

**The State of Bihar Vs. Kare Singh**

**The State of Bihar Vs. Kare Singh**

**SooperKanoon Citation :** [sooperkanoon.com/129487](http://sooperkanoon.com/129487)

**Court :** Patna

**Decided On :** Aug-13-2002

**Judge :** Sachchidanand Jha and T.P. Singh, JJ.

**Appeal No. :** Criminal Appeal No. 426 of 2001

**Appellant :** The State of Bihar Kare Singh

**Respondent :** Kare Singh state of Bihar

**Disposition :** Appeal Dismissed

**Judgement :**

**Sachchidanand Jha, J.**

1. 7th February 1997 was a very unfortunate day for Suresh Singh of Village Ramdiri P.S. Matihani District Begusarai, his informant-brother Ram Balak Singh and other family members when Dananjay Kumar Singh, 11 year old son of Suresh Singh, fell victim to assassin's bullet at 12.30 p.m. Only twelve days ago on 27th January 1997, the elder son of Suresh Singh named Sanjay Singh had been killed allegedly by the appellant. According to the prosecution the appellant had given a threat that he would not allow Shradh of Sanjay Singh to be performed. 7th February 1997 was the day when the final rites in connection with Shradh were being performed.

2. The appellant has been convicted for committing the murder of Dhananjay Singh. He was earlier convicted for the murder of Sanjay Singh too. In the present case he has been awarded death sentence.

3. The case of the prosecution is that preparations were afoot for the village feast in connection with the Shradh ceremony and Dhananjay Kumar Singh was peeling potatoes along with others at the darwaja of the informant, Ram Balak Singh. A boy, 10-11 years old, called Dhananjay Singh. Dhananjay left peeling potatoes and went towards him. They moved ahead in the southern Kita (house) of the informant. No family member was present inside. About five minutes after a loud sound of gun shot was heard. The informant and others rushed towards the house. They saw Dhananjay fallen, back portion of his head was blown up. The appellant was seen fleeing towards south in the Diara with a rifle in his hand. The occurrence was seen by Ganesh Singh. Naresh Singh and several villagers. The informant alleged that the same assailant i.e. the appellant had killed Sanjay Singh earlier. The occurrence was reported to Shri Ram Govind Ram, ASI of Police, Matihani PS at the house of the informant at Ramdiri at 1.30 p.m.

4. There is dispute as to whether fardbeyan was reckoned at 1.30 p.m. on 7th February 1997 and I would like to discuss this aspect of the case at this stage itself. According to the appellant, fardbeyan was ante timed and ante dated. It was pointed out that even though ex facie the fardbeyan is shown to have been recorded at 1.30 p.m., from the evidence of no less than the informant himself vide para 3 of his deposition, he made statement before the police at about 5.30 p.m. From scrutiny of the record I do not find any discrepancy in the prosecution case on the point. It may be recalled that the fardbeyan was recorded by ASI Radha Govind Ram. From the evidence of the Investigating Officer, SI Harendra Singh, it appears that at 10 a.m. on the date of occurrence i.e. 7th February 1997 he went to attend the Crime Meeting at Begusarai. He learnt about the occurrence after the meeting. He in fact learnt that the dead body was at Begusarai Sadar Hospital for post-mortem. He went to the Hospital at 5.30 p.m. He found that the dead body had been taken away a little earlier after post-mortem. He then proceeded to Ramdiri. He found that the fardbeyan had already been recorded by ASI Radha Govind Ram. He had also held inquest on the dead body and prepared the inquest

report and the Post-mortem Challan on the basis of which the dead body was sent to Hospital for post-mortem. At 5.40 p. m. he recorded further statement of informant Ram Balak Singh. This sequence of events is also borne out by the case diary. Thus when Ram Balak Singh stated about making statement at 'about 5/5.30' O'clock', obviously he meant his further statement. This becomes clear from the fact that in para 3 he stated to have made statement before a Sub Inspector {'Darogaji'}. Radha Govind Ram who had recorded the fardbeyan was of the rank of Assistant Sub Inspector. Thus I do not find any contradiction as regards timing of the fardbeyan as recorded therein and the informant's evidence in Court.

5. it may be relevant to mention here that the inquest was held by ASI Radha Govind Ram at 1 p.m. before recording the fardbeyan it appears that as soon as the information reached the Police Station he left for Ramdiri. On reaching there after seeing the dead body he immediately held inquest and thereafter recorded fardbeyan of the informant. It is also relevant to mention here that from the Post-mortem Report it appears that the dead body was received at the Sadar Hospital at 3.50 p.m. on 7th February 1999 and the post-mortem was held at 4.30 p.m. Ordinarily postmortem is not held without Post-mortem Challan stating relevant facts or copy of the First information Report. In these premises I do not find any substance in the contention that the fardbeyan/FIR was ante timed.

6. At this stage I would also like to deal with another submission of the appellant's Counsel regarding delay in receipt of copy of the FIR in the Magistrate's Court. It was submitted with reference of the order-sheet of the Magistrate's Court that the was received by the Chief Judicial Magistrate, Begusarai on 13.2.1997 i.e. after sic days which too makes the prosecution case about lodging of the FIR on 7th was urged that where FIR is not forwarded to the Magistrate forth with as per Section 157 of the Code of Criminal Procedure, there is possibility of the prosecution presenting a concocted version of the occurrence. Reliance was placed on the case of Thanedar Singh v. State of M.P. : 2002 CriLJ254 . In the facts of the case I do not find any substance in this contention too.

7. It is true that there was delay in receipt of the FIR by the Magistrate. As per the provisions of Sections 157 Cr.P.C. the 'report' of the occurrence is supposed to be sent to the Magistrate empowered to take cognizance of the offence 'forthwith'. But as explained in case of Pala Singh and Anr. State of Punjab (1972)2 SSC 640, this really designed to keep the Magistrate informed of the investigation of such cognizable offence as to be able to control investigation and, if necessary, under Section 159. But where the FIR is actually recorded without delay and the investigation starts on the basis of that FIR and there is no other infirmity brought to the notice of the Court, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. Similar view was expressed expressed in State of U.P. v. Goksrn and Ors. : 1985 CriLJ511 , wherein while considering similar argument in the context of two days' delay, the court observed that 'it is not that as if every delay in sending a delayed special report to the District Magistrate under Section 157, Cr.P.C., would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-time or antedated or that the investigation is not fair and forthright'. The Court noticed that the materials on record clearly showed that steps in investigation by way of drawing inquest report and other Panchanamas had been taken immediately after the occurrence, and observed that the delayed receipt of the report by the Magistrate concerned would not be enough to doubt the investigation as tainted nor the FIR could be regarded as ante-timed or antedated. Reference may also be made to the case of State of Karnataka v. Moin Patel : [1996]2SCR919 , and a recent case of Munshi Prashad and Ors. v. State of Bihar : 2001 CriLJ4708 .

8. In the instant case, as seen above, the inquest was held within half hour of the occurrence at 1 p.m. The body was sent for post-mortem soon after reaching the Hospital at 3.50 p.m. and at 4.30 p.m. the post-mortem was held. Before 5.30 p.m. the body was handed over to the family members and taken to Ramdiri. At 5.40 p.m. the Investigation Officer recorded further statement of the informant. In the morning of next day after recording the contents of the post-mortem at 8.45 a.m. he reached Ramdiri at 9.45 a.m. and recorded the statements of witnesses namely, PW 1 Ganesh Singh, PW 2 Arbind Singh, PW 3 Naresh Singh and

deceased's father Suresh Singh under Section 161 of the Code of Criminal Procedure. The statements of witnesses including that of the informant Ram Balak Singh being similar as in the fardbeyan and necessary steps in aid of investigation such as preparation of Inquest Report and the Post-mortem Challan, recording of the statements of witnesses having been taken on 7th February 1997 or on the next day as mentioned above, the delay in sending copy of the FIR and the receipt thereof by the Magistrate is not of much significance. It is relevant to mention here that no suggestion was given to the Investigating Officer nor he was questioned on the point of delay in sending the FIR to the CJM.

9. In the case of Thanedar Singh v. State of M.P. (supra), relied upon by the appellant's Counsel, a specific suggestion was given to the police officer that the FIR was prepared 2.-3 days after the occurrence. The Police Officer admitted that no attempt was made to apprehend the accused immediately after the occurrence, the details of the case were not found in the Inquest Report, Site Plan or the requisition sent to the Hospital for post-mortem. In these facts the Court doubted the correctness of the FIR, especially the time and date of its recording. The Court observed that above features of the case support the defence version that the FIR in which names of the accused were mentioned probably came into existence much later. There is no such thing in the instant case. The case of the prosecution is simple and straight. That Dhananjay was called by a boy when he was peeling potatoes. Five minutes thereafter a loud sound of gun shot was heard. When the informant and others reached the place they found the deceased dead. The back portion of his head was blown up. The appellant was seen running away with a rifle in his hand. Earlier the elder brother of Dhananjay was killed by the appellant and the informant claimed that he had killed Dhananjay too. The prosecution case thus admits little of embellishment which may be possible in case of delayed sending/receipt of the FIR by the Magistrate. The contention of the appellant's Counsel on the point thus does not have any substance.

10. Adverting to the sequence of evidence, after completing the investigation the police submitted charge-sheet against the appellant. At the trial which followed after usual commitment etc. the prosecution examined eight witnesses to prove its case. Out of them, PW 1 Ganesh Singh, PW 2 Arbind Singh, PW 3 Naresh Singh,

PW 4 Ram Balak Singh (informant), PW 7 Ram Chandra Singh and PW 8 Nagina Singh are material witnesses who stated to have seen the occurrence in the manner described in the fardbeyan. Dr. Akhilesh Kumar who held post-mortem was examined as PW 5 while SI Harendra Singh the Investigating Officer was examined as PW 6.

11. It was submitted on behalf of the appellant that except PWs 7 and 8 other material witnesses are close relatives of the deceased/informant. PW 1 Ganesh Singh is brother of the informant and thus uncle of the deceased, PW 2 Arbind Singh is son of another brother of the informant and PW 3 Naresh Singh is yet another brother of the informant. PW7 Ram Chandra Singh and PW 8 Nagina Singh too are agnates though not closely related. But they (PWs 7 and 8) neither figured as witnesses in the charge-sheet nor they were examined by the police during the investigation. The curiouser part of the case, according to the Counsel, is that the prosecution did not examine father of the deceased, Suresh Singh, who was the most natural witness; and still more, the boy who had called Dhananjay while he was peeling potatoes, soon where after he was killed. On the point of non-examination of witnesses Counsel also referred to Lutto Singh, whose statement under Section 164 Cr.P.C. had been recorded by the Magistrate but not examined as witness at the trial, and, further non-examination of witness on inquest. Counsel submitted that non-examination of the natural witness gives rise to presumption under illustration (g) of Section 114 of the Evidence Act that the prosecution has withheld relevant evidence. Reference was made to decisions in the case of Meharaj Singh (L/Nk.) v. State of U.P. : 1995 CriLJ457 and State of West Bengal v. Mir Mohammad Omar and Ors. (2002) 8 SCC 382. It was submitted that simply saying that the witness has been gained over is not enough, and in this regard reliance was placed on State of U.P. v. Jaggo : 1971 CriLJ1173 .

12. Before I consider the effect of non-examination of the boy or Surest Singh or Lutto Singh or inquest witnesses, I would like to observe that the presumption which the Court may draw about existence of any fact which it thinks likely to have happened in terms of illustration (g) of Section 114 can arise only where 'the evidence which could be and is not produced would, if produced, be unfavourable

to the person who withholds it'. So far as Suresh Singh is concerned, there is absolutely no question of his evidence being unfavourable to the prosecution case. Being father of the deceased, he was not expected to depose in favour of the appellant who had allegedly killed his elder son 12 days ago and killed the deceased in the occurrence. It is relevant to mention here that the trial Court has accepted the explanation that he was not in a position to depose in Court for the reason that the appellant had killed both his sons within 12 days. So far as Lutto Singh is concerned, in his statement under Section 164 Cr.P.C. on 4.4.1997 he had fully supported the prosecution version. At this stage, I may deal with a side argument.

13. Counsel for the appellant tried to find fault with the recording of statement of Lutto Singh, as, indeed, other three witnesses namely Ganesh Singh, Ram Chandra Singh and Nagina Singh under Section 164 Cr.P.C. on the ground that their statements had been recorded on their own without any request by the Investigating Officer which was not in accordance with the decision in the case of Jogendra Nahak and Ors. v. State of Orissa and Ors. : 1999 CriLJ3976 . In this case the Supreme Court held that 'a person who is neither an accused nor sponsored by the investigating agency, has no locus standi to apply to the Magistrate to record his statement under Section 164'. Though I should not be understood to mean that the law laid down in the aforesaid case of Yogendra Nahak can be applied from the date of judgment, for, their Lordships have merely stated the legal position as it always stood; however, it is relevant to mention here that the recording of their statements by the Magistrate at their instance was in accord with the two orders of this Court in the cases of Ram Khelawan Singh v. State of Bihar 1990 (2) PLJR 269 and Md. Maneer v. State of Bihar 1994 (2) PLJR 677. In the first case, by a rather short order, this Court held, that after commencement of investigation at any stage the Magistrate can record statement of the witness. The case had arisen from an order by which prayer of the witness to record his statement under Section 164 Cr.P.C. had been turned down. The order of this Court, passed in that context, was interpreted by the subordinate Courts as laying down the law that even at the instance of the witness the statement under Section 164 Cr.P.C. could be recorded and in this State, in many statements of witnesses were so recorded. In the later case, the Court clarified

that the witness cannot claim any right to get his statement recorded under Section 164 Cr.P.C., which was in the discretion of the Magistrate to be exercised in the circumstances of the case and he was not obliged to do so in all cases. The decision of the Madras High Court in Kalahasti Veeramma v. Prattipati Lakshmayya and Ors. AIR 1948 Madras 489, was followed. Though thus the effect of the earlier order in Ram Kumar Singh's case was somewhat diluted in the later case, it was not held that statement of the witnesses could be recorded only at the request of the Investigating Officer, as now held by the Supreme Court in Yogendra Nahak's case. Perhaps, it was in view of the said order of this Court that the statements of Lutto and others were recorded by the Magistrate under Section 164 Cr.P.C. on 24.4.1997. In any view of the matter, the above submission of the Counsel has been noticed and discussed only to make it part of the record, for, conviction of the appellant is not based on those statements which is not a substantive evidence.

14. As regards the non-examination of the 'boy' Counsel submitted that as per the evidence of the informant himself vide para 10 the boy was a co-villager, but even his identity has been withheld. No attempt seems to have been made to trace the boy muchless examine him as witness. It is relevant to mention here that in para 10 of his evidence the informant further stated that he tried to find out the boy but till date, could not gather any information about him or his father. I am inclined to think that the story of the 'boy' calling bhananjay Singh when the occurrence took place in not an integral part of the prosecution case. Had it been the case of the prosecution that the boy had called Dhananjay at the behest of the appellant the position could be different because then the story of the boy calling Dhananjay would have had a link with the appellant. All that the prosecution says is that while Dhananjay was peeling potatoes along with others he was called by the boy. After five minutes, a loud sound of gun shot was heard. Reference to the boy thus seems to have been made only to describe sequence of events. A child calling another child of the same age group is not unusual. It might be as simple as that of course, as mentioned above, if it were the case of the prosecution that the boy had been set up by the appellant to get the deceased inside the house and then kill him, it could be said that the prosecution has withheld necessary link and without this link, the chain is not complete. In this view of the matter do not think non-

examination of the boy makes the prosecution case doubtful.

15. Now coming to the positive evidence of the witnesses it would appear that all of them consistently said that while preparations were being made for performing Dwadsa Karma on 7th February 1997 and Dhananjay was peeling potatoes along with others to be used in the village feast on the occasion, at 12.30 p.m. he was called by a boy. Both of them went towards the house situate on the south of the informant's house and therefore, described as the southern house (kita). After 4-5 minutes a loud sound of gun firing was heard. They rushed to the place and found Dhananjay lying dead in the room, and saw the appellant fleeing with a rifle in his hand. Entire back portion of dhananjay's head was blown up and lumps of flesh and blood were scattered at different places. The witnesses further stated that prior to the occurrence the appellant had killed Dhananjay elder brother Sanjay and given a threat that if the case is filed he would not allow them to perform the shradh. The case with respect to Sanjay killing was in fact filed, as it had to be, being Matihani PS Case No. 7/97.

16. It is relevant to mention here that in Sessions Case No. 262/97 arising from Matihani Case No. 7/97 the appellant in course of time was convicted for having committed murder of Sanjay Singh, he has preferred appeal against the conviction which is pending in this Court.

17. We were taken through the evidence of the witnesses from beginning to end and we have not been able to discover any inconsistency or contradiction between their evidence inter se or with the fardbeyan version of the informant or their previous statement before the Police or Magistrate under Section 164 Cr.P.C. which suggests that their version of the occurrence has been throughout consistent. There is little cross-examination on the point of occurrence specially fleeing away from the place of occurrence after the incident with rifle. One of the witnesses, PW 8, was not cross-examined at all. The manner of occurrence finds full corroboration from the objective findings of the investigating Officer as mentioned in the case diary and his evidence in Court.

18. It was submitted that the record does not show as to whether blood, flesh or bullet was seized from the place of occurrence. The submission has been noticed

only to be rejected, for there is no dispute about the place of occurrence, if the police did not make seizure that would not make the prosecution case doubtful. The appellant should have questioned the Investigating Officer about the non-seizure if he wanted to derive any mileage out of it. Counsel also submitted that the description of the clothes put on by the deceased at the time of occurrence as mentioned in the Inquest Report does not tally with the description as mentioned in the Post-mortem Report. This submission too has to be summarily rejected for the simple reason that there is no dispute about the death of the deceased or the date and time of occurrence nor there is dispute about the post-mortem of his dead body. For the same reason, the argument of the Counsel that the witnesses on inquest were not examined, has to be rejected. These submissions in my opinion are to be appreciated keeping in view that fact that all follow up steps starting from the inquest up to the recording of the statements of the witnesses were taken with due promptitude. The occurrence was reported immediately after it took place which is apparent from the fact that the police reached the place of occurrence within half an hour. The inquest was immediately held at 1 p.m. and thereafter the dead body was taken to Sadar Hospital, Begusarai, reaching there at 3.50 p.m. Postmortem was held immediately thereafter at 4.30 p.m.. This was followed by recording of the further statement/statements of the witnesses at the place of occurrence in the evening on the same day or in the morning of the following day.

19. It was submitted that all said and done, no body claims to have seen the appellant killing the deceased and he has been convicted on the basis of a solitary circumstance that he was seen fleeing away from the place of occurrence with rifle in his hand It was submitted that the accused cannot be convicted on this solitary piece of evidence and the same cannot be treated as conclusive evidence. According to the Counsel, the case would appear to be based on circumstantial evidence and even if the prosecution case of the appellant fleeing from the place of occurrence is accepted, this solitary circumstance is not sufficient to convict him unless the entire chain of circumstances is complete. In support of the contention reliance was placed on *Dilawar Hussain v. State of Gujarat and Anr.* 1991 Criminal Law Journal 15 and *V. Vijay Kumar v. State of Kerala* : 2000 CriLJ739 .

20. The principles as to the nature and extent of proof of guilt in cases of circumstantial evidence are well settled. Where the prosecution case is based on circumstantial evidence, the prosecution is required to establish different circumstances beyond reasonable doubts to the extent that all the circumstances taken together must form a chain leading to no other inference except the guilt of the accused. Such-inference must be incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than his guilt. But what would be the length of chain would depend on facts of each case. In a particular case, a series of circumstances may have to be proved to complete the chain, in another case a few circumstances may complete the chain.

21. In the instant case, it would appear at first blush that the prosecution has proved only one circumstance, namely, the appellant fleeing away from the place of occurrence with a rifle in his hand immediately after the incident. But on close scrutiny of the evidence on record it would appear that the prosecution has also proved that 12 days prior to the incident the elder brother of the deceased had been killed. The appellant stands convicted for committing his murder in Sessions Case No. 262/97. It has also been proved that the appellant had given a threat that if any case is lodged with respect to that incident he will not allow the Shradh (of Sanjay) to be performed. It was not just a simple co-incidence that on the day of Dwadasha Karma when the final rites of his Shradhwere being performed, 'his younger brother i.e. the deceased was killed. As if the appellant kept his word. Again, the finding of the doctor also lends support to killing by rifle. The skull of the deceased was found badly lacerated, major portion of it was burst and skull bone was attached with the help of skin in the lower part of the frontal. In the opinion of the doctor' the type of injuries which were found on the body could be caused by high velocity object impacting the skull with a good amount of momentum. He clarified that the injuries of such of the type could be caused when a single piece of bullet hits the object. The weight of the fact that immediately after the incident the appellant was seen fleeing away from the place with rifle has to be considered in this background. As held by the Supreme Court in Pal Singh v. State of Punjab 2000 SCC (Cr) 100, this establishes his presence and participation in the commission of the crime.

22. From the map of the place of occurrence (supplied by the appellant's Counsel) for our understanding read with the description of the place in the evidence of the Investigating Officer, it appears that there are two houses. The room in which the deceased was killed is part of the southern house described as 'kita' Further south of which there are two rooms intervened by passage like space leading towards the southern most room having opening on south. It is through this room and the door that the appellant fled away towards south in the Diyara. On the eastern side of this southern kita is varandah. The aforementioned passage opens through a door on the said varandah towards east. Further east of which is open space. It is there that the deceased and others were peeling potatoes for the village feast. After the boy called the deceased he must gone inside through the said door of the passage between the two southern room and finally to the northern most of the three rooms, situate in a row, where he was killed. From the map it further appears that there is a common Angan on the west of aforesaid southern kita shared by three brothers. Being Angan, naturally, the female members of the family must have been there. There is evidence to suggest that none was present in the rooms of the southern kita at the relevant time, apparently because villagers were sitting at the open space where preparations were afoot for the village feast. There appears to be another passage between southern kita and the house in which the informant lives, situate north of it, through which also one could easily enter the southern kita. It appears that taking advantage of the situation the appellant had concealed himself in southern kita waiting for an opportune time to strike. As soon as the deceased came there he fired at him and fled away through the southern rooms towards south in the Diara. He was seen fleeing away, amongst others, by PW 1 Ganesh Singh whose house is situate only eight steps south of southern most room of the southern kita through which the appellant apparently fled away.

23. It was submitted that the entire case of the prosecution hinges on the appellant's fleeing away from the place of occurrence at the time of incident but this circumstance was not put to him in course of his examination under Section 313 Cr.P.C. The omission to put such a relevant question has caused the appellant a serious prejudice as he was denied opportunity to explain the circumstance and his conviction is fit to be set aside on that ground alone.

24. Section 313 Cr.P.C. may be quoted so far as relevant as follows:

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) ... ..

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case.

The purpose of Section 313, it would appear, is to enable the accused to explain the circumstances appearing in the evidence against him. For achieving that purpose, after the prosecution witnesses have been examined, the Court is required to put questions 'generally' about the case. Counsel for the State submitted that the word 'generally' indicates that the accused has to be asked general questions. In my opinion, the word 'generally' in the context means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of the case. The question is what would be the effect of omission to put question(s) regarding a particular circumstance or circumstances. It is well settled that omission to put any question with respect to a particular circumstance by itself does not vitiate the trial. Failure to afford opportunity to the accused to explain any incriminating circumstance may provide him a ground but he has to show that he has suffered prejudice by such omission. Onus to show prejudice is on him. Where any circumstance appears in the evidence', it must be put to him in that shape of question so that he may explain the circumstances. But where the particular circumstance is part of the prosecution case of which he was aware, the omission to point the circumstance at the stage of his examination under Section 313 Cr.P.C. may not be said to cause any prejudice to him. The object of the Section is to afford the accused an opportunity to explain the circumstances which appear against him in course of trial. For example, where any confession is sought to be used against the accused or some incriminating recovery has been made he must be asked to explain the same, but where the accused is fully aware of the substance of accusation from the very beginning and has faced the trial, heard the evidence of the witnesses recorded in his presence, consistently making the same accusation, it may not be said that the

accused was not made aware of the case against him and thereby he suffered any prejudice.

25. In the instant case, the appellant cannot contend that he was not aware of the prosecution case that he was seen fleeing away from the place of occurrence at the time of incident and, if that is so, it was open to him to explain this in response to the question giving him the opportunity to say anything in his defence. Neither he said anything to explain it at the stage of examination under Section 313 Cr.P.C. nor he filed any written statement which normally an accused does at the end of the trial. In the facts and circumstances of the case I do not think the appellant suffered any prejudice on account of the omission to put the circumstances of his fleeing from the place of occurrence and therefore, his conviction cannot be said to be vitiated on this ground.

26. Counsel lastly submitted that the appellant was juvenile at the time of occurrence and, therefore, could not be tried under the ordinary law. Reliance was placed on *Bhola Bhagat v. State of Bihar* : 1998 CriLJ390 . The submission in the facts of the case is totally misconceived. It may be mentioned that the only basis of this submission is the estimate of the appellant's age by the trial Court at the time of judgment as 22 years. It is on this ground that it is said that at the time of occurrence he was below 18 year old. But it would appear that in his statement under Section 313 Cr.P.C. the appellant himself declared his age as 25 years on 5.5.2001. The occurrence having taken place four years ago it would follow that he was 21 years old at that time. Thus even if the age for the purpose of trial under the Juvenile Justice Act is reckoned from the date of occurrence being 21 years at that time, it is clear that the provisions of the Juvenile Justice Act are not attracted and therefore, the impugned sentence muchless the trial or the judgment is not vitiated.

27. Counsel finally urged that if his submissions on merit are not accepted the case cannot be said to be one of the 'rarest of rare cases' to justify death sentence. He placed reliance on the cases of *Bachan Singh v. State of Punjab* AIR 1980 SC 684 and *Sheikh Ishaque v. State of Bihar* : 1995 CriLJ2682 .

28. Section 354(3) Cr.P.C. enjoins upon the Court to State special reasons for awarding death sentence. The reasons assigned by the Court below in the instant case are that appellant had killed two young boys of the family within a period of 12 days and therefore, he appeared to be a 'serial killer'. Secondly he had killed an innocent and un-armed boy of 10-11 years who had no enmity with any body. Thirdly, the murder was premeditated, cold-blooded and brutal which showed the depravity of mind of the appellant.

29. It is true that the appellant had earlier allegedly committed murder of elder brother of the deceased 12 days prior to the present occurrence for which also he stands convicted. But his conviction cannot be said to be final. The appeal is pending in this Court. The question of sentence therefore, should be considered without being influenced by the previous conviction of the appellant it is again true that the murder of a 10-11 year old boy who had no enmity with the appellant shows mental depravity of the assailant. However, it appears that at one stage the appellant and the deceased's elder brother i.e. Sanjay Singh were good friends. In course of time they fell part and became enemies. Allegedly for this reason he killed Sanjay Singh. If the appellant felt provoked by some act of Sanjay Singh to the extent that he killed him first and then killed the deceased, it may be over reaction and expression of. anger of a weak mind but that would not bring the case in the ambit of rarest of the rare cases. He is in twenties, May be after committing two murders he would be resentful and reform himself. The lesser punishment of life imprisonment in my opinion would serve the ends of justice.

30. In the result, the judgment of conviction under Section 302 of the Indian Penal Code is upheld but the sentence of death is set aside. Instead, he is sentenced to rigorous imprisonment for life, with this modification in sentence the appeal is dismissed and the reference is answered accordingly.

**T.P. Singh, J.**

I agree.