
(2014) 01 OHC CK 0016

In the Orissa High Court

Case No : DSREF No. 4 /2012 and CRLA Nos. 534/2013, 634 of 2012

State of Orissa

APPELLANT

Vs

Raju

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Penal Code, 1860 (IPC) — Section 302, 307, 34, 460

Citation : (2014) 1 ILR 853

Hon'ble Judges : P. Mohanty, J; Biswajit Mohanty, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

Biswajit Mohanty, J.—The present death reference No. 4 of 2012 arises out of Criminal Trial No. 17 of 2011 in which the learned Sessions Judge, Nuapada held the accused persons guilty of offences u/s 460/302/307 of the I.P.C. read with Section 34 of the I.P.C. and accordingly convicted them thereunder. On such conviction the learned Sessions Judge, Nuapada sentenced each of the convicts to undergo rigorous imprisonment for 10 years on each count under Sections 460/307 of the I.P.C. read with Section 34 thereof and further directed that the sentences were to run concurrently. The learned Sessions Judge further sentenced each of the convicts to death u/s 302 of the I.P.C. read with Section 34 thereof and further directed that each of them shall be hanged by the neck till they are dead. Learned Sessions Judge further directed that the proceedings be submitted to this Court for confirmation of the death sentence. Challenging the aforesaid orders of conviction and sentence, convict Manoj Kumar Bhoi has filed Criminal Appeal No. 534 of 2013 and convict Raju @ Motilal Barik has filed Criminal Appeal No. 634 of 2012 before this Court. In such background, the above noted death reference and two Criminal Appeals are heard together and are being disposed of by this common judgment. Prosecution case in brief is that convicts, namely, Manoj Kumar Bhoi and Raju @ Motilal Barik were frequently coming to the house of one Pankaj Mirdha (P.W. 1). On 1.2.2011 at about 3 to 4

P.M. both the convicts came to the house of Pankaj Mirdha and demanded money from the deceased wife of Pankaj Mirdha, namely, Saibani Mirdha. When Saibani Mirdha refused to meet the demand, both the convicts enquired about Pankaj Mirdha (P.W. 1). To such query the deceased Saibani replied that Pankaj Mirdha (P.W. 1) had gone to Dangar. Both the convicts threatened Saibani Mirdha, the wife of Pankaj Mirdha that unless the money is given to them, the deceased Saibani would meet dire consequences and then they left the house of P.W. 1. In the night, after taking meals P.W. 1, his deceased wife Saibani and youngest son Mukesh were sleeping in the Parchhi on the ground. The daughter of P.W. 1, Kausalya (also deceased) and elder son Khirasindhu of P.W. 1, who has been examined as P.W. 2 were sleeping in one cot in the front room adjoining Parchhi. There was a tin door in the Parchhi and the same was tied with an iron wire to keep it closed. In the night of occurrence, while P.W. 1 was sleeping in the Parchhi, the tin of the Parchhi hit at his head as a result P.W. 1 woke up and saw that the tin door was open and both the accused persons were standing inside the Parchhi. Then all of a sudden the convict Manoj Kumar Bhoi gave a blow on the neck of P.W. 1 by means of a sharp object and as a result P.W. 1 became, senseless. On 2.2.2011 in early morning P.W. 5 the informant when tried to open the front door of his house from inside he could not open the same as the same was locked from outside. P.W. 5 happens to be the full blooded younger brother of P.W. 1. Sometime after P.W. 5 was able to open the door and at that time there was Ho Hullah outside his house. After coming out from his house, P.W. 5 could know that the houses of P.W. 3 and Sadhu Mirdha were also locked from outside. There P.W. 5 along with others heard groaning sound from the house of his elder brother Pankaj Mirdha (P.W. 1). P.W. 5 along with others peeped into the said house and found all family members of Pankaj were lying in a pool of blood having sustained severe bleeding injuries. Later P.W. 5 found Kausalya the elder daughter of Pankaj Mirdha lying dead with bleeding injuries. The injured persons were unable to talk because of severe injuries sustained by them. The informant also noticed that one axe, one paniki, one knife and one lathi stained with blood were lying at the spot. Then suspecting involvement of some unknown persons in commission of the said ghastly crime, P.W. 5 (informant) lodged a written report before the police. On the strength of the said report, the Police of Komna Police Station registered Komna P.S. Case No. 10 of 2011 and took up the investigation. During course of investigation, the I.O. examined the informant and others, conducted the inquest over the dead body of the deceased Kausalya Mirdha and sent the injured persons for their medical examination to D.H.H., Nuapada. Soon thereafter, the injured Saibani Mirdha, the wife of P.W. 1 succumbed to her injuries in the hospital. The police made requisition to C.H.C., Komna for post mortem examination on the dead body of Kausalya Mirdha and another requisition to D.H.H., Nuapada for post mortem examination on the dead body of Saibani Mirdha. During course of investigation, the police seized weapons of offence and wearing apparels of the deceased. The police also sent different materials for their chemical examination to Regional Forensic Laboratory, Berhampur. The police arrested the accused persons on 8.3.2011 and forwarded

them in custody to the Court. On completion of investigation, the police submitted charge sheet against the accused persons under Sections 460/302/307 read with Section 34 of the I.P.C. on 26.5.2011 to the Court of learned S.D.J.M., Nuapada. Consequent upon the commitment of the case to the Court of the Sessions, Nuapada the convict-appellants stood their trial u/s 460/302/307 of the I.P.C. read with Section 34 of the I.P.C. for committing house breaking and for having murdered Saibani Mirdha and Kausalya Mirdha and also for attempting to commit murder of P.W. 1, P.W. 2 and Mukesh Mirdha.

2. The plea of the convict-appellants before the learned Sessions Judge was one of complete denial.

3. In order to establish the charges against the convict-appellants the prosecution examined 17 witnesses. P.W. 5 is the informant, who is also brother of P.W. 1. P.W. 1 is the injured eye-witness, who was attacked by convict Manoj Kumar Bhoi on his neck by means of a sharp object. P.W. 2 is also another injured witness, who happens to be the son of P.W. 1. P.Ws. 3 and 4 are the post occurrence witnesses. P.W. 6 is one Seshamati Majhi, who is the mother-in-law of P.W. 1. She is also a post occurrence witness. P.W. 7, one Tankadhar Kathar, proved the seizure of wearing apparels of the convict-appellants and mobile handset of convict Raju by the police. P.W. 8 denied the knowledge about the alleged occurrence. P.Ws. 9 and 10 are two Gram Rakhis, who proved the seizure of some wearing apparels and command certificate. P.W. 11 is a police constable, who proved the seizure of four sealed bottles by the police under Ext. 8. P.W. 12 is one Debanand Baikar, who scribed the F.I.R. under Ext. 3 as per the instruction of P.W. 5. P.W. 13 is Dr. Himansu Sekhar Sahu, the then Medical Officer of C.H.C. Komna, who conducted post mortem on the dead body of Kausalya Mirdha and prepared the post mortem report under Ext. 9. He also opined on the query made by the police on the weapon of offence under Ext. 10. P.W. 14 is the then Dr. Ansuman Pradhan, Medical Officer of D.H.H., Nuapada during the relevant period. He examined P.Ws. 1 and 2 and Mukesh Mirdha on 2.2.2011 on police requisition and found injuries on their persons vide Exts. 11, 12 and 13 respectively. Dr. Ansuman Pradhan also submitted his opinion on the query with regard to weapons of offences under Ext. 14. P.W. 15 is Dr. Bijaya Ranjan Panigrahi of D.H.H., Nuapada, who conducted post mortem on the dead body of Saibani Mirdha and submitted post mortem report under Ext. 16. He also submitted his opinion made by the police on the weapons of offence under Ext. 17. Exts. 19 and 20 are inquest reports. Ext. 30 is chemical examination report. P.W. 16 is the then S.I. of Police, Komna Police Station, namely, Manbodh Mishra, who investigated the case and later made over the charge of investigation of the case to P.W. 17. P.W. 17 Sibaram Sahu was the then I.I.C. of Komna Police Station, who took over investigation from P.W. 16. He subsequently submitted charge sheet in this case.

4. The convicts did not lead any evidence in their defence. After closure of recording of evidence, both the convicts were examined u/s 313 of the Cr.P.C.

Both of them answered the questions in negative and took the plea that they have been falsely implicated by the police. Upon completion of trial and after a detailed examination of materials on record, the learned Sessions Judge came to the conclusion that the prosecution has established its case beyond all reasonable doubt and accordingly found the convict-appellants guilty as indicated earlier and also sentenced them to death u/s 302 of the I.P.C. read with Section 34 of the I.P.C. and sentenced each of them to undergo R.I. for 10 years on each count under Sections 460/307 of the I.P.C. read with Section 34 of the I.P.C.

5. In assailing the impugned judgment, learned counsel for both the appellants mainly directed their attack on belated disclosure of the names of the convicts by P.W. 1 and perfunctory investigation conducted by the I.Os. According to Mr. Anirudha Das, learned counsel appearing for the appellant in Criminal Appeal No. 534 of 2013 though the investigation was initiated on 2.2.2011 but till 3.3.2011 P.Ws. 1, 2 and 6 never uttered a single word before any one or before the investigating agency about the role played by his client Manoj Kumar Bhoi. There is no explanation offered by the said witness as to why they disclosed the names at a belated stage. He also submits that no explanation has been offered by the prosecution for such belated examination of P.Ws. 1, 2 and 6 on 3.3.2011. For this reason, he submits no reliance can be placed upon such unexplained and belated disclosure. In this context, he has relied on the following decisions of various Courts. State of Orissa Vs. Mr. Brahmananda Nanda, , Duvvur Dasrathammareddy Vs. State of Andhra Pradesh, , Panda Nana Kare Vs. State of Maharashtra, , Sonia Bahera Vs. State of Orissa, , Alil Mollah and Another Vs. State of West Bengal, , Alil Mollah and Another Vs. State of West Bengal, , Pravaty @ Prativu Dalai & two others v. State of Orissa, >(2009) 42 OCR 368, Sana Santa Vs. State of Orissa, , Gopal Singh & another v. State of M.P., >(2011) 50 OCR 193, Lahu Kamlakar Patil and Another Vs. State of Maharashtra, , Lahu Kamaiakarpatil & another v. State of Maharashtra, >(2013) 54 OCR 865 ,Durjyodhan Jena v. State of Orissa and Durjyodhan Jena Vs. State of Orissa, .

Secondly, on perfunctory investigation Mr. Das submits that though the convicts were examined on 3.3.2011 but they were arrested on 8.3.2011. This only means that till 8.3.2011 no material was available before the investigating agency and later on the I.Os. got up the witnesses and fabricated a cooked up story against the present appellants. Further, Mr. Das highlighted the evidence of P.W. 17, who had deposed that during investigation it occurred to his mind that there might be some other accused persons except two against whom the charge sheet was submitted. Mr. Das also referred to the evidence of P.W. 16 in order to show that how during their examination before the Trial Court, P.Ws. 1, 2 and 6 have tried to improve their statement and thus contended that prosecution did not come with a clean hand. He submitted that on such background no reliance can be placed on the evidence of P.Ws. 1, 2 and 6. In this context, he relied on one decision of this Court and another decision of the Apex Court as reported in >1992 OCR 529, Krushna Podh Padhan and others v. State of Orissa and >2011

SCC (Cri.) 375, Sunil Kumar Sambhudayal Gupta and another v. State of Maharashtra. Lastly, he submitted that conceding for a moment but not admitting that conviction u/s 302 of the I.P.C. is legal and valid, however, on the facts and circumstances of this case, the same does not come under the "rarest of rare" category warranting death penalty.

6. Mr. D.P. Dhal, learned counsel appearing for Raju @ Motilal Barik in Criminal Appeal No. 634 of 2012 while assailing the impugned judgment submitted that belated disclosure of the name of his client by P.W. 1 and P.W. 2 makes evidence of P.Ws. 1 and 2 legally vulnerable. Secondly, he submits that since P.W. 1 had no inimical term with the convicts, the convicts had no motive to commit the alleged crime. Thirdly, he submits that since there was no eye-witness to the assault made on the persons of Saibani, Kausalya, Khirasindhu and Mukesh, fastening the liability on the convicts for injuries inflicted on the aforesaid persons amounts to acting on conjectures and surmises. Further, he submitted that the learned trial court has gone wrong in relying on a decision reported in Kashinath Mondal Vs. State of West Bengal, . He also attacked lack of promptitude by I.O. in carrying out investigation and has labelled the investigation as a perfunctory one on similar grounds as done by Mr. Das.

7. Mr. B.P. Pradhan, learned Additional Government Advocate while defending the impugned judgment submits that this is a case where motive of the convict-appellants in attacking the entire family has been proved by the evidence of P.Ws. 1 and 2. Further, the intention of the appellants is clearly proved from the way doors of the neighbours were locked to prevent them from saving the family of P.W. 1 and by use of weapons of offence i.e. M.O. I to M.O. IV. According to him, there is no delay in examining P.Ws. 1, 2 and 6 and the investigation conducted by P.Ws. 16 and 17 cannot be described as perfunctory. Conceding for a moment but not admitting that there has been some delay in examination of witnesses, he submitted that as per settled principles of law, the delay by itself does not render prosecution case suspect and further that in a case of defective investigation, it would not be proper to acquit the accused if the case is otherwise well established. In this context, he relied on the decisions reported in Sheo Shankar Singh Vs. State of Jharkhand and Another, , Banti @ Guddu Vs. State of Madhya Pradesh, , >(2002) 2 SCC 646 (Ambika Prasad and another v. State of Delhi Administration and Surajit Sarkar Vs. State of West Bengal, . Lastly, according to him, the chain of circumstances as indicated by the learned Sessions Judge is complete and the same clearly establishes that the convict-appellants are the authors of crime and none else. In this context, he relies on a decision reported in Sharad Birdhichand Sarda Vs. State of Maharashtra, .

8. In order to deal with a case of this nature, let us first see whether the death of both Kausalya and Saibani was homicidal or not. For proving the nature of death of Kausalya, prosecution has relied on evidence of P.W. 13. Dr. Himansu Sekhar Sahu, who conducted post mortem examination on the dead body of Kausalya. In course of post mortem examination he found as follows:-

External:-

- i) One cut wound of size 3" x ?" on the vertex which was deep into cranial cavity;
- ii) One cut wound of size 1.5" x ?" over the left occipital region of head which was deep into the cranial cavity;

The margins of the aforesaid two injuries were clean. The margin of the wounds were found to be red in colour and dried blood and lymph were adherent to the margin. Brain matter expelled out soiling the scalp hair.

- iii) Swelling injury of size ?" x ?" x 1/2" over the glabella;
- iv) Swelling injury of size ?" x ?" x 1/2" over mid upper forehead.
- v) Abrasion of size 1/4" x 1/8" over proximal phalanx of right hand index finger underneath the ring worn on dorsal aspect;

P.W. 13 who proved post mortem report vide Ext. 9, in his opinion has made it clear that external injuries (i) and (ii) and the corresponding or resultant injuries are ante mortem in nature and can be caused by moderately heavy or heavy cutting object. According to him both the injuries No. (i) and (ii) are sufficient to cause death in ordinary course of nature. He has clearly opined that the death of Kausalya was homicidal one. P.W. 13 has also opined that injury Nos. (i) and (ii) mentioned in the post mortem examination report can be caused by iron part of Tangia and Injury Nos. (iii), (iv) and (v) can be caused by wooden part of Tangia or Thenga or wooden part of Knife. It may be noted here that Tangia, Thenga, Knife and Paniki, which were marked as M.Os. I, II, III and IV respectively were also sent to P.W. 13 for his opinion as to whether the injury Nos. i, ii, iii, iv and v could be caused by the above noted M.Os. It is important to note here that both the convict-appellants declined to cross-examine P.W. 13. Thus, from the above evidence, it is clear that the prosecution has amply proved that the death of Kausalya Mirdha was homicidal in nature.

In order to prove the nature of death of deceased Saibani Mirdha, the prosecution relies on the evidence of P.W. 15, Dr. Bijaya Ranjan Panigrahi, who conducted post mortem examination on 2.2.2011 on police requisition on the dead body of the Saibani Mirdha, P.W. 15 vide Ext. 16 found as follows:-

- i) The body was stout, there was laceration wound over throat left side of size 5 c.m. x 2 c.m. x ? c.m. deep, exposing larynx (Air way);
- ii) There was another laceration over right side chin with mandibular bone fracture;
- iii) Another laceration wound over scalp (right temporal bone) of size 1 c.m. x 1 c.m. x with fracture of temporal bone right side with bone chips coming through laceration wound and there was tear and laceration on right side of hemisphere, blood filled seen in right side cranial cavity pushing the brain tissue; no abnormality in thorax and abdomen.

Further, P.W. 15 proved the post mortem report as Ext. 16 and in his deposition made it clear that all the aforesaid injuries were ante mortem in nature and were sufficient to cause death in ordinary course of nature. According to him the mode of death was homicidal one and the same had occurred within six hours. Police sent M.Os. I, II, III and IV to P.W. 15 for examination and his opinion as to whether the injuries found on the dead body of Saibani were possible by those weapons. According to P.W. 15 the injuries found on the dead body of Saibani Mirdha were possible by M.Os. I to IV. In the cross-examination P.W. 15 stated that in case of fracture of mandible one cannot talk and in the present case Saibani was not in a position to talk. However, P.W. 15 stated that in Ext. 16 he has not stated that injuries were ante mortem in nature and that the case was a homicidal one. But, from the nature of injuries, it can be deduced that the death of Saibani was homicidal. In any case, it may be noted here that convict-appellants have neither disputed nor challenged the fact that in both the cases death was homicidal in nature.

9. We have gone through the evidence on record carefully. P.W. 1, who received grievous injury as per evidence of P.W. 14, has stated that he knew both the convicts prior to the occurrence which took place on a Tuesday night. According to him on the day of occurrence at day time he had gone to nearby dangar to collect firewood and returned to home in the evening. On his return he came to know from his wife (deceased Saibani) that both appellants had come to their house and asked about his whereabouts and demanded Rs. 30,000/-. The deceased Saibani refused to meet such demand by saying how she would get the money. He further states that in the night of occurrence after taking meals he, his deceased wife Saibani, youngest son Mukesh were sleeping in the Parchhi on the ground. His deceased daughter Kausalya and elder son P.W. 2 were sleeping on one cot in front room adjoining his Parchhi. According to P.W. 1 there was a tin door in the Parchhi which he had tied with an iron wire to keep the same closed. While he was sleeping in the Parchhi, the tin door of the Parchhi hit him on his head and he woke up. After waking up P.W. 1 saw that the tin door was open and both appellants were standing inside Parchhi. Then all of a sudden the appellant Manoj gave a blow on his neck by means of a sharp object which he could not see. On receiving such blow on the neck P.W. 1 became senseless. During cross-examination, P.W. 1 stated clearly that he cannot say exactly how many days after the occurrence he regained his sense. Further P.W. 1 has stated that he regained his sense may be after 15 to 17 days. Further, during cross-examination he stated that after he returned to home from Burla Hospital police came to his house and asked about the occurrence. He further stated in the cross-examination that first his both the sons were discharged from Burla hospital then he himself was discharged. From the evidence of P.W. 1, it may be seen that his deposition relating to the fact that the accused persons were standing inside the Parchhi and then all of a sudden accused Manoj gave a blow on his neck by a sharp object remain undemolished and as to regaining of sense he was not sure as to exactly how many days after he regained his sense.

P.W. 2 aged about 11 years at the time of his examination makes it clear that he knew both the appellants as they were frequently coming to their house prior to the occurrence. On the day of occurrence both the appellants came to their house and demanded money from his deceased mother (Saibani Mirdha). When the deceased Saibani refused to meet their demands, then both the appellants asked about the whereabouts of P.W. 1. To this his deceased mother told that P.W. 1 had gone to the Dangar. Thereafter, both the appellants threatened the deceased mother that if she would not give money then they would kill her by coming in the night and thereafter they left the house. His further evidence is that in the night of occurrence, while P.W. 2 was sleeping in a cot along with his elder deceased sister Kausalya in a room; his father (P.W. 1) deceased mother and younger brother Mukesh were sleeping on the ground in the Parchhi. After some days of the said occurrence, when P.W. 2 regained his sense, he found himself in the Burla hospital with injury on head and forehead. Thus, the evidence of P.W. 1 is corroborated by P.W. 2 with regard to demand of money by the appellants in the afternoon of the day of occurrence and with regard to sleeping, position of various family members. A perusal of evidence of P.W. 2 shows that his aforesaid evidence has remained un-demolished in cross-examination. The nature of injuries suffered by both P.Ws. 1 and 2 as stated by them has been corroborated by P.W. 14. P.W. 14 has also made it clear that such injuries can be caused by M.O. I to M.O. IV which were seized from the spot with blood stains. Such seizure has been proved by P.W. 4 in his evidence vide Ext. 1.

Now coming to the evidence of P.W. 5, the informant, it may be noted that he is the younger brother of P.W. 1 and in the morning following the alleged occurrence, when he woke up he could not open the door of his house since it was locked from outside. P.W. 5 opened the SURSI of the SIKULI by making it straight and opened the door and at that time there was Ho Hulla outside his house. When he came out from his house he also came to know that the houses of P.W. 3 and Sadhu Mirdha were also locked from outside. Hearing SAN SAN sound coming from the house of Pankaj (P.W. 1) he peeped inside the house of P.W. 1 through the front door and saw that all the family members of P.W. 1 were lying with bleeding injuries. He immediately informed over phone to the Tarbod outpost and police came and opened the door of Pankaj Mirdha and saw Kausalya Mirdha, the elder daughter of Pankaj Mirdha was lying dead with bleeding injuries. He further deposed that he submitted a written report before the police under Ext. 3 and the written report was scribed by a petition writer, who was present at Komna P.S. P.W. 5 proved the written report as Ext. 3. His aforesaid evidence was corroborated by P.W. 12 who scribed Ext. 3. The evidence of P.Ws. 5 and 12 remain un-demolished in cross-examination. It is also the evidence of P.W. 5 that the police then shifted the dead body of Kausalya to C.H.C., Komna and injured persons to D.H.H., Nuapada. This evidence of P.W. 5 remains un-demolished in cross-examination. Rather, the evidence of P.W. 5 has been corroborated by P.W. 3 with regard to hearing of groaning sound at early morning coming from inside of the house of P.W. 1 and with regard to P.W. 1 and his

family members lying inside the room with bleeding injuries.

P.W. 6 happens to be the mother-in-law of P.W. 1. She states that in the morning following the alleged occurrence his son told her that he had received a phone call that family members of her deceased daughter have been murdered in their house. Hearing this, she, (P.W. 6) along with her son reached the house of the deceased daughter. There she saw her grand daughter Kausalya lying dead with bleeding injuries. She also saw P.W. 1, P.W. 2, her daughter and her two grand sons lying with bleeding injury making GAON GAON sound. The police personnel shifted all the four injured persons to the hospital. P.W. 6 and her son accompanied them to the hospital. As per P.W. 6, her deceased daughter was admitted in a small room. In that room the deceased daughter opened her eyes and asked for drinking water. Accordingly, P.W. 6 gave her drinking water and asked her as to how the occurrence took place. The deceased Saibani told P.W. 6 that "MANOJ MOTE MARIDELA" and then she closed her eyes. Then doctor came and declared her dead. Under Ext. 32 the statement of P.W. 6 was recorded u/s 164 Cr.P.C. where she has also stated that her deceased daughter told her that "MANOJ MOTE MARIDELA". However, from the evidence of P.W. 16, it appears that P.W. 6 has not stated before the police that her deceased daughter asked for drinking water and that P.W. 6 asked her deceased daughter as to how the occurrence had taken place. Further, the deposition of P.W. 14 in the cross-examination makes it clear that when injured Saibani, the wife of P.W. 1 was brought to the hospital along with three injured persons he found injured Saibani was in a shock with laceration of left side throat with larynx exposed. There was also fracture of mandible in the right side and she was not in a talking condition. Injured Saibani was also deteriorating and going towards cardiac failure. P.W. 14 in the cross-examination has further stated that the condition of Saibani was so serious that it was not advisable for better treatment in a referral hospital. The B.P. and pulse of Saibani was not recordable as it was a case of shock. P.W. 15 in the cross-examination has stated that in case of fracture of mandible one cannot talk. He further stated that Saibani was not in a position to talk till her death. It may be noted that P.W. 14 and P.W. 15 belong to the same hospital. In such background, that part of the version of P.W. 6 that Saibani told her that "MANOJ MOTE MARIDELA" is not believable. P.W. 6 in the cross-examination further stated that she had gone to Burla for the medical treatment of Pankaj and her two grand sons and that she returned from Burla 15 days after the treatment. According to her P.W. 1 and she herself returned to house. Police accompanied her after her return.

P.W. 14 in his evidence while proving injury reports under Exts. 11, 12, 13 made it clear that P.W. 1, P.W. 2 and Mukesh Mirdha had suffered grievous injuries and such injuries are possible by M.Os. I, II, III and IV. This evidence of P.W. 14 remains un-demolished. The evidence of P.W. 14 gives details of nature and location of injuries on the persons of P.W. 1, P.W. 2 and Mukesh Mirdha. All these make one thing clear that while dealing the blow, the assailants were quite aware that such bodily injuries were quite likely to cause death.

P.W. 16 speaks about seizure of one Knife, one Paniki, one Tangia, one Lathi and blood stained earth at the spot. This has also been proved by P.W. 4. He further deposed that on 3.3.2011 he examined P.Ws. 1, 2 and Mukesh Mirdha after they returned from the hospital. In his examination-in-chief he has also stated that he searched for the appellants and seized the wearing apparels, two mobile handsets and prepared seizure list under Ext. 4, which is dated 8.3.2011. It is important to note here that 8.3.2011 is the date on which the appellants were arrested by the police. Thus, the above version of P.W. 16 cannot be taken to mean that appellants were examined on 3.3.2011 but arrested on 8.3.2011. From the evidence of P.W. 16, it is clear that only on 8.3.2011 police could apprehend the appellants, examined them and prepared the seizure list vide Ext. 4 on the same day. P.W. 16 in the cross-examination has made it dear that F.I.R. was lodged against unknown culprits and that from 4.2.2011 to 3.3.2011 no clue was available in the case. Though he did not mention about the fact of referring the injured persons to Burla hospital in the C.D., however, he has stated that he was keeping watch about the treatment of the injured persons. It may not be out of place to indicate here that the treatment at Burla hospital has been clearly indicated by P.Ws. 1 and 2 in their deposition. However, P.W. 16 in his cross-examination admitted that he did not personally visit Burla hospital nor deputed any officer for that purpose and that he cannot say with reference to his C.D. as to when the injured persons were discharged from Burla hospital. He has also stated that he has not examined the concerned doctor of Burla hospital where the injured were being treated. He also stated that after the injured was referred to Burla hospital he had not kept any track about their treatment and he has not mentioned in the C.D. as to how long they were treated at Burla hospital and as to when P.W. 1 was discharged from Burla hospital. He has further stated that he cannot say when two sons of P.W. 1 were discharged from Burla hospital. With regard to P.W. 2, P.W. 16 has stated in the cross-examination that P.W. 2 stated before him that the appellants had told to her mother that unless money is given she would meet dire consequences not that the appellants would kill her in the night. Though the conduct of P.W. 16 leaves much to be desired however it cannot be said that his investigation has been totally perfunctory. He has made it clear that till 3.3.2011, no clue was available to him. P.W. 17 is the I.O., who submitted charge sheet. Though in the cross-examination he has stated that during investigation it occurred to him that there might be some other accused persons except the appellants, however, on perusal of records he was satisfied that the previous I.O., had properly undertaken the investigation.

All the above discussion and analysis would show that except assault by Manoj on P.W. 1 there does not exist any direct evidence in this case. However, the analysis of evidence shows the following chain of circumstances in this case.

- i) Prior to occurrence appellants were frequently visiting the house of P.W. 1 and they were known to the family of P.W. 1.
- ii) On the date of occurrence both the appellants came and demanded money

from deceased Saibani.

iii) When deceased Saibani refused to meet their demands, the appellants threatened the deceased Saibani with dire consequences.

iv) On the fateful night, while the entire family of P.W. 1 was sleeping, both the appellants entered inside the house.

v) When the tin door of the Parchhi hit the head, P.W. 1 woke up and saw both the appellants standing.

vi) At that point all on a sudden, Manoj, one of the appellants gave a blow on the neck of P.W. 1 by a sharp object, as a result P.W. 1 became senseless.

vii) On the next day early morning, houses of immediate neighbours of P.W. 1 like P.W. 3 and P.W. 5 were found to have been locked from outside.

viii) After P.W. 3 and P.W. 5 came out, they heard groaning sound from the house of P.W. 1.

ix) On opening of door P.W. 3 and P.W. 5 found all family members of P.W. 1 were lying with bleeding injuries. P.W. 5 found Kausalya lying dead.

x) On receipt of information police rushed to the spot and sent the injured to the Hospital and conducted inquest over the dead body of Kausalya.

xi) At the spot blood stained Tangia (M.O. I), Thenga (M.O. II), Knife (M.O. III) and Paniki (M.O. IV) were seized by the police.

xii) One of the injured, Saibani, wife of P.W. 1 succumbed to her injuries in the hospital.

xiii) Injured like P.W. 1, P.W. 2 regained their sense in the hospital much after the incident.

10. In the above background let us examine the submissions made by the learned counsel for the parties. As indicated earlier Mr. Anirudha Das, learned counsel appearing for the Manoj in Criminal Appeal No. 534 of 2013 and Mr. D.P. Dhal, learned counsel appearing for the appellant Raju in Criminal Appeal No. 634 of 2012 strongly argued that the delayed disclosure of names of appellants by P.Ws. 1 and 2 and 6 destroys the credibility of such witnesses. According to them, as per the evidence of P.W. 1 he regained his senses within 15 to 17 days say by 17.2.2011/19.2.2011. But he disclosed the names of appellants only on 3.3.2011 while examined by police. Therefore, there has been delay in disclosing the names of the appellants without any explanation. They submitted that the same is also the case with P.W. 2 and P.W. 6. They also relied on the evidence of P.W. 6 to submit that she has admitted that after receiving 15 days of medical treatment P.W. 1 and herself returned from the hospital. In other words as per P.W. 6, say by 17.2.2011/19.2.2011; P.W. 1 and P.W. 6 had returned from the hospital and as per the evidence of P.W. 2 he and his younger brother came to the village first and after some days P.W. 1 came to the village from Burla. Thus,

much prior to their examination by police on 3.3.2011 P.Ws. 1 and 2 were discharged from hospital, but strangely they did not disclose the fact of involvement of the appellants to anybody else. Therefore, both the learned counsel plead that the evidence of P.Ws. 1 and 2 lack credibility and are to be ignored. Mr. Pradhan, learned A.G.A. on the contrary contends that under the facts and circumstances, there has been no delay in disclosure of names of appellants and in the alternative contends that conceding for a moment but not admitting that there has been some delay in disclosure on account of delayed examination of the witnesses, mere delay would not be fatal to the prosecution and the same does not render prosecution case suspect. In this case, certain things are to be noted. Both the P.Ws. 1 and 2 are injured witnesses and P.W. 1 is an injured eye witness to a part of the crime. Both suffered grievous injuries and were hospitalized for a long time. One can imagine the trauma suffered by these two persons, namely, P.W. 1 and P.W. 2, who after coming to senses must have the shock of their life to know about death of two family members. It is well settled that all the persons do not react a like manner in a given situation. Some may react angrily and rush to police, while some may be depressed and withdrawn by the magnitude of such tragedy. Further it is well settled that evidentiary value of statement of injured witnesses enjoy greater credibility. Usually, the injured witness does not implicate anybody falsely. (See *Mano Dutt and Another Vs. State of U.P.*, . Further, it may also be noted that both P.Ws. 1 and 2 are rustic villagers and as per well settled principles of law where witnesses to a criminal case are rustics, their behavioral pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in the courts based on unreal assumption about the human conduct cannot obviously be applied to those given to the lethargic ways of our villages. (See *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*,). Here the facts are tell tale. An entire family of five was attacked by assailants. As a consequence of such attack, wife and daughter succumbed to the injury while rest three family members escaped the jaws of death by a whisker. All these must have created great shock in the minds of P.W. 1 and P.W. 2. It may not be out of place to indicate here that while P.W. 1 lost his wife and daughter; P.W. 2, a minor has lost his mother and sister. Further, from the evidence it is not clear as to on what date P.Ws. 1 and 2 were discharged from the hospital. The version of P.W. 6 also does not show with exactitude as to on what date P.Ws. 1 and 2 were discharged from Burla hospital. She only says "I returned from Burla 15 days after the treatment". It may be noted here that P.W. 6 was never receiving any treatment at Burla. Further, in her cross-examination she has stated that "myself and Pankaj returned to home. Police examined him when I returned from Burla". Since P.W. 6 was examined on 3.3.2011 by implication it can only mean that P.W. 6 and P.W. 1 returned to home only sometime prior to 3.3.2011. Further, defence has also not put any question to P.W. 1 as to on which date he was able to talk audibly. All this would show that in the background of great shock suffered by P.Ws. 1 and 2, there has not been much delay in disclosure of the names of appellants or in examination of witnesses. Further, P.W. 16 has

categorically stated that from 4.2.2011 to 2.3.2011 no clue was available in this case. P.W. 1 in the cross-examination has stated that by the time of discharge of both the injured sons, he was talking a little bit. Thus, on a cumulative appreciation of evidence on record it cannot be said that there has been any great delay in disclosure of names of appellants/examination of P.W. 1 and P.W. 2. As stated earlier, it is too much to expect rustic and injured family members like P.Ws. 1 and 2 to rush to police immediately in the background of magnitude of tragedy suffered by them. Though the investigation suffered from some lacunae, P.W. 16 in the cross-examination has categorically stated that from 4.2.2011 to 2.3.2011 no clue was available in the case and that he was keeping watch about the treatment of P.W. 1. He had further stated that he had telephonic conversation with brother-in-law of P.W. 1. P.W. 16 in Para-5 of his evidence has categorically stated that he recorded the statement of injured persons after they returned from the hospital. In order to buttress his point that delayed examination of witnesses destroys their credibility, as indicated earlier, Mr. Das, learned counsel for the appellant Manoj has relied on about 12 decisions of this Court and Hon'ble Supreme Court as indicated in Paragraph-6 (supra). However, all these decisions are distinguishable on facts vis-?-vis the present case. In those cases none of the witnesses who were examined after some delay suffered from any grievous injury like P.Ws. 1 and 2. Thus there was no reason for them not to make disclosures immediately. Further, unlike those cases, here there exists a host of other proven circumstances to connect the appellants with the crime. Thus the plea to reject evidence of P.W. 1 and P.W. 2 on the ground of delayed disclosure cannot be accepted. Further, with regard to submission of both the counsel for the appellants on delay in examination of witnesses, it is equally well settled that mere delay in examination of a particular witness does not, as a rule of universal application, render the prosecution case suspect. It depends on the circumstances of the case i.e., being invested. In a case where Investigating Officer has reason to believe that a particular witness is an eye witness to the occurrence but he does not examine him without any possible explanation for any such omission, the delay may assume importance but, in a case where the I.O. had no such information about any particular individual being an eye-witness, mere delay in examining such a witness would not ipso facto render the testimony of the witnesses suspect or affect the prosecution version. (See Sheo Shankar Singh Vs. State of Jharkhand and Another, . In the above noted case, there was a delay of one and half months in examining one of the eye-witnesses, namely, P.W. 6. Still Hon'ble Supreme Court did not reject the testimony of that witness. Coming to the facts of present case it may be noted here that the FIR was filed against unknown persons and P.W. 16 in his cross-examination has stated that from 4.2.2011 to 2.3.2011 he had no clue. Further, P.W. 14 (Doctor), who examined the injured has categorically stated in his cross-examination that voice of P.W. 1 was not audible at the time of admission. In such background plea to reject the evidence of P.W. 1 and P.W. 2 on the basis of their delayed examination cannot be accepted. (See Banti @ Guddu Vs. State of Madhya Pradesh,).

11. Both the learned counsel for the appellants attacked the impugned judgment on the ground of defective investigation. In this context, Mr. Das, learned counsel appearing for Manoj mainly relied on the evidence of P.W. 16 where he stated that on "3.3.2011. I examined the injured Pankaj Mirdha, Mukesh Mirdha and Khirasindhu Mirdha after they returned from the hospital and recorded their statement u/s 161 Cr.P.C. I also examined another witness. I searched for other accused persons Raju @ Motilal Bhoi & Manoj Kumar Bhoi, examined them". From the above, Mr. Das, learned counsel wanted to give us an impression that both the appellants were examined on 3.3.2011. However, as indicated earlier, such interpretation is not correct as the above quotation is an incomplete one. Complete quotation at Para-5 reads like this. "On 3.3.2011 I examined the injured Pankaj Mirdha, Mukesh Mirdha and Khirasindhu Mirdha after they returned from the hospital and recorded their statement u/s 161 Cr.P.C. I also examined another witness. I searched for other accused persons Raju @ Motilal Bhoi and Manoj Kumar Bhoi, examined them and seized wearing apparels, two mobile handset and prepared seizure list. Ext. 4 (already marked) is the said seizure list relating to seizure of mobile handset and wearing apparels of accused Raju @ Motilal wherein Ext. 4/2 is my signature" Ext. 4 is dated 8.3.2011. This makes it clear that only on 8.3.2011 both the appellants were examined and arrested. Thus, it is not true that both the appellants were examined on 3.3.2011, but were arrested on 8.3.2011. In such background, decision relied on by Mr. Das reported in *Sadaram Kalar Vs. The State of Madhya Pradesh*, with different set of acts has application to the present case. In the above noted case, though one of the police personnel has seen Sadaram assaulting the deceased and that after the assault though the police visited the house of Sadaram, but he was not arrested by the police. Hon''ble Supreme Court held that such conduct of police would be inexplicable and accordingly held that Sadaram cannot be held guilty. But in the present case, as explained earlier, police had examined the appellants on 8.3.2011 and arrested them on that date only.

Similarly, the submission of Mr. Das, learned counsel appearing for Manoj on P.W. 17's suspicion about the existence of other accused persons has no legs to stand in view of later statement of P.W. 17 that P.W. 16 has conducted the investigation properly. Thus, barring some lacunae in investigation, the present case against the appellants is well established. It is well settled that remissness and inefficiency of investigating agency would not be a ground to acquit a person, if there is enough evidence on record to establish his guilt. Irregularities and deficiencies in conducting investigations by the prosecution is not always fatal to the prosecution case. If there is sufficient evidence to establish the substratum of the prosecution case, the irregularities which occurred due to remissness of investigating agency, which do not affect the substratum of prosecution case should not weigh with the court. (*Sea Kashinath Mondal Vs. State of West Bengal*,). It is equally well settled that criminal trial is meant for doing justice to the accused, the victim and the society so that law and order is maintained. It is necessary to remember that a Judge does not preside over a criminal trial clearly

to see that an innocent person is not punished but also to see that a guilty man does not escape. One is as important as the other (See *Amihika Prasad and another v. State (Delhi Administration)*, >2000 (2) SCO 646). Keeping all these things in mind, it cannot be said that the learned Sessions Judge has gone wrong in convicting the appellants relying on evidence on record.

The submission of Mr. Das on the contradiction in the evidence of P.Ws. 1 and 2 vis-a-vis their 161 statements more particularly as to what they have stated in the examination-in-chief not being stated during their course of examination in 161 have not got much force as these contradictions are minor in nature and do not affect core of prosecution case. It is well settled that marginal variation between 161 statement and evidence are of no consequence. Minor contradictions, inconsistencies, embellishments without affecting core of the prosecution case should not be a ground to reject the evidence in entirety. (See *Sunil Kumar Samhhudayal Gupta (Dr.) and others v. State of Maharashtra*) >(2011) 2 SCC (CrL.) 375). So far as contradiction in the evidence of P.W. 6 is concerned as stated earlier, this Court has already disbelieved her version relating to her query on cause of death and her daughter's reply to the same on account of contradiction as well as on account of medical evidence.

12. Mr. D.P. Dhal, learned counsel appearing for the Raju @ Motilai Barik in Criminal Appeal No. 634 of 2012 additionally contended that there exists no material to show that the appellants had any motive to commit the crime. This contention cannot be accepted in view of the version of P.Ws. 1 and 2 that both appellants threatened the deceased Saibani with dire consequences when their demand for money was not met. The question of perfunctory investigation was also raised by Mr. Dhal. As stated earlier though there are some lacunae in the investigation, however, since it does not affect the core story, prosecution case cannot be thrown out in toto. It is well settled that investigation is not solitary area for judicial scrutiny in a criminal trial. It is well settled that even in case of defective investigation, the rest of the case can be scrutinized independently to assess impact of it. Otherwise Criminal Trial will plummet to the level of investigating agency ruling the roost. Criminal Justice cannot be made casualty for the wrong committed by the investigating agency in the case.

13. Mr. Dhal, learned counsel for Raju @ Motilai Barik further submitted that this is a case where there exists no eye-witness to assault on P.W. 2, Mukesh and two deceased. Thus the learned Trial court has gone wrong in convicting his client in such background. The circumstances enumerated in Paragraph-10 (supra) in the present case would show that the appellants had the motive to commit to crime. The motive for committing the crime by the appellants was refusal to pay the money demanded by them. In order to keep the neighbours away from the scene of crime, their houses were locked from outside. This shows preparation and intention of the appellants in committing the crime. Their intention to commit ghastly crime is also clear from the nature of weapons of offence used by them i.e. M.O. I to M.O. IV and location of injuries. The presence of appellants in the

night inside the house of P.W. 1 and attack by one of them, namely, Manoj on P.W. 1 with a sharp object also proved complicity of the appellants in committing the crime. The blood stained weapons of offence were recovered from the spot and as per evidence of P.Ws. 13 and 15, the injuries on the person of the deceased as well as on the injured person were possible by those weapons of offence. All these form a complete chain in all respect so as to come to a conclusion that it was the appellants and appellants alone who committed the crime at the scene of occurrence in the relevant night and none else. Learned Sessions Judge has correctly come to the conclusion that offence u/s 302 I.P.C. is well made out against the appellants, who in furtherance of their common intention committed the murder of deceased Kausalya and Saibani. With regard to offence u/s 307 I.P.C. read with Section 34 of the I.P.C. thereof, it is proved that both the appellants were present by the side of P.W. 1 at the spot in the relevant night and on account of assault by Manoj on his neck by sharp object he became senseless. From the evidence of P.Ws. 1 and 2 it is clear that they regained their sense in the hospital. As per the evidence of P.W. 14, most of the injuries found on P.Ws. 1 and 2 and Mukesh were grievous in nature and P.W. 14 further opined that such injuries were on the vital parts of the body of P.Ws. 1 and 2 and that such injury could be possible by M.O. I to M.O. IV. From the nature and location of injuries sustained by P.Ws. 1 and 2 and nature of weapons of offence, one can easily presume that while assaulting the injured persons particularly P.Ws. 1 and 2, it was quite within the knowledge of the appellants that such bodily injuries were likely to cause death of the said injured persons. From the entire facts and circumstances, it is clear that both the appellants had common intention in attacking three injured persons. Thus, the offence u/s 307 of the I.P.C. read with Section 34 of the I.P.C. is also made out against both the appellants.

So far as offences u/s 460 of the I.P.C. read with Section 34 of the I.P.C. are concerned, in the instant case, it has been proved that while on the relevant night P.W. 1 woke up due to hitting of the tin door of Parchhi on his head he saw that the door was open and both the appellants were standing inside his house. By now, it has been proved that both the appellants not only caused death of two family members but also attempted to cause death of three other family members. Thus, both the appellants have been correctly found guilty of the offence u/s 460 of the I.P.C.

Lastly Mr. Dhal contended that the decision reported in Kashinath Mondal Vs. State of West Bengal, which has been relied on by the trial court has got no application to the present case. It is reiterated here that the principle laid down in the same squarely applies as despite certain lacunae in investigation, the core prosecution story implicating appellants remain unaffected.

14. Now the question is whether under the circumstances death sentence is called for.

15. The answer would be an emphatic No. According to us this is not a rarest of

rare case. Submissions in the context made by the learned counsel for the appellants merit acceptance. Learned court below while warranting death sentence has not taken into account many mitigating circumstances in favour of the appellants. These are there exists no proof of criminal antecedents of the appellants. Further, there exists no proof to show that they would be a permanent threat to the society at large. There also exists no report of bad behavior while in custody. Additionally, also there exists no evidence to the effect that they cannot be reformed and rehabilitated. In drawing the balance sheet of aggravating and mitigating circumstances, it is well settled that the mitigating circumstances would be accorded full weightage and a just balance has to be struck before the option is exercised. It is well settled that awarding of life sentence is the rule and death is an exception. It is equally well settled that number of deaths or factum of whole family being wiped up cannot be the sole criterion for determining whether cases falls under the rarest of rare category. Brutality also cannot be only criterion for determining whether a case falls under the rarest of rare categories. (See Gudda @ Dwarikendra Vs. State of Madhya Pradesh,). In the instant case, no doubt two innocent persons including an innocent child of 15 years were killed by the appellants, but this alone would not be sufficient to place crime in category of rarest of rare case as the proportion of culpability of appellants could be separated into two parts: namely, on one part vis-?-vis the deceased wife the other parts vis-?-vis deceased daughter and three injured persons. So far as deceased wife is concerned, no doubt the crime is premeditated. While others are concerned, no pre-orchestration can be found out. It is well settled that in a civilized society a tooth for a tooth and an eye for an eye ought not to be criterion to clothe the case with "rarest of rare" jacket and courts must not be propelled by such notions in haste to award capital punishment. A reasonable proportion has to be maintained between brutality of the crime and punishment. The punishment neither be disproportionately severe nor it is to be manifestly inadequate.

16. Taking into account the entirety of the circumstances and balancing the aggravating and mitigating circumstances, we are of the considered opinion that sentence of death imposed on the appellants be commuted to imprisonment for life. At the same time, this Court is also not inclined to impose life imprisonment as is generally administered. This Court, therefore, is of the view that the appellants should be imprisoned for at least 25 years in terms of ratio decided in Swamy Sharaddananda @ Murali Manohar Mishra Vs. State of Karnataka, and Madhu @ Madhuranatha and Another Vs. State of Karnataka, for the offence u/s 302 of the I.P.C. In the result, we up-hold the conviction of the appellants under Sections 302/307/460 of the I.P.C. read with Section 34 of the I.P.C., but set aside the punishment of the death imposed on them and modify the sentence to the punishment of imprisonment for life with further condition that remission of sentence should not be considered by the authorities prior to completion of 25 years of incarceration. The reference made by the learned Sessions Judge is accordingly discharged and the Criminal Appeals filed by the appellants are partly

allowed.

The Death Reference and the Criminal Appeals are accordingly disposed of.