

State of Orissa and Etc. Etc. Vs. Dillip Kumar Chand and ors.

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Court : Orissa

Decided On : Jan-27-1987

Reported in : 1987CriLJ1242

Judge : R.C. Patnaik and ;D.P. Mohapatra, JJ.

Appellant : State of Orissa and Etc. Etc.

Respondent : Dillip Kumar Chand and ors.

Judgement :

D.P. Mohapatra, J.

1. All the aforementioned cases arise from the judgment dt. 2-4-86 of the Sessions Judge, Koraput, Jeypore in Sessions Case No. 134 of 1985 who tried the case on transfer from the Court of the Sessions Judge, Kalahandi under orders of this Court. Since the cases arise out of the same judgment and involve common questions of fact and law, they were heard together and will be disposed of by this judgment.

2. In the case sixteen accused persons were proceeded against under different sections of the Penal Code for their alleged involvement in the occurrence which took place on 17th of July, 1982 at about 10 p.m. at village Narla Road where situated a small railway station on the Waltair-Raipur line. The incident resulted in the death of one Bhagirathi Panda (hereinafter described as 'the deceased') who

was running a small hotel there. The deceased was living with his wife and children on the premises, a portion of which was being used for running the hotel.

The gist of the prosecution case was that the deceased and accused Arjun Das Agarwal, a rich businessman of the locality, were not pulling on well since the former supported Kausalya, an unmarried girl, working as a maid-servant in the family of accused Arjun Das Agarwal, had allegedly conceived through him. This incident raised a scandal in the locality. The girl demanded compensation from Arjun Das for her maintenance and treatment and had even staged a hunger strike in front of his house when he refused to accede to her demand. Some processions and demonstrations were held in the locality taking up the cause of the wronged woman. Since the deceased had taken prominent role in these matters, he had invited the wrath of Arjun Das Agarwal.

On the night of occurrence, that is 17-7-82, at about 10 p.m., when the deceased had almost wound up business in the hotel, had shut its front door and he was taking accounts of the sale during the day from the servant boy, Abhi, some persons knocked at the door and asked for meals. The deceased told them that Chapatis would not be available and they might come in if they would take rice meals. When the hotel boy opened the door, Devi Misra, Babuli alias Sudhansu Das, Uttam Behera and Radheshyam Agarwal, all accused in the case, got in. Immediately they picked up quarrel with the deceased over non-availability of Chapati meals and manhandled him. Smt. Radhamani Panda, wife of the deceased, and the informant in the case, rushed in and trying to appease the customers promised to serve them meals to their liking. She took her husband (the deceased) into the adjoining room to cool him down. Food was served to the aforementioned customers in two plates. Instead of taking the meals they crashed the plates, broke the chairs, tables, tore out the electric wiring and broke the lanterns burning in the hotel. It is relevant to mention here that at the time of the occurrence it was drizzling and there was no supply of electricity in the area. While this was going on in the hotel room the informant heard the cry of pain of her husband coming from the adjacent room. On rushing in there she found that he had been stabbed on his belly. Accused Dillip Kumar Chand was holding a knife and along with accused Kishanlal Kamani was trying to drag the deceased from

out of the room. Accused Frafulla Kumar Pradhan was manhandling the deceased. When the informant tried to rescue her husband accused Manmohan Das pushed her back. All the aforesaid four persons dragged the deceased out of the house to the road where ace used Dillip Chand gave three to four stabbing blows. Accused Arjun Das Agarwal standing on the road was instigating the assailants to finish the victim soon. The other accused persons, viz. Rambilash Agarwal, Motilal Agarwal, Madanlal Agarwal, Santosh Kumar Kamani, Santosh Misra, Puspak Biswal and Hajarilal Agarwal surrounded the deceased while he was being assaulted by accused Dillip Chand and his associates. The informant, the employees in the hotel and some other persons present at the spot rescued the deceased and carried him back to the house.

The informant with- some difficulty arranged a truck and carried the injured to Narla Hospital. She also sent information to the Narla Police Station about the incident. The Assistant Sub-Inspector attached to Narla Police Station on getting the information reached the hospital and took the first information report from her. The doctor attending on the injured advised that he should be immediately removed to the headquarters hospital at Bhawanipatna. The injured was carried to Bhawanipatna Hospital in the same truck. On reaching the said hospital the doctor declared him dead.

3. On the aforesaid allegations, accused Dillip Kumar Chand, Kishanlal Kamani, Prafulla Kumar Pradhan, Manmohan Das and Arjun Das Agarwal were charged under Sections 102/149 and 302/34, I.P.C. for the offence of murder of the deceased. The first four were further charged under Section 441, I.P.C. for committing house trespass in order to commit murder of the deceased. Accused Devi Misra, Babuli alias Sudhansu Das, Uttam Kumar Behera and Radbeshyam Agarwal were charged under Section 451/34, I.P.C. for committing house trespass with common intention to commit mischief. They were further charged under Section 427/34, I.P.C. for committing mischief by damaging properties in the hotel of the deceased. Accused Rambilash Agarwal, Motilal Agarwal, Madanlal Agarwal, Santosh Kumar Kamani, Santosh Kumar Misra, Puspak Kumar Biswal and Hajarilal Agarwal were charged under Section 341/149, I.P.C, for wrongfully restraining the deceased. Accused Devi Misra was also charged under Section

323, I.P.C. for causing hurt to the informant.

4. The accused persons pleaded not guilty and denied their involvement in the alleged crime. Accused Arjun Das Agarwal pleaded that the leaders of the Communist Party of India to which party the deceased belonged, approached him for donation and since he refused, this false case has been foisted against him and his relations. Accused Santosh Kumar Kamani, Motilal Agarwal and Radheshyam Agarwal took the plea of alibi.

5. Sixteen witnesses were examined on behalf of the prosecution and seven by the defence. Of the witnesses examined in support of the prosecution case, P.Ws. 1, 2, 3, 4, 6 and 7 were witnesses to the occurrence, P.Ws. 5 and 8 spoke about the motive for the crime. P.Ws. 10, 13, 15 and 16 were the police officers who investigated into the case. P.Ws. 11 and 12 were the medical officers who treated the injured Bhagirathi and performed post-mortem examination of his dead body. P.W. 14 was the Judicial Magistrate who deposed about the Test Identification Parade of the accused persons. Of the witnesses examined on behalf of the defence, D.Ws. 1, 3 and 6 were residents of Raipur. D.Ws. 2 and 4 were businessmen, D.VV. 5 was a hotel keeper and D.W. 7 was a railway employee. They were examined mainly in support of the plea of alibi taken by some of the accused persons. Indeed learned Counsel for the appellants did not place reliance on the evidence of the D.Ws. at the hearing of the case.

6. On consideration of the materials placed before him and the submissions advanced on behalf of the prosecution and the defence, the learned Sessions Judge believed the witnesses cited by the prosecution and accepted the prosecution case against some of the accused persons. He held accused Dillip Kumar Chand guilty for murder of Bhagirathi, convicted him under Section 302, I.P.C. and sentenced him to death. He held accused Kishanlal Kamani, Manmohan Das alias Manu Bangali, Prafulla Kumar Fradhan and Arjun Das Agarwal guilty under Section 302/149, I.P.C. and sentenced each of them to undergo rigorous imprisonment for life. Accused Radheshyam Agarwal, Uttam Kumar Behera, Devi Misra and Babuli alias Sudhansu Sekhar Das were found guilty under Sections 451 and 427, I.P.C. and each of them was sentenced to

undergo rigorous imprisonment for one year on each count with the direction that the sentence would run concurrently. He acquitted the other accused persons, viz. Rambilash Agarwal, Motilal Agarwal, Madanlal Agarwal, Santosh Kumar Kamani, Hajarilal Agarwal, Santosh Kumar Misra and Puspak Kumar Biswal of the charges framed against them. The Sessions Judge referred the matter under Section 366, Cr.P.C. for confirmation of the sentence of death of accused Dillip Kumar Chand. The Criminal Appeals were filed by the convicts challenging the decision of the learned Sessions Judge.

7. The medical officer attached to the Narla Primary Health Centre, who examined the injured Bhagirathi on 17th/18th July, 1982 night found the following injuries on the injured:

(1) a linear incised wound 1' X 1/4' X 1/4' placed longitudinal near the outer anole of the left eye.

(2) Punctured wound 1' X 1/3' placed obliquely on the upper part of the left side of the abdomen below the costal arch three inches towards the left from the midline with cozing of blackish red blood and air probably communicating with the thoracic and abdominal cavity.

(3) Punctured wound 1' X 1/2' placed on the left side of the abdomen about the level of umbilicus two inches to the left from the midline probably communicating with the peritoneal cavity.

(4) Incised wound of 1' X 1/2' X 1/4' placed posteriorly over the iliac-crest (waist), and

(5) Incised wound of 1' X 1/2' X 1/2' placed over the lower part of the midline of the back.

According to him injuries (1), (4) and (5) were simple in nature and probably caused by sharp cutting object. He further stated that when the patient was brought to the hospital he was in acute collapsing condition and was in shock with agonising pain. He was unable to respond and was groaning only. After the witness examined the patient and intimated the officer-in-charge of the police

station at about 5.30 a.m., he referred the patient to the headquarters hospital. Ext. 6 is the injury report prepared by him. In cross-examination, the witness stated that from the papers available it appears that the patient was at the Narla Hospital from 2.30 a.m. to 5.30 a.m. on 18th July, 1982.

Dr. Jambeswar Tripathy, P.W. 12, was working as the Assistant Surgeon in the district headquarters hospital at Bhawanipatna on 18-7-82. He conducted the autopsy on the dead body of Bhagirathi and found the following external and internal injuries:

- (1) Incised wound situated vertically at outer angle of left eye of the size 1' X 1/4' X
- (2) Incised wound over left posterior superior iliac spine of the size 1' X 1/2' X 2'.
- (3) Incised wound at the level of third lumbar vertebra at midline of the size 1' X 1/2 X 1/2'.
- (4) Punctured wound of the size 1' X 1/3' X cavity deep situated obliquely over left side of the abdomen 3' away from midline below the tenth left rib and penetrating the abdominal cavity. There was a punctured wound 1' X 1/4' X 1/2' along the outer surface of spleen half inch above inferior margin.
- (5) Punctured wound 1' X 1/2' X cavity deep situated over the left side of abdomen two inches away from the midline at the level of umbilicus and penetrating the abdominal cavity and a loop of jejunum of the size 1' X 1/3' about three feet away from pylorus of stomach.

The doctor opined that the cause of death was due to haemorrhage and shock resulting from different wounds, specifically from that in the spleen. According to the doctor, the injuries were ante-mortem and homicidal in nature. Nothing has been elicited in the cross-examination of the above named medical officers to cast any doubt about their statements. From their statements and that of the eye-witnesses it is clear that Bhagirathi suffered a homicidal death. This position is also not contested on behalf of the accused persons.

The next question for consideration is whether the prosecution has been able to establish beyond reasonable doubt that the accused persons were responsible for the death of the deceased and if so the manner and extent of their involvement in it.

8. The case of the prosecution rests mainly on the evidence of P.Ws. 1,2,3 and 4 who were eye-witnesses to the occurrence. P.Ws. 6 and 7, as their evidence discloses, saw only parts of the incident. They were declared hostile by the prosecution. P.W. 1, Radhamani Panda, is the wife of deceased Bhagirathi Panda. She has given a clear and graphic picture of incident commencing from the stage when the accused persons, Radhe, Babuli, Devi and Anr. entered into the hotel, till the deceased after being stabbed was dragged out from his room to the road in front of the hotel. She has stated that on 17-7-82 at about 10.00 p.m. when the hotel had just closed and the deceased was taking down accounts, Radhe, Babuli and Devi shouted from outside if meals would be available. The deceased replied that only rice meal would be available and not Chapati meal. On the door of the hotel being opened, accused Babuli, Uttam, Radhe and Devi entered into the hotel, manhandled the deceased, pulled down the electric wire and broke the tables and chairs inside the hotel. At this juncture the witness intervened and took her husband (deceased) to the adjacent room. She asked the cook Bhaskar Panda (P.W. 4) to serve meals to the accused persons. When meals were served, Devi and Uttam broke the plates. The witness further stated that just then she heard her husband shouting 'MARIGALI, MARIGALI'(I am dying) from the adjacent room. On entering into the room she found that her husband had been stabbed on the belly with a knife. Accused Kishan was holding his beard, while accused Dillip was dragging him by his hand. At this stage, Kailash Chandra Panda (P.W. 2) and Baikuntha Panda (P.W. 3) who were running a tea-stall and a betel shop respectively, near the hotel, reached the spot and intervened. The witness has further stated that the accused persons dragged her husband to the road and accused Dillip executed other stabbing blows. It is her categorical statement that accused Dillip was the only person who was holding a knife. According to the witness, accused Prafulla was also manhandling her husband and assaulting him with a stick. Accused Arjun Das Agarwal, Santosh Kumar Kamani, Rambilash Agarwal, Puspak Biswal, Santosh Kumar Biswal (Misra) and Uttam Kumar Behera

came out from the house of Hajari Budha situated in front of the hotel and accused Arjun was instigating to beat the deceased telling that he was helping the poor. She further stated that after the incident they carried her husband inside the hotel. She was afraid to come out of the house immediately since she felt that she was being watched from outside. She sent Kailash (P.W. 2) to telephone to the police station, but he returned back and informed that he could not get phone connection. After about 2.00 a.m. in the night she ventured to go out and arranged a truck belonging to one Giridhari Kedia in which she took her injured husband to Narla Hospital. On the way she left Baikuntha (P.W. 3) at the police station to report the matter. The doctor at Narla Hospital made some preliminary treatment and advised her to remove the patient immediately to Bhawanipatna Hospital. The injured was taken by the same vehicle to Bhawanipatana Hospital. They reached the hospital at about 6 a.m. The doctor on examination declared the injured dead. At the hospital she lodged the F.I.R. (Ext. 1) with the police officer who had come there on being informed about the incident by Baikuntha (P.W. 3).

She has been searchingly cross-examined on behalf of the accused persons. On scrutiny of her evidence, it has to be said that she has stood the cross-examination well. Her evidence shows that she faced the grim situation arising out of the incident almost single-handed. A number of questions were put about her past life, how she was married to one Bhagirathi Panda of Bishnupur, became a child widow, worked as a midwife before marrying the deceased and that the deceased previously carried the name as Udeyanath Pad and after his marriage with the witness he changed his name to Bhagirathi Panda. It was also suggested to her that the deceased was her nephew (BHANAJA). This part of the cross-examination has no link with the present case and appears to have been an attempt to show that she was a woman of questionable character. The learned Counsel for the appellants tried to highlight the omission of some details regarding the incident, according to them very vital, from the F.I.R., Ext. 1, placing the testimony of P.W. 1, they commented that she tried to develop the case from stage to stage and therefore her evidence lacks credence and should be rejected in toto. We have carefully perused the evidence of the witness and also the F.I.R., Ext. 1. We are not persuaded to accept the above noted submission of the learned Counsel for the appellants. It has to be borne in mind that the F.I.R. was lodged on

the date of the incident (17-7-82), shortly after the injured was brought to the district hospital at Bhawanipatna. As noticed earlier, P.W. 1 had faced the ordeal commencing at about 9.00 p.m. to 10.00 p.m. She must have been under great mental strain then, Ext. 1 shows that she has given a broad picture of the incident. The next point of attack on this witness was regarding omissions said to have been made by her in her statement on examination by the investigating officer under Section 161, Cr.P.C. In this connection, the evidence of the two police officers, P.Ws. 15 and 16, is relevant. The former was attached to Narla Police Station as A.S.I, of Police while the latter was the Circle Inspector, Kesinga Circle and took over charge of investigation of the case on 19-7-82. On the night of 17/18-7-82, when Baikuntha (P.W, 3) went to the police station, P.W. 15 was given the information at his residence in the absence of the officer-in-charge of Narla Police Station. However, this witness before handing over the charge of investigation to P.W. 16 had not examined any witness excepting Pira Majhiani, P.W. 6. From the evidence of P.W. 16 it appears that he examined P.W. 1 on 19-7-82. The omissions/discrepancies in the evidence of P.W. 1 as brought out in the statement of this witness, it appears, were relating to the weapon of assault by Prafulla, instigation by Arjun Das Agarwal to assault Bhagirathi, presence of Baikuntha (P.W. 3) when the deceased was being stabbed inside the house and that Prafulla and Manu were standing at the threshold. P.W. 16 stated that P.W. 1 in her statement before him did not name Radhe, Uttam, Devi and Babuli to have broken the chairs. In fact, she did not state about breaking of tables at all. These omissions, in our opinion, do not touch the core of the incident. Therefore, these omissions do not render her evidence improbable or untrustworthy. The discrepancies in her evidence regarding the exact manner of assault, the parts of the body of the injured which were hit at the time knife blows were given and the number of blows inflicted with the knife are normal since the lady was deposing about the incident after a lapse of about 2 1/2 years. At one stage of the arguments it was suggested by the learned Counsel for accused Dillip that the evidence on record suggests that P.W. 1 might have a hand in the killing of Bhagirathi. We find no substance in the submission.

9. P.W. 2, Kailash Chandra Panda, as noticed earlier, was running a tea-stall since about six months before the incident on the verandah of the hotel of the deceased.

Previously he was running a betel shop by the side of the hotel and after opening the tea-stall he gave the betel shop to his brother Baikuntha Panda (P.W. 3). It appears from his evidence that the witness knew most of the accused persons prior to the occurrence. According to this witness at about 10.00 p.m. on the night of the occurrence he was in his tea-stall. It was drizzling. Since there was no supply of electricity, a lantern was burning in his tea-stall. The witness stated that Devi, Babuli, Uttam and Radhe came out from the house of Hajari and were standing by the side of the bamboo Tati of the hotel asking if two Roti meals would be available. The witness heard the deceased asking his servant, Abhi Senapati (P.W. 7), to open the door. The witness further stated that no sooner was the door opened, all the four above named accused persons got into the hotel. Devi Misra manhandled Bhagirathi. At this stage, F.W. 1 came out from inside the house and separated them. The witness also went in and intervened. According to the witness, Babuli was breaking down the chimneys. P.W. 1 requested the accused persons to calm down and promised to supply them meals. The cook, Bhaskar Panda, supplied the meals. Devi Misra again broke down the chairs and started to burn the electric wires. The witness further stated that the accused persons thrashed the chairs and tables. Then, as the witness stated, he heard Bhagirathi Panda shouting 'MAA LO, BAPALO' (cry of pain) from his sleeping room (SOIBA GHARA) lying to the left side of the hotel. On entering that room, the witness saw Dillip Chand pushing a knife into the belly of Bhagirathi. Kishan Kamani had caught hold of the beard of the deceased. Manu Bangali and Ors. had caught hold of the tuft of beard. When P.W. 1 tried to intervene, Manu pushed her back. According to the statement of this witness, the assailants dragged the deceased to the verandah and Dillip Chand dealt three to four stabbing blows with knife on the deceased on his left eyebrow, left chest near the nipple and the back above the waist. The witness further stated that Arjun Das Agarwal who came out of the house of Hajari gave (?) out to kill the deceased soon. On receiving injuries, Bhagirathi fell down on the verandah. The witness further stated that Pradip Bhanja, Bidya Pole, Dave Sharma, Muly, Motilal Agarwal, Santosh Kamaru, Manu Bangali, Puspak Biswal, Madanlal Agarwal, Kailash Agarwai and Santosh Misra, all accused persons, came out of the house of Hajari Budha and shouted to finish Bhagirathi soon. At the intervention of this witness and P.W. 1, the assailants

refrained from further assault. The deceased was then taken to his bed room and was placed on a cot. The witness proceeded to state that after the injured was brought inside the house, he left through the back door to Suresh Oil Mill to contact the police station on phone, but had to return back since the phone line was dead. By the time he returned to the hotel, it was 2.00a.m. Thereafter P.W. 1 went and arranged a truck of Kedia in which the injured was taken to Narla Hospital. Purna Dhal, Abhi Senapati and Baikuntha Panda accompanied this witness and P.W. 1 in the truck. On the way, Baikuntha Panda got down at the police station, informed about the incident at the police station and returned to the truck. On reaching the hospital, the doctor talked with the injured who was groaning then. At about 4.00 a.m. the doctor advised for removal of the patient to Bhawanipatna. He was then carried in the same truck to Bhawanipatna. They reached the hospital at Bhawanipatna at about 6.00 to 6.30 a.m. the doctor there examined the injured and declared him dead. The witness has stated that they returned to Narla Road with the dead body by evening.

This witness was cross-examined at great length. But nothing material could be elicited to discredit his statement on relevant aspects. The discrepancies between his evidence in Court and his statement under Section 161, Cr.P.C. were sought to be highlighted. From the evidence of the police officer (P.W. 16) who recorded the statements of this witness in course of the investigation on 19-7-82 it appears that the witness had not stated before him about his brother Rabi Panda having a hotel at Titilagarh which was being looked after by him (the witness), that they sold it away; that he served in Bijaya Hotel at Narla Road and later on opened the betel shop by the side of the hotel of the deceased; that he had been running a tea-stall for about four years prior to the incident and not six months as stated in Court. He had also not stated that the accused persons, Devi, Babuli, Uttam and Radhe came from the house of Hajari and came by the side of the bamboo Tati of the hotel. He had not stated before the police officer about other accused persons coming out from the house of Hajari shouting out to beat and finish the injured Bhagirathi soon. He had also not stated about the presence of Manu Bangali or Prafulla either in the bed room or in any part of the hotel. The discrepancies pointed out do not relate to the material aspects of the occurrences, particularly assault by Dillip with knife on Bhagirathi and he being manhandled by the other

accused persons before receiving the knife injuries and after that. As noticed earlier, there is no improbability or imperfection in the statement of this witness to cast a doubt about his truthfulness and acceptability. This witness running a shop on the verandah of the hotel just outside it was in natural courses of things expected to be present at the time of the incident and was therefore competent to speak about it.

10. P.W. 3, Baikuntha Panda, as noticed earlier, is the brother of P.W. 2. He was running a betel shop in front of the hotel of Bhagirathi Panda. Initially, the shop was started by his brother Kailash (P.W. 2). It is in the evidence of this witness that Bhagirathi Panda had his residential house adjoining the hotel. The witness used to sleep in his shop. According to his testimony on the night of the incident at about 10.00 p.m. he had gone to attend call of nature. At that time there was no supply of electricity and the weather was cloudy. The tea-stall of P.W. 2 was open at that time. The hotel of Bhagirathi Panda was closed. From the back side of the hotel where he (the witness) had gone to ease himself, he heard the deceased Bhagirathi shouting 'BAPALO MAA LO' (cry of pain) from his bed room. When the witness rushed to that room he saw Prafulla holding the tuft of hair of Bhagirathi, accused Kishan holding the beard and accused Dillip giving stabbing with a knife on the left chest of Bhagirathi. The witness further stated that the injured was being dragged from his bed-room towards road side (DANDA side). According to him ten to fifteen persons assembled in front of the house of Hajari and accused Arjun Das Agarwal directed them to finish the deceased as soon as possible. Thereafter the witness, wife of the deceased P.W. 1, Kailash P.W. 2 and Bhaskar P.W. 4 lifted the injured and took him to the bed room. The witness further stated that P.W. 1 brought the truck from Kedia in which the injured Bhagirathi was taken to Narla Hospital. The witness, P.W. 1, P.W. 4 and Ors. accompanied the deceased to the hospital. This witness went to Narla , Police Station and gave the information to the A.S.I, of police there. On the advice of the medical officer at Narla Hospital, the injured was removed to Bhawanipatna Hospital where he died.

The cross-examination of this witness too was fairly detailed. The witness identified accused persons Dillip, Madanlal, Motilal Agarwal, Santosh Kamani, Puspak, Kishan and Prafulla in two T. I. Parades are of little value since the

witness knew most of the accused persons previously. The witness stated that he narrated the entire incident to the A.S.I, of police, Pal Babu (P.W. 15) when he informed about the occurrence in the night of the occurrence. In the cross-examination the witness has clearly asserted about stabbing blows inflicted by accused Dillip on Bhagirathi. The discrepancies pointed out between his evidence in Court and the statement made before the investigating officer (P.W. 16) relate to the injured having been stabbed on the road, that Prafulla was pulling the beard of the deceased on the road and Kishan holding the beard of the deceased on the road (the discrepancies being about place). Thus, the discrepancies do not relate to the material aspects of the incident. This witness, as noticed earlier, was having a betel shop just in front of the hotel where he used to sleep at night. Thus, his presence near the hotel at the time of the incident was expected and was probable.

11. P.W. 4, Bhaskar Panda, as noticed earlier, was the cook attached to the hotel of the deceased on the date of the incident. He has stated about different stages of the incident commencing from the entry of Devi, Babuli, Uttam and Radhe into the premises. It is in his evidence that on the night of the incident at about 9.00 p.m. when they were closing the hotel, two persons enquired if meals would be available. Then Babuli and Devi came inside the hotel at first and asked for meals. The witness served meals to these persons. They immediately broke the plates saying that they had taken enough of such meals. Then Radhe and Uttam came into the hotel. When Uttam, Radhe and Devi caught hold of the deceased, P.W. 1 intervened and promising to serve meals to the accused persons, she took her husband inside the old hotel. The witness also stated that thereafter accused Dillip entered inside the old hotel and stabbed on the belly of Bhagirathi with a knife. At that time this witness was in the new portion of the hotel. When Bhagirathi cried out 'MARIGALI' (I am dying), the witness rushed towards him. The witness saw accused Uttam holding the hair of the deceased. Accused Radhe was also holding him. Accused Babuli and Ors. threatened to assault the witness and Ors. who intervened. I Then accused Dillip gave another stab blow on the waist of Bhagirathi with a knife inside the hotel. The witness further stated that at that time ten to twelve persons came out of the house of Hajari Budha armed with lathis and accused Arjun Das Agarwal was telling to finish him (deceased) soon. The

persons who came out of the house of Hajari Budha assaulted the deceased on road in front of the hotel and thereafter ran away from the place. Then the witness and Ors. brought the injured inside the hotel and removed him in a truck first to Narla Hospital and thereafter to Bhawanipatna Hospital. The doctor at Bhawanipatna declared him dead.

In his cross-examination the witness stated that he used to work in the hotel from morning till 10 O'clock in the night and after that he used to sleep there. The witness further stated that the old hotel, the new hotel and other rooms are within one premises. According to the witness, the stabbing with knife was given in the bed room of the deceased. It is in his Statement that the deceased was dragged to the road by the culprits. All servants were present in the new hotel during the time of the incident. From his cross-examination it appears that the witness was closely questioned about the wearing apparel (Lungi) of the deceased when he was taken to the hospital at Narla Road and then to Bhawanipatna. The suggestion appears to have been made that the Lungi was changed on the way when the injured was being taken from Narla Hospital to Bhawanipatna. The witness also stated that the son and daughter of P.W. 1 were sleeping in the bed room. The witness woke up and saw the occurrence. About the discrepancies in his statement in Court with his statement made before the police, it appears from the evidence of P.W. 16 that he did not state that Devi, Babuli, Uttam and Radhe came from the house of Hajari and stood by the side of the bamboo Tati of the hotel, that those four persons caught hold of the deceased and were trying to assault him in the old hotel. The witness stated before P.W. 16 that Radhe, Uttam Devi and Babuli came together to the hotel. He also did not state that Dillip entered inside the old hotel and stabbed at the belly of the deceased by knife. The contradiction is regarding the place and the portion of the body. The witness had also not stated before the investigating officer that Dillip gave another stabbing blow on the waist of Bhagirathi by means of a knife inside the hotel and he was dragged to the door of the old hotel by accused Devi, Uttam and Radhe. From the aforesaid discussions, it is clear that the discrepancies in the evidence of the witness in Court with his statement before the investigating officer relate to the place at which different stages of the incident took place, the particular part on which assault by knife was given at different times and the activities by the accused persons Uttam, Radhe,

Devi and Babuli at different stages of the incident. The discrepancies, however, do not affect the core of the incident as such. We find no justification for the submission of the learned Counsel for the appellants that his evidence should be thrown out altogether.

12. P.W. 15, Chanchala Debi, is the mother of girl Kausalya and the boy Abhi Senapati. She states about the illegal pregnancy of her daughter Kausalya by accused Arjun Das Agarwal, her demand of Rs. 300/- made from Arjun for medical expenses of abortion, refusal of Arjun to pay any money and the deceased and some other persons of the locality giving her assistance. She has not stated anything about the incident giving rise to the present case.

13. P.W. 6, Pira Majhiani, was the maid servant engaged in the hotel at the time of the incident. She stated that the occurrence took place at about 9.00 to 10.00 p.m. on a Saturday. While she was washing utensils in the backyard and the deceased was in the hotel writing accounts and Abhi Senapati was by his side giving the names of the customers those had taken meals in the hotel, she heard a hulla in hotel, came there and saw some people taking meals. She expressed her inability to state anything further about the incident. She was declared hostile and cross-examined by the prosecution. In cross-examination she stated that F.W. 2 had a tea-stall on the verandah of the hotel some days prior to the occurrence. He did not have any house or place of residence and was staying in his tea-stall.

14. P.W. 7, Abhi Senapati, the boy engaged in the hotel stated about the first part of the incident in a fairly detailed manner. According to him, on the date of occurrence at about 10.00 p.m. while the deceased was writing accounts in the new hotel and he was telling him the names of the customers who had taken meals that day. Uttam and Devi came and asked if meals would be available. They were told that Chapati meal was not available, but they could have rice meals if they wished to. The witness opened the door. These two persons came in and Bhaskar served them rice meals. They asked for a torchlight to the Telugu boy, Patnaik. When Patnaik refused telling that it did not belong to him, they assaulted him. When the deceased intervened, accused Babuli and Radhe rushed into the hotel. Then accused Uttam, Devi and Babuli started pulling off the electric wirings.

At that time P.W. 1 came in and 'consoled those accused persons saying that she would supply them meals to their liking and requested them not to pick up quarrel. The accused persons threw away the meals and damaged the plates. P.W. 1 took the deceased to the old hotel room and left him there. The accused persons after damaging ' the plates started breaking chairs and tables in the hotel. At this stage Kailash and Baikuntha came in. Thereafter the witness stated that out of fear he went out through the back door and did not see further happenings in the hotel. This witness was also declared hostile and cross-examined by the prosecution.

15. P.W. 8, Kausalya Dei, the girl whose illicit pregnancy through Arjun Das Agarwal was, according to the prosecution, the root cause of the incident has stated about this aspect of the case.

These are the material witnesses examined in the case on behalf of the prosecution.

16. The contentions raised by the learned Counsel for the accused persons can be broadly classified as follows:

(1) The prosecution has not examined all material witnesses and, therefore, it has failed to establish its case.

(2) The version of the eye-witnesses suffers from several discrepancies on material particulars which render their evidence totally unacceptable. .

(3) In the F.I.R., Ext. 1, the informant (P.W. 1) has omitted several aspects of the case which casts a doubt about the prosecution case.

(4) Assuming that the conviction of the appellants is upheld on the facts and in the ' circumstances of the case, the sentence of death imposed on accused Dillip Kumar Chand is unwarranted.

The learned Counsel for the State submitted -that the order of conviction and sentence passed by the Sessions Judge is well-founded and should be upheld. A large number of decisions were cited by the learned Counsel for both parties in support of their respective contentions. Most of the decisions relate to the question

of appreciation of evidence of witnesses in different situations. It is a well accepted principle that in criminal cases no hard and fast rule can be laid down for appreciation of statements of the witnesses. It will depend on the facts and circumstances of each case. However, some broad principles which have been accepted as providing proper guidelines in the matter are : that the prosecution is not bound to examine all the witnesses in a case, it may choose to examine such of the witnesses whom it considers relevant and material for the purpose of unfolding its case; it is not the quantity of evidence that is material, but its quality; what is relevant is whether the witnesses examined are reliable and trustworthy and their version acceptable and not which of the witnesses have not been examined in the case. If on examination of evidence on record it is found that the prosecution has deliberately suppressed material witnesses, or has failed to unfold the entire story, then it may be held that the trial has not been a fair one. It is also an accepted principle that the first information report need not state every minute detail about the incident, It would be sufficient if it contains a gist of the incident not omitting the material aspects of it. When the report is lodged by a person claiming to be an eyewitness to the occurrence, it is expected that he/she would not omit to state a striking feature about the incident. If such infirmity is found in the first information report, then the version of the eye-witness who lodged it is liable to be rejected. Regarding appreciation of evidence of the eye-witness, interestedness is not by itself sufficient to discard his testimony. Simply because there are discrepancies in the evidence of the witness and his statement before the investigating officer in course of investigation, that would not also be sufficient to throw out the evidence unless it is shown that the discrepancies go to the very root of the matter touching the core of the material aspect of the incident. Indeed such discrepancies would show that the witness is not repeating the same version in a mechanical and parrot-like manner. It would be sufficient to notice some of the decisions enunciating the principles summarised above.

This Court in the case of *State of Orissa v. Thakur Singh Munda*, reported in (1972) 38 Cut LT 564, considering the point regarding omission of material particulars in the F.I.R. held:

The First Information Report is not accepted to be the encyclopaedia of the prosecution case.... In what circumstances adverse inference may be drawn for omission of a material particular from the First Information Report would depend upon the facts of the case.

A Division Bench of this Court in the case of the State v. Kanhu Charan Barik 1983 Cri LJ 133, considering the same question observed:

The F.I.R. is not required to contain all the facts and circumstances that the informant might know. Even if the same incident is observed by a group of persons simultaneously, reports lodged by each of them separately would not be identical. The contents would vary from person to person depending upon the importance attached by the informant to each fact or circumstance, to the details and upon his estimate of relevancy. The F.I.R. is lodged with a view to setting the investigative process in motion and not for the purpose of setting down on paper all known facts and circumstances about the incident. There should be a common sense approach to such matters while evaluating the criticism levelled against an F.I.R. In the circumstances non-mention of a 1 fact was not of any consequence.

The Surpeme Court in the case of Amar Singh v. State of Haryana : 1973 CriLJ1409 , dealing with the credibility to be attached to the evidence of interested witnesses laid down:

Non-examination of disinterested neighbours residing near the place of occurrence is no ground for disbelieving the eye-witnesses even though they are related to or interested in the complainant when there is no evidence to show that any person other than the eye-witnesses saw the occurrence.

In the case of Narpal Singh v. State of Haryana : 1977 CriLJ642 , the Supreme Court has held that the circumstance that name of a witness examined at the trial was not given in the first information report, though of some relevance would not be sufficient by itself to entail rejection of his evidence. The Court observed:

The real question for determination is not as to what is the effect of non-examination of ! certain witnesses as the question whether the witnesses

examined in Court on sworn testimony should be believed or not. Once the witnesses examined by the prosecution are believed by the Court and the Court comes to the conclusion that their evidence is trustworthy, the non-examination of other witnesses will not affect the credibility of these witnesses.

In the case of *Matadin v. State of U.P.* : 1981 CriLJ740 , the Supreme Court dealing with effect of omission in statements to the police observed:

The statement given by the witnesses before the Police are meant to be brief statements and could not take the place of evidence in the Court. Where the omissions are vital, they merit consideration, but mere small omission will not justify a finding by a Court that the witnesses concerned are self-contained liars.

The Supreme Court in the case of *State of Maharashtra v. Krishnamurti Laxmipati Naidu* : 1981 CriLJ9 , dealing with the case of drawing adverse inference against prosecution for non-production of material witness observed:

Where all the circumstances vouched by the eye-witnesses unerringly and irresistibly led to the conclusion that the two contusions and the head injury were received by the accused after he had stabbed deceased, the non-production of any witness loses its significance much less can it afford a ground for drawing an adverse inference against the prosecution.

In the case of *Krishna Pillai Sree Kumar v. State of Kerala* : AIR 1981 SC1237 , the Court dealing with this point observed:

The prosecution evidence no doubt suffers from inconsistencies here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies, etc. go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases.

In the case of *Maqsoodan v. State of U.P.* : [1983]2SCR45 , the Court dealing with the appreciation of evidence in criminal trial held that improvements made by

witnesses and variations in their earlier and latter statements are not by itself sufficient to hold their testimony to be infirm. It is the duty of the Court to remove the grain from the chaff. The Court further observed that it is not the number of witnesses examined nor the quantity of evidence adduced by the prosecution that counts. It is the quality that counts.

A similar view was expressed by the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* : 1983 CriLJ1096 , wherein the Court observed:

Overmuch importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake ' the basic version of the witnesses, therefore, cannot be annexed with undue importance, More so when the all important 'probabilities factor' echoes in favour of the version narrated by the witnesses.

The Supreme Court in the case of *State of Uttar Pradesh v. Hari Ram* : 1983 CriLJ1638 , dealing with appreciation of evidence of interested , witnesses observed that interestedness is no ground to discard the testimony of the witness. In that case, the Court held that merely because the witness was a class fellow of the victim that was not sufficient ground to throw out his testimony, more particularly when he was common friend of both victim and one of the accused.

In the case of *State of U.P. v. M. K. Anthony* : 1985 CriLJ493 , it has been held :
'Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to

the main incident because power of observation, retention and reproduction differ with individuals....

The Supreme Court in the case of State of U.P. v. Ballabh Das : 1985 CriLJ2009 , dealing with appreciation of evidence, has observed:

There is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest of or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. In a faction ridden village, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses. Once it is found by the Court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot persuade the Court to reject the prosecution case on that ground alone.

17. We have carefully perused the evidence of the eye-witnesses and the other material witnesses and assessed the same in the light of the principles enunciated in the decisions noted in the foregoing paragraph. It is clear from the evidence that P.Ws. 1 and 4 were living in the premises where the incident took place. P.Ws. 2 and 3 were having their shops either on the premises or very close to it. Therefore, all of them were natural witnesses to the occurrence and in normal circumstances were expected to see the incident. There is no acceptable material to show that any of them had any serious animus against the accused persons which would prompt them to rope in the accused persons falsely in this case. It is in the evidence of these witnesses that when the incident took place inside the hotel, excepting the informant, the persons employed in the hotel and P.Ws. 2 and 3, no outsider was present. Therefore, the criticism levelled against the prosecution that it has failed to examine other independent witnesses to the occurrence has no basis. No doubt there are discrepancies and omissions here and there in the

version of the eye-witnesses, but in our view the discrepancies do not go to the root of the matter touching the core of the material aspects of the prosecution case. In this regard, it has to be borne in mind that the incident took place in a dark rainy night when there was no supply of electricity in the area. In such a situation it is but natural that the eyewitnesses were not able to see each and every part of the incident in minute details and their versions do not exactly tally with each other. On perusal of the evidence of the witnesses, we find that there has been confusion about description of the different rooms in the premises where the incident took place. It appears from the sketch-map prepared by the investigating officer and the evidence of the witnesses that there were three main rooms; one new hotel room, one old hotel room and one bed room. In addition to these, there was a kitchen and a cowshed. Different witnesses have described the rooms in which the incident took place differently. This aspect was highlighted in course of arguments by the learned Counsel for the appellants. But on scrutiny of the evidence, we find that all the witnesses have consistently stated that the stabbing on Bhagirathi first took place in the room adjacent to the new hotel where he had been taken after Devi, Uttam, Babuli and Radhe manhandled him in the new hotel room. We do not consider the discrepancies in the description of the rooms a sufficient reason to cast a doubt about veracity of their evidence, far less to discard their evidence altogether.

On the aforesaid discussions, we are not persuaded to accept the contention raised on behalf of the appellants that the evidence of the eye-witnesses should be thrown out altogether, or that the prosecution case is liable to be rejected since it has failed to examine all the material witnesses. We are also not able to accept the contention that the evidence of P.W. 1, the informant, suffers from any infirmity since she omitted very vital and material aspects of the case while lodging the FIR. Ext. 1. On close scrutiny of the evidence of P.Ws. 1 to 4, we find that they are competent, trustworthy and reliable witnesses and the Sessions Judge rightly placed reliance on their evidence. Further, their ocular evidence finds substantial corroboration from the medical evidence also.

18. There is unimpeachable evidence that accused Uttam, Radha, Debi and Babuli had entered into the hotel, manhandled the deceased and caused

destruction and damage to properties inside the hotel; that Dillip Kumar Chand stabbed the deceased with a knife first in the bed-room and thereafter on the verandah and on the road and that Kishanlal Kamani and Frafulla Kumar Pradhan were holding the deceased when some of the blows were given by Dillip. Hence, the conviction of Uttam, Radhe, Devi and Babuli under Section 451 and 427 of the Penal Code is unassailable. On the findings, we modify the conviction and convict Dillip Kumar Chand, Kishanlal Kamani and Prafula under Section 302 read with Section 34 of the Penal Code.

There is no evidence that accused Arjundas Agarwal entered the premises. It is alleged that he was standing near the house of Hajari Budha and incited, others to finish the deceased. Pursuant to the aforesaid act, it is alleged that the deceased was assaulted with lathis. The story is not corroborated by the medical evidence. The assault by Dillip with the knife preceded the aforesaid act, therefore, the conviction of Arjundas Agarwal under Sections 302/149 I.P.C. is unsustainable. There is no evidence worth acceptance implicating Manmohan alias Manu Bangali in the commission of any offence. His conviction under Sections 302/149 I.P.C. is, therefore, unsustainable.

19. Then remains for consideration the question of sentence. As noticed earlier, accused Dillip Kumar Chand has been sentenced to capital punishment by the Sessions Judge. The principle regarding imposition of capital punishment was considered by this Court in the case of *The State v. Kanhu Charan Bank*, reported in 1983 Cri LJ 133, wherein referring to the decision of the Supreme Court in the case of '*Bachan Singh v. State of Punjab* : 1980 CriLJ636 , this Court observed as follows:

Under Section 354(3) of Cr. P.C. life imprisonment for murder is the rule and capital sentence the exception, to be resorted to for reasons to be stated. In olden times emphasis was on crime alone. The recent trend in penology has shifted the emphasis. Now both crime and the criminal are equally material. Shortly put, death sentence would be warranted if the murder is 'diabolically conceived and cruelly executed, having regard to the weapon used and the manner of their use, the horrendous features of the crime and helpless state of the victim, and the like,

which steel the heart of the law for a sterner sentence' and also where murder has been committed after previous planning and involves extreme brutality. However, presence of ameliorating circumstance or mitigating factors would call for lesser penalty.

In another recent case, the State v. Aru Pradhan, reported in 1985 Cri LJ 161 (Orissa), considering the same question this Court observed:

In a case of murder, to sentence the convict to undergo imprisonment for life is the rule and to impose the death sentence is an exception. The legislature wants the court of trial to record special reasons for passing the sentence of death. Killing is cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravation that special reasons can legitimately be said to exist for passing the extreme penalty of the law.

Considering the case against this accused in the light of the principles aforesaid, we are unable to agree with the Sessions Judge that this is an exceptional and rarest of rare case deserving imposition of capital sentence against accused Dillip. We would, therefore, vacate the sentence of death passed against accused Dillip and sentence him to imprisonment for life instead. The sentence imposed against the other appellants in our view needs no modification.

20. In the result, the appeals filed by Arjun Das Agarwal and Manmohan Das are allowed and they are acquitted of the charges framed against them. The appeal by Dillip Kumar Chand is allowed in part. He is convicted under Section 302/34 I.P.C. and sentenced to undergo rigorous imprisonment for life. The death reference is discharged. The appeals filed by Prafulla Kumar Pradhan, Kishanlal Kamani, Radheshyam Agarwal, Devi Prasad Misra, Sudhansu Sekhar Das alias Babuli and Uttam Kumar Behera are dismissed.

R.C. Patnaik, J.

21. I agree.

