
(2002) 04 OHC CK 0055

In the Orissa High Court

Case No : Death Reference No. 1 and Jail Criminal Appeal No. 10 of 2002

State

APPELLANT

Vs

Kampala Khamari and Another
Another Vs State of Orissa

RESPONDENT

Date of Decision : 25-04-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) 1 OLR 602

Hon'ble Judges : P.K. Misra, J;B. Panigrahi, J

Bench : Division Bench

Advocate : G.K. Mohanty, in Death Ref. 1/2002 and Sangam Kumar Sahoo, in J. Criminal app. 10/2002, for the Appellant; Sangam Kumar Sahoo in Death Ref. 1/2002 and G.K. Mohanty, Additional Government Advocate in J. Crl. App. 10/2002, for the Respondent

Final Decision : Dismissed

Judgement

B. Panigrahi, J.—The Death Reference and the Jail Criminal Appeal are directed against the judgment passed by the Addl. Sessions Judge, Sonepur in Sessions Case No. 102/1 of 2000/2001 dated 25.1.2001 convicting the accused-appellants u/s 302 read with Section 34, Indian Penal Code (in short "IPC") and sentencing them to be hanged by neck till their death for having brutally killed deceased Prafulla and Pramod.

2. The prosecution story as unravelled during trial is as follows :

On 27.6.2000 morning at about 8.00 A.M. while deceased Pramod Khamara, husband of P.W.I Jayanti Kumari had been to his field, Jayanti Kumari was cleaning the cow-shed, the appellant Bhagaban came sliely, entered into the cow-shed and exhibited lewd gesture to P.W. 1. By such indecent behaviour, P.W. 1 Jayanti got infuriated and retorted by saying that appellant Bhagaban could have exhibited such type of behaviour to his own sister. At. this juncture when deceased Pramod. husband of P.W.1 came and enquired about the incident, P.W.

1 narrated the background of such misbehaviour shown by appellant Bhagaban. Deceased Pramod went to accused Bhagaban and questioned about such unsavoury behaviour to which he got agitated and assaulted the deceased Pramod. After being badly injured deceased Pramod went to Keutapali village along with P.W. 1 to narrate their woes to Prafulla, the other brother of Pramod. After some time Pramod, Prafulla and P.W. 1 Jayanti returned towards their village. Initially they were wavering as to whether they would proceed to police station or to their residence, but they made up their mind to come to their residence whereafter they would go to the police station to lodge a report. On the way they found both the accused- appellants being armed with Tangias (axes) standing in front of their house. The assailants attacked both the victims, namely, Prafulla and Pramod in such a dastardly, grisly and horrendous manner that they separated their trunk from their heads. They inflicted successive blows on deceased Pramod and Prafulla and nobody could dare to rescue them. P.W.3, the father of the victims proceeded to the police station and reported the matter and immediately thereafter the police swung into action, arrested the appellants, recorded the statements of the witnesses, held inquest over the dead bodies and sent the dead bodies with the severed heads for post mortem examination. The police seized the weapons of assault and after completion of investigation placed the charge- sheet against the appellants under Sections 302, 323/34, I.P.C.

3. The appellants pleaded innocence before the trial Court.

4. Prosecution in order to unfold its story had examined 17 witnesses of whom the evidence of P.Ws. 1, 3 and 4 are significant as they claimed to be eye-witnesses to the occurrence. P.W. 2 had claimed that on the date of incident the deceased Prafulla was working as a field servant, P.W. 5 was cited as a witness to the recovery of Tangias with which the appellants are said to have killed the deceased. P.W. 6 was a post-occurrence witness, who narrated that while he was constructing a tank (reservoir) he heard hulla and people were shouting that both the accused persons killed Pramod and Prafulla. P.W. 7 was the scribe of the F.I.R. (Ext. 1) which he reduced to writing on being instructed by P.W.3 Sukru Khamari. His evidence further certified that on 4.7.2001 the appellant Bhagaban while in police custody recovered a Tangia which he concealed in a heap of straw and produced before the police and it was seized in his presence, vide Ext 9. P.W. 8 was the Medical Officer, who examined Jayanti Khamari, wife of deceased Pramod Khamari and prepared the injury report. P.W. 9 was a witness to the inquest. P.W. 10 was the doctor, who conducted post mortem examination over the dead body of deceased Prafulla Khamari. P.Ws. 14 and 15 were Investigating Officers. P.W. 16 was the Medical Officer, who conducted post mortem examination over the dead body of deceased Pramod Khamari. P.W. 17 as the Officer-in-charge of Birmaharajpur police station who received charge of investigation from the A.S.I. of Subalaya Outpost.

5. In this case the evidence of P.Ws. 1 and 3, who were the wife and father of deceased Pramod respectively, is significant. P.W. 1 presented a vivid picture of

the prosecution story. She narrated that on the date of the incident the appellant Bhagaban exhibited some lewd gesture at her, therefore, it was unbecoming for her to tolerate the unsavoury and indecent behaviour. Therefore, she retorted by saying to behave in the same way with his sister. At that time Sandhya the sister of accused Bhagaban came and abused her and on her call the deceased Pramod, who was in his field came and enquired about the incident. At that time accused Bhagaban attacked and assaulted deceased Pramod in his head with a spade and the other appellant Kampal also assaulted deceased Pramod with a merha as a result of which deceased Pramod sustained injuries on his person and some bangles of P.W. 1 were broken. After the assault P.W. 1 along with deceased Pramod went to call Prafulla, the younger brother of deceased Pramod. All of them were returning to village and proposing to file a case against the appellants. At that time when deceased Prafulla reached near a Neam tree, both the appellants all on a sudden attacked deceased Pramod and Prafulla with Tangis (axe and tabli). After receiving injuries when deceased Pramod fell down unconscious, appellant Kampal severed his head from the trunk. The other appellant Bhagaban too severed the head of deceased Prafulla by cutting his neck. P.W. 1 was trembling with fear at the ghastly murder of her husband and his younger brother. The evidence of P.W. 3 also certified in the same manner as that of P.W. 1. On a combined reading of the evidence of P.Ws. 1 and 3 there leaves no room for doubt that the appellants were the perpetrators of the crime. The appellants did not have a slightest compassion or remorse for commission of such deadly offence. P.W. 2 was the employer of the deceased Prafulla and he narrated that on the date of incident deceased Pramod went to call deceased Prafulla to report the incident which had taken place in the morning at the police station. P.W.4 also corroborated the prosecution case which was described in detail by P.Ws.1 and 2. P.W.4 in cross-examination has stated that while both the deceased were returning towards the village they were armed with merah (stick). There was exchange of pelting of stones between the appellants and both the deceased. P.W.4 is an independent witness. Nothing has been suggested by the prosecution why his evidence should not be accepted, Therefore, from the testimony of P.W.4 it is gathered at the time of incident both the deceased were returning towards the village with sticks in their hands and immediately preceding the incident, there was exchange of brickbats. P.Ws.5 and 6 were the seizure witnesses in whose presence both the axes had been seized on production by appellant Kampal and Bhagaban. In their cross-examination nothing was suggested to discredit their testimony. P.W.7 had scribed the F.I.R. and testified that on 4.7.2000 both the appellants while in custody produced the axe which was concealed in a heap of straw. He also proved the seizure list, Ext. 9, P.W.8 was the Medical Officer, who examined P.W.I and found the following injuries :

"(i) Abrasion of size 1 cm x. 1/4 cm on the left parietal eminence of the scalp with surrounding haematoma on the left parietal eminence of the scalp of size 2 cm x 2 cm.

(ii) Abrasion of size 2 cm x 1 cm on the right side of the face 1 cm lateral to the lateral canthus of the right eye.

(iii) Bruise of size 2 cm x 1/2 cm on the left side of the back over the lower boarder of the thoracic cage along the posterior axillary line;

(iv) Haematoma of size 3 cm x 2 cm on the lateral aspect of left knee joint."

According to him all the injuries were simple in nature and might have been caused by hard and blunt weapon. P.W. 9 was a witness to the inquest over the dead body of Pramod and Prafulla and proved the inquest reports, Exts. 2 to 7. P.W. 10 was the Medical Officer who conducted post mortem examination over the dead body of Prafulla and found the following injuries :

"(i) Neck was separated from head at cervical 2nd, 3rd vertebra lebel posteriorly and 1st and 2nd tracheal rings anteriorily. All the muscle of the neck including oesphagus were incised.

(ii) There was a chop wound of size 1" x 2" x skin deep on the ulnar aspect of right forearm.

(iii) Chop wound of size 4" x 3" x bone deep was present on the dorsal aspect of left forearm just below the elbow joint.

(iv) Fracture of both radius and ulna were detected below injury No. 2.

(v) Chop wound of size 7" x 1/2 x bone deep oh right size chest and it was oblique.

(vi) There was fracture dislocation of distal phalanx of right middle finger.

(vii) Incised wound of size 2" x 1/2 and skin deep between middle and index finger on right hand.

(viii) Chop wound of size 4" x 2" x skin deep on the anterior aspect of right shoulder.

(ix) Incised wound of size 2" x 1" x skin deep on back of chest.

(x) Chop wound of size 3" x 1" x skin deep on back 6" above the sacral bone

(xi) Chop wound of size 3 x 1/2" x skin deep just below the above noted injury.

The other injuries in respect of the, head were as follows :

"(i) Head was separated from body at the level of C2 vertebra.

(ii) Chop wound of size 3" x 1" bone deep on lower jaw of left side 1" below the lower lip.

(iii) Chop wound of size 4" x 2" x bone deep on the occipital region of head on right side.

(iv) Incised wound on left side of face size 1" x V2" x skin deep just above the

eyebrow.

(v) Fracture of occipital bone underlying injury No. 3.

(vi) There was fracture of 5th and 6th ribs on the right side of the chest."

On dissection of head P.W. 10 found the following internal injuries on the head of deceased Prafulla.

"(i) There was lacerated wound of cerebral membranes underlying injury No. 4.

(ii) Incised wound of size 1" x 1/2" was detected on posterior aspect of right side cerebral lobe."

On dissection of thorax (chest) P.W. 10 found the following injuries on the body of deceased Prafulla.

"(i) The plura underlying the injury of the chest was congested.

(ii) Fracture was separated at the level of 1st and 2nd rib.

(iii) Incised wound of size 2" x 1/2" was detected on the right lungs underlying the chest injury.

(iv) Carotid vessels were incised at the neck at the level C/2 and 3 cervical vertebra. An incised wound of size 1" x 1/2" right lobe of the liver on upper aspect and it was congested."

P.W. 12 was a constable attached to Birmaharajpur police station, who produced the wearing apparel of the deceased persons and also of the appellant Kampal vide Exts. 15 to 17. P.W. 13 was the constable of Subalaya Outpost. He received the Command Certificate from the Officer-in-charge and went to the place of occurrence. From there he along with A.S.I. Jagannath Gouda despatched the dead body of Pramod and Prafulla to the District Headquarters Hospital, Sonapur for post mortem examination. P.W. 14 was the Circle Inspector of Police of Birmaharajpur police station, who sent a query to the Medical Officer, Sonapur to ascertain whether the death of Pramod and Prafulla was possible by the help of Tangias (M.Os. I and II) to which he replied affirmatively, vide Ext. 22. P.W. 15 was the A.S.I, attached to Subalaya Outpost and held inquest over the dead-body of deceased Pramod and Prafulla and prepared the inquest report, vide Exts. 2 to 7. P.W. 16 conducted post mortem examination over the dead body of Pramod and found the following injuries :

"While the head of the deceased Pramod was found decapitated, the body bore one incised wound of size 2 1/2 x 1" x 1/2 on the left medial side of his arm, one incised wound of size 1 1/2" x 1" x 1/2 was also found on the neck over the sternal notch, one more incised was further found on the face near the tragus of the left ear and size of his injury was 1" x 1/2 x 1/2 one lacerated wound of size 4" x 1/2 x 1" was also noticed on the left side of the scalp which had caused the fracture of temporal and parietal bone. There was also laceration of brain matter under bone the above fracture of temporal and parietal bone. All the

muscles of neck were found cut at level C-4. The C-4 vertebra was also found cut. Apart where larynx was also found cut at thyrod cartilage level. Oesophagus was also found cut."

P.W. 16 prepared the post mortem report, vide Ext. 26. He also opined that the injuries over the dead body of Pramod could be possible by M.Os. I and II, the axes. P.W. 17 was the O.I.C. of Birmaharajpur Police station, who conducted investigation, arrested the accused persons, seized Tangias, collected the wearing apparels of deceased and the accused persons and sent them to Forensic Science Laboratory through the S.D.J.M., Birmaharajpur and thereafter placed the charge-sheet before the Court.

6. On a combined reading of the evidence of eye-witnesses, P.Ws. 1, 3 and 4, there leaves little room for doubt that both the deceased, namely, Pramod and Prafulla met with homicidal death. The death caused to those deceased was dreadful, horrendous, grisly and atrocious inasmuch as the head had been severed from the trunk of both the deceased.

7. From the evidence on record we found that there was no love-lost between the two families. The appellant Bhagaban went to the cowshed of P.W. 1 and made some indecent overtures for which it is normally expected that P.W. 1 must have reacted and retorted to it.

8. Mr. Sahu, learned Advocate appearing for the appellants, in his wisdom did not seriously dispute about the conviction of the appellants.

9. In the above conspectus of the case we have no other option to hold that both the appellants are guilty of committing the offence of murder of deceased Pramod and Prafulla which is punishable u/s 302, IPC.

10. Mr. Sahu, learned Advocate appearing for the appellants has strongly contended that the engagement of State defence counsel in the trial Court should not be a mere compliance of provisions of law, but with all intent, purpose and sincerity the lawyer must conduct the case of the accused. In this case the conducting counsel appearing for the appellants appears to be more superfluous without any real contest. Therefore, the defence was not able to conduct its case properly and for that reason alone the death sentence must be transmuted into imprisonment for life. To strengthen his contention reliance was placed on a Division Bench case of this Court reported in 1995 OCR 435 in the case of Debendra Pradhan and Ors. v. State of Orissa. From the ratio of the judgment we found that it is the duty of the Sessions Judge while appointing the State defence counsel to give sufficient time to the counsel for preparing the defence and also supply him all relevant papers, otherwise such defence would only be a farce without its real purpose. In this case, we found that the appellants' case could not be properly handled before the learned Sessions Judge, but however, we have had the opportunity of assistance of Mr. S. K. Sahu, who acted like an astute lawyer fulfilling the expectation of the Bench from the Bar. Therefore, we record our high appreciation of Mr. Sahu.

11. An eye for an eye was the clarions" call during the stone ages, but such concept has been gradually given a go by. Instead, reformatory measures have been adopted in the criminal justice delivery system. The provision of death penalty is an alternative punishment for committing murder punishable u/s 302, I.P.C. The punishment of death sentence in appropriate cases does not violate the letter of ethos of Article 19 of the Constitution of India. The offence which squarely affects public order deserves award of such severe punishment. All murders generally disturb or affect "public order". Some murders may be purely private, significant and the injury and harm resulting therefrom affect only specific individual. The Supreme Court in case of Bachan Singh Vs. State of Punjab, has drawn the iron curtain by delineating in which cases the death penalty can be imposed. It has further stated that it is very difficult to formulate rigid standards in an area in which such punishment can be imposed. Only guidelines consistent with the policy indicated by the legislature in Section 354(3) of the Cr.P.C. has been adumbrated. In the judgment cited supra the Supreme Court held in the following manner :

"There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. 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, in the instant case, show 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 ever more 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."

12. Mr. Sahu, learned State defence counsel has submitted that when the Court after consideration of the evidence has intended to impose a death sentence, ordinarily the question of imposition of sentence should be postponed to the subsequent dates whereby the convict can be afforded a reasonable opportunity of hearing on the question of sentence. Learned Addl. Government Advocate has relied upon a decision reported in (1994) 7 OCR 55 in the case of State of Orissa v. Subash Joshi and submitted that no hard and fast rule can be laid down that the question of sentence should or should not be passed on the date of the judgment and thereby the Court does not commit any illegality or impropriety by

imposing the extreme sentence. But in the aforesaid case on a consideration of the lesser gravity of the offence, this Court has commuted the death sentence into imprisonment for life.

13. Mr. Sahu submitted that when severe punishment of death sentence is proposed to be imposed against an accused, he should be given an opportunity of hearing on the same and as far as possible it be avoided.

14. It is true that while the offence of murder was committed with extreme brutality, the Court in such situation can impose death sentence. In other words, where the accused committed reprehensible and gruesome murders by which public order is very likely to be disturbed, the Court considering the degree of criminality can impose such extreme punishment of death. It is also true that opportunity to the accused should not appear to be a mere formality, but he should be given a chance of submitting to the Court by indicating the circumstances in which a lesser punishment of imprisonment for life can be imposed. In the judgment reported in (Allauddin Mian and Ors.. Sharif Mian and other v. State of Bihar) the Hon"ble Supreme Court held in the following manner :

"Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the Judge follow for determining the punishment to be imposed in each case to fit the crime ? The choice has to be made after following the procedure set out in Sub-section (2) of Section 235. The requirement of hearing the accused in the sub-section is intended to satisfy the rule of natural justice. It is a fundamental requirement of fairplay that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced Sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. In a case of life or death as in the case of punishment for murder, the presiding officer must show a high degree of concern for the statutory right of

the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the Court, the Court's decision on the sentence would be vulnerable. It need hardly be mentioned that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision: a fortiori, therefore the principle of fairplay must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of Sub-section (2) of Section 235 in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing Court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. As a general rule the trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

In the case of *State of Orissa v. Subash Joshi* (supra) the *Alluddin Mian*'s case was also followed. In that case the Division Bench arrived at the conclusion that on such account the death sentence cannot be regarded as illegal.

15. Mr. Mohanty, learned Addl. Government Advocate has relied upon the judgment reported in *Subash Chandra Panda and Others Vs. State of Orissa*, and contended that relying on the principle enunciated in the above case the appellants should be awarded the punishment of death sentence. The same question as to whether the sentence of death can be imposed or not has been answered in the above case.

16. Therefore, on the rationale of the above judgment it has been unmistakably established that no rigid or inflexible formula can be laid down that in no case the sentence of death can be imposed on the date of conviction. If the reasons for awarding the death sentence are adequate and sufficient, in such eventuality there is no reason to defer the hearing on the question of sentences.

17. It has to be borne in mind that while awarding extreme penalty of death sentence Courts are expected to exhibit sensitiveness because in case of sentence of death, life once lost cannot be brought back. For determining the appropriate sentence, the Court should take into account the aggravating circumstances and it should not also overlook or ignore the mitigating circumstances. The manner in which the crime was committed, weapons used and the brutality or the lack of it are some of the considerations which must be

present in the mind of the Court. Death sentence being an exception to the general rule, should be awarded in the "rarest of the rare cases" for "special reasons" to be recorded after balancing the aggravating and mitigating circumstances in the facts and circumstances of a given case.

18. In a recent judgment reported in 1999 SCC (Cri.) 334 (Om Prakash v. State of Haryana) it has been held :

It is true that the Court must respond to the cry of the society and to settle what would be a deterrent punishment for an abominable crime. It is equally true that a large number of criminals go unpunished thereby increasing criminals in the society and law losing its deterrent effect. It is also true that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect; in the ultimate analysis, the society suffers and a criminal gets encouraged. Sometimes it is stated that only rights of the criminals are kept in mind, the victims are forgotten. Despite this it should be kept in mind that while imposing the rarest of rare punishment, i.e., death penalty, the Court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case."

19. Reliance was placed on another case reported in 1998 SCC (Cri.) 610 (Vinayak Shivajirao Pol v. State of Maharashtra). The facts of that case appear to be some what similar to the present case. Even the Supreme Court has commuted the sentence of death into imprisonment for life for meeting the ends of justice. In a recent judgment reported in (2002) 22 OCR (SC) 424 (Lehna v. State of Haryana) the Supreme Court has laid down the parameter in which the extreme penalty of death can be imposed. In the aforesaid judgment it has been held that when a murder is committed in an extremely brutal, grotesque, diabolical revolting or dastardly manner so as to arouse intense and extreme indignation of the community, in such situation the death sentence would be proper and imprisonment for life would be grossly inadequate. While considering such factor the Court cannot shut its eyes to ponder over the mental condition of the accused which led him to commit the crime. The same may not be relevant to judge the culpability, but is certainly a factor while considering the sentence. Every murder is brutal, diabolic, inhuman, atrocious and repulsive. But in all cases of murder, sentence of death would be improper, undesirable and deterrent. Therefore, the balance-sheet of aggravating and mitigating circumstances has to be struck and while so doing the mitigating circumstances have to be given full weightage and thereafter the decision of imposing penalty of death sentence or imprisonment for life has to be arrived at.

20. Keeping the aforesaid principle in mind let us now advert to the reasoning given by the learned Addl. Sessions Judge while imposing the death sentence against the appellant. It is true that the appellants had committed the crime in a

most inhuman, atrocious and grotesque manner, but at the same time while striking the balance we will have to find out; Are there any mitigating circumstances while so doing ? The learned trial Judge has used in his judgment that the appellants had played a diabolical trickery while committing the brutal, homicidal death of Pramod and Prafulla. There is absolutely no evidence to suggest that there was any pre-meditation or pre-plan to put an end to the lives of Pramod and Prafulla. On reading the evidence of P.W.4 we found that both the deceased were armed with merah (stick) while advancing towards the house of the appellants. It is, therefore, to be considered that if the appellants were armed with axes which the deceased had seen earlier, it is not understood why did not they retreat back and advance towards them. Had they retreated, they could have avoided such ghastly murder. We have also found that there was exchange of pelting of stones between the appellants on one hand and the deceased on the other. Deceased Prafulla had caught hold of appellant Bhagaban. Thereafter both the appellants assaulted the deceased. Therefore, in such factual matrix it cannot, however, be said that the deceased persons were unarmed at the time of incident.

21. In view of the aforesaid mitigating circumstances, we do not, however, approve the order of the learned Addl. Sessions Judge whereby the he had imposed the sentence of death against the appellants. Accordingly, we commute the sentence of death into imprisonment for life.

22. In the result, the appeal filed by accused Kampal Khamari and Bhagaban Khamari is hereby dismissed and the death reference is answered in the light of the above observations.

Ch. P.K. Misra, J.

I agree.