and exhibited 4 documents in the trial.

PW-1 Geegraj has stated about the incidence being an eye witness. The allegation for opening fire was made against accused Prashnadeep @ Parra. The evidence led by the prosecution shows not only recovery of the firearm at the instance of the accused but its use in the incidence. The bullet recovered from the person of the deceased Ghanshyam was sent to FSL. It was fired from the arm recovered from the accused. In view of the above, not only there exist eye witnesses but other evidence to corroborate the prosecution case.

The recovery of pistol at the instance of accused Prashnadeep @ Parra and recovery of bullet and cartridge at the instance of accused Ashok @ Dholia was proved by PW-1-Geegraj, PW-29-Sudhir and PW-30-Ranjeet Singh.

It is also stated that apart from the aforesaid evidence, there exist extra judicial confession by accused Prashnadeep @ Parra before PW-13-Ram Niwas. In the statement under section 164 CrPC, PW-13- Ram Niwas had named accused Prashnadeep @ Parra for his confessional statement. He has maintained his statement even in the court. Accused Prashnadeep @ Parra disclosed the incidence of killing Ghanshyam thus apart from other evidence, extra judicial confession has also supported prosecution case.

Two eye witnesses PW-8-Iqbal and PW-10-Pankaj had also shown involvement of the accused while their statements were recorded under section 161 CrPC. They have shown their presence in the shop at the time of occurrence and named accused Prashnadeep @ Parra for opening fire on deceased Ghanshyam. Those two eye witnesses were, however, declared hostile in the court. The prosecution produced PW-5-Trilok Chand and PW-7-Suresh Chand to prove motive to cause death.

The statement of Dr Surendra Yadav (PW-24) shows the nature of injuries sustained by the deceased and even cause of death. It is out of gunshot injury. The bullet found in the body was sealed and sent to the police. The cause of death also supports prosecution case. Taking into consideration the evidence against the accused, they have been convicted for the offence under sections 302, 392 and 452 IPC and 3/25 of the Arms Act.

The accused was then heard on the sentence. The trial court examined the matter minutely. The accused Prashnadeep @ Parra is involved in twenty other cases thus a threat to the public order, hence he was given death sentence for offence under section 302 IPC.

So far as accused Ashok @ Dholia is concerned, he has been given life imprisonment for offence under section 302/34 IPC apart from other sentences for different offences. The prayer is to confirm the death sentence given to the accused Prashnadeep @ Parra and answer the reference accordingly and, while doing so,

appeals preferred by both the accused appellants may be dismissed.

ARGUMENTS OF LEARNED COUNSEL FOR ACCUSED PRASHNADEEP @ PARRA

Learned counsel for accused Prashnadeep @ Parra submitted that a case was registered at the instance of PW-1-Geegraj, showing him to be eye witness of the occurrence, whereas, he was not present at the spot. The aforesaid fact is proved from the statement of PW-10-Pankaj, who was working at the shop of deceased Ghanshyam. It is stated that after the occurrence, he went to the village to call Geegraj. PW-30 - Ranjeet Singh has also denied presence of PW-1-Geegraj at the time of occurrence. In view of the above, trial court should not have relied on the statement of PW-1-Geegraj. So far as other eye-witnesses PW-8-Iqbal and PW-10-Pankaj are concerned, they turned hostile. In view of the above, no one had seen the occurrence.

In the written report itself, Geegraj stated about his presence in the market and came at the place of occurrence after incidence took place thus prosecution could not produce any eye witness to support their case.

It is also stated that even after the incidence, when IO came at the place of occurrence, he did not preserve the spot or the blood lying therein, rather, it was done after two days of the incidence thus it remained exposed till then.

The extra judicial confession by accused Prashnadeep @ Parra before PW-13-Ram Niwas has been relied by the trial court. He is again a doubtful witness. His statement under section 161 CrPC was recorded after lapse of 22 days and statement under section 164 CrPC after lapse of more than two and half months. He was available after the occurrence thus statement under section 161 CrPC should have been recorded immediately and not after lapse of 22 days. In view of the above, testimony of PW-13- Ram Niwas should not have been believed by the trial court. It is more so when the accused was arrested on 19.3.2016 i.e. much prior to the statement under section 161 CrPC.

The other connecting evidence is recovery of firearm at the instance of accused Prashnadeep @ Parra. The recovery of the firearm is also doubtful apart from recovery of empty cartridge. The recovery of arms is otherwise of no consequence in view of the size of bullet given by PW-24-Dr Surendra Yadav. It is not matching to the size given in the FSL report. The size of the bullet shown by PW-24 is of 7 mm, whereas, in the FSL report, it is shown to be of 7.65 mm. The size of the cartridge and the barrel of firearm given therein is also of 7.65 mm. The bullet and the cartridge cannot be of same size so as the barrel. If the size of the barrel and the cartridge is same then it cannot fit in the firearm. The aforesaid aspect has also been ignored by the trial court. It is also stated that bullet from the body of the deceased was recovered on 5.3.2016 but its seizure memo was prepared on 6.3.2016. The recovery of the bullet was thus not proper.

It is lastly stated that even as per the statement of PW-30-Ranjeet Singh, PW-1-Geegraj was not present on the spot at the time of occurrence. The aforesaid statement is corroborated by PW-28-Manohar Singh thus statement of PW-1-Geegraj should not have been believed by the trial court but, ignoring the aforesaid, not only his statement has been relied but is the basis for conviction. The prayer is accordingly to set aside the order of conviction.

The arguments were also made on the sentence. It is stated that even if conviction is maintained, sentence given to the accused Prashnadeep @ Parra is excessive. The trial court has passed a detailed order to award death sentence to the accused Prashnadeep @ Parra but it is out of emotions and not after considering mitigating circumstances for the aforesaid. The court has placed reliance on the pending cases to show involvement of accused Prashnadeep @ Parra in the crime, however, it ignored that he has not been convicted in any of the cases, rather, acquitted in majority of cases. It may be that few cases are still pending against him thus taking into consideration the aforesaid, the Death Reference may be answered against the prosecution. Reference of the judgment of this court in the case of DB Cr Death Reference No.1/2017, State of Rajasthan versus Kapil @ Anna & ors, decided on 7.3.2018 has been given.

**ARGUMENTS OF LEARNED COUNSEL FOR APPELLANT –
ASHOK @ DHOLIA**

Learned counsel appearing for appellant – Ashok @ Dholia has stated that without any evidence to connect the accused, an order of conviction has been passed with the aid of section 34 IPC. When report was lodged, name of the accused Ashok @ Dholia was not given. He was not named even thereafter because as per the statement of PW-1-Geegraj, he could not see other two accused while naming main accused Prashnadeep @ Parra for causing occurrence. His name was later on introduced by PW-1-Geegraj and PW-13-Ram Niwas with an after thought.

If accused Ashok @ Dholia had come with common intention then IO would have conducted identification parade as he was not named in the FIR. No identification parade was conducted and even PW-13-Ram Niwas has not identified accused Ashok @ Dholia. Therefore, conviction of Ashok @ Dholia is without any evidence.

It is also stated that even no recovery has been made at the instance of accused Ashok @ Dholia other than one magazine and bullet but it is not from his place but from the place of other accused Parshnadeep @ Parra. The allegation against accused Ashok @ Dholia was not for opening fire but for his presence thus his active role for causing offence under section 302 read with section 34 IPC is not coming out. The accused did not come with an intention to kill the deceased. The aforesaid aspect was ignored by the trial court and otherwise, no eye witness has named accused Ashok @ Dholia, which includes PW-8-Iqbal and PW-10-Pankaj. Even if statement of PW-13- Ram Niwas is looked into, name of accused Ashok @ Dholia was given by accused

Prashnadeep @ Parra but he has not identified him in the court. His involvement at the instance of co-accused should not have been accepted by the trial court.

It is also submitted that previous cases are of petty nature and accused has not been named for all the cases in which other accused Parshanadeep @ Parra was involved. In view of the above, conviction of the accused Ashok @ Dholia for offence under section 302/34 IPC is not proved beyond doubt. To support the arguments, learned counsel has made reference of the judgment of the Apex Court in the case of Gopal Sah versus State of Bihar, (2008) 17 SCC 128. The prayer is to set aside the order of conviction and, accordingly, to allow the appeal.

DISCUSSION OF EVIDENCE

We have considered rival submissions of the parties and scanned the record carefully.

We are answering the Reference of Death sentence and, at the same time, deciding the appeals preferred by the accused against the order of conviction and sentence.

A case was registered on a written report of PW-1-Geegraj while deceased Ghanshyam was in Kailash Hospital, Behror. An occurrence took place at 4.30 PM on 4.3.2016 while deceased Ghanshyam was in his shop. It was alleged that three persons came, out of whom, one remained on the motorcycle while other two entered into the shop. The accused opened the

box to take money out of it. It was resisted by the deceased Ghanshyam. On the aforesaid, accused Prashnadeep @ Parra opened fire on the deceased.

After investigation, police filed charge sheet. The charges were thereafter framed. When accused did not plead guilty and claimed trial, it was commenced.

The prosecution produced 31 witnesses and exhibited 61 documents to support their case, whereas, statements of the accused were recorded under section 313 CrPC and they exhibited 4 documents in defence.

PW-1-Geegraj has stated that at around 4.30 PM on 4.3.2016, three persons came at the shop of Ghanshyam (deceased). Two accused entered in the shop while one stayed outside on the motorcycle. Accused Prashnadeep @ Parra opened box lying in the shop to take money, which was resisted by the deceased. Accused Prashnadeep @ Parra first slapped the deceased and, thereafter, opened fire on him. The witness was near the shop thus reached at the place of occurrence immediately. He saw accused Prashnadeep @ Parra and two other accused running on the motorcycle. The said witness has named other accused Ashok @ Dholia for his participation in the occurrence. He has proved Ex.P-3 for recovery of pistol at the instance of accused Prashnadeep @ Parra. One magazine and bullet was recovered at the instance of other accused Ashok @ Dholia vide Ex.P.5. The said witness has proved his signatures on Ex.P-6. Ex.P-7, 8 and 9 have also been proved by him. The

signatures on it have been accepted by PW-1-Geegraj. The recovery of empty cartridge vide Ex.P-11 has also been proved. The recovery memo of blood of the deceased on the counter of the shop is Ex.P.10.

The statement of PW-1-Geegraj was earlier recorded under section 164 CrPC. He maintained his statement in the court. In the cross examination, the witness has shown his presence at the time of occurrence but agreed that he was not knowing name of other two accused. He was cross examined to show his presence in the village at the time of occurrence. The said witness has shown himself to be an eye witness though, at one place, he has stated about his presence in the market and came on the spot at the stage when the accused were running after causing the occurrence. He cannot be said to be an eye witness but saw the accused Prashnadeep Singh @ Parra and two others running on the motorcycle after causing occurrence.

PW-5-Trilokchand has given motive of the accused Prashnadeep @ Parra for causing the offence. It has been stated that accused Prashnadeep @ Parra used to demand money from Ghanshyam. The transaction for purchase of property has also been narrated. The past incidence where accused Prashnadeep @ Parra demanded money has also been given. The said witness has stated that on the date of incidence also, accused Prashnadeep @ Parra came along with one accused and caused the incidence. Prior to the incidence, he had given call to demand money. The said witness has stated about the incidence but is not an eye

witness. He has given motive of the accused for causing occurrence.

The other witness is PW-7-Sureshchand. He has stated that deceased Ghanshyam purchased a house from Kishanlal's son through property dealer Shambhu. The accused was demanding a room in it. Deceased Ghanshyam told him that accused Prashnadeep @ Parra has given threatening that if he will not satisfy his demand then would be killed. It is also stated that deceased Ghanshyam went to "Paarshad" - Jale Singh for settlement. The occurrence, thereafter, took place on 4.3.2016 at around 4.30 PM. The incidence was described to him by deceased's servant - Iqbal (PW-8). It was informed that accused Prashnadeep @ Parra had opened fire on Ghanshyam when he resisted him for taking money from the box. When he reached on the spot, deceased was lying near the counter. "Panchayatnama" (Ex.P-13) was prepared in his presence and, thereupon, Ex.P-14 and 15 were prepared. PW-5 and 7 were cross examined. It was admitted that no report about previous incidence was made but stated about demand of money by accused Prashnadeep @ Parra.

PW-11-Smt Reshami has also stated about the motive of accused Prashnadeep @ Parra. The deceased informed her about the demand for money by accused Prashnadeep @ Parra.

PW-10-Pankaj has made statement about the incidence under section 161 CrPC. He stated that accused Prashnadeep @ Parra opened fire on deceased Ghanshyam. He was, however, declared hostile in the court along with PW-8-Iqbal. PW-10 Pankaj

has stated in the court that immediately after the incidence, he went to call PW-1-Geegraj from his village which is at the distance of 5 km. He has shown his presence in the godown at the time of occurrence. He has accepted that deceased Ghanshyam was found lying on the floor. Two eye witnesses PW-8-Iqbal and PW-10-Pankaj turned hostile. The incidence has been admitted by those hostile witnesses but they have not disclosed the name of any one for causing it. PW-9-Mohit Kumar has stated that on 4.3.2016, he had seen Ashok and Prashnadeep @ Parra, on an unnumbered motorcycle. This witness was also declared hostile. PW-10-Pankaj had also mentioned about the two accused on an unnumbered motorcycle but he was declared hostile.

The statement of PW-13- Ram Niwas is quite relevant. There exist extra judicial confession of accused Prashnadeep @ Parra before him at around 7.30 PM on the date of occurrence itself. He has deposed that accused Parra came to his shop and asked to arrange food. After taking food, accused Parra stated about murder of Ghanshyam by him. The other person with him was accused Ashok @ Dholia. He was knowing accused Prashnadeep @ Parra because he had earlier came to his shop with Rakesh. Uncle of Rakesh Gurjar and his elder brother had studied together. Rakesh Gurjar introduced him with accused Prashnadeep @ Parra. In cross examination, he has maintained his statement and stated that Rakesh Gurjar had introduced accused Parra to him. He had, however, denied his meeting with other accused Ashok @ Dholia. He was not knowing deceased Ghanshyam but extra judicial confession by accused Prashnadeep @ Parra was disclosed to the police.

It was urged that PW-13-Ram Niwas was planted by the prosecution. His statement under section 161 CrPC was recorded after lapse of 22 days and statement under section 164 CrPC was recorded after lapse of two and half months from the date of occurrence. We find no cross examination on the aforesaid. It has not been asked as to how he came in picture to disclose extra judicial confession. The witness has otherwise maintained his statement in the cross examination. The witness could have stated that under fear he did not come in picture immediately. He made statement subsequently when things settled. The appellant did not cross examine even Investigating Officer on it.

The other witness examined by the prosecution is PW-15-Ravindra Kumar. He is an Armourer. He examined 32 bore pistol recovered from accused Prashnadeep Singh @ Parra. It has come that firearm and magazine apart from bullets recovered at the instance of the accused were sent to the Armourer after seal. The pistol was sealed and marked as packet 'G-1', cartridge and magazine were marked as 'H'. The cartridge was of a 0.32 bore pistol. He has made statement to support the prosecution case.

The other witness relevant to the case is PW-19-Vikram Singh. He has witnessed the recovery of motorcycle. PW- 18-Rohitash has also proved recovery of motorcycle. It was used by the accused. They came on the spot on the motorcycle.

The other witness is PW-21-Somdutt and PW-22-Ramjeet Singh to prove documents exhibited by the prosecution. PW-24-Dr Surendra Yadav has described injuries on the person of the deceased. According to him, deceased received two injuries out of firearm. First gunshot injury on right side of the chest was visible, whereas, second injury was swelling. When it was opened, a bullet was recovered out of second injury. He has stated about the size of the bullet to be of 7 mm/1.2 cm. The bullet recovered from the body was sealed and sent to the police.

PW-26-Dr Puneet Tiwari has also supported the prosecution case and stated about two injuries sustained by the deceased. The description of the injuries has been given in the post mortem report. It has been admitted that name of the company of the weapon has not been given by him and he cannot state as to which weapon was used for causing the occurrence.

Another material witness is PW-30-Ranjeet Singh who made investigation of the case. He has corroborated the evidence. It is not only in regard to recovery of the weapon at the instance of the accused but a motorcycle used therein. It was stated that recovery of firearm at the instance of accused Prashnadeep @ Parra was from his grand father's house. The place, where the weapon was lying, has also been described. He has proved the documents produced by the prosecution, which include FSL report of the firearm, cartridge and the bullet used in the occurrence.

PW-29-Sudhir has also supported the prosecution case. He has made statement showing involvement of accused Parra

and recovery of pistol at his instance. He has described recovery of the weapon used for causing the occurrence. The presence of PW-1-Geegraj at the time of recovery has also been shown apart from supporting the signatures of PW-1-Geegraj on Ex.P-4 and other documents.

The testimony of all these witnesses was considered by the trial court in detail.

The prosecution has even led evidence for commission of offence under section 3/25 and 5/27 of the Arms Act. PW-19-Vikram Singh, ASI, and PW-20-Om Prakash, Constable have stated that arms were sent to the Armourer for his report. PW-15-Ravindra Kumar, Armourer has made statement to prove prosecution case. He had examined the firearm after opening the sealed packet. It was not only pistol but magazine and the cartridge. Ex.P-22 is the report of the Armourer. PW-23-Umadutt Sharma was examined by the prosecution and he has proved prosecution sanction vide Ex.P.40. In view of the above, even evidence was led to prove the offence under section 3/25 and 5/27 of the Arms Act. The firearms were recovered at the instance of accused Prashnadeep @ Parra and Ashok @ Dholia.

The question for our consideration is as to whether prosecution could prove its case against accused appellants for offence under sections 302/34, 392 and 452 IPC. From the evidence on record, it has come that PW-1-Geegraj was near the place of occurrence and immediately rushed to the spot after information about the incidence. He had seen accused

Prashnadeep Singh @ Parra and others running on the motorcycle after causing occurrence. He has named accused Prashnadeep @ Parra for opening fire on deceased Ghanshyam but he cannot be said to be eye witness. He came on the place of occurrence when accused were running on the motorcycle after causing the incidence but he had seen accused Prashnadeep and two others running on the motorcycle. The other witnesses examined by the prosecution as eye witnesses were PW-8-Iqbal and PW-10-Pankaj but were declared hostile. They earlier stated about accused Prashnadeep Singh @ Parra for opening fire on deceased. They did not support prosecution case in the court. PW-1 Geegraj, however, saw Prashnadeep @ Parra along with two other accused running on a motorcycle. The motorcycle was recovered at the instance of the accused.

PW-5-Trilokchand has supported prosecution case. He had given past history and motive of accused Prashnadeep @ Parra for causing the offence. It has been deposed that accused Parra was demanding money from him and his brother Ghanshyam. The accused was given Rs.5000/- by his brother, deceased Ghanshyam few days back. He received a telephonic call from Ghanshyam prior to the occurrence informing about demand of money again by accused Prashnadeep @ Parra. When it was not satisfied, rather, resistance was shown, fire was opened on deceased Ghanshyam. It was, however, admitted that information about the previous incidence was not given to the police but was to the Chairman – Jale Singh and Paarshad Manoj. The witness was not cross examined on the material issue.

The other witness who has supported the prosecution case is PW-7-Sureshchand @ Khushiram. He has corroborated the statement made by PW-5-Trilok Chand. He has given the motive of the accused Parra for causing offence.

The prosecution produced PW-13-Ram Niwas before whom accused Prashnadeep @ Parra made extra judicial confession. He has named Ashok @ Dholia for accompanying accused Parra while extra judicial confession was made. The accused Prashnadeep @ Parra came to his shop at 7.30 PM on the day of occurrence and stated that he has killed Ghanshyam. The other accused Ashok was with him at that time. He was knowing Prashnadeep @ Parra who was introduced by Rakesh Gurjar. The description of the accused Prashnadeep @ Parra and the dress worn by him has also been given. In view of the aforesaid, there exist extra judicial confession and the appellant could not demolish his statement in the cross examination. The issue of delay in recording his statement has been raised by the appellants. PW-13-Ram Niwas was not cross examined as to how he came in the picture after lapse of twenty two days of the occurrence to make statement. The appellants did not cross examine even Investigating Officer as to how he recorded statement of PW-13- Ram Niwas after lapse of time. It is that witness was under fear to make a statement immediately after the occurrence as accused was earlier involved in twenty other cases.

Apart from the aforesaid, recovery of the weapons exist at the instance of accused Parra and Ashok @ Dholia which is a material evidence in this case. The recovery memo has been

proved by the prosecution. It is by PW-1 Geegraj, PW-29-Sudhir, PW-30-Ranjeet Singh and PW-5-Trilok Chand. The appellant could not demolish their statement in the cross examination. PW-29-Sudhir has stated about recovery of weapons from accused Parra and Ashok @ Dholia in his presence. He had also testified his signature on Ex.P.3, 4, 5, 6 and 7. PW-30-Ranjeet Singh has also testified recovery of weapon.

The documents Ex.P-3 is recovery memo of pistol and Ex.P-5 is recovery memo of magazine and a bullet, at the instance of accused Prashnadeep @ Parra and Ashok. Ex.P-11 is recovery memo of one empty cartridge. These documents were produced by the prosecution and proved by the witnesses.

The firearms recovered from the accused and bullet found in the body were sent for FSL report. The FSL and Armourer report has confirmed use of firearm recovered at the instance of the accused and bullet found in the body was fired by it. The size of the bullet, cartridge and barrel of the gun has been given in the FSL report-Ex.P-59 and 60. It has been questioned by the counsel for appellant. If the bullet size was 7.65 mm then it cannot be fitted in the barrel of 7.65 mm, rather, it has to be little bigger than the size of the bullet and the cartridge. The size of cartridge is also shown to be 7.65 mm. The reference of the size of the bullet given in the post mortem report has also been made where it was shown to be of 7 mm. It is not corroborating to the size given in the FSL report.

We find no cross examination on the aforesaid issue and, otherwise, exact size can be given in the FSL report and not by the doctor. The bullet recovered from the person of the deceased Ghanshyam was sent for FSL report after sealing it by Dr Punit Tiwari-PW-26. Learned counsel for appellant has questioned the seal of the bullet. It is submitted that bullet was recovered in the post mortem but was not sealed by the police on the same day. We find that Dr.Punit Tiwari (PW-26) has stated that bullet was put in a jar and sealed and sent to the Police Station where recovery memo was prepared. The IO and the doctor were not cross examined on the question of sealing of the bullet. As per the FSL report, it was found sealed.

The variation of the size of bullet given by the doctor cannot be of any consequence looking to the fact that exact size can be given in the FSL report. No cross examination on it was otherwise made. If cross examination on the issue would have been made, it could have been explained by the witness. It is more so when FSL report is specific for use of the firearm, cartridge and the bullet. The relevant part of the FSL report is quoted hereunder for ready reference -

"1. One 7.65mm country made pistol (W/1) from packet 'G-1' is a serviceable firearm.

2.The chemical examination of barrel residue indicates that submitted 7.65mm country made pistol (W/1) had been fired. However the definite time of its last fire could not be ascertained.

3.Based on comparison microscopic examination it is the opinion that one 7.65 mm K.F. cartridge case (C/1) from packet 'C' and one 7.65 mm round nose copper jacketed bullet (B/1) from packet 'unmarked

(M.O.)' have been fired from submitted 7.65 mm country made pistol (W/1) from packet 'G-1'.

4. One empty magazine (M/1) from packet 'H-1' could be used as extra magazine in submitted 7.65 mm country made pistol (W/1) from packet 'G-1'.

5. Holes (marked-P) present on exhibits (S/1 & S/2) from packet 'A' could have been caused by copper jacketed bullet fired from firearm as lead and copper metal were detected the periphery of these holes.

6. The chemical examination of one blood smeared gauze piece from packet 'unmarked (M.O.)' shown presence of gun shot residue (copper metal) which could have been caused by deposition of particles of copper jacketed bullet.

7. One 7.65mm K.F. cartridge (L/1) from packet 'H-1' is a fireworthy ammunition. However this cartridge (L/1) was also test fired from submitted 7.65mm country made pistol (W/1) from packet 'G-1' in the laboratory."

The perusal of the report shows that one 7.65 mm KF cartridge case from packet "C" and one 7.65 mm round nose copper jacketed bullet from packet unmarked (MO) has been fired from 7.65 mm country made pistol from packet G-1. The result of examination further stated that one empty magazine from packet H-1 could be used as extra magazine in country made pistol in packet "G-1". The FSL report has supported prosecution case. It is not only that the firearm was recovered at the instance of the accused appellant but was used in the occurrence. The bullet taken out from the person of the deceased was fired from the pistol recovered at the instance of accused Prashnadeep @ Parra.

PW-13- Ram Niwas has proved extra judicial confession by accused Prashnadeep @ Parra. His statement in chief could not be demolished in the cross examination. In that regard, statement of PW-1-Geegraj is also relevant though his presence has been

doubted but he had named accused Parra for opening fire on the deceased in the report made in the hospital itself i.e. immediately after the occurrence. He had seen Prashnadeep @ Parra at the place of occurrence.

PW-5-Trilok Chand and PW-7-Sureshchand @ Khushiram have given motive of the accused Parra for causing the offence thus it is not only that the evidence has been led showing involvement of accused Parra in the occurrence but even motive for it.

The prosecution has proved the documents produced which include the documents i.e. recovery memo of motorcycle (Ex.P-30), site map prepared by the police(Ex.P-2), written report (Ex.P-1), copy of Malkhana register (Ex.P-39A), sanction of prosecution (Ex.P-40), Ex.P-41-post mortem report, Ex.P-43 to 50 – information given under section 27 of the Evidence Act etc. In view of the discussion made above, we find evidence against the accused Prashnadeep @ Parra for causing the occurrence. The prosecution could prove its case against accused Prashnadeep @ Parra beyond doubt for the offence under section 302, 392 and 452 IPC.

CASE OF ACCUSED APPELLANT ASHOK @ DHOLIA

The co-accused appellant Ashok @ Dholia has also been convicted for offence under section 302/34, 392 and 452 IPC. The challenge to the conviction and sentence has been made in reference to the evidence discussed by us while considering

case of the main accused Prashnadeep @ Parra. We find that PW-1-Geegraj, PW-5-Trilokchand and PW-7-Sureshchand have not shown motive of the accused Ashok @ Dholia for the occurrence. PW-8-Iqbal Hussain and PW-10-Pankaj Sharma have not made allegations against Ashok @ Dholia for opening fire even if their statements under section 161 CrPC are taken into consideration, though both the witnesses were declared hostile thus did not support prosecution case.

PW-1-Geegraj has not named accused Ashok @ Dholia in the complaint. He did not name Ashok @ Dholia for opening fire on the deceased. The allegation for it is on accused Prashnadeep @ Parra and has been proved by the prosecution. The name of Ashok @ Dholia has been given by PW-13- Ram Niwas before whom main accused Prashnadeep @ Parra made confessional statement. Therein, accused Ashok @ Dholia did not make extra judicial confession. No overt act of Ashok @ Dholia has come. The pistol used in the occurrence was recovered from accused Prashnadeep and not from accused Ashok @ Dholia though a magazine and bullet was recovered at his instance. In absence of motive, and active participation for causing the occurrence, his conviction for offence under section 302/34, 392 and 452 IPC cannot sustain. It is more so when no identification parade was conducted for the said accused when he was not even named in the written report so as the FIR. The prosecution has failed to bring evidence to show common intention to cause the offence. PW-30-Ranjeet Singh has also not named the said accused for opening fire on the deceased Ghanshyam.

If motive is looked into, it was against accused Prashnadeep @ Parra. The currency notes were also recovered at the instance of main accused Prashnadeep @ Parra. In view of the above, we do not find any evidence against Ashok @ Dholia for his conviction for offence under sections 302/34, 392 and 452 IPC. It is not that he came with main accused Prashnadeep with common intention to cause the incidence so as to convict him with the aid of section 34 IPC. Mere recovery of the magazine and a bullet cannot prove his case beyond doubt for the offence under section 302/34, 392 and 452 IPC. Accordingly, accused appellant Ashok @ Dholia is acquitted of the offence under sections 302/34, 392 and 452 IPC.

OFFENCE UNDER SECTION 3/25 OF THE ARMS ACT

The prosecution has produced evidence regarding recovery of weapon at the instance of accused appellants Prashnadeep @ Parra and Ashok @ Dholia. The recovery of pistol is at the instance of accused Prashnadeep @ Parra and recovery of magazine and bullet are at the instance of accused Ashok @ Dholia. It was proved by PW-1-Geegraj, PW-29-Sudhir and PW-30-Ranjeet Singh. The recovery of the firearm was made in their presence. We find that recovery of weapon at the instance of the accused appellants was under section 27 of the Evidence Act vide Ex.P.43 to Ex.P.50. The weapon so recovered were sent for FSL report. It confirmed its use in the occurrence. The accused did not produce licence of the firearm. The prosecution could produce witnesses to prove sanction for prosecution under the Arms Act. We do not find that in the cross examination, the witnesses of the

recovery of the weapon or information under section 27 of the Evidence Act apart from the FSL report could be demolished by the appellant. In view of the above, we find that case for offence under section 3/25 of the Arms Act is made out against both the accused as recovery of the weapon is at the instance of both the accused and they failed to produce licence for it.

We, accordingly, confirm the finding of the trial court for conviction of both the accused for the offence under section 3/25 of the Arms Act and, accordingly, conviction of accused Prashnadeep @ Parra and Ashok @ Dholia for the above offence is maintained.

The question now comes about the sentence. Learned counsel for accused Prashnadeep @ Parra has challenged death sentence not only in reference to the facts of this case but by referring the judgment of the Division Bench of this court in the case of "State of Rajasthan through PP versus Kapil @ Anna & ors", DB Criminal Death Reference No.1/2017, decided on 7.3.2018. The judgment aforesaid makes reference of the judgments of the Apex Court on the issue.

Accused Prashnadeep @ Parra has been given death sentence finding offence under section 302 IPC. The trial court has taken into consideration the pending criminal cases against him. He was involved in 20 cases thus has committed crime one after another. Learned counsel for accused Prashnadeep @ Parra, however, stated that out of 20 cases, he has been acquitted in many cases. Few cases are pending against him. He has not been

convicted in any of the cases other than the present one. It is submitted that death sentence is without considering mitigating circumstances and otherwise referring to the judgment of the Division Bench in the case of Kapil @ Anna (supra), prayer is made to interfere in it.

The aforesaid has been opposed by learned PP. It is submitted that the accused Parra is involved in many criminal case, therefore only, even two eye witnesses PW-8-Iqbal and PW-10-Pankaj have turned hostile under threat and fear. They earlier stated about the incidence and involvement of accused Prashnadeep @ Parra for opening fire on deceased Ghanshyam after entering in the shop. Taking into consideration the aforesaid and case history of the accused Parra, prayer is made to confirm the death sentence and answer the Reference accordingly.

We have considered the submissions made by learned counsel for the parties.

The accused Prashnadeep @ Parra has committed offence under sections 302, 392 and 452 IPC apart from section 3/25 of the Arms Act. We have perused the finding of the trial court for giving death sentence to the accused Prashnadeep @ Parra. It is not only in reference to the past cases against him but other mitigating circumstances. It is, however, stated that accused Prashnadeep @ Parra has not been convicted in any of the case, rather, acquitted in many cases.

A reference of the age of accused Parra has also also been given. He is at the age of 25 years. In view of the above, we are considering on the aspect of proportionality of sentence. In our considered view, the same has to be prescribed according to culpability of criminal conduct of the accused. The sentencing system has to operate in such a manner which may reflect collective conscience of the society and should be as stern as the facts of given case demand. In what kind of cases sentence of death should be awarded has been subject matter of discussion in various judicial pronouncements.

The guidelines were laid down by the Supreme Court in the case of Bachan Singh Vs. State of Punjab – (1980) 2 SCC 684. Therein, validity of Section 302 IPC (which authorises imposition of death sentence) was upheld while concurring with the view expressed by it in earlier judgment in Ediga Annamma Vs. State of Andhra Pradesh – (1974) 4 SCC 443, laying down the principle. It is adhered to till date, which are that (i) extreme penalty of death need not be inflicted except in gravest cases of extreme culpability, (ii) before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime', (iii) Life imprisonment is the rule and death sentence is an exception.

In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime. The option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature

and circumstances of the crime and all the relevant circumstances, and (iv) a balance sheet of aggravating and mitigating circumstances has to be drawn and, in doing so, the mitigating circumstances have to be accorded full weightage. A just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.

The principles laid down by the Supreme Court in the case of Bachan Singh(supra), were best summarised in Machhi Singh v. State of Punjab – (1983) 3 SCC 470. Para 38 of the judgment aforesaid, is reproduced as under:-

"38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case (supra):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck

between the aggravating and the mitigating circumstances before the option is exercised.”

The Supreme Court in *Devender Pal Singh v. State of NCT of Delhi*, (2002) 5 SCC 234, while detailing out the circumstances and the relevant principles by revisiting *Bachan Singh's* case and *Machhi Singh's* case and observed in Para 58 as under:-

“58. From *Bachan Singh's* case (supra) and *Machhi Singh's* case (supra) the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:

The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

In *Rameshbhai Chandubhai Rathod Vs. State of Gujarat*, (2009) 5 SCC 740, judgment of High Court confirming death sentence awarded to the appellant was challenged before the Supreme Court. The appellant in that case was convicted for offence under Sections 363, 366, 376, 397 and 302 of the IPC. The matter was laid before two-Judges bench of the Supreme Court. The Hon'ble Judges though upheld conviction of the accused but differed on the question of sentence. The matter was therefore referred to a larger bench. A three judge bench of the Supreme Court in the case of "*Rameshbhai Chandubhai Rathod (2) Vs. State of Gujarat*", (2011) 2 SCC 764, answered the reference. It relied on earlier two judgments in the case of "*Ramraj Vs. State of Chhattisgarh*", (2010) 1 SCC 573 and "*Mulla and Another Vs. State of Uttar Pradesh*", (2010) 3 SCC 508. The death sentence awarded to the accused was commuted to life imprisonment to the full life of the appellant, subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

The Apex Court held that life imprisonment is a rule and death sentence is an exception. Apart from guidelines in *Bachan Singh's* case, referred to above, the Supreme Court in *Machhi Singh's* case (supra), in Para 33 and 34 additionally observed that in making a choice between the death penalty and

that of life imprisonment, the court shall always take into consideration manner and motive of commission of murder. Para 33 and 34 of the judgment in the case of Machhi Singh(supra) in extenso:-

"I. Manner of Commission of Murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for Commission of murder

34. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-avis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland."

The Apex Court in the case of "Swamy Shraddananda Vs. State of Karnataka", AIR 2008 SC 3040, was dealing with a case of murder convict. The case was just fall short of the rarest of the rare category thus felt reluctant in endorsing the death sentence, but, at the same time, having regard to the nature of the crime, found sentence of life imprisonment, which, subject to remission, normally works out to a term of 14 years, would be grossly disproportionate and inadequate. The Supreme Court held

that in such a case, just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e., the vast hiatus between 14 years imprisonment and death. The Court can substitute death sentence by life imprisonment for rest of life of convict or by a term in excess of fourteen years and further to direct that the convict would not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be. The Supreme Court, therefore, while commuting the death sentence, directed that the convict would not be released from the prison for the rest of his life or for the actual term as specified in the order.

In the case of "Neel Kumar @ Anil Kumar Vs. State of Haryana", (2012) 5 SCC 766, accused was convicted for rape and murder of his four years old daughter. In the facts and circumstances of the case, the Supreme Court did not find the same to be a rarest of rare case. Considering, however, the nature of the offence, age and relationship of the victim with the convict and gravity of injuries caused to the victim, the Supreme Court did not find that to be a fit case to award lenient punishment to the convict and he was sentenced for a term of 30 years without remission before consideration of his case for premature release.

In "Shankar Kisanrao Khade Vs. State of Maharashtra", 2013 Cri.L.J. 2595, the death sentence was commuted to life imprisonment with a direction that he shall not be released for rest of his life. It was a case of repeated rape and sodomisation

and then murder by strangulation of a minor girl of 11 years with intellectual disability by a man of 52 years. The Supreme Court held that rarest of rare case test must be based on perception of society and must not be judge-centric and that special reasons are required to be recorded for awarding death sentence but no special reasons are required to be recorded for awarding life imprisonment. Death sentence awarded to the accused was commuted to life imprisonment with direction that he shall not be released for rest of his life.

Learned trial court, in the present case, by drawing the balance sheet of aggravating and mitigating circumstances has taken into consideration the series of offences committed by the accused Prashnadeep @ Parra but learned counsel appearing for accused Prashnadeep @ Parra has stated that in many cases he has been acquitted. In view of the aforesaid and taking into consideration age of the accused Prashnadeep @ Parra apart from other mitigating circumstances, we do not find it to be a 'rarest of rare case' to award death sentence. It cannot be said that other than death sentence, no other sentence would be appropriate in this case. The opinion aforesaid has been recorded after taking into consideration the judgments of the Apex Court referred to above wherein it has been held that death penalty should be an exception while life imprisonment is a rule. It cannot be said to be a case of grievous nature of extreme culpability.

Accordingly, we commute the death sentence with life imprisonment. Accused Prashnadeep @ Parra is sentenced to

twenty years imprisonment for the offence under section 302 IPC with fine of Rs.50,000/-, in default to pay fine, to further undergo six months rigorous imprisonment. The sentence for the offence under section 392 and 452 IPC and section 3/25 of the Arms Act, as given by the trial court is maintained. All the substantive sentences shall run concurrently.

So far as accused Ashok @ Dholia is concerned, he is acquitted for the offence under section 302/34, 392 and 452 IPC. He is, however, convicted for the offence under section 3/25 of the Arms Act. The sentence awarded to him by the trial court is interfered. The accused Ashok @ Dholia is sentenced to two and half years imprisonment with fine of Rs.5,000/-, in default to pay fine, to further undergo three months imprisonment for the offence under section 3/25 Arms Act.

With the aforesaid, Death Reference and criminal appeals are disposed of.

A copy of this judgment be placed in each connected file.

(DINESH CHANDRA SOMANI),J

(M.N. BHANDARI),J

bnsharma