
(1995) 03 OHC CK 0027

In the Orissa High Court

Case No : Death Reference No. 1 of 1994 and Jail Criminal Appeal No's. 434, 435 and 436 of 1994

Debendra Pradhan, Rabindra Pradhan and Sanatan Pradhan

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 27-03-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 354(3)

Citation : (1996) CriLJ 326 : (1995) 1 OLR 485

Hon'ble Judges : S. Chatterji, J;R.K. Patra, J

Bench : Division Bench

Advocate : S.K. Sahoo, for the Appellant; D.K. Misra, A.S.C., for the Respondent

Judgement

S. Chatterji, J.—The above Death Reference No. 1 of 1994 u/s 366 of the Code of Criminal Procedure along with Jail Criminal Appeal Nos. 434, 435 and 436 of 1994 was taken up together and all the cases are disposed of by this common judgment. Mr. S.K. Sahoo, learned advocate appointed in terms of the procedure as laid down in the Rules of the High Court of Oriss to defend the accused in the Death Reference also appears for the accused in the aforesaid Jail Criminal Appeals. The reference u/s 366, Cr PC has been made by the learned Additional Sessions Judge, Sambalpur for favour of confirmation of the death sentence in Sessions Trial No. 28/7 of 1994. Rule 16 of the Rules of the Orissa High Court indicates the procedure to be adopted in a reference in case of capital sentence and Rule 22 enjoins that in a reference made to this Court for confirmation of death sentence, the Registrar shall immediately on arrival of the records lay the same when necessary before the Hon'ble the Chief Justice for appointment of an advocate. It appears that the Hon'ble the Chief Justice appointed Shri S.K. Sahoo, Advocate since 20th of January, 1995. The condemned prisoners, namely, Rabindra Pradhan and Sanatan Pradhan, have preferred appeals from jail which are numbered as Jail Criminal Appeals 436 of 1994 and 436 of 1994 respectively. Besides the condemned prisoners, accused Debendra Pradhan has also preferred appeal from jail numbered as Jail Criminal Appeal No. 434 of 1994. All the

prisoners have submitted their Vakalatnamas duly signed by them and have also signed the legal aid forms for engagement of an advocate to defend them at the time of hearing of their appeals. The required number of paper books have also been filed.

2 Mr. D.K. Misra, Additional Standing Counsel appears for the State. The prosecution case is that Sanatan Pradhan, S/o Kamal Lochan Pradhan, aged 58 years, Upendra Pradhan, s/o Sanatan Pradhan, aged about 18 years, Debendra Pradhan aged about 20 years, s/o Sanatan Pradhan, Jemadei Pradhan, wife of Sanatan Pradhan. aged 48 years and Rabindra Pradhan, s/o Sanatan Pradhan, aged 24 years, all residents of village Basiapada, P.S. Jujumura, District-Sambalpur stood charged with offences under Secs. 307 and 302 read with Section 34 of Indian Penal Code for having attempted to commit murder of one Brundaban Pradhan (PW 7) and murder of his two sons and one daughter, namely, Sanjib, Rajib and Pravasini aged about 11 years, 3 years and 7 years respectively, in furtherance of their common intention. Sanatan and Brundaban Pradhan are two brothers having title deeds of their lands standing in their names jointly. They were, however, separate in mess and properties by an amicable partition. Before 27-8-1993 accused Sanatan asked Brundaban for the Patta of their lands to procure a loan. The Patta having been with his mother, Brundaban refused to give the same to him. Accused Sanatan was annoyed and declared to cut the members of his family into pieces and ruin his progeny Brundaban for fear of life, left his ancestral house and stayed in the house of one Keshab Pradhan of his village till 29-8-93. Panchayat meetings were held to decide the dispute between them on 27-8-1993 and 2-8-1993 and the second day's meeting settled the dispute on compromise in view of the undertaking given by Brundaban to supply a Patta to Sinatan within ten days. At about 8 p.m. of 2 -8-1993 Brundaban returned to his house with his wife and the three children, the husband and wife holding lanterns, since the apprehension and fear were removed from their mind after the compromise. At their sight, accused Sanatan was flared up and both Sanatan and his wife accused Jemadei Pradhan called out their sons, the other accused, namely, Upendra, Debendra and Rabindra, to cut the family members of Brundaban into pieces and to end his family. No sooner than Brundaban entered his house and asked his children to follow, accused Rabindra. Debendra and Upendra came to him with axes and lathi. Accused Rabindra dealt two blowes with his axe on the neck and head of Brundaban and Debendra dealt a blow with his a e on the head of Brundaban. With profuse bleeding wounds on his person, Brundaban grovelled into the nearby house of one Kulamani Budhia and there became senseless. Accused Upendra and Debendra then caught deceased Sanjib, Rajib and Pravasini and accused Rabindra gave axe blows on their necks and other parts of their body. The mother of the said children. PW 1, stood at the sight being dumb. She screamed aloud and the villagers came there to see the dead bodies of the children. The Sarpanch of the Gram Panchayat getting this alarming news called the police from Jujumura Police Station. PW 1 lodged oral report with police on

which investigation ensued. After charge-sheet and commitment of the case to the Court of Session, trial of the accused was held.

The defence case is however denial of the charges. There is a suggestion that due to long sustained dispute between their respective families they have been falsely implicated.

3. Prosecution has examined fifteen witnesses. PW 1 is the wife of Brundaban. PW 2 is the local Sarpanch. PWs 3 to 5 are the doctors. PW 6 is a local person. PW 7 is Brundaban. PWs 8 and 9 are also local persons. PWs 10 and 13 are the police constables. PWs 11 and 12 are also local persons PW 14 is the investigating officer and PW 15 is the Judicial Magistrate, First Class.

4. Prosecution introduced the motive for commission of the offence. The learned Sessions Judge found that title deeds of PW 7 and accused Sanatan were standing jointly in their names. Brundaban, PW 7, refused to supply the Patta to Sanatan which he wanted to procure a loan. There were Panchayat meetings on 27-8-1993 and 29-8-1993. PWs 2, 9 and 11 were independent persons who have stated about such meetings. There was constant threat to the life of Brundaban and that of the members of his family by accused Sanatan. The threat was to the extent of wiping out the family of PWs 1 and 7 and Exts. 6 and 7 prove the fact of Panchayat meetings being held as also the dispute between PW 7 and accused Sanatan having been compromised. Accused Sanatan was also a signatory to the said documents. Admittedly for fear of life. Brundaban had to leave his ancestral house with his wife and children and stay for some time in the house of a villager named Keshab Pradhan. While returning home on 29-8-1993 at about 8 p. m. PWs 1 and 7 with their children faced the wrath of accused Sanatan who gave direction to his sons, the other male accused, to cut the family members of Brundaban into pieces. His feverish frenzy still continued, the malignity of which culminated in the ghastly murders. His dangerous design was translated into action by his sons accused Rabindra and Upendra. This evil motive gave rise to their criminal action by way of common intention. The medical evidence has established the cause of death of the deceased children, as per the opinion of the doctor PW 5. being cutting of the necks, spinal cords, muscles, survival vertebra, etc. This is with reference to the post mortem examination of deceased Pravasini and Rajib covered under the post mortem reports, Exts. 9 and 10. The post-mortem report of Sanjib has been admitted into evidence by waiver of formal proof as per Ext. 15. The time of the murderous assault on the deceased tallied with the time factor as categorically stated by PW 5. The deaths were instantaneous. The medical evidence of PW 5 admitted of no doubt that the deaths of deceased were homicidal on account of the fatal cuts on their necks. His further opinion vide Ext. 11 was that infliction of the injuries on the deceased was possible with the axe MOI. Blood and hair were sticking to the axe as deposed by PW 2 and the above medical expert.

5. It is found from the materials on record that PW 1, the mother of the deceased children, following her husband and the children. saw the accused

persons entering her house immediately being directed by accused Sanatan and his wife Jemadei Pradhan. In her presence accused Rabindra gave blows with his axe on the head and neck of her husband, Brundaban, PW 7. PW 7 with bleeding wounds grovelled to the nearby house of Kulamani and at this critical moment accused Debendra and Upendra ought deceased Sanjib and accused Rabindra dealt blows on his neck with his axe. Accused Debendra then dragged deceased Pravasini and accused Rabindra dealt blows with the axe on her neck. Accused Upendra then caught deceased Rajib and accused Rabindra dealt axe blow on his neck. All the innocent children died instantaneously. Their heads were almost dangling. The incident was witnessed by PW 6 who has stated in unequivocal terms. These facts were reported to the investigating officer. PW 6 corroborated the evidence of PW 1 regarding assaults and the manner of assaults on the deceased as well as on PW 7. The dead bodies of the deceased were found by PWs 2, 6, 8 and 12.

6. The recovery of MOI, the axe, and the disclosure statement made by accused Rabindra to police and other witnesses while in custody indicate that the axe, MOI, had been kept hidden inside the straw of the thatch of his goat-shed. PW 15, the Judicial Magistrate, First Class recorded the confession of accused Rabindra after time was given to him for cool reflection. He has recorded the confession that he had killed two of his younger brothers and one younger sister and had also assaulted his paternal uncle who was saved by luck. His confession was found by the learned Sessions Judge as voluntary and that was correctly recorded by PW 15 who had ascertained the details from accused Rabindra as per Ext. 23.

7. The learned Additional Sessions Judge found corroboration in the evidence of PWs 1, 6, 7, 9, 11 and 12 with regard to presence of PW 1 at the spot, and threats being given by accused Sanatan and direction given by him to the other accused to finish and ruin the family of PW 7. By analysing the evidence of the prosecution witnesses, the learned Addl. Sessions Judge has found that the dastardly acts of the male accused in attempting to commit murder of PW 7 and murder of his children have been convincingly proved. without leaving any room for doubt. The vendetta of the accused to obliterate the family of PWs 1 and 7 was materialised by their acts. The injuries on PW 7 enough not proved by the medical personnel have been otherwise proved by his hospitalisation at the VSS Medical College-Hospital, Burla through PW 3. The axe and the wearing apparels seized were found to have contained human blood stains on chemical examination as per the report Ext. 20. The defence examined one witness as DW 1 who has stated accused Sanatan not being present at the place of occurrence as both PW 1 and accused Sanatan had been to village Phuljharan where Panchayat meeting was being held that day and from 8 p. m. to 10 p. m. accused Sanatan was with him. His evidence supports the prosecution case as regards death of the deceased children and injuries on PW 7, whom he had brought to the hospital. On the date of the occurrence the Panchayat meeting was over by 5 p. m. There was therefore no need for accused Sanatan to stay at

Phuljharan till 7 p. m. to 9 p m. without returning home. Evidence of PW 1 was not found to be trustworthy. By ultimate analysis of the facts, the learned Addl. Sessions Judge came to the conclusion of guilt of the three male accused persons. The female accused had been implicated in the case, as found by the Court below, on the exaggerated version of PW 1, not supported by any independent corroboration. The evidence of PW 12 while preparing Biri on the verandah of Kulamani Budhia as to not finding accused Upendra at the place of occurrence has not been explained by the prosecution. The statements of PWs 1 and 6 showing the part played by Upendra in catching deceased Pravasini were found not in conformity with each other. The learned Additional Sessions Judge had the doubt about involvement of accused Upendra in the crime. The benefit of doubt has been given to accused Jamadei Pradhan and Upendra Pradhan and they were found not guilty under Secs. 307 and 302 read with Section 34, IPC. The learned Sessions Judge has however found accused Sanatan, Rabindra and Debendra guilty under Secs 307 and 302 read with Sec 34, IPC. The unfortunate occurrence was found to be the outcome of the pre-plan of the accused, Sanatan being the director and instigator. Their diabolic acts were found in negation of all human traits. After hearing the convicts on the question of sentence and considering the grave agony of an injured father like PW 7 and a sobbing pathos of a sterilised mother like PW 1, their children having been killed in their presence, the children having the possibility of rising in their life and further considering that this was one of the rarest of rare cases that had ever happened, the convicts having put slurs in the name of humanity and nothing could be crueler and more devilish than to kill the young innocent children in presence of their helpless parents sentenced accused Sanatan and Rabindra to capital punishment u/s 302/34, IPC subject to confirmation of their death sentence by this Court and imprisonment for life u/s 307/34, IPC. He has sentenced accused Debendra to imprisonment for life for offences under Sections 307 and 302/34, IPC.

8. Mr Sahoo, learned advocate appearing for the accused-appellants, has argued that there was no fair trial of the accused in the trial Court. The order-sheets of the learned trial Court indicate that on 15-7-1994 the accused expressed their inability to engage any lawyer to defend them in the trial. That day an advocate was appointed as the State Defence Counsel and the case was adjourned to 20-7-1994 for consideration of charges. On 20-7-1994 another advocate was appointed as the State Defence Counsel and the charges were framed against the accused the next day, i. e., 21-7-1994. On that day trial was fixed to 7-9-1994 and 8-9-1994. On 7-9-1994 when the trial commenced, another advocate was also appointed as the State Defence Counsel and the same day PWs 1 and 2 were examined, cross-examined and discharged. Though there is no specific mention in the order-sheets as to which accused were defended by which counsel, the cross-examination of the witnesses shows that accused Sanatan and Jamadei were defended by one counsel and the other three accused were defended by another counsel. Mr. Sahoo has highlighted that law is well settled that the Sessions Judge should appoint competent counsel to defend the

accused during trial and sufficient time should be given to the advocate so appointed for preparation of the defence and taking effective steps to defend the accused. There cannot be a proper and fair trial unless this principle is strictly followed. In support of his contention, he has referred to a decision reported in 1971(1) CWR 636 (Kamala Doman v. State). The ratio of that decision is that the duty of the Sessions Judge in appointing State Defence Counsel is to give sufficient time to the counsel for preparing the defence and supply him all the relevant papers, otherwise there cannot be a proper and fair trial. In an appropriate case, there should be a remand for fresh trial. He has also cited another decision reported in 1971 (2) CWR 422 (Mangulu Behera v. State). In that case a State Defence Counsel had been appointed when the Court began its sitting for taking evidence in a sessions trial and no time could have been there for the counsel to be acquainted with the facts of the case and to find out what defence to be taken. It was held that there was no scope for the counsel to get instruction for cross-examination of the prosecution witnesses and the trial was therefore vitiated and retrial was ordered

9. On perusal of the materials on record, we have considered this point with all seriousness as it deserves. It transpires from the order-sheets that Shri Girindra Panda, Advocate and Shri Nilambir Saraf, Advocate were appointed as State Defence Counsel long before the trial began. Shri B.K. Nayak was appointed thereafter for all the accused. They had made no grievance against their engagement without being supplied with any paper to defend the case. Rather, the said learned advocates duly participated in the proceeding and made lengthy cross-examination of PWs 1 and 2 without any grievance whatsoever. The facts of every case are to be considered in proper perspective." On scrutiny we do not find that there was any irregularity which might have vitiated the trial in any manner as suggested by the learned advocate for the appellants. This preliminary point appears to have no merit and is overruled.

10. Mr. Sahoo has tried to defend the appellants one by one separately and singularly. In dealing with the case of Sanaan he has argued that since there was a compromise fully arrived on 29.8.1993, there was no occasion for any grudge by appellant Sanatan. He was not named before the police immediately after the incident by PW 1, mother of the deceased children. Instead, PW 1 had specifically named Jemadei, wife of Sanatan. Her deposition before the Sessions Court should not have been believed. Sanatan was found to be absent from the place of occurrence in terms of the evidence, of DW 1. The finding of the learned trial Court that Sanatan was guilty cannot be sustained.

He has developed his argument further that since Debendra was also found to be not present, implication of Debendra by the prosecution should also be ruled out.

In case of appellant Rabindra, the prosecution evidence is highly improbable. His confessional statement recorded is not in conformity with the provisions u/s 164(2), Cr PC. He has also developed his submission by drawing attention of the Court that Sanatan has been convicted under Secs. 307 and 302 read with

Section 24. IPC, but the only allegation against him is that he had instigated his sons for commission of the offences. The only witnesses who have stated regarding presence of accused persons is PW 1, the informant, and PW 7 her husband. There is no such allegation against Sanatan in the FIR lodged by PW 1. The other witness who implicated accused Sanatan is PW 7. The statement of PW 7 is contradictory and even if the statement of PW 1 is accepted, it is not appreciated as to why Brundaban PW 7 while returning to his residential house with his family members, accused Sanatan would instigate his sons to commit the offence as there was already a compromise before the Panchayat.

11. We have tried to appreciate the argument of Mr. Sahoo patiently and diligently. We do not, however, appreciate the way he has analysed the evidence. We have looked to the FIR and the deposition of PWs 1 and 7, The deposition of PWs 1 and 7 and other material on record as also the U PWs 6, 8 and 12 are to be read together. PW 7. his wife and Children were about to enter into the house while accused Sanatan and his wife accused Jemadei instigated the other accused persons to ruin the family of PW 7. While PW 7 entered inside his house with the children, he was assaulted by the accused. It is true that although accused Jemadei had been named by PW 1, her statement was not corroborated. But the presence of Sanatan has well been proved by PWs 1 and 7 as also other relevant prosecution witnesses and the findings of the learned Additional Sessions Judge in this regard appear to be consistent with the materials on record.

12. Regarding appellant Debendra Pradhan, it is argued that this accused has , been convicted under Secs. 307 and 302 read with Section 34, IPC and sentenced to undergo imprisonment for life on both the counts though the prosecution case is that this accused assaulted PW 7 on his head and after PW 7 escaped to the house of Kuimani Budhia, he along with accused Babindra Pradhan and Upendra Pradhan entered inside that room. There is no allegation that appellant Debendra assisted in any manner while accused Rabindra dealt blows on Pravasini This appellant did not play any role in the commission of murder of the youngest child Rajib. Mr. Sahoo has argued that no injury report as regards PW 7 has been proved. He has however conceded before us that the evidence on record proves the involvement of appellant Debendra in committing the offence u/s 302 IPC only. According to him, there is no proper evidence or materials as to his committing offence u/s 302, IPC He has tried to analyse the evidence of PW 7. He has read the evidence of PW 6 and submits that this witness has simply stated that accused Rabindra dealt a blow with his axe on the neck of Brundaban who entered inside the house of Kulamani Budhia. She did not implicate accused " Debendra in the assault on PW 7. Similarly. PW 12 has stated that appellant Rabindra assaulted PW 7 with an axe on his neck and head. He has not named Debendra for assault on PW 7. The only witness who implicated appellant Debendra is PW 7 the injured himself who has stated that after he was assaulted by appellant Rabindra with an axe, appellant Debendra dealt a blow with axe on his head. In view of the fact that PWs 1, 6 and 12 did

not implicate appellant Oebandra, the solitary evidence of PW 7 should not be accepted for convicting him u/s 307 read with Section 34, IPC. However, by looking to the evidence of the relevant prosecution witnesses, the learned trial Court has come to its finding. By reading the depositions again and again with the help of the learned advocate for the appellants and the learned Addl. Standing Counsel, we do not find that the evidence is contradictory or there is any discrepancy for which the finding of the learned trial Court should not be sustained. The assessment of evidence by the learned trial Court in this regard is found to be proper. There is no room to interfere with the findings of the learned trial Court in the manner as suggested by the learned advocate for the appellants.

13. With regard to the case against appellant Rabindra, he has been convicted under Sections 307 and 302 read with Section 34, 3IPC and while he has been sentenced to imprisonment for life under Sec, 307/31,IPC. has been sentenced to death u/s 302/34, IPC. So far as his conviction u/s 307/34, IPC. i.e., attempting to commit murder of PW 7 is concerned, the depositions of PWs 1, 6 and 12 should be properly considered. Even though there are ample materials in the evidence for a finding that Rabindra had assaulted PW 7 with an axe, his conviction u/s 307/34, (PC cannot be sustained in the absence of medical evidence to come to a finding that there was an attempt to commit murder of PW 7 and It is Argued that at best he can be convicted u/s 324.IPC and not under Section 307/34,IPC. So far as his offence of assaulting the three children is concerned, prosecution relied upon the evidence of PW 1, the judicial confession of the accused himself and recovery of the blood-stained axe from his goat-shed. It is argued that while considering the prosecution case, the appreciation of evidence of PW 1 should be very much crucial as the prosecution entirely rests its case on the solitary evidence of this interested witness. According to Mr. Sahoo, law is well settled that the evidence of a solitary witness must be absolutely reliable, cogent and trustworthy. He has argued with much emphasis that PW 1 is the solitary witness who deposed about the incident from beginning to end, i.e. from the entrance of her husband and children inside the house till the children were killed. PW 1 is not a witness of that category on the basis of whose solitary evidence Court can unhesitatingly find the accused person guilty. Since PW 1 is the mother of the deceased children, she was highly interested. The evidence of PW 1 has not been accepted by the learned trial Court to implicate accused Jemadei Pradhan and Upendra Pradhan in the alleged crime. The presence of PW 1 at the spot at the time of the occurrence is to be tested with great caution which is an important aspect. According to PW 1, the children were assaulted in the entrance room and she - saw the incident by means of lantern light. Though during the trial PW 1 stated she was holding a lantern and there was another lantern also burning inside that room, the existence of two lanterns at the spot was very much doubtful as the police had seized only one. PW 7 has stated that just when he was placing his youngest child Rajib on the cot in a leaning position, he was assaulted. In his statement PW 7 has further stated that at the relevant time his children were going to sleep on their cots

inside the room. In view of such statement of PW 7 it is more probable that the victims must have been assaulted inside the bedroom and not in the entrance room. Besides the evidence of PW 1, prosecution has also relied on the judicial confession of accused Rabindra Pradhan. The manner in which the confessional statement of accused Rabindra has been recorded, much reliance should not be placed on that. The order-sheets of the learned SDJM, indicate that the accused was produced in Court on 31.3.1993 and the investigating officer prayed for recording his confessional statement u/s 164. Cr. P.C. Though the other three accused declined to confess, accused Rabindra alone wanted to confess his guilt and he was sent to jail custody for his cool reflection. It was desirable that when an accused was given time for cool reflection, the learned Magistrate should have cautioned him about the consequences of his confession informing him that he was not bound to make any confession, so that before the accused decided to confess his guilt he would have thought over the matter and taken a decision during the period allowed to him for cool reflection whether he would confess or not. In the present case, on 31-8-1993 the learned Magistrate, Mr. Sahoo submits, did not caution him as above. The confessional statement Ext. 23 indicates that the most important caution after disclosing his identity that the accused was not bound to make confession and the confession if made would be utilised as evidence against him during the trial had been given to the accused after he confessed his guilt. In that view of the matter, it cannot be said that the recording of the confessional statement of the accused was proper and to be acted upon. In support of his contention, Mr. Sahoo has referred to a decision reported in AIR 1936 253 (Privy Council) which has dealt with recording of 164 statement of accused by Magistrate. It was held therein that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all, the other methods of performance being necessarily forbidden and the oral evidence of the Magistrate being not admissible. He has further referred to another decision reported in Dagdu and Others Vs. State of Maharashtra, and has specifically drawn the attention of the Court that there should be a strict and faithful compliance with Section 164, Cr PC and failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statement. There is further reference to a case reported in 1995(1) Crimes 138 (Shivappa v. State of Karnataka) to the effect that in a case where statement u/s 164. Cr PC was recorded the Magistrate did not disclose to the accused that he was a Magistrate, no inquiry was made to find out whether the accused had been influenced by anyone, the Magistrate did not lend assurance to the accused that he would not be sent back to police custody in case he did not make confessional statement and the accused was not questioned as to why he wanted to make confession, the same could not be said to be voluntary and it was not prudent to act upon the said confessional statement.

14. We have tried to appreciate this aspect of the argument of Mr. Sahoo. By looking to the confessional statement itself and the entire records of the trial Court as also the order-sheets of the learned Magistrate before whom the

confession was made, we find that while the accused expressed his mind to make confessional statement, he was given sufficient caution by the learned Magistrate and the matter was referred to another Magistrate. From the order sheets it appears that after giving sufficient caution, the confessional statement had been recorded. We have considered the argument of Mr. Sahoo in this regard by verifying the entire records of the case from the very beginning. We do not find that the recording of the confessional statement suffers from any infirmity or irregularity as after recording the statement it was disclosed to the accused that such statement made before the Magistrate would be used in the case against him. We do not find any merit in the submission of Mr. Sahoo in this regard. A confessional statement can at best be considered as a piece of evidence. The learned Additional Sessions Judge has not solely depended on the confessional statement to find Rabindra guilty of the offences so committed by him. This confessional statement made by Rabindra has been treated as a piece of evidence. This piece of evidence has been considered along with the other evidence on record. The learned Additional Sessions Judge has considered the topography and the deposition of the prosecution witnesses and has found that there are trustworthy evidence as regards commission of the offence by accused Rabindra. The entire deposition of the prosecution witnesses and the materials on record together with the confessional statement of Rabindra have been considered in the proper perspective. With great anxiety we have considered the depth and details of the prosecution evidence and top of it the confessional statement of Rabindra being treated as an important piece of evidence. The finding of the learned trial Court being put to the strictest proof of law does not show that anything wrong therein for holding appellant Rabindra guilty of the offence. We have not been able to persuade ourselves to differ from the conclusions reached by the teamed Additional Sessions Judge in any manner whatsoever.

15. Regard being had to the materials on record the learned advocate for the appellants has also argued with regard to the scope of punishment. Attention of the Court "was drawn to the principles as laid down in *Bachan Singh Vs. State of Punjab*, . It has been observed in that decision at page 944 in pars 304 that the mitigating circumstances have to be taken into account by the Court while considering the sentence of death. Our attention has also been drawn to the decision reported in (*Allauddin Mian v. State of Bihar*). In that case, two girls of seven years and seven months of age were killed where the motive for crime was obscure. The killings were not for gain and more fact that intents were killed without more, was not sufficient to bring the case within the category of rarest of rare cases. Another decision was cited which is repotted in (4) 1991 CCR 619 (*Satate v. Setalu Sudan Reddy*.) In that case, a young girl of six years was lited from the village road and brutally killed. There was death sentence but the same was converted to imprisonment for life. The reasons indicated therein were that there was emotion and mental disturbance. Similarly, in the case reported in 1994 (7) OCR 53 (*State of Orissa v. Subhas Joshi*) where a boy of seven years

was kidnapped and killed, the sentence of death was converted to life imprisonment. Our attention has also been drawn to the decision reported in *Srirangan Vs. State of Tamil Nadu*, which was a case of triple murder. The accused was found to be young in age and in a state of frenzy the offence had been committed. Death sentence in that case was reduced to life imprisonment. We find also in the case reported in *Om Prakash Vs. State of Haryana*, that the imposition of death sentence was held to be excessive when two co-accused who were alleged to have instigated the accused to fire at the deceased were given benefit of doubt. In another case 1994 SCC 323 (*Balraj v. State of U. P.*), there were murders of a brother, his two children and their friend and the offence was committed under influence of extreme mental and emotional disturbance. Innocents were killed and the murders were found not cold-blooded. The accused was found to have acted in a frenzied manner and the sentence of death in that case was reduced to imprisonment for life. 1994 (3) Crimes 619 (*M. S. Sheshappa v. State of Karnataka*) was a case where the accused was alleged to have killed his parents, brother and sister-in-law and was aged about 32 years. There was no evidence that he had pre-planned the series of murders. He appeared to have been obsessed with some ideas. It was held to be a case of extreme mental and emotional disturbance and the death sentence was converted to imprisonment for life. Similarly, in 1994 SCC 629 (*Vithal v. State of Maharashtra*) the accused had committed murder of his brother's wife, inflicted injury to his father and brother and also killed a seven years' old boy. Participation of the accused in the crime was proved but the motive was clearly established by the prosecution. Death sentence in that case was found not justified and was reduced to imprisonment for life.

16. On the converse, the learned Additional Standing-Counsel has referred to the cases reported in *Asharfi Lal and Others Vs. State of Uttar Pradesh*, , *Sevaka Perumal, etc. Vs. State of Tamil Nadu*, , *Bollavaram Pedda Narsi Reddy and others Vs. State of Andhra Pradesh*, , *Kuljeet Singh alias Ranga Vs. Union of India (UOI) and Anr.*, . AIR 1978 SC 1248 (*Shankaria v. State of Rajasthan*) and (1990) 3 OCR 417 (*State v. Jaharlal Das*).

17. We have gone through the materials on record very minutely and have tried to feel the gravity of the same. True it is that there was a great tragedy happened in the life of a helpless father and crying mother. In their very presence their three young children were brutally murdered. Since they had the apprehension for life, they had to leave their residential house and take shelter at the house of a villager named Keshab Pradhan. Only the compromise had convinced them that they could come back to their own house. Unfortunately, Sanatan's anger did not extinguish. He flared up at the sight of PW 7 returning with PW 1 and the children. It is proved that Sanatan being the eldest member of the family instigated his three young sons to commit the crime. Being instigated by their father his sons forcibly made their entry into the house of PW 7, assaulted their uncle and killed the three innocent children like hungry wolves. The part played by Sanatan is beyond comprehension, but it appears that he has

acted under an emotional outburst. Without understanding the consequences, he instigated his young three sons, but did not realise the consequences of the heinous offence going to take place. The instigation was sufficient enough to excite the accused sons to commit the crime. Appellant Rabindra being very young in age was found to have been more emotionally excited and he hit all the three children by his axe causing their death. All these actions have been committed under grave emotional disturbance and in great frenzy. The crucial moments of tragedy have taken place. The Supreme Court in one of its judgments reported in *Bachan Singh Vs. State of Punjab*, has held certain salient features to be considered in inflicting death sentence. The Supreme Court has held that the provision of death penalty as an alternative punishment for murder in Section 302, IPC is not unreasonable and it is in the public interest. It can be held that the provision in Section 302 violates neither the letter or the those of Article 19 of the Constitution, but certain mitigating circumstances have got to be considered. In para 204 at page 944 of the decision, the Supreme Court has quoted certain suggestions made by Dr. Chitaley as mitigating factors:

"Mitigating circumstances-In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused-II the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
- (5) That in the facts and circumstances, of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person ; and
- (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate criminality of his conduct."

The Supreme Court has unequivocally observed that nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death-penalty must receive a liberal and expansive construction by the Courts In accord with the sentencing policy writ large in Section 354(3) judges should never be blood thirsty. Hanging of murderers has never been too good for them Facts and figures albeit incomplete, furnished by the Union of India, how that in

the past Courts have inflicted the extreme penalty with extreme infrequency a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

18. Judging from this angle of vision, although we deprecate the offence committed by the accused, yet there is a great saying that to lose faith in humanity is a sin. It must be appreciated that there is still life in life sentence and only death in death sentence. There is a great saying also that it must be a human endeavour to hate the sin and not the sinner. Relying on the ratio of the decisions of the apex Court as discussed above, we find that the ends of justice will be met in the present case if instead of confirming the death sentence, it is reduced to imprisonment for life.

19. The Criminal Appeals are allowed in part. So far as death sentence of appellants Sanatan and Rabindra is concerned, the same is reduced to imprisonment for life. The conviction of all the appellants as also their other sentence remain unaltered. With the reduction of sentence, the Death Reference is disposed of.

20. Before parting with this case, we observe that we shall fail in our duty if we do not place on record the note of appreciation as to how we have really been assisted by the learned advocate for the appellants, namely, Shri Sangam Kumar Sahoo. He has very wisely assisted the Bench in adjudicating this case. He appears to be young and in fact he has acted like an astute lawyer fulfilling the expectation of the Bench from the Bar. He has not only tried to do justice to his clients to the best of his ability, has also performed the role of a real amicus curiae.

R.K. Patra, J.

21. I agree.