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The State of Bihar Vs. Amar Nath Gupta

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Court : Patna

Decided On : Mar-20-2008

Judge : Chandramauli Kumar Prasad, A.C.J. and Abhijit Sinha, J.

Acts : Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : Death Referanc No. 6 of 2004 and Criminal Appeal No. 542 of 2004

Appellant : The State of Biharamar Nath Gupta

Respondent : Amar Nath GuptaThe State of Bihar

Advocate for Def. : Lala Kailash Bihari Prasad, A.P.P.

Advocate for Pet/Ap. : Ajay Kumar Thakur,

Disposition : Appeal dismissed

Judgement :

Abhijit Sinha, J.

1. The sole appellant, Amar Nath Gupta, was tried by Sri Jyoti Kumar Srivastava, the learned Presiding Judge, Fast Track Court No. 1, Sitamarhi, in Sessions Trial No. 356/12 of 2001/2003, arising out of Sitamarhi P.S. Case No. 109 of 2001 and having been found guilty by judgment dated 30 June, 2004 for commission of

offence under Section 302 I.P.C. in committing the barbaric and gruesome murder of Rekha Gupta and Upma Gupta has been sentenced to capital punishment of the gallows by order dated 5 July, 2004. Aggrieved thereby he has preferred the instant appeal No. 542 of 2004 which has been made analogous with the Death Reference for confirmation of the sentence of death.

2. Due regard being had to the fact that the Death Reference and the Criminal Appeal arises out of the same judgment of conviction and order of sentence they have been taken up together and having been heard together are being disposed of by this common judgment.

3. The factual matrix needs recounting and a resume thereof would subserve the purpose. The entire proceeding was set in motion when S.I. Rabindra Nath Dubey (P.W.18), the then Officer Incharge, Sitamarhi, P.S. recorded his self statement at 14.45 hours on 28.5.2001 at the house of accused Amar Nath Gupta located on Old Exchange Road in the town of Sitamarhi, wherein, it was stated inter alia, that earlier that day at about 14.10 hours he received a frantic telephone call from one Mohit Kumar alias Guddu (P.W.3) that his house located on Old Exchange Road was closed from inside and although cries of alarm by this mother and sister were coming from inside the house, they were not opening the door notwithstanding repeated calls from outside for them to open the door and this gave the impression that some untoward mishap had taken place indoors. Having made Sanha entry No. 725 the S.I. alongwith a police party proceeded to the house in question for investigation and there he was met by Guddu who introduced himself as the one who had made the telephone call. The S.I. found that the outer gate of the house was closed from inside and the grill gate at the back of the house was locked from outside. Guddu pointed out that his mother, Kanchan Gupta (P.W.2), sister Khushboo Gupta (P.W.1), aunt Rekha Gupta, first cousin (chacheri bahen) Upma Gupta, his father Amar Nath Gupta and paternal grandmother Ram Pyari Devi were insider the house. The S.I. claims to have called out to the people indoors to open the door but he, in response, could hear only female voices coming from within stating that the door was closed from outside.

4. The further prosecution story is that the S.I. in presence of Guddu and some independent witnesses having obtained the permission of Guddu broke open the lock of the grill door in the rear of the house and entering into the house he noticed that on the ground floor of the house the room facing south adjacent to the north Varandah of the house was chained from outside and there were two women inside that room whom Guudu identified as his mother and sister. The S.I. opened the chain and freed both of them and they on a query stated that gotani Rekha Devi and niece Upma Gupta who lived on the upper floor had screamed some time back and suddenly both of them had fallen silent. The S.I. asked Khushboo to accompany him to the upper floor but Guddu's mother forbade her from doing so and she herself refused to go up whereupon the S.I. himself went up with Guddu and saw two women lying in pools of blood inside the room - one on the floor whom Guddu identified as his aunt Rekha Gupta and the other on the cot was identified as cousin Upma Gupta. From a close look it appeared that both the deceased had been killed barbarously and blood in huge quantity lay on the floor and was also smeared on the cot. On a query being made Guddu feigned ignorance and gave out that he was in his general store located at Shankar Chowk where the maid servant had come and had informed him that none had been opening the door of the house from inside and it was only then that he had returned home and tried to open the door and having failed he had informed the police over telephone.

5. The S.I. returned to the ground floor with Guddu and inquired from Guddu's mother and sister about the carnage of the upper floor whereupon Kanchan Devi is said to have given out that her husband Amar Nath Gupta had gone upstairs into the room of her gotni Rekha Devi and Bhatiji Upma Gupta and while going up he had bolted the door of their room from outside and soon thereafter she heard the shriek of the deceased persons and thereafter silence prevailed. Kanchan Devi further stated that her husband and Late Paras Nath Gupta, the husband of the deceased Rekha Devi were full brothers whose properties were though joint but there was dispute regarding the partition between Amar Nath Gupta and Rekha Devi as a result whereof tension had prevailed and frequent altercation took place. The S.I. noticed blood splashes on the floor, over door planks, door frames, floor of Varandah. From beside the staircase he recovered a blood stained sword and

its cover concealed in a heap of bamboo and wood. He prepared a seizure list in presence of Dhrub Kumar (P.W.8) and Mahendra Prasad (P.W.4) and on further query Kanchan Devi stated that her husband would be in the khatal (cattle shed) but on search he could not be found there. The S.I. claimed that it was accused Amar Nath Gupta who had murdered Rekha Gupta and Upma Gupta who had also laid stake to the properties left behind by the deceased brother, Paras Nath.

6. On the basis of the self statement of P.W.18, a formal F.I.R. was drawn up and investigation was assigned to P.W.20, Prabhat Kumar Singh, S.I. who after completing investigation submitted a chargesheet against the sole accused under Section 302 I.P.C.

7. At the trial a charge under Section 302 I.P.C. was framed against the sole accused for intentionally causing the death of Rekha Devi and Upma Gupta to which he pleaded not guilty and claimed to be tried.

8. The defence plea is one of total innocence and denial of allegations levelled against him. It would also transpire from the trend of cross examination of the P.Ws. that the further defence of the accused appears to be a plea of alibi as P.Ws.1, 2 and 3 who are daughter, wife and son respectively of the accused had testified in course of their depositions that the accused was at Gujarat at the time of the alleged occurrence.

9. In support of its case, the prosecution sought to examine as many as 20 witnesses and further sought to bolster its case by bringing on record documentary evidence and material exhibits. The defence however has not chosen to examine any witness.

10. Of the 20 witnesses examined by the prosecution P.W.1, Khushboo Gupta, P.W.2, Kanchan Gupta and P.W.3, Mohit Kumar being respectively the daughter, wife and son of the accused have naturally turned hostile and P.W.11, Mangal Paswan and P.W.12, Ramdeo Rai, who happen to be the Chowkidar had been tendered for cross examination. P.W.20, S.I., Prabhat Kumar Singh is the Investigating Officer of this case and P.W.13, Vinay Mishra and P.W.14, Rakhtu Prasad, have proved the inquest report of Rekha Gupta and Upma Gupta.

11. Admittedly, the factum of death of Rekha Gupta and Upma Gupta is not in controversy. The primary question which calls for pointed consideration is whether the prosecution has been able to prove the charge against the accused herein beyond all reasonable doubts and if the answer is in the positive then whether the case of the appellant would be one of 'rarest of the rare' cases so that death sentence can be imposed.

12. Admittedly, there are no eye witness to the occurrence and the entire prosecution case is based upon the circumstantial evidence. As held in the case of Deepak Chandrakant Patil v. State of Maharashtra reported in : AIR 2006 SC1708 , in a case based on circumstantial evidence there may be no direct evidence to prove the manner of assault or the actual participation of an accused in the assault on the deceased resulting in his death, but if the circumstantial evidence is conclusive in nature, a conviction on the basis of such circumstantial evidence may be recorded. Keeping this in mind we have to delve and deliberate as to whether the circumstances established on record are incriminating in nature and the chain of circumstances established by the prosecution is so complete as not to be consistent with any other hypothesis except the guilt of the accused.

13. Khusboo Gupta, the daughter of the accused figuring as P.W.1 deposed in court that when she returned from school at around 12.30 P.M. she found her father absent from the house and her aunt and cousin lying in pools of blood. Although she claims to have given her statement before the police she was not in a position to state as to who had killed the two deceased. On being declared hostile she in course of cross examination denied of any partition having taken place between Rekha Gupta and her father. She also denied of having told the police that her father had come out from the khatal at that very moment and had left the house after taking his meal. She further denied having stated that when she woke up from sleep on hearing a scream and hearing her Guddi Didi exclaiming Chhottey Papa why are you doing this. She also denied having stated that when her father had come in his face wore a fetish look and that he had fled away after closing the door from outside. However, she admitted that her Guddu Bhaiya had come with the police. In course of cross examination by the defence the witness stated that her father was not present in the town on the day of

occurrence as he had gone to Gujarat to visit her Mausi - Mausa and had returned only 14-15 days thereafter. She also claimed that there was cordial relationship between her father and uncle as also amongst their family members.

14. Kanchan Gupta, the wife of the deceased figuring as P.W.2 in course of her deposition in court stated that there had been no dispute between her husband and Paras Nath Gupta over land and she was not in a position to say as to who had killed Rekha Gupta and Upma Gupta although she was in the house at the time of the occurrence. This witness too was declared to be hostile and in course of cross examination by the prosecutor she denied her statement under Section 161 Cr.P.C. She has deposed on the pattern of her daughter. In cross examination by the defence she stated of good and cordial relationship existing between her family and that of Paras Nath Gupta. She also stated that the deceased Paras Nath Gupta carried out business of lending money and that her husband was not in town on the date of the occurrence as he had gone to Gujarat.

15. Mohit Kumar alias Guddu, the son of accused Amar Nath, figuring as P.W.3 admitted of having informed the police and of the police having broken open the locked door in his presence. He also claimed to have shown the dead bodies to the police. He stated that he had come home for his lunch. This witness also stated about the cordial relationship between his family and that of his uncle and between the two brothers also. He denied about the existence of any enmity prevailing between his father and uncle over landed property. He also stated that his father was not present in town on the date of occurrence as he has gone to Gujarat.

16. It is but natural that P.Ws.1, 2 and 3 being the daughter, wife and son of the accused would make all efforts to save their father/husband and consequently have not supported the prosecution case and due to the close affinity between these witnesses and the accused it was never expected that there would be any support to the prosecution case from them. However, this much is certain from the deposition of P.W.3 that he had informed the police and in his presence the police had broken open the locked door to enter into the house and the detection of the two dead bodies. It is also curious that when Kanchan and Khusboo were present

in the house they had no knowledge of the murders taking place on the first floor and the door being locked from outside. However, they have admitted the fact of the arrival of the police and of having given their statements. Apparently, all these three witnesses have lied in an effort to save their father/husband.

17. P.W.4, Mahendra Prasad in his deposition in court has stated that he knew Amar Nath Gupta who had another brother Paras Nath Gupta who had also been murdered but no case had been filed for that. He went on to state that he was at the shop and had seen Amar Nath Gupta buying sonepapdi and Bhujia. He also stated that the son of the accused along with two other boys had come to him at 2 P.M. with a request to come over to their house where some occurrence had taken place. He also stated that the son of the accused had informed the police in his presence. He further stated that the main entrance was locked from inside and that the police had broken open the lock in the rear of the house and had entered into the house. He claims to have seen the two dead bodies on the upper floor of the house. He further stated of the recovery of blood stained sword in his presence from amongst bamboo and wood near the hand pump on the ground floor and the police seized it under a seizure list whereupon he had signed as a witness. He further stated that a panchayat had been held between the accused and the deceased on Saturday whereat he was not present but he knew that the panchayat was over the issue of partition. He further stated that the wife of the accused had stated before the police that it was her husband who had committed the murders of the two deceased. Nothing substantial has been extracted from this witness by the defence save and except the fact that his knowledge about the panchayati was hearsay.

18. Praveen Kumar (P.W.5) stated in court that he knew the deceased as also the accused. He has also stated having gone to the house and seen the dead bodies of Rekha and Upma. He claims to have seen the accused that day. He stated of the existence of a dispute between the deceased and the accused over land and of a panchayati having taken place two days back over the expenditure incurred over the mother of the accused. He further stated that all the family members of the accused had jointly committed the murder. The defence again has not been able to extract anything substantial in the cross examination of this witness.

However, from the cross examination it has come to light that the wife and daughter of the accused had admitted before the police in his presence about the commission of alleged murder by the accused and of his running away after confining them inside the room by closing it from outside.

19. P.W.6, Dr. Basant Kumar Mishra, has stated that as soon as he stepped out of the saloon after having a shave he saw the accused coming hurriedly from the lane and that there were stains of red colour in his T-Shirt which appeared to be blood stains. He claims to have enquired from the accused as to why he was nervous but without answering his query the accused went towards the Girls Middle School. He claims to have come to know about an hour later that Rekha and Upma had been killed. This witness has also substantiated the fact of dispute over landed property and of a quarrel having ensued between Rekha and Amar Nath about a month before the instant occurrence and of he having been summoned by Rekha and on going to the house in the company of his friend Ram Lakhan Jee he found a weeping Rekha standing in the court-yard and a women consoling her. He also stated that Rekha on seeing him had replicated whether she would have to face such treatment and ignomity for ever. He expressed his confirmed opinion that it was Amar Nath who had committed the murder. In course of cross examination by the defence he reiterated having given his statement before the police regarding the quarrel between both parties and of his having gone there with his friend.

20. Unfortunately, P.W.6 has not been questioned by the defence on the material aspects and there is no reason to disbelieve this witness. The fact that this witness had deposed of having seen the accused in a perplexed state of mind his clothes revealing blood stains only leads to the presumption of the complicity of the accused in the crime. There is no reason why this witness should depose against the accused more so when defence has not even attempted to bring out any semblance of the witness being inimical to the accused. The only difference is in between T-Shirt and a half shirt since to the court question, the witness had stated before the police that the accused was dressed in blue trouser and half shirt. A T-Shirt is also a half shirt and this minor discrepancy cannot take away the value of the deposition of this witness nor does it render his deposition non est.

21. P.W.8, Dhrub Kumar, from whom P.W.4 is said to have heard about the panchayati having taken place in the house of the accused has his house situated some 4-5 houses away from the place of occurrence. He claims to have gone to the house on hearing about the murder of Rekha and Upma and seen their dead bodies. He also states about the seizure of the blood stained sword in his presence and of putting his signature on the seizure list (Ext. 1/1). In his cross examination the witness stated that the deceased and accused were living separately and were separated in mess also. Oral partition had taken place but the same had not reached finality and both of them looked after the affairs of their landed property separately and the land in deceased's share was looked after and cultivated by share croppers.

22. P.W.7, Sudhir Kumar Gupta, a cloth shop owner, is a neighbour of the accused. He too deposed about the dispute over property between the accused and the deceased. He claims to have heard at about 1-1.30 P.M. the wailing voice of Upma pleading with her uncle but he did not take much notice as there were quarrels there all the time. He claims to have taken a rest and on hearing sound coming from the road 45 minutes later he got up and saw that the police had arrived and going to the spot he learnt of Rekha and Upma having been murdered and also saw their dead bodies. He further stated that he had seen Amar Nath that day in between 9-10 A.M while he was coming from the direction of his khatal. However, he was frank enough to admit that he was not in a position to say whether all the family members of Amar Nath had jointly committed the murder. He also stated that when the police came, the wife and daughter of the accused were present in the house and the door was closed from outside. In cross examination, he stated of having given his statement to the police on 29.5.2001 wherein he had stated that Amar Nath and Rekha used to sell their respective lands. He also stated of having told the police of wailing Upma pleading with the guilty and having seen Amar Nath coming from the khatal side at around 9-10 P.M.

23. P.W.15, Devendra Prasad, also claims to have seen Amar Nath on the day of the occurrence. He has stated that the police had gone to the house of Amar Nath at about 2-2.30 P.M. in his presence. He saw the police recording the statement of

Amar Nath's wife and daughter. He claims to have been informed there that Rekha and her daughter had been killed but was not in a position to disclose how they had been killed. He also stated that the wife of Amar Nath had stated that her husband went to the upper floor of the house and killed both of them. He also stated that the wife had given out that there had been much hulla on the upper floor and that her husband had fled away after committing murder. He also claimed of the blood stained sword being recovered in his presence. In course of cross examination he stated that his house is situated in front of the house of the accused and admitted that the blood stained sword had not been recovered in his presence and he had only heard of it. He also admitted that he had neither seen the occurrence taking place nor had talked to any person there.

24. P.W.16, Banarsi Lal Sah, also claims to have seen Amar Nath on the date of the occurrence. He admits that he had not entered inside the house and had come to know that Amar Nath Gupta had fled away after committing murder of his bhabhi and bhatiji. In his cross examination he merely stated that he could not recall to his mind as to who informed him about the murders.

25. From the evidence of P.Ws. 15 and 16 this much is clear that both of them had seen Amar Nath in the town in the morning on the date of occurrence and the defence unfortunately has not asked them anything to the contrary in course of the cross examination. So far as the question of murder of Rekha and Upma is concerned, both these withesses as also P.W.17 (Baijnath Prasad) are hearsay witnesses and not much reliance can be placed on their deposition in respect of the murder of Rekha and Upma.

26. P.W.18, S.I. Ravindra Nath Dubey, is the informant and he has reiterated his self statement which forms the basis of the F.I.R. in toto. He has also proved his self statement (Ext.4) and his signature on the seizure list (Ext. 1/2). He further stated that he handed over a copy of the seizure list to Guddu. In his cross examination he has given a topograph of the place and stated that he had opened the door and freed Kanchan and Khusboo. He also reiterated that he had put in writing that Kanchan and Khusboo had stated before him of having heard Rekha and Upma raising alarm from the upper floor whereafter everything became silent.

He also stated that he had gone to the upper floor with the other officer only after the statement of Kanchan and Khusboo. He admitted that he had not mentioned in his self statement of having seen ornaments on the person of the dead bodies. He further stated that Ram Pyari Devi, the mother of the accused was sick and unable to speak and this fact he had noted in his self statement. He has also stated that he had not recorded the statement of any person before recording his self statement.

27. P.W.20, Prabhat Kumar Singh is the Investigating Officer who identified the blood stained sword and its cover in court which had been seized from the place of occurrence. He has also proved the recovery of blood stained bed sheet (Ext.III), blood soaked cotton (Ext.IV) and key ring (Ext.VII) as also the seizure list (Ext.5). He has also proved the photographs taken at the place of occurrence which are exhibits VIII to XXII. In course of his cross examination P.W.20 admitted that he had not sent the blood seized at the place of occurrence for chemical analysis but that by itself cannot be made an issue or could not have rendered the entire investigation void.

28. P.W.9, A.S.I. Bhashitha Narayan Singh, stated that on receiving information from Guddu he had gone to the house of Amar Nath under the orders of the Officer Incharge where Guddu met him. He further stated that Guddu had told the Officer Incharge that his father Amar Nath had fled away after committing the murder and closing them inside the room. He claims to have entered the room with the Officer Incharge after breaking open the northern door whereafter they unlocked the door of the room in which Guddu's mother and sister were confined. On the upper floor he found the two dead bodies of Rekha and Upma. He also stated about the recovery of the blood stained sword in his presence. He also stated that Guddu had given out that his father used to threaten the deceased from before and that he killed them in order to grab their property. In course of cross examination he admitted that the statement of Guddu was recorded by the Officer Incharge but then resiled from his statement. He has also stated that he had assisted the Investigating Officer in keeping the arms, collecting blood stained earth and in breaking open the lock. He also claims to have called the Photographer but he admitted that the I.O. had not recorded his statement.

Similarly P.W.10, A.S.I. Siya Sararn Choudhary's statement was also not recorded by the Investigating Officer. That being the position the deposition of these two witnesses was for the first time made before the court and as such not much reliance can be placed on the deposition of these two witnesses.

29. P.W.19, Phulmatia Devi, is the maid employed in the house of the accused. She stated that she had not gone to work in the house in the morning and when she went in the afternoon she could not enter the house as the door of the house was closed. She further stated that Khusboo had requested her to call her brother which she did and thereafter she went to work else where and when she returned from her work she was informed that Gudia (Upma) and her mother had been killed. She also stated that she was later on informed that it was Laddu who had killed them and she identified Laddu as the person standing in the dock. In her cross examination she admitted that she had not given her statement before the police. The statement of this witness too cannot be relied upon.

30. If we omit the deposition of P.Ws.1, 2, 3 and 9, 10 and 19 whose statement under Section 161 Cr.P.C. had not been recorded and of P.Ws.11 and 12 who were tendered for cross examination, the remaining witnesses other than P.Ws.1, 2 and 3 have contributed and corroborated sufficient material evidence to point an accusing finger at the accused of having committed the gruesome crime. The defence unfortunately has not been able to extract anything in course of cross examination of these witnesses so as to put any doubt in the prosecution story and there is no palpable reason to disbelieve them. On the other hand, good reasons have been put forward by the prosecution witnesses which had goaded or compelled the accused to take the law in his own hand which culminated in the gruesome murder. It may be that his mind got derailed of the track and went astray or beyond control because of extreme mental disturbances resulting from the frequent quarrels and tension prevailing in the house but nothing has been offered on this aspect by the defence.

31. Particular mention must be made herein of the fact that the accused in his statement under Section 313 Cr.P.C. had stated that he would give witness in his defence but curiously no defence witness has been examined. The accused has

also not taken the plea of alibi in his statement under Section 313 Cr.P.C. and in that view of the matter the defence plea of alibi though propounded by the P.Ws.1, 2 and 3 cannot be accepted in the face of evidence to the contrary by independent witnesses.

32. It is true that the doctor who conducted autopsy on the dead body of the two deceased has not been examined but that by itself cannot render the prosecution case untrustworthy since the post-mortem reports were exhibited in this case on admission. From a perusal thereof it would appear that the same support the inquest report of the deceased persons and the injuries on the dead body appear to have been caused by sharp cutting weapon. In a case of this nature the defence was required to put a clog in the prosecution story so as to create a doubt that anyone else other than the accused himself had committed the offence. However, neither has any defence witness been examined nor has material of any consequence been extracted by the defence in course of the cross examination of the prosecution witnesses so as to create a doubt in the prosecution story. Even the fact of recovery of the blood stained sword has not been denied and the factum of enmity was not sought to be disproved.

33. In a case resting on circumstantial evidence the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable grounds for a conclusion consistent with the innocence of the accused and it must be searched as to show that within all human probability the act must have been done by the accused. In the instant case, there was sufficient circumstantial evidence as analyzed by the learned trial judge to connect the accused with the murder of the deceased and I have no reason to differ from the same.

34. Accordingly, having given my anxious thoughts to the facts and the circumstances of the case, I am unable to compel myself to take a contrary view than the one taken by the learned trial judge and I confirm the conviction of the

accused under Section 302 I.P.C.

35. Considering the aforesaid background of the matter, the question would be whether the case of the appellant could be one of the 'rarest of the rare' cases so that death sentence is required to be imposed.

36. The learned Counsel for the appellant contended that the case in hand does not fall within the category of 'rarest of the rare' cases and as such extreme penalty of death is not called for. It was sought to be pointed out that number of persons killed is not relevant to determine the question of sentence and there was nothing on record to suggest that the appellant shall be a menace and incapable of rehabilitation or reformation after he came out of incarceration and shall be a continued threat to the society.

37. The learned A.P.P., on the other hand, contends that the manner in which the appellant had committed the crime shocks the conscious of the civilized society and as such it falls within the category of 'rarest of the rare' cases.

38. It is true that it may be kept in mind that while imposing the 'rarest of rare' punishment, i.e., death penalty, the Court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case. Dealing with this aspect in the case of Shankar v. State of Tamil Nadu reported in : 1994 CriLJ3071 , the Apex Court observed as under:

The choice as to which of the two punishments provided for murder is the proper one in a given case will depend upon the particular circumstances of the case and the Court has to exercise its discretion judicially and recognized principles after balancing all the mitigating and aggravating circumstances of the crime. The Court also should see whether there is something uncommon about the crime which renders sentence of imprisonment of life inadequate and calls for death sentence. The nature of the crime and the circumstances of the offender should be so revealing that the criminal is a menace of the society and the sentence of imprisonment of life would be inadequate. The sentence of death should be reserved for the rarest of rare cases after a due consideration of both mitigating

and aggravating circumstances. What circumstances bring a particular case under the category of rarest of rare cases vary from case to case depending upon the nature of the crime weapons used and the manner in which it is perpetrated etc.

39. Having given my anxious thoughts to the rival submissions, I am of the opinion that the extreme penalty of the gallows needs to be inflicted in rarest cases of extreme capability and before opting for the death penalty the manner of the crime should be taken into consideration and not the circumstances of the offender. To hang or not to hang - that is the question before us. A balance of aggravating and mitigating circumstances has to be drawn up with due regard to the mitigating circumstances and a just balance has to be struck between the two before the option is exercised. So long that the statue provides for death sentence the holders of judicial powers, de hors their personal opinion has to inflict death sentence if the circumstances of the case so justified.

40. From a perusal of the records, I find nothing therein to suggest that the appellant was a menace to the society who cannot be reformed and rehabilitated and shall continue to be a threat to the society. From the statement of the accused under Section 313 Cr.P.C. recorded on 29 January, 2004 he claims to be 45 years old and that is also the assessment of the learned trial judge. Although the crime committed by him is gruesome and brutal yet in my considered opinion it does not fall within the category of 'rarest of the rare' cases. In this view of the matter, I refrain from confirming the sentence of death awarded to the appellant. Following the precedent laid down in the case of Prakash Dhawal Khainar (Patil) v. State of Maharashtra reported in : 2002 CriLJ928 , I sentence the appellant to suffer rigorous imprisonment for life with the condition that he shall not be released before completing the actual term of 20 years including the period already undergone by him.

41. In the result, the conviction of the appellant under Section 302 I.P.C. is upheld and instead of confirming the death sentence awarded to him, I, for the reasons stated above, sentence him to suffer rigorous imprisonment for life with the condition that he shall not be released before completing the actual term of 20 years including the period already undergone by him. The appeal accordingly fails

and the reference is answered in the negative.

Chandramauli Kumar Prasad, A.C.J.

42. I agree.

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