

(2014) 05 OHC CK 0012

In the Orissa High Court

Case No : DSREF No. 1 of 2014 and JCRLA No. 10 of 2014

State of Orissa

APPELLANT

Vs

Sudam

RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 354(3)

Evidence Act, 1872 — Section 154

Penal Code, 1860 (IPC) — Section 294, 300, 302, 323, 324

Citation : (2015) 2 CCR 142 : (2014) 2 ILR 38 : (2014) 2 OLR 670 Suppl. : (2014) 2 OLR 670

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

Bench : Division Bench

Final Decision : Disposed Off

Judgement

Biswajit Mohanty, J.—The present Death Sentence Reference No. 1 of 2014 and JCRLA No. 10 of 2014 arise out of judgment dated 18.3.2014 in C.T. (Sessions) No. 66 of 2012/49 of 2013 in which the learned Addl. Sessions Judge, Jajpur has held Sudam @ Dinabandhu Mallik guilty of offence u/s 302 of I.P.C. and accordingly convicted him thereunder. On such conviction, the learned Addl. Sessions Judge, Jajpur sentenced Sudam @ Dinabandhu Mallik to death, subject to confirmation by this Court and a fine of Rs. 50,000/-, in default to undergo R.I. for three years. Challenging the aforesaid judgment of conviction and sentence, the convict-appellant Sudam @ Dinabandhu Mallik has filed JCRLA No. 10 of 2014 before this Court. The prosecution case in brief is that on 22.1.2012 on account of previous enmity, the convict-appellant Sudam @ Dinabandhu Mallik who was in hospital, left his hospital bed and picked up a spade from the hospital premises and chased Niranjana Mallik (deceased) from the hospital up to Srirampur Chhak and dealt three successive blows on the face of the deceased by using the spade. As a result of such ghastly assault, the deceased fell down in a pool of blood and died. Such ghastly assault by the convict-appellant was witnessed by P.Ws. 5, 6, 7, 10, 11 and 22. On receiving information from P.W. 7,

P.W.4 came to Jajpur Town and lodged an F.I.R. in Jajpur Police Station, which was registered as F.I.R. No. 5 of 2012. Thereafter, the police investigated the matter, conducted inquest over the dead body and sent the same to the District Headquarters Hospital for autopsy. P.W.19, the doctor who conducted the postmortem examination found five incised wounds on the face of the deceased and cutting of the bones underneath due to spade blows. The doctor opined that all the injuries were ante mortem in nature and death was due to haemorrhage and shock and on account of damage to vital organ like brain. He further opined that the injuries were sufficient enough to cause death. Police seized blood stained earth, one pair of leather chapal, one plastic chapal and bamboo lathi (all blood stained) lying at the spot of occurrence. Thereafter, police apprehended the convict-appellant and seized the weapon of offence, i.e, blood stained spade from his possession and also seized blood stained dhoti of the convict-appellant. The material objects were sent for chemical examination. After conclusion of investigation, the police submitted charge sheet against the convict-appellant before the court of learned S.D.J.M., Jajpur, who committed the case to the Court of Sessions. The convict-appellant stood his trial u/s 302 of I.P.C.

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

3. In order to establish the charges against the convict-appellant, the prosecution examined 24 witnesses. P.W.4 is the informant. P.Ws.1 and 2 are the witnesses, who proved inquest report. P.W.3 and P.W.8 are witnesses to the seizure of the blood stained spade. P.Ws.5, 6, 7 and 11 are the family members, who witnessed the occurrence. P.Ws.8 and 9 are the security guards of the hospital at the District Headquarters Hospital, Jajpur. P.Ws.10, 15 and 22 are the independent eye-witnesses out of whom P.W.15 turned hostile. After the occurrence, the convict-appellant hid in the house of P.Ws.12 and 13 at village Kuansapur. P.W.14 is the wife of the informant. P.Ws.11 and 17 are the son and wife of the deceased respectively. P.W.16 is the Havildar who was attacked by the convict-appellant, when he asked the convict-appellant to drop the spade. P.W.18 is the I.I.C. who proved about lodging of written report by P.W.11 and the convict-appellant separately with him on 21.1.2012 making allegations against one another. P.W.19 is the doctor, who conducted autopsy. P.W.20 is the medical officer who examined P.W.16, who suffered injury at the hands of the convict-appellant. P.W.21 is the junior clerk at District Headquarter Hospital, Jajpur who proved Bed Head Ticket under Ext.8 and seizure list under Ext.9. P.W.23 is another doctor who treated P.W.11 and the convict-appellant on 21.01.2012. P.W.24 is the Investigating Officer. The prosecution also exhibited 17 documents. After closure of prosecution evidence, the convict-appellant was examined u/s 313 Cr.P.C. He answered most of the questions in negative and took the plea that he was admitted in the hospital after being assaulted and he had not committed murder of the deceased.

4. The convict-appellant did not lead any evidence in his defence. Upon

completion of trial and after detailed examination of materials on record, the learned Addl. Sessions Judge came to a conclusion that the prosecution successfully proved its case against the convict-appellant beyond all reasonable doubts and accordingly found the convict-appellant guilty u/s 302 of I.P.C. and sentenced him to death and to a fine of Rs. 50,000/-, in default to undergo R.I. for three years.

5. In assailing the judgment dated 18.3.2014, Mr. Panda learned counsel for the convict-appellant submitted that P.Ws.5, 6 and 7 being interested eye-witnesses, the learned court below had gone wrong in accepting their version as gospel truth. Secondly, he submitted that there existed a number of discrepancies amongst the evidence of P.Ws.5, 6 and 7, which had been ignored by the learned court below. Thirdly, he submitted that though P.Ws.10 and 22 were independent eye-witnesses, there existed many discrepancies in their evidence. According to him while P.W.10 in his evidence spoke about the deceased using a bamboo stick in order to obstruct the convict-appellant, the same was never stated by P.W.22 and others in their depositions. According to him in view of the aforesaid fact and circumstances, death sentence could not be sustained and the same was liable to be set aside. On the above points, he relied on the decisions of this Court as well as the Apex Court as reported in *Pabitra Pradhan Vs. State of Orissa*, *Sadasiv Mohapatra and Another Vs. Prafulla Kumar Das*, *Bisikesan Pujari Vs. The State of Orissa*, (2008) 39 OCR (SC) 626 (*Ramesh Krishna Madhusudan Nayar v. The State of Maharashtra*). Fourthly, he submitted that on a bare reading of the evidence of eye-witnesses as well as other witnesses, it was clear that the convict-appellant had no plan to kill the deceased and he assaulted the deceased on account of heat of the moment without any plan and pre-meditation and accordingly Mr. Panda contended that this case clearly came under Exception-4 of Section 300 of I.P.C. In such background, he submitted that death sentence could not have been imposed against the convict-appellant. On this point he relied on the decisions of this Court as well as the Apex Court as reported in *M. Adi Narayan Vs. State of Orissa*, (2004) 29 OCR (SC) 223 (*Prakash Chand v. State of Himachal Pradesh*), *Kulesh Mondal Vs. The State of West Bengal*, , *State Vs. Subrat Mandal*, , *Shaukat Vs. State of Uttaranchal*, , *Purandar Mirdha Vs. State of Orissa*, Fifthly, Mr. Panda submitted that conceding for a moment but not admitting that the offence u/s 302 of I.P.C. was made out against the convict-appellant, however, considering the facts and circumstances of the case, the instant case did not come under the rarest of rare category warranting death penalty. In this context, he relied on a decision reported in *Bachan Singh Vs. State of Punjab*, Lastly, he submitted that a bare reading of the impugned judgment would reveal that the learned court below has not complied the statutory mandate as provided u/s 354(3) Cr.P.C. inasmuch as no special reason has been given for sentencing the convict-appellant to death. In such background, he also prayed that this Court should set aside the death sentence. In this context he relied on two decisions of Hon''ble Apex Court as reported in *Muniappan Vs. State of Tamil Nadu*, and *Ambaram Vs. The State of Madhya*

Pradesh,

6. Mr. B.P. Pradhan, learned Addl. Government Advocate stoutly defended the impugned judgment and submitted that motive for committing the crime was clear from the evidence of P.Ws.14 and 17. Secondly, a number of eye-witnesses have clearly implicated the convict-appellant in committing the crime of murder. Thirdly, according to him, the version of eyewitnesses stood corroborated by the evidence of P.W.19, the doctor who conducted the autopsy. Fourthly. Mr. Pradhan, contended that in the present case, there existed no material whatsoever to bring the case under Exception-4 of Section 300 of I.P.C. Accordingly, he submitted that the Death Reference be confirmed and the Jail Criminal Appeal No. 10 of 2014 be dismissed. Lastly, Mr. Pradhan, learned Addl. Government Advocate submitted that mere absence of special reason would not vitiate a conviction and death sentence. Courts at all stages, viz., trial or appeal must analyze the evidence and all materials, and, thereafter reach an independent conclusion as to whether the case warrants imposition or death sentence.

7. At the outset, it may be noted here that the convict-appellant neither disputed nor challenged the fact that in the instant case, the death was homicidal in nature. Even otherwise from the nature of injuries, as deposed by P.W.19, i.e., the doctor conducting the autopsy, it can be safely deduced that death of Niranjana Mallik was/is homicidal. As per the evidence of P.W.19, there existed laceration of 1 inch X 1/4th x scalp deep on right side of vertex lying obliquely, five multiple sharp cutting injuries extending to different directions from forehead covering facial bones and mandible distorting the facial appearance, cutting the bones underneath and injuring the eye balls in the orbital cavity. The base of skull in the anterior cranial fossa was cut into pieces and brain material herniated through orbital cavity of eyes. He further opined that the injuries were ante mortem in nature and might have been caused by sharp cutting weapon. P.W.19 also opined that death was due to haemorrhage and shock and damage to vital organ like brain.

8. We have gone through the evidence on record minutely.

P.W.1 in his examination-in-chief has stated that he came to the spot after hearing the death of Niranjana Mallik. He found Niranjana Mallik lying dead. He came to know that convict-appellant had enmity with the deceased. In his presence police held inquest over the dead body and he signed the same. He proved the inquest report-Ext.1. He further stated that the house of the convict-appellant and the deceased were closed to each other and on previous date of incident, the convict-appellant had assaulted P.W.11, son of the deceased with a Kata causing injury for which P.W.11 was shifted to the hospital. The deceased was attending P.W.11 at the hospital. In the cross-examination, P.W.1 stated that he could not say the exact date on which the convict-appellant assaulted P.W.11 and he had not seen personally, the deceased attending his son, P.W.11 at the hospital. But he stated that he had seen the deceased coming to the hospital with his injured son. Thus, nothing adverse has been elicited in the cross-

examination of P.W.1.

P.W.2 in his examination-in-chief has stated that the deceased was the younger brother of his father. On hearing about the death of the deceased, P.W.2 came to Srirampur Chhak and found the deceased lying dead with bleeding injury on his head. He had also seen the injuries on the person of P.W.11 in the village. He further stated that he had seen the assault made by the convict-appellant on P.W.11. He also proved the inquest report, i.e., Ext.1. In his cross-examination, he deposed that he had seen the assault on P.W.11 by the convict-appellant. He denied a suggestion that being relative of the deceased he was deposing falsely to help the family members of P.W.11, who was the son of the deceased. Thus nothing much has been elicited from P.W.2 in his cross-examination.

P.W.3 in his examination-in-chief stated that the occurrence took place on 22.1.2012 at village Srirampur. He heard that one person after having committed murder at Srirampur was fleeing away holding a spade towards his village Kuansarpur and the man entered into the house of P.W.13 of his village. People had assembled at the spot. Police also came there and arrested the convict-appellant and took him to the police station along with the weapon of offence, i.e., blood stained spade. In his deposition, he made it clear that police seized the spade in his presence, prepared the seizure list which he proved as Ext.2. On being asked by the police, the convict-appellant told to have killed the deceased of his village. In his cross-examination, P.W.3 deposed that after arrest of the convict-appellant, he (P.W.3) had gone to Srirampur. He denied a suggestion that he had no knowledge about the incident and had deposed falsely at the instance of the police.

P.W.4 is the brother of the deceased and informant in the present case. In his examination-in-chief he stated that on 21.1.2012, the convict-appellant had assaulted P.W.11 with a Katari on the base of left ear and right palm. Hearing nullah, he rushed to the spot and shifted P.W.11 to Alakund Police Outpost and later P.W.11 was shifted to Binjharpur hospital and thereafter to Jajpur Hospital. On the next day morning, the deceased was attending the patient and P.W.4 noticed the convict-appellant moving at the hospital premises at Jajpur and as such P.W.4 warned the deceased to remain vigilant vis-a-vis the convict-appellant. While at home, P.W.4 got intimation from P.W.7 that the convict-appellant had killed the deceased. P.W.4 went to Jajpur town and found the dead body of his brother at Srirampur Chhak. According to him the convict-appellant had dealt spade blows on the face of the deceased. He got the F.I.R. scribed through one Manoj Das and presented the same at the police Station. It was written as per his instruction and having understood the contents therein, P.W.4 had put his signature. P.W.4 proved the F.I.R. as Ext. 3. In his cross-examination, he admitted that in the F.I.R. the prior incident of assault on P.W.11 was not indicated. He also admitted that he had not seen the incident of killing of his brother and he had only heard about the same.

P.W.5 is the sister of the deceased and an eye-witness to the occurrence. In her

examination-in-chief, P.W.5 stated that the incident took place one and half years back at Srirampur (Jajpur Town). On the preceding date, the convict-appellant had assaulted P.W.11 with a sharp cutting weapon and P.W.11 was admitted at Jajpur hospital. In the morning, she came to Jajpur to see her nephew, P.W.11. While she was looking after the patient at the hospital, deceased went to the medicine store for purchasing some medicines. The convict-appellant chased the deceased by holding a spade and killed him near a school at Srirampur. When the deceased stumbled and fell down during the chasing, the convict-appellant went on dealing spade blows on his face and killed the deceased. While the convict-appellant was chasing the deceased, P.W.5 was also running behind them. At the time of incident of killing, P.W.5 was there at a distance of 50 cubits away from the spot. According to her, the time of incident was about 9 "O" clock in the morning. Further, she deposed that P.Ws.6 and 7 also came behind her to the spot. In her cross-examination, P.W.5 deposed that there was previous dispute between the deceased and the convict-appellant as the convict-appellant had pulled the wife of the deceased. She also stated that her deceased brother was running at the front while the convict-appellant was chasing him. In order to save the deceased-brother, she was also running after them. She further stated that while fleeing away from the spot, the convict-appellant was holding the weapon and moving the same around him. She also stated that the deceased-brother was wearing a black type pant and white shirt and that she had immediately reached the spot of incident. P.Ws.6 and 7 also reached the spot very soon. It is very clear from the deposition of P.W.5 that the core story of assault of deceased by the convict-appellant by using spade and killing him remains un-demolished in the cross-examination. It may further be noted here that P.W.5 also corroborates the previous date of incident as stated by P.W.1.

P.W.6 is another eye-witness to the occurrence. The deceased is her bhinoi (brother-in-law). In her examination-in-chief P.W.6 has stated that she knew the convict-appellant as she used to visit the house of the deceased. The occurrence took place one and half years back. The convict-appellant had assaulted her nephew P.W.11 with a sharp cutting weapon on the preceding date, as a result of which P.W.11 had been admitted in Jajpur Hospital. She further stated that her husband P.W.7 had come to see the nephew (P.W.11). She also wanted to see her nephew-P.W.11 and hence on the next date morning she along with her husband P.W.7 came to Jajpur Hospital. At the hospital her nephew-P.W.11 intimated them that the convict-appellant was chasing the deceased (brother-in-law) and asked her to look into the matter. She along with her husband-P.W.7 enquired from some people, who told them the direction in which the convict-appellant was chasing the deceased (brother-in-law). After some time she along with her husband saw the convict-appellant chasing the deceased holding the spade. According to her the deceased was running towards Srirampur and while so running on the road, the deceased fell down and the convict-appellant dealt spade blows on the face and killed him. She also made it clear that sister of the deceased (P.W.5) was ahead of them. The convict-appellant after killing the

deceased fled away from the spot with the weapon. According to her, the time of incident was at 10 to 11 A.M. In her cross-examination, she stated that after reaching the hospital she immediately went in search of the deceased. The handle of the spade was about 2 feet. She denied a suggestion that she had not stated before the police that P.W.11 told her that the convict-appellant was chasing the deceased by holding a spade. Further, she stated that she did not mark any injury on the person of the convict-appellant. From the evidence of P.W.6, it is clear that the core prosecution story relating to assault on the deceased by the convict-appellant by using spade and killing him remains unshaken. P.W.6 had also stated about the presence of P.W.5 and P.W.7 at the spot.

P.W.7 is the "sadu" of the deceased-Niranjan Mallik. In his examination-in-chief he stated that the deceased was murdered on 22.1.2012 at Srirampur (Jajpur Town) on the road. His nephew, P.W.11 had been admitted at Jajpur Hospital as an indoor patient. On 21.1.2012, the convict-appellant had wounded P.W.11 by means of a Kati. On 21.1.2012, P.W.7 had come to Jajpur to see P.W.11. On the next date, i.e., 22.1.2012, P.W.7 along with his wife (P.W.6) came to see the wounded nephew. On reaching the hospital, P.W.11 intimated them that the convict-appellant was chasing his deceased father and he requested them to save his father. Accordingly, P.W.7 enquired from the people and proceeded to Gariapur. He also enquired at Gariapur and proceeded towards the direction as indicated by the people. He found the convict-appellant running after the deceased holding a spade and at times moving the spade around him. When he was at a distance about 25 cubits, the deceased stumbled on the road and fell down and at that time the convict-appellant hit him with the weapon on his face and caused cut injuries. The convict-appellant dealt around 2 to 3 blows by means of a spade. He proceeded to the spot hurriedly. Hearing nullah, 7 to 8 persons also reached the spot, but nobody could catch the convict-appellant as the convict-appellant moved the spade around them and fled away. Within a few minutes, the deceased died at the spot though P.W.7 and others tried to save him by serving water. Like P.W.6, P.W.7 also stated that sister of the deceased (P.W.5) had also reached the spot and at that time it was 10 "O" clock in the morning. In the cross-examination, he stated that when the deceased stumbled on the road, he was at a distance of about 25 cubits. He denied a suggestion that at the time of very incident, he was not at the spot and that no other witnesses had also reached there. He also deposed that he did not mark any injury on the person of the convict-appellant. P.W.7 further stated that the relationship between the convict-appellant and the deceased was strained as the convict-appellant had misbehaved with the wife of the deceased. Like P.Ws.5 and 6, in the cross-examination, the core prosecution story as given by P.W.7 relating to assault and killing of the deceased by the convict-appellant by using a spade remains un-demolished.

P.W.8 is the security guard at District Headquarters Hospital, Jajpur. In his examination-in-chief he stated that convict-appellant was the person who was

holding a spade in the hospital premises and chasing another person towards Gariapur side. Later on he heard that the convict-appellant had killed a person and the deceased was the person whom the convict-appellant was chasing at the hospital. The convict-appellant later entered into one house at Kuanasarpur and police arrested the convict-appellant from that house and seized the spade in his presence. He proved the relevant seizure list at Ext.2. In his cross-examination, he stated that he had not seen the convict-appellant earlier and he could not say from which place of the hospital, the convict-appellant had started chasing the deceased. He orally intimated the fact to the C.D.M.O.

P.W.9 is another security guard at District Headquarters Hospital, Jajpur. In his examination-in-chief he had stated that the incident took place in January, 2012. It was 10.00 to 10.30 A.M. The convict-appellant ran to the construction place in question, picked up a spade from that place and started moving the weapon around him violently. He could not catch him. The convict-appellant chased another person towards the front gate of the hospital and thereafter to Gariapur side on the road. After one or two hours later, P.W.9 heard that the convict-appellant had killed a man at Srirampur and fled away from the spot to village Kuansarpur and entered into the house of another person. The police arrested the convict-appellant from that house. In the cross-examination, he admitted that he had no prior acquaintance with the convict-appellant and he had not seen him earlier. He also stated that it was a fact that he stated before the police that one person under treatment in the hospital chased another person by holding a spade. He denied a suggestion that he did not say before the police that the convict-appellant picked up a spade from the construction side of the temple and started moving the weapon violently for which he could not catch him. He also deposed that he orally intimated the fact to the C.D.M.O.

P.W.10 who is a farmer, in his examination-in-chief has stated that the incident took place one and half years back in front of his house on the road. It was 10.00 to 10.20 A.M. Hearing hullah, P.W.10 came out to the road. The convict-appellant was holding a spade by which weapon he hit on the face of the deceased thrice, in consequence of which the man died. The convict-appellant fled away from the spot with the weapon. He was moving weapon so violently that nobody could nab him. The police seized blood, blood stained earth, two pairs of chapals from the spot. He also stated that he had been examined by the police. However, in the cross-examination, P.W.10 made a statement that he was not examined by the police about the incident. Further, in his cross-examination he stated that at the time of dealing of blows, he was at a distance of 50 feet and the convict-appellant was at the front and the deceased was at the back side. The deceased picked up a bamboo from the dry fence and tried to obstruct the convict-appellant whereupon the convict-appellant picked up a stone piece from the road and threw it to the deceased.

P.W. 11 is the son of the deceased. In his examination-in-chief, he stated that he knew the convict-appellant as a co-villager. The occurrence took place at about

one and half years back. On 21.1.2012 while he was taking rest in his house, the convict-appellant entered into the house holding a Kati and hit on his head at the left side of his ear. Later, the convict-appellant had also hit his right palm near the wrist. Thereafter, he ran outside the house. He was bleeding severely. His deceased father and uncle immediately shifted him to Binjharpur hospital and later he was shifted to Jajpur hospital. P.W.5, his aunty was present near P.W.11 as per the instruction of the deceased-father. He had seen the convict-appellant in the hospital during the morning time. He was waiting for his father to return, who had gone to bring medicine. Some patients of the ward intimated P.W.11 that one person holding a spade was chasing his father. P.W.5 went to enquire about it. Later P.W.6 and 7 came to him. He also told the fact to them and asked them to look after his deceased father. Those three persons, viz., P.Ws.5, 6 and 7 did not return to the ward. Accordingly, P.W.11 left his bed and came outside and enquired from the people and proceeded on a bike towards the spot. While P.W.11 was at a distance of about 100-150 feet away, he found the convict-appellant dealing blows by the weapon on the face of his father and killed him. In the cross-examination, P.W.11 stated that at the time of first occurrence, he was alone in his house and P.W. 4 came after the incident of assault. He could not say about arrival of other persons as he had been severely wounded and thereafter immediately shifted to the hospital. He did not mark any injury on the person of the accused. He further stated that he could not say about the police case on the incident of 21.1.2012. He further stated that he did not know about any family dispute except that the convict-appellant had misbehaved with the female members of his family. He also deposed that he did not take permission of the doctor for leaving the hospital to go to the spot. Before reaching the spot, he found that the convict-appellant was behind his father and P.Ws.5, 6 and 7 were at a distance from them. He did not mark any other injury except the injuries on the face of his deceased-father. The size of the spade was 8 to 9 inches and the height was also same. The convict-appellant was holding the spade on his shoulder just before the incident. He further stated that he was present at the spot till the dead body was sent for postmortem examination. On reaching the spot, he along with others took care of the deceased, but he immediately died. There was profuse bleeding and he found a pool of blood at the spot. He denied a suggestion that the convict-appellant did not chase his father holding a spade and that P.Ws.5, 6 and 7 were not going behind the convict-appellant and the deceased father and that he was deposing falsely due to family dispute. Here also the core prosecution story with regard to assault and murder of the deceased by the convict-appellant by the help of a spade has not been demolished in the cross-examination.

P.W.12 is a labourer, who in the examination-in-chief has stated that the convict-appellant entered into his house holding a spade and police came in his absence and arrested a person from his house. P.W.12 was declared hostile. During his examination u/s 154 of the Evidence Act, he admitted that he ascertained that the man after killing a person fled away from the place and hid in his house. In

his cross-examination, he stated that he was seeing the convict-appellant for the first time in the court and had no personal knowledge about the matter.

P.W.13 is the son of P.W.12. In his examination-in-chief he stated that when he returned to the house in the evening of the date of occurrence, he heard that one person after killing a person had hidden in their house and he had a spade with him. Police came and arrested him. In his cross-examination he stated that he was not examined by the police.

P.W.14 is the wife of the informant (P.W.4). In her examination-in-chief, she stated that the occurrence took place about one and half years back. Fifteen days prior to the murder of the deceased, the convict-appellant had entered into their house and embraced P.W.17, who happens to be the wife of the deceased. Hearing shouts, she went to the house of P.W.17 and found that the convict-appellant had embraced her from her backside. Thereafter, convict-appellant came out and fled away. Next, she stated that one day morning, while P.W.11 was sleeping in his house, the convict-appellant dealt a kati blow on the right side head near the ear and another blow on the palm. She rushed to the place hearing the shouts of P.W.11. The deceased and her husband-P.W.4 shifted Radhesyam to the hospital first at Binjharpur and then at Jajpur. On the next day morning at the request of the deceased, P.W.4 proceeded to Jajpur. P.W.11 was at hospital and the deceased was attending him. Thereafter, P.W.4, husband of P.W.14 returned home and while taking meal, she received intimation about murder of the deceased and accordingly she along with her husband came to Jajpur hospital and found the dead body of the deceased. There was cut injury on his fore head. In her cross-examination, she stated that during second incident, the younger brother of P.W.11 was present. She further stated that the length of Kata was about 9 inches having no handle. By 10.30 A.M. approximately they got the intimation about murder of the deceased. She denied a suggestion that the convict-appellant had not killed her brother-in-law (deceased).

P.W.15 is the senior clerk at the Collectorate at Jajpur, who was declared hostile. In his examination-in-chief he stated that he heard that one person was murdered at the spot. Many people including him saw the dead body of the deceased and the face of the deceased had been totally mutilated. He further stated that he could not say who was the deceased and who was the murderer. In his cross-examination he stated that he was not examined by the police.

P.W.16 is the Havildar, who was attacked by the convict-appellant when he tried to intervene. In his examination-in-chief he stated that he heard that one culprit having killed a man was running away towards Biraja Hata and Kuansarpur. He proceeded towards that direction on his bike. At Rakhyakali temple he saw a number of people following the convict-appellant. He asked the convict-appellant to leave or drop the spade but the convict-appellant rushed to him and dealt a blow aiming on his head. At that time, he was having a small stick by which he tried to ward off the attack, but the weapon hit on his back side left wrist causing

profuse bleeding. When the people were shouting the convict-appellant fled away and entered into the house of a person at Kuansarpur village. Later on, the convict-appellant was arrested from that house, P.W.16 saw the dead body of the deceased later and heard that the convict-appellant had murdered that person. The deceased was one Niranjan Mallik of Naraharipur. In his cross-examination, he stated that he was not in traffic duty but on patrol duty. According to him, the handle of the spade may be three feet and iron portion would be 10 X 12 inches. The handle of the spade was made of Wood. He was medically treated at the hospital. He told that he had not lodged any F.I.R. for assault on him. He denied suggestion that the convict-appellant never attacked him and on that date he was not performing the patrol duty.

P.W.17 is the wife of the deceased. In her examination-in-chief, she stated that one day while she was cutting vegetables, the convict-appellant had came from her back side and embraced her for committing rape. When she raised nullah, P.W.14 rushed to the spot. At that point of time, the convict-appellant was threatening to kill her son unless she fulfilled his desire. On seeing P.W.14, the convict-appellant fled away. With regard to the second incident, she stated that when her son P.W.11 was sleeping at home, at about 9.00 A.M., the convict-appellant entered into their house and dealt a blow near the ear of her son by means of a Kata. P.W.11 was immediately shifted to the hospital by the deceased and P.W.4. P.W.7 intimated her about the murder of her husband by the convict-appellant and thereafter, the informant (P.W.4) proceeded on a bike to Jajpur. Later she came with others to Jajpur. She further stated that the face of her husband was crushed by the weapon. P.Ws.5, 6 and 7 told her that the convict-appellant murdered her husband and they had seen the incident. In her cross-examination, she stated that the second occurrence took place in the month of Magna on a Saturday. On the same Saturday, his son P.W.11 was taken to the hospital. On Sunday, P.Ws.5,6 and 7 had came to the hospital. On that date also, the informant also came to the hospital. By 11.00 A.M., they were intimated about the murder. She admitted that she had not seen the occurrence. She stated that she found face of her husband totally damaged due to injuries.

P.W.18 is the I.I.C. of Binjharpur Police Station, who received two written reports on 21.1.2012. In his examination-in-chief he stated that on 21.1.2012 at about 12.45 P.M., on the written report of P.W.11, he registered P.S. Case No. 11 of 2012 under Sections 341/294/324/326/506 IPC against the convict-appellant. On the same date at 1.45 P.M. on the written report of Tikili Mallik, wife of the convict-appellant, P.W.18 registered P.S. Case No. 12 of 2012 under Sections 341/323/325/34 of I.P.C. against P.W.11 and his deceased father. On 22.1.2012, he got the intimation that the convict-appellant committed murder of the deceased with a spade. In his cross-examination, he stated that the I.I.C. Jajpur intimated him that convict-appellant had murdered the deceased and that he did not visit the spot of occurrence as he was not investigating the same.

P.W.19 is the doctor who conducted the postmortem examination. In his

examination-in-chief he has stated that he conducted postmortem examination on the dead body of the deceased on being identified by Sarat Chandra Jena, Constable. On external examination, he found the following injuries:

"Rigor mortise present all over the body. Laceration of 1 inch x 1/4th x scalp deep on right side of vertex lying obliquely. Multiple sharp cutting injuries five in numbers extending to different directions from fore head covering facial bones and mandible, distorting the facial appearance, cutting the bones underneath and injuring the eye balls in the orbital cavity. The base of skull in the anterior cranial fossa having a cut into pieces and brain material herniated through orbital cavity of eye."

He further opined that the injuries were ante mortem in nature and might have been caused due to sharp cutting weapon and death was due to haemorrhage and shock and damage to vital organ like brain. He further made it clear that these injuries were sufficient enough to cause death and that the injuries could have been caused by the spade. Blood stains were present over the spade. In his cross-examination, he stated that he had mentioned about presence of blood over the spade and injuries on deceased could not have been possible by weapons like sword. The gravity of injuries was such that they were not possible even by fall by great force. Such injuries were also not possible by fall on great force over iron plates. He stated that he found five incised wounds on the faceo orbital area. Injury No. 1, i.e., laceration on head could have been possible in standing position of the deceased, but the other five injuries could have been inflicted in lying position facing upwards. It may be seen here that the medical evidence corroborates the description given by P.Ws.5, 6, 7, 11 and 22 with regard to site and nature of assault.

P.W.20 is another doctor, who examined P.W.16. In his examination-in-chief he stated that he found one incised wound with lacerated margin 1 1/2 inch x 1/2 inch x 3/4 inch on the dorsal aspect of left fore arm on P.W.16. It was caused by heavy cutting weapon within six hours. In his cross-examination, he stated that the heavy cutting weapons were like axe, katuri, spade etc. He also stated that such injuries were possible by fall on such heavy weapon.

P.W.21 is the junior clerk of District Headquarters Hospital, Jajpur. In the examination-in-chief he stated that the police officer seized Bed Head Ticket on 24.1.2012 from his custody. He proved the Bed Head Ticket as Ext.8 and seizure list under Ext.9. In his cross-examination, he stated that the seizure was made on 24.1.2012 and he denied a suggestion that Ext.8 was a created document at the instance of the police officer.

P.W.22 is an independent eye-witness to the occurrence. In his examination-in-chief he stated that the occurrence took place 50 meters away on the road from Bepari Berhampur Chhak in between Srirampur and Bepari Berhampur. He had a betel shop at the chhak. At the time of the incident, he was present in his shop. He saw that the convict-appellant holding a spade was chasing the deceased and

the deceased was requesting to catch the convict-appellant. When P.W.22 along with others came out to save the deceased, the convict-appellant threatened to kill them. At the spot of occurrence, the deceased fell down while looking back towards the convict-appellant. The convict-appellant dealt two to four blows with the spade on the face of the deceased. Thereafter, the convict-appellant proceeded ahead with the weapon at his hands. Within five minutes the deceased died at the spot. The relatives of the deceased were also present at the spot. In his cross-examination, he stated that hearing shouts, a number of people assembled there and amongst them P.W.10 was also present. He denied a suggestion that he had not stated before the police that the convict-appellant was chasing the deceased. Thus, the core prosecution story of the convict-appellant assaulting and killing the deceased by using a spade remains undemolished in the cross-examination.

P.W.23 was the Medical Officer of Binjharpur C.H.C., who treated P.W.11 on 21.1.2012. He also treated the convict-appellant. As per his examination-in-chief he also referred both of them to the District Headquarter Hospital, Jajpur. In his cross-examination, he denied a suggestion that he had not treated the convict-appellant and P.W.11.

P.W.24 is the investigating officer. In his examination-in-chief, he stated that after registration of P.S. Case No. 5 of 2012 u/s 302 of I.P.C., he took up the investigation. He had received the F.I.R. from P.W.4. During investigation, he examined the complainant, issued command certificate to the Constable-Sarat Jena to guard the spot. He visited the spot and prepared a spot map, which he proved as Ext. 11. The dead body was lying at the spot. He conducted the inquest over the dead body in presence of the witnesses. Inquest report was proved as Ext.1. He seized blood stained earth, one pair of brown leather chappal of the deceased, pair of black coloured plastic chappal and one bamboo stick stained with blood. He proved the seizure list as Ext.4. He was intimated that the convict-appellant was hiding in the house of P.W.13 and he went to that house and apprehended him and seized the weapon of offence, i.e., a spade having stained with blood. He examined other witnesses. One Havildar R.K. Jena (P.W.16) had been wounded by the convict-appellant and in that respect he issued injury requisition for his examination at the District Headquarters Hospital, Jajpur. After conducting inquest at the spot, he sent the dead body to the District Headquarters Hospital for postmortem examination. He seized blood stained white dhoti of the convict-appellant under the seizure list proved as Ext.14. The convict-appellant also put his signature in the seizure list. He examined other witnesses. On the next date, he seized the Bed Head Ticket of the convict-appellant under seizure list already proved as Ext.9. In the latter days, he examined other witnesses. He verified the O.P.D. register of Binjharpur C.H.C. and found that the convict-appellant had been treated by P.W.23. On the same day, P.W.11 has also treated by P.W.23. The doctor had referred both of the patients to the District Headquarters Hospital. On 3.2.2012, he received postmortem examination report. He made a query from the doctor by sending

weapon of offence to which the doctor submitted his opinion. On 8.3.2012, he examined the I.I.C., Tofan Bag, Binjharpur P.S. regarding registration of police case against the convict-appellant and the complainant. After completion of investigation, he submitted the charge sheet, he the cross-examination, he stated that the time of the incident as mentioned in the F.I.R. is 11.30 A.M. According to him, P.W.10 had a grocery shop and P.W.22 had a betel shop in between Kalimegha to Bepari Berhampur. When he arrived at the house of P.W.13, he was not present. He also stated that he had examined P.W.13 and others. The convict-appellant was inside the house of P.W.13. The dhoti of the convict-appellant was seized at the police station, but the spade was seized from the house of P.W.13. Prior to the incident, there was a criminal case and counter case on the previous date. He also stated that he had not received any other F.I.R., but had received a telephonic intimation prior to occurrence from his staff. He denied a suggestion that he had not examined P.W.12 and P.W.23. He also stated that there was no injury on the person of the convict-appellant at the time of arrest. In his re-examination in chief he stated that he had examined P.W.12 and P.W.15 (who turned hostile later). In the further cross-examination by the defence, he denied a suggestion that he had not examined P.W.15 and that he did not apprehend the convict-appellant from the house of P.W.13.

9. All the above discussions and analyses would show that the core prosecution story of assault on the deceased by the convict-appellant by using a spade remains un-demolished. In fact the evidence on this aspect by the eye-witnesses like P.Ws.5, 6, 7, 11 and 22 corroborate each other. All these eye-witnesses have stated that the convict-appellant had dealt blows with the spade on the face of the deceased and killed him. The evidence of the doctor conducting postmortem examination, namely, P.W.19 corroborates the version of eye-witnesses like P.Ws.5, 6, 7, 11 and 22 as he clearly deposed about five incised wounds on the facial orbital area and the base of skull in the anterior cranial fossa having cut into pieces and brain material having herniated through orbital cavity of eye. The doctor, P.W.19 also makes it clear that all the injuries were ante mortem in nature and were sufficient enough to cause death. He further made it clear that all the injuries could have been caused by the spade. Thus, the evidence of the doctor P.W.19 corroborates the version of the eye-witnesses like P.Ws.5, 6, 7, 11 and 22. That apart motive of the convict-appellant has also been brought out by P.Ws.14 and 17. A scanning of evidence of P.Ws.14 and 17 would make it clear that the convict-appellant was always bent upon harming the family members of the deceased by one way or other. P.W.17, who happens to be the wife of the deceased has clearly stated that the convict-appellant had earlier embraced her for committing rape and was threatening to kill her son unless she fulfilled his desire. Further, on previous date, i.e., 21.1.2012, the convict-appellant had assaulted her son, P.W.11 who was hospitalized and ultimately on 22.1.2012, he killed her husband. Thus, it appears that the convict-appellant has gone against the family members of the deceased with a vengeance. Though the learned court below has relied on P.W.10 as an eye-witnesses, on scanning of evidence of

record, this Court refuses to believe him as an eye-witnesses on account of serious contradictions in his version. While in examination-in-chief, he stated that he was examined by the police, however, in the cross-examination he stated that he was never examined by the police. This means for the first time he narrated about the incident in the court after a gap of one and half years. This greatly affects his credibility. Therefore, we discard his version of the incidence. There are also other contradictions in his evidence. Even if this Court disbelieves the version of P.W.10, however, as indicated earlier the version of other eyewitnesses with regard to core prosecution story of assault and murder of deceased by the convict-appellant by using a spade remain unshaken. Further, in the instant case, it appears that when the deceased had gone to purchase medicines for his son-P.W.11, he was chased and killed by the convict-appellant. There is no evidence to show that such chasing was preceded by sudden quarrel/fight between the convict-appellant and the deceased and the convict-appellant in the heat of passion assaulted the deceased. The conduct of the convict-appellant could also be seen from his assault on the Havildar-P.W.16, who wanted him to drop his spade.

10. In the above background, let us examine the submissions advanced by learned counsel for the parties.

11. As indicated earlier, according to Mr. Panda, learned counsel for the convict-appellant, the trial court has gone wrong in believing the version of P.Ws.5, 6 and 7 as they happen to be the close family members of the deceased. In this context we would like to remind every body that merely because a witness is related to the accused, it does not mean that his/her evidence can be thrown out. It is well settled that since the aforesaid witnesses are related to the convict-appellant, there evidence has to be critically scrutinized with abandon caution. Relationship with deceased itself is not enough to discard their testimony. In the instant case, as has been indicated earlier, that versions of P.Ws.5, 6 and 7 with regard to core prosecution story of assault and murder of the deceased by the convict-appellant by using a spade corroborate one another. There version has also been corroborated by the evidence of independent witnesses like P.W.22 with regard to above core prosecution story. Further as indicated earlier, there version has also been corroborated by medical evidence as deposed by P.W.19. Thus, for all these reasons the evidence of P.W.5, 6 and 7 cannot be thrown out merely because they are related to the deceased. It is interesting to note here that Mr. Panda has not taken exception to evidence of another eye-witness, namely, P.W.11, who happens to be son of the deceased. As indicated earlier, P.W.11 also clearly implicated the convict-appellant in committing the crime. His version also corroborates the above indicated core prosecution story. Secondly, Mr. Panda tried to highlight discrepancies in the evidence of P.W.5, 6 and 7 with regard to timing of incident. While according to P.W.5, the time of incident was 9 "O" clock in the morning, according to P.W.6 the time of incident was 10 to 11 A.M. According to P.W.7, the time of incident was 10 A.M. This cannot be described as a material discrepancy having regard to the fact that all these

witnesses are rustic witnesses and they cannot be expected to depose about the time with exact precision in the facts and circumstances of the case. Thus, the said discrepancies are minor discrepancies without touching the core prosecution story of assault by the convict-appellant by using of spade on the face of the deceased leading to his instant death. In this context, Mr. Panda further submitted that P.Ws.6 and 7 in their evidence have stated that they could not recognize the convict-appellant and the deceased as well as P.W.5 on the way while they were coming towards hospital. However, on perusal of deposition of P.Ws.6 and 7 nowhere it shows that they have stated as above. With regard to submission of Mr. Panda regarding discrepancies in the version of independent eye-witnesses like P.Ws.10 and 22 we do not consider it fit to answer such contentions as we have already rejected the evidence of P.W.10. On the point discrepancy, four decisions cited by Mr. Panda in the cases of Pabitra Pradhan (supra), Sadasiv Mohapatra and another (supra), Bisikesan Pujari (supra) and Ramesh Krishna Madhusudan Nayar (supra) are factually distinguishable and have no application to the present case.

12. Now, coming to contention of Mr. Panda that this case is squarely covered under Exception-4 of Section 300 of I.P.C., we can only say that facts of this case do not support his contention. Here the facts do not reveal that the convict-appellant attacked the deceased on account of sudden quarrel/sudden fight in the heat of passion. In fact on the date of occurrence, i.e., 22.1.2012, there is nothing on evidence to show that prior to chasing of the deceased by the convict-appellant, there was any sudden fight or any sudden quarrel resulting in the chase in the heat of the moment. In that view of the matter basic ingredients of Exception-4 to Section 300 IPC are not satisfied in the present case. Simple absence of premeditation cannot bring a case under Exception-4 to Section 300 of I.P.C. Before a case is made out under Exception-4 to Section 300 IPC, several ingredients are to be satisfied and only one of them is lack of premeditation. Even in the present case it cannot be said that there was no premeditation on the part of the convict-appellant before chasing and assaulting the deceased. From the evidence of P.Ws.14 and 17, it is crystal clear that the convict-appellant had an intention to harass the family members of the deceased step by step. First he misbehaved with the wife of the deceased in an indecent manner. Secondly, he assaulted the son of the deceased, i.e., P.W.11 by means of a Kata and lastly he assaulted the deceased and killed him. For all these reasons, we repel the contention of learned counsel for the convict-appellant that the instant case comes under Exception-4 of Section 300 of I.P.C. The decisions cited by learned counsel for the convict-appellant in the cases of M. Adinarayan (supra), Prakash Chand (supra), Kulesh Mondal (supra), State of Orissa v. Subrata Bala (supra), Shaukat (supra) and Purandar Mirdha (supra) on this aspect are factually distinguishable. However, the principles laid down in the cases reported in Kulesh Mondal Vs. The State of West Bengal, and Shaukat Vs. State of Uttaranchal, clearly goes against contention of the appellant as ingredients of Exception-4 as indicated therein remains unsatisfied in this case.

13. In such background we have no hesitation in holding that learned trial court was correct in convicting the convict-appellant u/s 302 of I.P.C.

14. Now, coming to the question as to whether under the facts and circumstances of the case, the learned trial court has reached a correct conclusion by imposing death sentence on the convict-appellant. Our answer to this question is an emphatic "no". In this context submission made by the learned counsel for the convict-appellant Mr. Panda that the present case does not come under the rarest of rare category merits acceptance. Learned court below while imposing death sentence has not taken into account many mitigating circumstances in favour of the convict-appellant, which are- (1) There exists no proof to show that the convict-appellant would be a permanent threat to the society at large. (2) There also exists no report as to bad behaviour by the convict-appellant while in custody. (3) There also exists no evidence to the effect that the convict-appellant 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 just balance is to be struck before option is exercised. It is equally well settled that imposing of life sentence is a rule and death is an exception and death sentence can be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to relevant circumstances of the crime. It appears that the learned court below while inflicting the death penalty has been mainly influenced by the previous record of the convict-appellant as to his misbehavior with the wife of the deceased (P.W.17) and his assaulting the son of the deceased-P.W.11. The learned court below has also been influenced by the attack made by the convict-appellant on the police havildar (P.W.16). With regard to previous criminal record of the convict-appellant, it is seen that though at the first instance the convict-appellant had misbehaved the wife of the deceased by embracing her from back side, however, P.W.14 in her cross-examination has admitted that there exists no police case on that incident. With regard to assault on P.W.16 subsequent to the murder it appears from the evidence of P.W.16 itself that he never lodged any F.I.R. on that incident. It is also 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. The punishment should neither be disproportionate nor the same is to be manifestly inadequate. For all these reasons and taking into account the entirety of circumstances and aforesaid aggravating and mitigating circumstances, we are of the considered opinion that this is not a rarest of rare case and sentence of death imposed on the convict-appellant appears to be excessive and the same should be commuted to imprisonment for life. However, this Court is not prepared to impose the life imprisonment as is generally administered, rather it is of the view that the convict-appellant should be imprisoned for at least 25 years in terms of the ratio decided in the case of 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 I.P.C. Thus, while upholding the conviction of the convict-appellant u/s 302 of I.P.C., we set aside the punishment of death imposed on him 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 20 years of imprisonment. However, it is made clear that- that part of sentence with regard to fine imposed by learned court below will remain unaltered. The reference made by the learned Addl. Sessions Judge is accordingly discharged and the Jail Criminal Appeal filed by the convict-appellant is partly allowed. The DSREF and JCRLA are accordingly disposed of.