

(1988) 12 CAL CK 0004
In the Calcutta High Court

Case No : Death Ref. Case No. 1 of 1987 with Cri. App. No. 317 of 1987

Binode Pandey

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 21-12-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 113B, 32(1), 32(i)
Penal Code, 1860 (IPC) — Section 120B, 201, 3, 302, 303

Citation : 93 CWN 899

Hon'ble Judges : Sankari Prasad Das Ghosh, J

Bench : Single Bench

Advocate : Dilip Kumar Datta, Sudipta Maitra and Goutam Lahari, for the Appellant; Sarojesh Mukherjee, K. Safiullah and Subhasis Roy, for the Respondent

Final Decision : Allowed

Judgement

Sankari Prasad Das Ghosh, J.—Criminal Appeal No. 317 of 1987 and Death reference Case No. 1 of 1987, which have been heard together, arise out of an order of conviction and sentence passed by the learned Additional Sessions Judge, First Court, Howrah. Out of the four appellants, the appellant No. 1, Binode Pandey, happens to be the husband of one Shakuntala. The appellant No. 2, Bharat, is the father of Binode. The appellant No. 3, Rahrani, is the mother of Binode. The appellant No. 4, Madhubala, is the second wife of Binode. These four appellants stood charged under sections 120B, 302/34 and 201/34 I. P.C. The charge u/s 302/34 I.P.C. was to the effect that these four appellants along with one Manoj Pandey (who happens to be another son of the appellant no. 2, Bharat), on the night of 4/9/86 and 5/9/86 (or at any time before the said night), at 8/3, Sree Charan Sarani (Bally Station Road) under P. S. Bally, District Howrah, in furtherance of their common intention, committed murder by intentionally or knowingly causing the death of Shakuntala Pandey. The charge u/s 120B I. P.C. was that they, along with Manoj Pandey, on that night and at that place, agreed to do (or caused to be done) an illegal act to commit murder by

causing the death of Shakuntala and that the act of murder of Shakuntala was done in pursuance of an agreement amongst them. The remaining charge u/s 201/34 I.P.C. was for causing certain evidence of murder of Shakuntala to disappear with the intention of screening the appellants from legal punishment. It is to be stated in this connection, that Manoj Pandey did not stand trial in this case as the case against him was split up and was sent to the Juvenile Court. On 5/9/86 at about 8-25 P.M., the Duty Officer of Bally Police Station received an anonymous telephone call to the effect that dead body of Shakuntala Pandey had been kept concealed in the house of Bharat Pandey at 8/3, Sreecharan Sarani, Bally, and that the dead body might be disposed of in course of that night. This information, as recorded in the general diary, is Ext. 10. Immediately, the police officers of Bally P. S. led by the Officer-in-Charge, rushed to the spot to work on the information. The police officers recovered the dead body of Shakuntala in presence of some local witnesses from a north-facing room at the first floor of the house at 8/3, Sreecharan Sarani. The dead body was first identified by the appellant No. 2, Bharat, and thereafter by the local witnesses. The father of Shakuntala also came there and identified the dead body.

2. The prosecution case is that the death of Shakuntala was caused by the four appellants and Manoj Pandey, in furtherance of their common intention and that they caused the evidence of the murder of Shakuntala to disappear with a view to screen them from legal punishment. The prosecution examined 18 witnesses. P.W.I is the father of Shakuntala. P.Ws.3, 4, 5, 6 and 8 are the local witnesses, who live near premises No. 8/3, Sreeccharan Sarani, wherefrom the dead body was recovered. P.W.7 is a photographer, who took photographs of the dead body from different angles. P.W. 12 is a Dom, whose service was requisitioned. P.W.11; is a doctor, who held the postmortem examination on the dead body of Shakuntala at 2-30 P.M. on 6/9/86. On holding the post mortem examination. P.W.11 found scattered burns of first, second and third degree over head, face, neck, tongue and extremities. Coils of intestine were coming out from deep burns at right side of abdomen. The doctor also found diffused echymosis over front of neck upper part and on dissection he found extensive extravasation of blood detected over front side of the neck with trachea of right cornue of the hyoid bone. The hyoid bone was also found fractured. According to the doctor, (P.W.11)," the death of Shakuntala was due to asphyxia as a result of strangulation, which was ante-mortem and homicidal in nature. The doctor opined that the burn injuries were post-mortem injuries and that the time of death was before 24 hours but less than 72 hours. Moderate rigor mortis had passed off. According to the doctor, the death of Shakuntala took place earlier and thereafter the body was burnt. In his opinion, the death of Shakuntala was caused by strangulation. P.W. 17 is a practicing Advocate, who translated two letters, written by Shakuntala, in English. Exts. 3/2 and 3/3 are those two letters. P.Ws. 9, 10, 14 and 15 are Police Constables. P.Ws.2, 16 and 18 are Sub-Inspectors of Police. P.W.13 is the Officer-in-Charge of Bally P.S. The case was first investigated by P.W. 2 and thereafter by P.W.18.

3. On a scrutiny of the evidences of the aforesaid P.Ws. and the materials on record, the learned judge found that the following circumstances had been proved by the prosecution against the appellants :-

i) The appellants were living with Shakuntala at 8/3, Sreecharan Sarani, which is commonly known as Bally Station, Road and that Shakuntaia lived in that premises along with the appellants till her death;

ii) There was no servant and there was no scope for any outsider to enter the house;

iii) Shakuntala was murdered in that house;

iv) There were marks of strangulation on the neck of Shakuntaia

v) The appellants destroyed the evidence about the exact time of murder. They set fire to the dead body with the hope that marks of strangulation would disappear and with further hope that they would be able to show that it was a case of death by accidental fire;

vi) The evidences on record excluded the possibility of the death being caused by suffocation or by accidental fire;

vii) There was extensive use of powder and scent to suppress the odour of decomposition and to stop spreading of the odour of decomposition;

viii) There was no burnt saree on the dead body of Shakuntala and there was introduction of a new saree on her body which bore no mark of burning;

ix) The police was not informed about the death by the accused person. The police was informed only by an anonymous telephone call, which was recorded in the general diary as Ext. 10;

x) Manoj was found hearing a taperecorder inspite of the death of Shakuntala;

xi) The factum of death of Shakuntaia was deliberately kept concealed to the local residents;

xii) The appellant no. 1, Binode, was absent when the police came. The police failed to trace out Binode till 21/11/86 when Binode surrendered in the court of the Sub-Divisional Judicial Magistrate, Howrah, after the occurrence on the night of 4-9-86/ 5-9-86;

xiii) Binode married for the second time due to inability of Shakuntala to bear a child and there was strained relationship between Shakuntala and the appellants Nos.1, 2, 3 and 4 after the second marriage of Binode;

xiv) There was recovery of burnt saree and cotton from a gunny bag, Ext. XIV. There was pouring of the burnt saree and cotton by the appellants No.3 and 4 inside that gunny bag;

4. According to the learned Judge in the court below, the aforesaid circumstances

led to the irresistible conclusion that the accused Binode along with the appellants No. 3 and 4 murdered Shakuntala and that all the four appellants caused disappearance of the evidence of murder with the intention of screening the offenders from legal punishment. As regards the charge u/s 120B I.P.C., the learned Judge was of the view that the evidence regarding this charge was not very satisfactory inasmuch as Shakuntala only alleged a conspiracy in a letter, Ext. 3/2, addressed to her brother, sister-in-law and mother's mother. Moreover, when there was sufficient evidence, according to the learned Judge, with regard to section 34 I. P.C., the learned Judge did not think it necessary to give a clear finding with regard to the charge u/s 120B I. P.C. As such, all the four appellants were acquitted of the charge u/s 120B I. P.C. As for the charge u/s 302/34 I.P.C., the learned Judge was of the opinion that the prosecution has been able to substantiate the charge against the appellants No. 1, 3 and 4 and not against the appellant No. 2, the father of Binode. The learned Judge sentenced each of these appellants No.3 and 4 to imprisonment for life on their conviction u/s 303/34 I.P.C. and sentenced the appellant No. 1, Binode, to death on his conviction u/s 302/34 I.P.C. As for the remaining charge under" section 201/3 I.P.C, the learned Judge sentenced the appellant No"s to suffer rigorous imprisonment for four years. As regards the appellants No. 1, 3 and 4, the learned Judge did not pass any separate sentence u/s 201/34 I.P.C, though he sentenced the appellants No. 3 and 4 to suffer imprisonment for life on their conviction u/s 302/34 I.P.C and had sentenced Binode to death u/s 302/34 I.P.C. There is no appeal against the acquittal of Bharat on the charge u/s 302/34 I.P.C

5. Mr. Datta, the learned Advocate for the appellants, has contended that the evidences on record do not make out any case of torture of Shakuntala by any of the appellants No.2, 3 and 4. His contention is that the evidences of the local witnesses viz. P.Ws. 3, 4, 5, 6 and 8, only show ill-treatment of Shakuntala by Binode and by no other appellant. According to him, the learned Judge was not justified in considering the two letters, Exts. 3/2 and 3/3, written by Shakuntala when these letters were not admissible in evidence u/s 32(i) of the Evidence Act. The next contention of Mr. Datta is that when the appellants were acquitted of the charge u/s 120B I.P.C., none of the appellants could be held guilty u/s 302/ I.P.C. for causing murder of Shakuntala in furtherance of their common intention. As for the charge u/s 201/34 I.P.C, the contention of Mr. Datta is that there is no evidence to show that Bharat did cause evidence of the murder of Shakuntala to disappear and that when strangulation was ante-mortem and the burn injuries were post-mortem, as per the doctor, none of the appellants No. 3 and 4 could be convicted u/s 201/34 I.P.C.

6. P.Ws. 3, 4, 5, 6 and 8 happen to be the close neighbours of the appellants. They have spoken about quarrel between Shakuntala and Binode. It is in the evidence of P.W.1 that Shakuntala was married with Binode in 1982 according to Hindu rites and customs in the native village Rewati of Shew Prasad (P.W.1), the father of Shakuntala, in the District of Gopalgunj in the State of Bihar. The evidences show that after marriage Shakuntala began to live with her husband at

8/3, Sreecharan Sarani, commonly known as Bally Station Road, and that the appellant No. 1 married the appellant No. 4, Madhubala in 1984. Besides P.Ws. 3, 4, 5, 6 and 8, P.W.I has also spoken about the torture and ill-treatment of Shakuntala by Binode and assault of Shakuntala by Binode. It is in evidence that Shakuntala was not given proper food. The learned Judge also relied on the evidences of P.W.6 to show that the appellants No. 3 and 4 also used to quarrel frequently with Shakuntala. Considering the evidences on record, we find nothing to disbelieve the evidences of P.Ws. 3, 4, 5 and 6 as well as the evidence of P.Ws. 1 and 8 about the torture of Shakuntala by Binode as well as the appellants No.3 and 4 because of inability of Shakuntala to bear any child. Considering the evidences, we also find nothing to interfere with the finding of the learned Judge that as Shakuntala was childless, Binode married Madhubala for the second time. The learned Judge did not accept the prosecution version that Bharat also used to ill-treat and torture Shakuntala. The oral evidence of these P.Ws. about torture and ill-treatment of Shakuntala due to her inability to bear child is corroborated by the two letters, Exts. 3/2 and 3/3, written by Shakuntala. One of these letters, Ext. 3/2, is addressed to the elder brother, sister-in-law and mother's mother of Shakuntala and the other letter is addressed to the brother of Shakuntala. The evidence of P.W.I is that after marriage Shakuntala came to her native village after 22 months from the date of marriage. P.W.I stated that Shakuntala remained with him for about 16 months and that thereafter Shakuntala came back to the house of Binode towards the last part of 1985. P.W.I further stated that Shakuntala wrote the letters after her return in 1985. The contention of Mr. Datta is. at when Shakuntala returned to her husband's place in the last part of 1985. these letters, Exts. 3/2 and 3/3, could well have been written by. Shakuntala just after her return to her husband's place and would no be admissible in evidence u/s 32(1) of the Evidence Act. We are unable to accept this contention.

7. The decision of the Privy Council in the case of Pakala Narayana Swami v. Emperor (AIR 1939 Privy Council 47) regarding admissibility of statement relating to cause of death has been relied on by Supreme Court in the case of Sharad Birdhichand Sarda v. State of Maharastra (AIR 1984 SC 1622 = 1984 SCC (Criminal) 487). It has been held in the case of Sharad Birdhichand Sarda (supra) that the distance of time will depend or vary with circumstances of each case. Where death is a logical culmination of a long and continuous process, the statement regarding each step directly connected with the death would be admissible because the entire statement would have to be read as organic whole, not torn from the context. Fazal Ali, J. held in that case that if the distance of time was not spread over more than 3 to 4 months the statement would be inadmissible u/s 32(1) of the Evidence Act. Mukherjee, J., however, held in that case of Sharad that as a general proposition, such a time limit could not be laid down. In order to make the two letters. Exts. 3/2 and 3/3, admissible, prosecution would have to show that the letters had proximate relation to the actual occurrence. u/s 32(1) of the Evidence Act, "the circumstances", are of the

transaction which resulted in the death of the deceased. It is not necessary that there should be a known transaction other than that the death of the declaration has ultimately been caused, as condition of the admissibility of the letters is that, "the cause of (the declarant's) death comes into question". In this case, the transaction was strangulation which resulted in the death of Shakuntala, as per the opinion of the doctor (P.W.11), which has been accepted by the court below. We find nothing to interfere with the finding of the learned Judge in the court below that the death of Shakuntala was because of strangulation and that burn injuries were post-mortem injuries. The ill-treatment and torture meted out to Shakuntala prior to the causing of strangulation of Shakuntala will be relevant and admissible when it was requested in the letter, Ext. 3/2, that the younger uncle of Shakuntala should come during Puja suddenly to take Shakuntala from her husband's place. It was stated in this letter that it was uncertain as to whether she should be alive upto Puja or not and that she could not at all bear the cruelty of all the family members at her husband's place. It was further stated in that letter that it became very difficult for her to live at her husband's place even for a moment. It was further stated in that letter that they, meaning the members of the family of her husband," were conspiring to finish her and that she was not counted as a family member in her husband's place. It was also stated in that letter that if Shakuntala could give birth to two sons in a year, they would all worship her more than gods. The Puja, according to the learned Public Prosecutor, meant DurgaPuja in 1986. This is not controverted by Mr. Datta, the learned Advocate for the appellants. Durga Puja was held in October, 1986. The letter, Ext. 3/2, was for requesting the younger uncle of Shakuntala to come to her husband's place during the Puja suddenly, so that the life of Shakuntala could be spared till the end of the Puja in 1986. The time gap cannot thus be more than 3 or 4 months from the date of writing of the letter, Ext. 3/2. In the other letter, Ext. 3/3, Shakuntala also complained to her brother that the family members in her husband's place were not taking any interest in her and that her mother-in-law (appellant No.3), threatened her that she would not see the face of Rewati (the village of Shakuntala) till she was alive. This letter was written as Shakuntala was feeling uneasy. Considering the fact that these two letters were written after the return of Shakuntla to her husband's place in the last part of 1985 and also considering the fact that Durga Puja in 1986 took place in October, 1986, both these letters are admissible in evidence as circumstances of the transaction resulting in the death of Shakuntala. It has been held by the Supreme Court in the case of Tapinder Singh v. State of Punjab (AIR 1970 SC 1566) that a dying declaration is admitted in evidence on the principia of necessity. If the dying declaration is accepted evidence the court can act on it and can convict the accused. In this case, there is no reason as to why both these, letters should not be treated as truthful. Irrespective of the evidence of P.Ws. 3, 4, 5, 6 and 8 or P.W.I, there can, therefore, be no denying of the fact that Shakuntala was tortured and ill-treated not only by her husband but also by the appellants No.3 and 4 due to the liability of Shakuntala to bear a child.

8. The question is whether the appellants No. 1, 3 and 4 could be held guilty u/s 302/34 I.P.C. when the learned Judge in the court below acquitted the appellants on the charge u/s 12GB I.P.C. Mr. Datta has. in this connection, referred us to the case of Ram Nath v. State of Madhya Pradesh (1953 Criminal Law Journal 1772) and has contended that section 34 I.P.C. does not apply when the evidence as to conspiracy u/s 120B I.P.C. has been rejected by the trial court. It is no doubt true that it was held by the Supreme Court in the case of Ram Nath (supra) that if the evidence as to conspiracy u/s 120B I.P.C. is rejected, the same evidence cannot be used for finding a common intention u/s 34 I.P.C. The learned Judge in the court below did not, however, reject the evidence regarding conspiracy. The learned Judge only found that the evidence regarding conspiracy was not very satisfactory. According to the learned Judge, when there was sufficient evidence with regard to section 34 I.P.C, it was not necessary u/s 120B of the Indian Penal Code. As the learned Judge did not reject the evidence of conspiracy, the appellants Nos. 1 3. and 4 cannot be acquitted of the charge u/s 3034 L.P.O. on the basis of the decision of the Supreme Court in the case of Ram Nath (supra). Even then, considering the evidences on record, we are of the opinion that the appellants No. 3 and 4 cannot be held guilty on the, charge u/s 302/34 I.P.C. The principle which section 34 I.P.C. embodies is participation in some action with the common intention of committing a crime. Once such participation is established, section 34 I.P.C. is at once attracted. The common intention must be to commit the particular crime, although actual crime may be committed by any one sharing the common intention. Conviction with the aid of section 34 I.P.C. is not justified where an accused did not share the intention of causing death with the co-assailant. In the case of an offence involving physical violence, it is essential, for the application of section 34 I.P.C., that the person who instigates or aids the commission of crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. In this case, there was undoubtedly torture of Shakuntala due to her inability to bear a child and added torture and ill-treatment of Shakuntala after the second marriage of Binode with Madhubala. Considering the evidences on record, we find nothing to disagree with the finding of the learned Judge in the court below that Shakuntala was taken to be a liability after the birth of a child to Madhubala. There Was thus enough motive of appellants No. 1, 3 and 4 to cause the death of Shakuntala. The presence of the appellants Nos. 1, 3 and 4 at 8/3, Sreecharan Sarani on the night of the death of Shakuntala, the motive for causing the death of Shakuntala as well as torture and ill-treatment meted out to Shakuntala by not only her husband but also by the appellants No. 3 and 4 cannot, however, justify conviction of the appellants Nos. 3 and 4 u/s 302/34 I.P.C, when there is nothing in the evidences to show that the death of Shakuntala by strangulation was the result of joint criminal venture of the appellants no. 1, 3 and 4. It is to be stated, in this connection, that the doctor (P.W.11) found diffused ochymosis only on the neck of Shakuntala, prior to dissection. When this is not a case a dowry death, there can be no presumption, as drawn by the learned Judge in the

court below, u/s 113B of the Evidence Act that the appellants Nos.3 and 4 had also caused the death of Shakuntala. Circumstantial evidence means a net-work of facts, cast around an accused. The net-work may be made mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which an accused is entitled to pass in safety, it may so close, so stringent, so coherent in its texture that no effort on the part of the accused can break through it. In this case, the proof of motive by the prosecution, physical presence of the appellants No. 1, 3 and 4 at the first floor of the premises at the time of death of Shakuntala as well as torture and ill-treatment of Shakuntala by the appellants No. 1, 3 and 4 cannot justify a conviction of the appellants No. 3 and e charge u/s 302/31 I.P.C, in the absence of materials on record to show or suggest the participation of the appellants Nos. 3 and 4 in some action, whether by instigation or aiding, at the time of causing of death of Shakuntala. it is no doubt true that the evidences are that when P.Ws. 2, 13. 16 and 18 went to the first floor of premises No. 8/3. Sreecharan Sarani after recording of the entry in the General Diary, Ext. 10, the appellants No. 3 and 4 were found pouring some burnt portions of saree and cotton inside a gunny bag, Ext. XIV. From this act of putting of the burnt pieces of saree and cotton inside the gunny bag by the appellants No. 3 and 4, it cannot be inferred that the appellants No.3 and 4 participated at the time of causing of death of Shakuntala in some way or the other when the doctor's evidence is that the burn injuries were post-mortem. The putting of these articles inside the gunny bag has more relevance to the charge u/s 201/34 I.P.C. than to the charge u/s 302/34 I.P.C. When two inferences are possible, one in favour of the accused and the other in favour of the prosecution, the rule which applies in the case of circumstantial evidence is that the benefit of doubt, if any, would have to be given to the accused. As such, putting of burnt saree or cotton inside the gunny bag cannot be used to the benefit of the prosecution in relation to the charge u/s 302/34 I.P.C. and cannot be a safe circumstance to be relied on for convicting the appellants No. 3 and 4 on the charge u/s 302/34 I.P.C. The position is different with regard to the appellant No. 1. We have already stated that the prosecution has been able to prove the motive for murder, ill-treatment and torture meted out to Shakuntala and the presence of the appellant No. 1 as well as the appellants No.2, 3 and 4 at the first floor of premises No.8/3, Sreecharan Sarani, on the night of the death of Shakuntala. Coupled with these facts, one is to consider the abscondence of the appellant No. 1, when the police officers (P.Ws. 2, 13, 16 and 18) came to that house on getting an anonymous telephone-call, Ext. 10. We have already stated that from.5/9/86, the appellant No. 1 absconded till 21/11/86 when he surrendered in the court of the Sub-Divisional Judicial Magistrate, Howrah. It is in evidence that the appellant No. 1 could not be traced in spite of best efforts (vide P.W.18). At the time of his examination u/s 313 Cr.P.C, the appellant No. 1 could not give any satisfactory explanation regarding his evasion of arrest by the police, about which a question was put to him. He only denied his. alleged abscondence. The evidence? of P.Ws. 3, 4, 5 and 6 about their last seeing Binode

at his residence at about 5 P.M. or 6 P.M. on 3/9/86 do not appear to be convincing, though relied on by the learned Judge in the court below. Even then, the ill-treatment and torture of Shakuntala by the appellant No. 1, the motive of the appellant No. 1 to cause the death of Shakuntala after child was in to Madhubala after his second marriage with Madhubala, though bigamy was an offence, the presence of the appellant No. 1 in the house on the night of the death of Shakuntala as well as long abscondence of the appellant No. 1 create a net-work of facts and circumstances, so close, so stringent and so coherent in its texture that it is difficult for the appellant no. 1 to come out. These circumstances, which have been conclusively proved by the prosecution, lead to only one conclusion viz. guilt of the appellant no. 1 regarding the causing of the death of Shakuntala. These circumstances cannot be explained in any other manner. There can be a conviction of the appellant no. 1 u/s 302 I.P.C., though the appellant No. 1 stood charge along with the other appellants u/s 302/34 I.P.C. The appellant no. 1, is, accordingly, found guilty u/s 302 I.P.C. for committing murder by intentionally or knowingly causing the death of Shakuntala on the night of 4/9/86 at the first floor of premises No. 8/3, Sreecharan Sarani.

9. As regards the charge u/s 201/34 I.P.C. we are unable to accept the contention of Mr. Datta that the charge has not been proved. So far as the appellant No. 2, Bharat, is concerned, it is no doubt true that it is in the evidences of P.Ws. 4 and 18 that after arrival of the police officials (P.Ws. 2, 13, 16 and 18), the appellant No. 2 invited the police officers to search and thereafter identified the dead body of Shakuntala before the police. This factum of invitation of police officers to search the premises is to be viewed in the light of the other circumstances transpiring in evidence against the appellant no. 2. These circumstances are the concealment of the factum of the murder of Shakuntala from the police officials by the appellant no. 2 (as per the evidences of P.Ws. 2, 13, 16 and 18) and the presence of Bharat at the first floor of premises No. 8/3, Sree Charan Sarani on the night of the occurrence, (as per the evidences of P.Ws. 3, 4, 5 and 6), which were not denied by the appellant no. 2 at the time of his examination u/s 313 Cr. P.C., though denied by the appellant no. 1 at the time of his examination u/s 313 Cr.P.C. Needless to say, the statement of the appellant No. 1 at the time of his examination u/s 313 Cr.P.C. that his father used to stay at the ground floor cannot be taken as a circumstances in favour of Bharat, when Bharat had himself not stated it, though a specific question was put to him that he as well as the appellants nos. 1, 3 and 4 used to reside at the first floor of premises no. 8/3, Sree Charan Sarani, at the relevant time. The very fact that Bharat had concealed the factum of death of Shakuntalla before the police officials, though the death took place in the early morning of 5/6/86 as held by the learned Judge, a conclusion from which we find nothing to differ, as well as the fact that extensive use was made of powder and scent on the dead-body to do away with the odour of decomposition of the dead body, when considered with the presence of Bharat at the first floor on the night of, the occurrence, go to show that there was a joint criminal venture not

only by the appellants no. 3 and 4, who were putting burnt saree and cotton inside the gunny bag, but also by the appellant no. 2 for disappearance of the evidence of murder with a view to screen the offender from punishment. We are, accordingly, of the opinion, on a scrutiny of the materials on record, that the learned Judge was justified in holding all the four appellants guilty on the charge u/s 201/34 I.P.C. So far as the appellants No. 3 and 4 are concerned, it is to be stated that they were found in the act of putting burnt saree and cotton inside the gunny bag, Ext. XIV and that they went inside a room on seeing the police officers. This goes to show that the appellants no. 3 and 4 were also trying to screen the offender from punishment and were trying to cause disappearance of the evidence of murder of Shakuntala.

10. While the learned Judge in the court below failed to pass any sentence on the appellants no. 1, 3 and 4 on their conviction u/s 201/34 I.P.C., we can impose sentence on these appellants on their conviction u/s 201/34 I.P.C.

11. The next question is as to whether the appellant No. 1 Binode, should be sentenced to death. The guidelines, for awarding a sentence of death have been laid down by the Supreme Court in the case of Bachan Singh v. State of Punjab (AIR 1980 SC 898). These guidelines have been followed by the Supreme Court in the subsequent decisions in the cases of Machhi Singh v. State of Punjab (AIR 1983. SC 957) and Asharfi Lal and Sons v. State of U. P. (AIR 1987 SC 1721). For persons convicted of murder, imprisonment for life is the rule and death sentence is an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. This ought not to be done except in the rarest of rare cases when the alternative option is unquestionably foreclosed. A balance sheet of aggravating and mitigating circumstances have 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 mitigating circumstances before the option is exercised. This is not a case in which it can be stated that there is something which is uncommon about the crime, which renders sentence of imprisonment inadequate. This is a case of commission of murder after having a child out of another wedlock, after Shakuntala failed to beget a child. Considering the degree of criminality and the facts and circumstances of this case, we think that the safer course will be to set aside the sentence of death and substitute in its place the sentence of imprisonment for life on the appellant no. 1 [Chandranath Banik v. State of West Bengal = 1987 Calcutta Criminal Law Reporter (S.C.) 152].

12. The death reference is, accordingly, rejected. The criminal appeal is allowed in part. The order of conviction and sentence of the appellants no. 3 and 4, Rajrani Pandey and Madhubala Pandey u/s 302/34 I.P.C. are set aside and they are acquitted of the charge u/s 302/34 I.P.C. The appellant no. J, Binode Pandey, is found guilty u/s 302 I.P.C, is convicted thereunder and is sentenced to suffer imprisonment for life. Each of the appellants nos. 1, 2, 3 and 4 is found faulty u/s 201/34 I.P.C, is convicted thereunder and is sentenced to suffer rigorous

imprisonment for four years. Both the sentences of the appellant no. 1, Binode Pandey, to run concurrently.

Ajit Kumar Nayak, J.

I agree.