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Court : Orissa

Decided On : Jul-02-1984

Reported in : 1985CriLJ161

Judge : B.K. Behera and ;P.C. Misra, JJ.

Appellant : The State

Respondent : Aru Pradhan

Judgement :

B.K. Behera, J.

1. Hanging in the balance between life and death with an order of conviction recorded by the Court of Session against him Under Section 302, Penal Code (for short, the Code) with a direction that he be hanged by the neck till he is dead, the accused-convict (described hereinafter as the 'appellant') has appealed against the judgment and order. The learned Sessions Judge has made 'a reference to this. Court for confirmation of the sentence of death. The death reference and the criminal appeal have been heard together and will be governed by this judgment.

2. The case of the prosecution and the plea of the appellant have been set out in details in the judgment of the trial court.

There had been land dispute between the appellant and his mother Labanya, who also figured as a co-accused being charged of abetment of the commission of the offence of murder by the appellant, on the one hand and Hadiani alias Urbasi Pradhan (hereinafter described as the 'deceased'), born through step-mother of the appellant, on the other, over the properties- left by Kaira Pradhan, his father. After the deceased successfully instituted a suit against the appellant and obtained a decree and had obtained an ex parte order of restraint against the appellant and the co-accused in a proceeding Under Section 144, Cr PC and after having taken possession partially of the lands she was entitled to on 18-1-1983 and the rest of the lands was to be demarcated on the day following, the appellant, it was alleged, on the day following, i.e. on 19-1-1983, at about 10 a.m., attacked the deceased while she was moving on the road at village Talagad where she had come, under the instigation of the co-accused to kill her, caught hold of the hairs of the deceased who had been carrying her child aged about one and a half years as a result of which she fell down and the appellant pressed her chest and cut her throat by the Katari he was holding which resulted in the death of the deceased. The appellant left the place with the Katari stained with blood which was witnessed by Banshidhar Maharana (P.W. 7), who had his black-smith shop nearby and Udayanath Sahu (P.W. 8), who had come to that place to have his Tangia sharpened, besides Chakra Sahu (not examined), who was also in the blacksmith shop and there, the appellant made an extrajudicial confession before them that he had cut the throat of the deceased and that he had been going to the police station. The occurrence had been witnessed by four co-villagers of the appellant, namely, Asha Pradhan (P.W. 2), Kumar Sahu (P.W. 4), Sudhakar Behera (P.W. 5) and Prasanna Sahu (P.W. 6). The child of the deceased was brought and kept by P.W. 2 after her murder. On receiving information from Nishanath Sahu (P.W. 1) that the appellant had killed the deceased, the Grama Rakshi (P.W. 1), a resident of Bandanposi, who was also the Grama Rakshi for this village, came to the village of the appellant, enquired from some villagers as to what had happened and then went and lodged the first information report (Ext. 1) at the Talcher Police Station on which basis investigation was taken up by the Officer-in-charge (P.W. 13) who, in course of investigation, arrested the appellant and the co-accused and seized a banian (M.O. I.) with stains of blood in it from the person of the appellant on 21-1-

1983. A lathi (M.O. II) had been seized from the verandah of the appellant's house. On the completion of investigation, a charge-sheet was placed and the appellant and the co-accused were prosecuted.

3. The appellant stood charged Under Section 302 of the Code for having committed the murder of the deceased and the co-accused stood charged Under Section 302 read with Section 114 of the Code for abetment of the commission of the offence of murder. To bring home the charges, the prosecution had examined thirteen witnesses. The plea of the appellant and the co-accused was one of the denial and false, implication. The appellant had set up a plea of alibi and his case was that he was away from his village on the date of occurrence. Three witnesses had been examined for the defence.

4. On a consideration of the evidence, the learned Sessions Judge accepted the case of the prosecution in so far as the appellant was concerned and convicted him Under Section 302 of the Code and sentenced him to death. The co-accused was acquitted owing to paucity of evidence against her.

5. Mr. Rath has contended for the appellant that the order of conviction cannot be sustained on the false and tainted evidence relied on by the prosecution. It has been submitted by him that it is not one of those rarest of rare cases where death sentence is to be imposed. Mr. Ray, the learned Additional Government Advocate, has, however, submitted that the order of conviction is well founded and in view of the very cruel nature of the crime, death sentence is the appropriate punishment. It is not disputed at the Bar and indeed, it cannot be, because of the large volume of evidence which need not be catalogued in this judgment, that there had been land dispute between the deceased on the one hand and the appellant and the co-accused on the other. There is no doubt from the evidence that all was not well between the deceased on the one hand and the appellant and the co-accused on the other because of land dispute and on the day prior to the day of occurrence itself, some lands, which the deceased was entitled to have, had been demarcated by the Revenue Inspector (P.W. 12) and the evidence of P.W. 1 would show that the rest of the lands were to be demarcated by the Reyenue Inspector on the next day, i.e., on the day of occurrence. This was said to be the motive for the

commission of murder. Motive, however adequate, cannot sustain a criminal charge and absence of proof of motive is of no consequence if there is clear and cogent evidence of the commission of an offence against the accused.

6. At the trial, the prosecution relied on the evidence of four witnesses to the occurrence (P.Ws. 2 and 4 to 6) of whom P.W. 4 did not support it and was put leading questions Under Section 154, Evidence Act, and was confronted with his statements made in the course of investigation implicating the appellant as the author of the crime which he disowned. Besides, reliance had been placed on the evidence of P.Ws. 7 and 8 with regard to the extrajudicial confession said to have been made by the appellant while he had been armed with a bloodstained Katari. There is, in addition, the recovery of M.O. I stained with blood from the person of the appellant two days after the occurrence, which, on chemical and serological test, has been found to contain human blood. There is the evidence of the doctor (P. W. 3) who had conducted the autopsy and whose evidence with regard to the nature of the assault corroborates that of P.Ws. 2, 5 and 6.

7. We notice on a perusal of the evidence of these three witnesses (P.Ws. 2, 5 and 6) that they have given a clear and consistent version with regard to the occurrence. According to these witnesses, while the deceased was moving on the road with her child aged one and a half years, the appellant attacked her being armed with a Katari, pulled her hairs, attempted to cut her throat by the weapon he was holding and when, in the process, the deceased fell down, he cut her neck with the Katari in spite of the fact that the deceased entreated the appellant by giving out that she would not claim the land and that she would eat his night-soil and drink his urine. The deceased died on the spot. It is in the evidence of P.W. 2 that some time after the occurrence, she carried away the small child of the deceased. After all, what could the helpless child do. A simple child that lightly draws its breath and feels its life in every limb, what does it know of death.

8. P.W. 4 had turned hostile for which he was put leading questions Under Section 154, Evidence Act, and confronted with the statements made by him in the course of investigation clearly implicating the appellant as the killer of the deceased. A statement made in the course of investigation is no evidence. It appears to us that

P.W. 4 had given a go-by to the statements made by him during the investigation and had suppressed the truth.

9. Mr. Ray has brought to our notice that except a self-serving suggestion made to P.W. 2 regarding her enmity with the appellant which has also found a place in the statement recorded by the trial court, there is no evidence to show that P.W. 2 had any axe to grind against the appellant. Being co-villagers of the appellant, P.Ws. 2, 5 and 6 are natural and competent witnesses. At the time of the murderous assault, P.W. 2 was following the deceased with a jar to get water. P.W. 5 was feeding his bullocks nearby when he heard the cries raised by the deceased and saw the occurrence and P.W. 6 was standing near the cowshed of P.W. 5. There is no reason as to why these three witnesses should be hands in glove with the prosecution and falsely involve the appellant in such a grave crime. True, disinterested evidence is not necessarily true and interested evidence is not necessarily false. It is not always possible for an accused to say as to how and why some witnesses have deposed against him and merely because no reason has been assigned as to why some witnesses have come forward to depose against the accused, their evidence is not to be glibly accepted. In this connection, reference may be made to the observations of our Lord the Chief Justice of India in : 1981 CriLJ325 Shankarlal Gyarasilal v. State of Maharashtra, to the following effect at P. 330 of Cri LJ :

Our judgment will raise a legitimate query : If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of. unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions....

In the instant case, however, besides being disinterested witnesses, P.Ws. 2, 5 and 6 have given a clear, cogentand consistent version about the occurrence and their version finds support in the evidence of the doctor (P.W. 3) who had noticed injuries on the neck which could be caused by a sharp cutting instrument, as deposed to by the witnesses to the occurrence.

10. Much advantage has been sought by the defence of a statement made by the doctor that death had taken place about forty hours prior to his postmortem examination which had been conducted at 4.25. p.m. on 20-1-1983 and it has been contended that accepting the medical evidence in this regard, the occurrence had taken place some time during the night of the 18/19-1-1983 and not at about 10 a.m. on 19-1-1983, as sought to be established by the prosecution. We are not impressed by this argument as it would not be possible for a doctor to say with mathematical precision as to when actually the death had taken place prior to the autopsy and merely because he has in terms, stated that death had taken place within forty hours, the evidence of P.Ws. 2, 5 and 6 that they had witnessed the occurrence at about 10 a.m. on the 19th is not to be brushed aside. As has been observed and held by the Supreme Court recently in the case of Punjab Singh v. State of Haryana : 1984 CriLJ921 , if direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence.

11. The learned Counsel for the appellant has invited our attention to an extract from Modi's Medical Jurisprudence, Twentieth Edition and it has been submitted that the time of death as deposed to by the witnesses to the occurrence cannot be accepted as the Medical Officer had found rigor mortis (noted in the post mortem report) and as noted by the author, it lasts for two to three days. We do not see any reason as to how the evidence of P.Ws. 2, 5 and 6 is to be discarded on this ground. That apart, as has rightly been submitted by Mr. Ray for the State, on the principles laid down in : [1957]1SCR854 Bhagwan Das v. State of Rajasthan to which reference has been made and reliance has been placed by this Court in the case of Chudiamal Jain v. State 1984 57 Cut LT 81, it is not a satisfactory way of disposing of the evidence of the medical witness by discrediting it on the ground that his statements did not agree with the opinions expressed in the text books by authors on medical jurisprudence without bringing such extracts to his notice. Another decision of the Supreme Court in this regard has also come to our notice. It has been observed in : 1980 CriLJ408 Kusa v. State of Orissa, that no reliance can be placed on the observations expressed by authors unless those observations are put to the doctor in his cross-examination. We thus reject this contention raised on behalf of the defence.

12. As earlier observed by us, the evidence of the doctor with regard to the nature and cause of the injuries does tally with the evidence of the witnesses to the occurrence (P.Ws. 2, 5 and 6). Medical evidence has corroborative value. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries having taken place in the manner alleged by the eye-witnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. See : 1983 CriLJ822 Solanki Chimanbhai Ukabhai v. State of Gujarat. In the case before us, there has been no conflict between the ocular testimony and ythe medical evidence.

13. Relying on the evidence of the doctor that death had taken place about forty hours prior to the post mortem examination and on the basis of the evidence of P.W. 1 that he had seen marks of dragging of the dead body on the ground which, however, had not been noticed by the Investigating Officer (P.W. 13) as would appear from his evidence and in the absence of (specific evidence from the side of the prosecution that there had been a struggle or fracas on the spot, it had been contended by Mr. Rath for the appellant that the deceased was done to death by some unknown assailant or assailants during the previous night and that her dead body had been thrown on the village road. Marks of dragging could be noticed even if the dead body had not been dragged from any place and in the course of a struggle for life at the time of the murderous assault. It would be noticed from the evidence that the dead body of the deceased was lying naked with a piece of cloth covering her body. The evidence of the witnesses to the occurrence was that the appellant had caught hold of her hairs and that thereafter the deceased fell on the ground and the appellant cut her neck several times which resulted in her death and in the course of the occurrence, the deceased had entreated the appellant not to do so. There must naturally have been some struggle and resistance on the part of the deceased and, therefore, there could be marks of dragging on the spot. If the deceased had been done to death and her dead body had been thrown on the village road during the night after dragging her dead body, the dead body of the

murdered person would have been noticed by the villagers in the early hours of the morning. There has been no such evidence. The theory that the deceased had been killed during the night and that during broad day light, her dead body was brought and thrown by the assailant or assailants or by other persons in the village road appears to us to be theoretically unitelligible and practically bewildering as no one would venture to do such an act during the day time within the view of the villagers to create evidence against oneself.

14. It has strenuously been urged by Mr. Rath that non-mention of the names of P.Ws. 2, 5 and 6 in the FIR as witnesses to the occurrence would tell its own tale especially when the names of others had specifically found a place therein and in addition, although P.Ws. 2 and 5 had claimed to have informed some other co-villagers about the occurrence, there was no evidence in support of it and, therefore, the evidence of these three witnesses should be thrown out. We are unable to accept this contention for the following reasons.

15. The FIR is not an encyclopaedia It is not the be all and end all of a case. Such a report sets the law in motion and at the stage of investigation, the details can be gathered and filled up. It must also be kept in mind that the first information report, in the instant case, had been lodged not by a witness to the occurrence, but by the Grama Rakshi (P.W. 1) who, on receiving information from P.W. 1 that the deceased had been done to death by the appellant, came to the village in his uniform, made some inquiries from some of the villagers which took some time, as would be clear from the evidence of P.Ws. 2 and 5 that P.W. 1 was on the scene of occurrence till about 4.00 p.m. and thereafter, he went and lodged the FIR at 5.30 p. m. at the police station. As would appear from his evidence, he did ask the villagers as to why they did not go to report at the police station and they gave out that they did not dare to report as they could not 'supply proof. It was thus that thereafter P.W. 1 went and lodged the FIR at the police station. This attitude of the villagers is understandable. Of the three witnesses to the occurrence, P.W. 2 had certainly taken courage not only to witness the occurrence, but had also tried to intervene verbally and after the deceased was done to death, she had brought away the baby of the. deceased She had informed her husband and P.W. 1 about what she had seen P.W. 1 did say in his evidence that P.W. 2 had informed him

that the appellant was the assailant and that he had killed the deceased. P.W. 2 had kept the small baby and it was not expected of her to have gone and reported at the police station. There was the evidence of P.W. 5 that when he wanted to intervene, the appellant had shown the Katari at him and he had run away out of fear. The evidence of P.W. 6 was that he was not present in village when P.W. 1 came as he had taken his she-bufallo for tending and returned to the village at about sun-set time. One of the co-villagers, namely, P.W. 1, had informed P.W. 1 about the occurrence.

The Investigating Officer had visited the spot on the day of occurrence itself. P.Ws. 2 and 5, had been examined by him in the course of investigation in the evening of the same day. P.W. 6, the other witness to the occurrence, had been examined during the investigation on 21-1-1983 and the evidence of the Investigating Officer that this delay occurred as P.W. 6 was not available earlier for his examination had not been assailed in his cross-examinatioa There had thus been no delay in the examination of these principal witnesses to the occurrence and in the circumstances of the case, it could not be said that these three witnesses had made belated disclosures and that, 'therefore, their evidence did not deserve credence. The evidence of P.W. 2 was not to be thrown out on the ground that although she had claimed to have informed P.W. 9 about the occurrence, P.W. 9 had not stated so in this evidence, nor was the evidence of P.W. 5 to be discarded on a similar ground in that while according to him, he had described the occurrence to P.W. 1 in the village, P.W. 1 had not stated specifically about this either in the first information report or in his evidence in the court In the very nature of things, when P.W. 1 came to the village of occurrence, he would have enquired from a number of persons and it would not be possible for him to specifically give the names of all the persons in the first information report or in his evidence in the court.

16. As earlier indicated by us, P.W. 1 was not supposed to take up a full enquiry into the matter before lodging the first information report For the limited purpose of verifying as to whether the information he had received from P.W. 1 was correct P.W. 1 came to the village of occurrence and in our view, justifiably so, to make some enquiry before lodging the report It had not been stated in the first

information report that the persons specifically named by him were witnesses to the occurrence. He had stated that he had ascertained from Dharani Sahu (P.W. 9), Padana Sahu, Sarat Sahu, Musa Behera and other persons of the village and came to know that the appellant had killed the deceased by means of a Katari and had gone away somewhere. From this statement it could not be assumed that the persons named by him were witnesses to the occurrence. No adverse inference could be drawn against the prosecution for non- examination of all these witnesses on the ground, that their evidence was unreasonably withheld. One of the named persons Dharani Sahu had been examined and his evidence would show that he was not a witness to the occurrence.

17. In this connectioa some pronouncements of the Supreme Court have come to our notice. In : 1971 CriLJ1540 Bankey Lai v. State of UP a similar contention because of non-mention of some facts in the FIR given by the head constable after visiting the place of incident was raised but negatived.

It has been laid down by the Supreme Court in the case of Narpal Singh v. State of Haryana : 1977 CriLJ642 that the mere fact that the name of the eye-witness is not given in the FIR though of some relevance, would not be sufficient by itself, to entail rejection of the testimony of the witness.

In : 1981 CriLJ752 Pralhad v. State of Maharashtra, it was urged on behalf of the appellant that the evidence of the two eye-witnesses was to be discarded as their names did not find a place in the first information report Their Lordships of the Supreme Court observed and held at P. 753 of Cri LJ :.... The first informant was not an eye-witness at all and there is no evidence to show that these two witnesses had disclosed the name of the assailant to the informant The definite case put forward by the two witnesses in Court is that immediately after they saw the assault, they were given serious threats by the accused and other villagers also advised them not to intermeddle with the affairs of the deceased and the appellant This explains the silence of the witnesses. Thus, there being nothing to show that these witnesses had mentioned the names of the assailant to the informant Tulsi Das, they cannot be disbelieved on the ground that their names had not been indicated in the FIR.

In the instant case, too, there was no evidence that P.Ws. 2, 5 and 6 had given out the names of the eye-witnesses to P.W. 1.

18. For the reasons aforesaid, we are of the view that the evidence of P.Ws. 2, 5 and 6 was not to be thrown out because their names had not been mentioned in the FIR and it could not be said that there had been belated disclosure with regard to the occurrence by these three witnesses.

19. Mr. Rath has contended that the evidence of P.Ws. 2, 5 and 6 is not to be accepted as the evidence on record clearly establishes the plea of alibi raised by the appellant that he was absent from the village much earlier to the occurrence and also on the 18th when the Revenue Inspector had visited the spot and on the 19th, the day of occurrence. In this connection, our attention has been invited to the evidence of P.W. 3 examined on his behalf. The notice to be served on the appellant had not been served on him, on the 18th as would appear from the evidence of P. Ws. 1 and 12 and the evidence of P.W. 1 was that on the day the Revenue Inspector made identification of the land, i.e., on the 18th, he did not see the appellant. It is pertinent to note that not even a suggestion had been made by the defence to any of the co-villagers of the appellant regarding this belated plea of alibi raised by him during the cross- examination of the Investigating Officer and in his statement at the trial after the prosecution closed its case. P.W. 3. who had been examined to substantiate this plea, had deposed thus :

I know the accused persons in the dock. Aruna is my relation. So he was in visiting terms tp my house since before he was taken into jail in connection with this case. More than one year back accused Aruna was living in my house before his arrest, from 16th to 20th but I cannot tell the month or the year. On 20th he left my house at about 12 noon, 20th was a Thursday.

On his own showing, the appellant is his god-relation (Surya-Bandhu). His evidence was not to be discarded merely on the ground that he has not received a summons to depose as a witness for the defence, but it would be seen from his cross-examination that no one had even asked him to depose in the case and he had come voluntarily to depose. He has stated in his cross-examination :

I observe Badaosha and Kartikapurnima Osha. I cannot tell the dates when they fell last. I cannot tell the date 13 days back from today or what will be the date 21 days after from today. None told me the dates 16th or 20th as stated by me, above. But I knew the date as Aruna went to jail. Aruna stayed in our house for four days. Aruna came to our house on Sunday. He left our house on the 4th day. He came to our village at 4 p.m. by walk. I cannot say if anybody saw Arun in our village.

The evidence of P.W. 3 was too vague to be accepted and it could not substantiate the plea of alibi raised by the defence. The clear and acceptable evidence of P.Ws. 2, 5 and 6 with regard to the complicity of the appellant would also belie the evidence of P.W. 3 and demolish this plea.

20. It is for an accused to establish the plea of alibi. As held in : 1981 CriLJ618 Dudh Nath Pandey v. State of U.P. the plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The accused must be so far away at the relevant time that he could not be present at the place where the crime was committed. In : 1984 CriLJ4 State of Maharashtra v. Narsingrao Gangaram Pimple, the Supreme Court has held at P.9 of Cri LJ :

It is well settled that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence.

Keeping these principles in mind, it must be held that the appellant had failed to establish his plea of alibi and the evidence adduced by him through P.W. 3, apart from its highly unsatisfactory character, was far short of the mark to substantiate such a plea.

21. One of the criticisms levelled with regard to the veracity of P.Ws. 2, 5 and 6 by the learned Counsel for the appellant is that on their own showing, they did not have their houses near the place of occurrence and they were chance witnesses and further, they had not physically intervened at the time of the murderous assault which normally persons standing nearby are supposed to do. But as has

been submitted by Mr. Ray, the learned Additional Government Advocate, these three witnesses are the co-villagers of the appellant, One of them was behind the deceased as she had been going with a brass jar to bring water and the other two were nearby when the occurrence took place. They are thus natural and competent witnesses, Different persons react differently when they see & murderous assault and merely because these three witnesses did not physically intervene by attempting to snatch away the Katari or otherwise physically preventing him from assaulting the deceased, their evidence is not to be discarded. In this connection, we can do no better than to quote two extracts from the decision of the Supreme Court reported in : 1983 CriLJ1272 Rana Partap v. State of Haryana. With regard to the criticism levelled on the ground that some witnesses are chance witnesses, Hon'ble Chinnappa Reddy, J., speaking for the Court, observed at P. 1274 of Cri LJ :

There were three eye-witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as 'chance witnesses' implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression 'chance witness'. Murders are not committed with previous notice to witnesses ; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere on in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.

With regard to the criticism that the witnesses did not go to the rescue of the deceased when he was in the clutches of the appellants, it was observed :

Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. there is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

These views of the Supreme Court would meet the aforesaid criticism levelled in the instant case with regard to the value of the testimony of P.Ws. 2, 5 and 6.

22. Another ground of attack on the evidence of P.Ws. 5 and 6 is that P.W. 2 had stated in her evidence that she had not seen them on the spot. The murderous assault had been seen by this lady (P.W. 2) while she was behind the deceased. Different persons may witness the same occurrence from different directions. The evidence of P.W. 2 did not rule out the presence of P.Ws. 5 and 6. All that she had stated was that she had not seen them on the spot. As would appear from the evidence of P.Ws. 5 and 6, they were in a position to see P.W. 2 who was behind the deceased. It could be that in the state of excitement when P.W. 2 had seen the commission of a murder within her view, she had been dazed and it was not expected of her to look around and notice as to whether other persons were present near the scene of attack. The evidence of P.Ws. 5 and 6 cannot be rendered doubtful on this ground.

23. In view of the position evidence of P.Ws. 2, 5 and 6 that they had witnessed the occurrence and in view of the satisfactory features in their evidence to which reference has been made by us, we are clearly of the view that their evidence is

reliable and acceptable and is not to be discarded, apart from the other reasons advanced before us on behalf of the appellant, on the ground that P.Ws. 1 and 2, one of whom was a relation of the appellant in that the appellant was her husband's agnatic younger cousin, had testified that they had not disclosed the occurrence to these two defence witnesses.

24. This takes us to the next items of evidence, viz., the appellant having been seen going away from the place of occurrence with a blood-stained Katari and his having made an extrajudicial confession before P.Ws. 7 and 8. It is clear from the evidence of P. Ws. 7 and 8 that the blacksmith shop of P. W. 7 is near the place of occurrence and the evidence of these two witnesses would show that P.W. 8 had come to P.W. 7 for having his Tangia sharpened. It would be seen from their evidence that while they were there, the appellant came from the western side of the village and was going to the eastern side when he was wearing a full pant and a full shirt and had been holding a bloodstained Katari in his right hand. According to them, he gave out that he had cut the neck of Hadiani and that he was going to the police station. So skying, he went away and P.Ws. 7 and 8 went and saw the murdered dead body of the deceased. We see no infirmity in their evidence that they had seen the appellant, moving with a blood-stained Katari in his right hand and we are not prepared to accept the contention raised by the defence that the stains of blood in the Katari could not have been marked by these persons, as by the time they saw the appellant moving away, the stains of blood would be heavy and fresh.

25. As to the extrajudicial confession, however, there had been verbal differences in the evidence of these two witnesses as to what the appellant had given out. While P.W. 7 had stated that the appellant had told them that he had cut the neck of Hadiani and that he was going to the police station, the evidence of P.W. 8 was that the appellant had told them addressing them as brothers that he had been going away from their village from that day and when he was asked by P.W. 8 as to what had happened, the appellant replied that he had cut the neck of Urbasi. We do not attach much importance to the difference in the name of the victim as deposed to by these two witnesses as the deceased had two names - Urbasi and Hadiani. But it was not in the evidence of P.W. 7 that the appellant had given out

that he had been leaving the village from that day. It was not in the evidence of P.W. 7 either that on being asked by P.W. 8 as to what had happened, when they saw him with a Katari stained with blood, the appellant had made a confessional statement admitting to have cut the neck of Urbasi. The learned Additional Government Advocate wants us to rely on this evidence and according to him, the purpose of making the confessional statement was to show his bravery. But apart from the question as to why he should make such a confessional statement, it is not understood as to why he should make one before P.Ws. 7 and 8 as there was no material to indicate that the appellant could repose confidence in P.Ws. 7 and 8.

26. As has been observed by the Supreme Court in : 1975 CriLJ282 State of Punjab v. Bhajan Singh the evidence of extrajudicial confession in the very nature of things is a weak piece of evidence. In order to accept such evidence, it must be plausible and must inspire the confidence of the court. The learned Counsel for the appellant has heavily relied on the observations of the Supreme Court in : 1983 CriLJ149 Heramba Brahma v. State of Assam. Their Lordships observed and held at p. 152 of Cri LJ :

We are at a loss to understand how the High Court accepted the evidence on this extrajudicial confession without examining the credentials of P.W. 2 Bistiram, without ascertaining the words used ; without referring to the decision of this Court to be presently mentioned wherein it is succinctly stated that extra-judicial confession to afford a piece of reliable evidence must pass the' test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. In Rahim Beg v. State of U.P. : 1972 CriLJ1260 , this Court while examining the evidence as to extra-judicial confession made by two accused to Mohmed Nasim Khan P.W. 4 observed that :

There was no history of previous association between the witness and the two accused as may justify the inference that the accused could repose confidence in him. In the circumstances, it seems highly improbable that the two accused would go to Mohmed Nasim Khan and blurt out a confession'. So saying the Court rejected the evidence as to extra-judicial confession. Position in this case is more

deplorable. If the High Court had examined the decision of this Court, there would have been no difficulty in rejecting the evidence of extra-judicial confession. It fails to pass all the tests. We reject this evidence of extra-judicial confession, as unworthy of belief....

In the instant case, there have been some verbal differences as to what the appellant had told them and as to under what circumstances he made the statement. There was nothing to show that the appellant had previous association with P.Ws. 7 and 8 and that he could repose confidence in them and make an extrajudicial confession involving him in a crime of murder. Judged in the light of the tests laid down by the Supreme Court, the evidence, in our view, falls short of the mark and it would not be legal and proper to accept their evidence in this regard.

27. Because we have not accepted the evidence of P.Ws. 7 and 8 with regard to the extrajudicial confession, it does not necessarily follow that we also must reject their evidence, however credible it may be, with regard to their seeing the appellant on the date of occurrence being armed with a blood-stained Katari, After all, we have not recorded a finding that the evidence of P.Ws. 7 and 8 with regard to the extrajudicial confession is false. We have found that the evidence is not safisfactory and does not stand the tests laid down by ;the Supreme Court. Even assuming, however, that the evidence of P.Ws. 7 and 8 in this regard is false and had been led by the prosecution to strengthen its case, the doctrine, falsus in uno falsus in omnibus, is not applied by courts in India and it is the duty of the court to separate the grain from the chaff, the truth from falsehood. The evidence of P.Ws. 7 and 8 that they had seen the appellant moving near them with a Katari stained with blood is clear and consistent and we find no reason to reverse the finding recorded by the trial court in this regard.

28. There remains for consideration the evidence with regard to the seizure of a banian (M.O.I.) from the person of the appellant by the Investigating Officer (P.W. 13) after the appellant's arrest on 21-1-1983, -as per the seizure list (Ext. 4) which had been witnessed by P.Ws. 5 and 6. On chemical and serological test, human blood was found in it although the extent of stains had not been indicated by the

Chemical Examiner and there was no material that the blood group of the deceased tallied with the blood group of the stains of blood group in M.O.I. The appellant had chosen to deny the recovery and seizure of M.O.I from his person. The evidence of P.Ws. 5, 6 and 13 with regard to the recovery and seizure of M.O.I. from the person of the appellant is clear and reliable and there is no reason to discard their testimony in this regard. Instead of explaining as to how stains of human blood had been found in his banian two days after the occurrence, the appellant had taken a false plea that this article had not been seized from him. By itself, this circumstance would not lead the court to any conclusion against the appellant, but with the other evidence, it would be a guilt-pointing circumstance against him.

29. No doubt, the weapon of attack had not been recovered in this case, but in a case of this nature when the appellant, after commission of murder, took to his heels and went away from the village, the Investigating Officer might not have been in a position to unearth as to where the appellant had thrown away the Katari. As a matter of fact, as the evidence of P.Ws. 7 and 8 would indicate, the appellant had worn a full pant and a full shirt. There was no evidence that he was wearing the full shirt at the time of his arrest. It could be that he had thrown it away somewhere for which he had only a banian on his person which was recovered and seized. The non-recovery of the weapon of attack in a case on murder cannot, by itself, be a circumstance to throw out the case.

30. We thus find, on a consideration of the evidence, that the motive which had apparently prompted the appellant to commit the crime, the evidence of P.Ws. 2, 5 and 6 supported by the medical evidence that the appellant was the killer of the deceased ; the evidence of P.Ws. 7 and 8 that they had seen the appellant moving away with a blood-stained Katari in his right hand and thereafter they went and saw the dead body lying on the spot and the recovery of M.O.I stained with human blood from the person of the appellant would leave no manner of doubt that the appellant was the author of the crime and that he had killed the deceased by means of a dangerous instrument. The ante-mortem and fatal injuries noticed by the doctor on a vital part of the body of the deceased would clearly establish that the appellant had the intention of committing the murder of the deceased and that

with that intention, he had caused injuries sufficient in the ordinary course of nature to cause death. The order of conviction recorded against the appellant Under Section 302 of the Code is, therefore, well founded and must be maintained.

31. The next and the important question for consideration is as to whether the sentence of death passed by the trial court on the appellant is to be confirmed.

32. As provided in Section 354(3), Cr.P.C. 1973, 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. As observed by a Division Bench of this Court in me case of State v. KanhuCharan Barik 1983 Cri LJ 133, in olden times emphasis was on crime alone, but the recent trend in penology has shifted the emphasis and now both crime and criminal are equally material. Mahatma Gandhi said:

Hate the crime but not the criminals.

In the words of Buckle :

Society prepares the crime, the criminal commits it.

While considering the reference made for confirmation of the sentence of death, we may keep in mind the observations made in : 1981 CriLJ325 (supra) :

Passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because that is one sentence which cannot be recalled.

The learned Counsel for both the sides have referred to a number of reported cases of the Supreme Court with regard to the imposition of the sentence of death. The guidelines have been given in : 1980 CriLJ636 Bachan Singh v. Slate of Punjab. Their Lordships have observed :..As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the Court must pay due regard both to the crime

and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of xxxxxxxx the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore, all murders are cruel. But such cruelty may vary in itsdegree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist.

33. The Supreme Court has reiterated the view taken in : 1980 CriLJ636 (supra) in the case of Shidagouda Ningappa Ghandavar v. State of Karnataka : 1981 CriLJ324 and has observed that the rule that the normal sentence for the commission of murder is life imprisonment should be observed both in letter and in spirit and death sentence should be imposed in very extreme cases.

In : 1981 CriLJ726 Munnidppan v. State of Tamil Nadu, it has been observed At P. 727 fo Cri LJ :.. We plead our inability to understand what is meant by a 'terrific' murder because all murders are terrific and if the fact of the murder being terrific is an adequate reason for imposing the death sentence, then every murder shall have to be visited with that sentence. In that event, death sentence will become the rule, not an exception and Section 354(3) will become a dead letter.

The Supreme Court has observed in : [1982]1SCR380 Ummilal v. State of Madhya Pradesh that when murder has been committed under a sudden impulse in a grave fit of rage, ends of justice would be met by sentencing the accused to imprisonment for life.

Referring to the case of Bachan Singh v. State of Punjab 1980 Cri LJ 636, the Supreme Court has observed in 1983(1) Crimes 784 : 1983 Cri LJ 846, Erabhadrappa v. State of Karnataka that the sentence of death should not be passed except in the rarest of the rare cases.

34. In the case of Machhi Singh v. State of Punjab : 1983 CriLJ1457 , the Supreme Court has again laid down the guidelines for imposition of the sentence of death. The Supreme Court has observed :

Protagonists of the 'an eye for an eye' philosophy demand 'death-for-death'. The 'humanists' on the other hand press for the other extreme viz., 'death-in-no-case'. A synthesis has emerged in 'Bachan Singh v. State of Punjab' : 1980 CriLJ636 wherein the 'ratest-of-rare-cases' formula for imposing death sentence in a murder case has been evolved by this Court. Identification of the guidelines spelled out in 'Bachan Singh' in order to determine whether or not death'sentence should be imposed is one of the problems engaging our attention, to which we will address ourselves in due course.

XXX XXX XXX

In this background the guidelines indicated in Bachan Singh's case 1980 Cri LJ 636 (SC) (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case :

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

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

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

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

weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines inter alia the following questions may be asked and answered :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the question posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

35. The Supreme Court has held that death sentence is the proper sentence when there has been the murder of a public servant while discharging his official duties : 1981 CriLJ883 Gayasi v. State of U.P.), in the case of a brutal murder of two young children committed in a professional manner : 1981 CriLJ1045 Kuljeet Singh alias Ranga v. Union of India (UOI), when five persons have been murdered and there is not a single circumstance in favour of the accused for the lesser sentence 1983 SCC (Cri) 57 (2) Mehar Chand v. State of Rajasthan), for the murder of the sister-in-law and two children and the girl servant and committing robbery : AIR 1983 SC594 Javed Ahmed Abdulhamid Pawala v. State of Maharashtra and where there were gruesome murders of several persons 1983 2 SCJ 71 : 1983 Cri LJ 971 Munawar Harun Shah v. State of Maharashtra. These are some of the cases in which the Supreme Court has held the death sentence to be the proper sentence which have come to our notice.

36. In the case before us, the learned Sessions Judge is of the view that the murder has been cold-blooded, preplanned and gruesome, for gain without any Provocation. The appellant was hard-hearted most cruel and brutal in hisattitude

and did not even pay any heed to the pathetic requests of the deceased, as observed by the learned trial Judge and in addition, the doctor's evidence would show that the deceased was carrying at the time of the occurrence although the appellant pleaded ignorance about it. For these reasons, the learned Judge is of the view that it is one of the rarest of the rare cases where death sentence is the only adequate punishment and imprisonment for life would not meet the ends of justice.

37. For passing the sentence of death, reference has been made by the learned Sessions Judge to the case reported in : AIR 1983 SC594 (supra). In that case, however, the appellant had committed multiple murdersand robberyand the Supreme Court had observed that no ground for substituting the sentence of life imprisonment for death could be perceived. According to the Supreme Court, it was truly the rarest of the rare cases and accordingly the death sentence was confirmed.

38. In our view, the case before us is one of the many cases which one comes across where murders have been committed owing to land disputes. The prosecution had sought to build its case as if it was one of conspiracy between the appellant and his mother (acquitted co-accused). The case of the prosecution and the evidence led in its support was that on the day prior to the fateful day of occurrence, the co-accused had threatened by saying that the deceased would be killed on the day of occurrence, it was alleged. When the deceased was moving on the village road, the co-accused instigated the appellant to kill her. This part of the prosecution case as against the co-accused has not been accepted by the trial Court. Having lost in the litigation against the deceased and with a sense of frustration and despair, the appellant appears to have taken the opportunity of killing the deceased on the spur of the moment when she was moving on the village road. There was no evidence that the appellant was aware of the fact that the deceased was then pregnant. The offence appears to have been committed by the appellant in moments of emotional disturbance. 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, as observed in : 1980 CriLJ636 (supra). The act of the appellant has not been committed after previous planning and does not, in our view, involve exceptional depravity. Ends of justice can be met in a case by sentencing an accused to imprisonment for life when the murder has been committed under a sudden impulse in a grave fit of rage, as has been done in the instant case by the appellant when he saw the deceased, who had succeeded in her litigation against him, moving on the village road. Death sentence is to be imposed only when life imprisonment appears to be an altogether inadequate punishment. The act of murder committed by the appellant was not something uncommon. What seems to have prompted the mind of the appellant is not immediate gain by the commission of the murder, but his sense of frustration and disappointment in connection with the litigation between him and the deceased. There are no special reasons, in our view, for imposing the death sentence. We are, therefore, of the view that it would meet the ends of justice if instead of sentencing the appellant to death, he is sentenced to undergo imprisonment for life.

39. In the result, we would discharge the death reference and allow the appeal in part with regard to the sentence imposed on the appellant. The order of conviction recorded against the appellant is maintained, but he is sentenced to undergo imprisonment for life.

40. Before we part with this case, we must record a very disquieting feature with regard to an order passed by the learned Sessions Judge for the disposal of the seized articles including M.Os.I and II Section 452(1), Cr.P.C. provides that when an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, bydestruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence. We notice from the order-sheet the following order :

The disposal of the M.Os. shall be carried out according to the orders of the Hon'ble High Court. If no such order is passed by the Hon'ble High Court then by the Registrar, Civil Courts, Dhenkanal who is in charge of the Sessions Malkhana.

The learned trial Judge, instead of performing his duty under the law and making an order himself, has left the matter to this Court. As can be seen from the evidence of the Investigating Officer, the blood-stained Sari, bangles and gold ornaments of the deceased had been deposited with him by the Havildar (P.W. 11) after the post mortem examination. It is not clear from the evidence as to whom the gold ornaments belonged and who are entitled to those articles. We would accordingly make a direction Under Section 452(3), Cr.P.C. that the gold ornaments be delivered to the Chief Judicial Magistrate of the district who shall deal with them in the manner provided in Sections 457 to 459 of that Code. The other articles seized in the course of investigation shall be destroyed. But the aforesaid direction in respect of the ornaments and the order with regard to the other articles shall be carried out after the period for preferring an appeal against this judgment and order is over, if noappeal is preferred and if an appeal is preferred to the Supreme Court, after disposal of the same.

P.C. Misra, J.

41. I agree.

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