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**(2000) 03 PAT CK 0035**

**In the Patna High Court**

**Case No :** Death Reference No. 1 of 1999 with Criminal Appeal No. 87 of 1999

The State of Bihar

APPELLANT

Vs

Devendra Kumar Mahto

RESPONDENT

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**Date of Decision :** 10-03-2000

**Acts Referred:**

Constitution of India, 1950 — Article 14, 21

Penal Code, 1860 (IPC) — Section 302, 307, 354, 366

**Citation :** (2000) 3 PLJR 28

**Hon'ble Judges :** S.K. Chattopadhyaya, J;N. Rai, J

**Bench :** Division Bench

**Advocate :** Bindeshwar Prasad Singh and Angad Kunwar, for the Respondent

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## **Judgement**

Nagendra Rai, J.—The sole appellant was put on trial before the Additional Sessions Judge, VI, Gaya, in Sessions Trial No. 427 of 1997/45 of 1997 for the offences under sections 302 and 307 of the Indian Penal Code (for short "I.P.C.") and has been convicted under the aforesaid sections and sentenced to capital punishment u/s 302 and life imprisonment u/s 307 of the I.P.C. The Additional Sessions Judge made a reference u/s 366 of the Code of Criminal Procedure (hereinafter referred to as "the Code") for confirmation of death punishment and the appellant has filed an appeal against his conviction and sentence and both of them have been heard together and are being disposed of by this common judgment. The convict accused shall be referred to hereinafter as "appellant".

2. The prosecution case is that Mahendra Singh (P.W. 10) is resident of village Ranipur Chowki within Chawk Police Station of district Patna. P.W. 12 Sona Devi is his wife. Five daughters, including deceased Saroj Devi and two sons, namely, P.W. 11 Sudhir Kumar Singh and P.S. 13 Randhir Kumar Singh were born from their wedlock. Deceased Saroj Devi was first married to Krishna Singh of village Ranipur, who died after a year of marriage. Deceased Saroj was employed as a peon in Handloom Section of the Bihar Small Scale Industries Corporation at Apna Bazar, Gandhi Maidan, Patna. Later on, she was transferred to Gaya and

there she remarried with appellant Devendra Kumar Mahto, resident of village Pa Konch, District Gaya, in the year 1985 in the court Two children one deceased Silpi and a minor son were born out of the said wedlock. It appears that the relationship between them became strained when deceased Saroj Devi started claiming partition of the house situated in the village of appellant Devendra Kumar Mahto The deceased also used to take money forcibly from the deceased, which resulted into bad relation between them. On 23.2.1996, the appellant with his wife Saroj Devi and two children Silpi and minor son, left Patna in the night by 15 P.G. train for going to their village home. In the way when the train was in between Chakand and Gaya Railway Junction, the appellant started stabbing deceased Saroj Devi with dagger. He also started stabbing Silpi his daughter. The appellant wanted his daughter Silpi out of the running train, which was resisted to by her mother Saroj Devi. Thereafter, the appellant pushed her inside the train and threw Silpi out of the train. He also threw his minor son from the train

3. Injured Silpi Kumar was thrown near Nawada Gumti, which is at a distance of 2/3 Kms. from Gaya Railway Junction. Havildar Subodh Kumar Yadav (P.W. 3) who was posted at Chhoti Nawada Town Out Post falling within Delha Police Station, got an information in the morning on 24.2.1996 that was lying injured by the side of the way track near Nawada Gumti. after, he went there and found the girl lying in injured condition having received injuries in the abdomen and other parts of her body. The girl narrated that her name is Silpi Kumari, daughter of appellant Devendra Kumar Mahto. She also stated that the quarrel had taken place between her mother and father and her father pushed her outside the train. She disclosed the name of her mother as Saroj Devi. She also stated that her one brother aged two years was also there in the train.

4. Thereafter, he informed the Police Station and the injured was taken to Gaya Pilgrim Hospital. On the same day i.e. 24.2.1996, P.W. 16 Ram Sajeewan Singh, who was posted as Sub-Inspector of Police in Government Railway Police Station, Gaya, received a memo from Railway authorities with regard to presence of a dead body in Compartment No. 8081/Y of the 15 P.G. passenger train stationed at platform no. 8. He went there to inspect the compartment. In the meantime, he received an information from the Uday Paswan, constable, that a girl in injured condition was found lying beside the Railway line leading to Patna. Then he went there and found that the Delhi Police had already taken the girl to the Pilgrim Hospital for the purpose of treatment. Thereafter, he proceeded to the Pilgrim Hospital and saw injured Silpi lying there and he recorded her farebeat at 8 A.M. in presence of Dr. P. Shekhar (P.W. 2). The statement was read over to the girl and, thereafter, she put her thumb impression in presence of the Doctor. The said farebeat has been marked as Ext. 7, on the basis of which a formal F.I.R. was drawn up by the literate constable, which has been marked as Ext. 10. Thereafter, as the condition of Silpi Kumari was serious, she was referred to Magadh Medical College Hospital, Gaya, for better treatment.

5. A requisition was made by the Officer-in-charge, Gaya Railway Police Station,

to the Sub-Divisional Magistrate, Gaya Sadar (Ext. 1) to record the dying declaration of Silpi Kumari as she had received serious injuries. Thereafter, the Sub-Divisional Magistrate deputed Shailendra Kumar Choudhary, Executive Magistrate (P.W. 1) to record the statement of Silpi Kumari. He went to the Magadh Medical College Hospital, Gaya and recorded the dying declaration of Silpi Kumari at 9.30 A.M. on the same day and read over the same and finding the same to be true, she put her thumb impression. The said dying declaration has been marked as Ext. 2. Silpi Kumari later on succumbed to the injuries.

6. On the same day i.e. 24.2.1996, P.W. 6 Ravi Bhushan Choudhary, P.W. 7 Sudam Choudhary and P.W. 8 Manoj Kumar, all residents of village Dumri within Chakand Police Station, heard a rumour that a boy was found thrown by the side of the Railway track, which is 2 Kms. away from Chakand Railway Station. Thereafter, they went there at about 10 or 11 O'clock and found the boy, who was being kept at that time by certain persons, who were cutting grass. The age of the child as found by them was 3-4 years. They also noticed injuries in his Panjra. They took that child to the Pilgrim Hospital first but the child was not admitted by them and, thereafter, they took the child to Magadh Medical College Hospital, Gaya, and where he was admitted by the side of the bed where Silpi was already admitted and seeing the boy, Silpi uttered that the boy was her brother.

7. The Investigating Officer (P.W. 16) inspected Compartment no. 8081/Y and found that in between the two four seated berths bearing seat nos. 82, 83, 84 and 85 and 86, 87, 89 and 90, respectively, the dead body of deceased Saroj Devi was lying on the floor. The blood stains and splashes of blood were found near the head of the deceased as well as at several places at the place of occurrence and blood was also found fallen in large quantity near the head. Towards the south of these seats, he also found blood-stains and blood splashes in dry condition on the floor. A dagger containing blood stain and having handle of white dust colors was also found. He also found two Hawai Chappals, a white empty plastic bag, a terri-cotton frock, a gent's woollen shawl, coins worth Rs. 3 and 25 paise and pieces of bangles and seized the same. He also visited other two places of occurrence i.e. Nawada Gumti where deceased Silpi was found and the place 2 Kms. south of Chakand Railway Station, where the male child was found. During the course of investigation, he traced out the parents of the deceased Saroj Devi, namely, her father Mahendra Singh (P.W. 10) and mother Sona Devi (P.W. 12) and their sons, namely, P.W. 11 Sudhir Kumar Singh and P.W. 13 Randhir Kumar and recorded their statements. He apprehended the appellant on 20.7.1996 and after completion of investigation submitted charge-sheet in the case.

8. After cognizance and commitment of the case, the appellant was put on trial, which ended in his conviction as stated above.

9. The prosecution has examined seventeen witnesses in this case. P.W. 1 Shailendra Kumar Choudhary, recorded the dying declaration (Ext. 2) of Silpi

Kumari on 24.2.1996. P.W. 2 Dr. Purendu Shekhar examined Silpi Kumari on 24.2.1996 in the Pilgrim Hospital and the injury report has been proved by him as Ext. 3. He is also a witness to the recording of the farebeat of Silpi Kumari by P.W. 16. P.W. 3 Subodh Kumar Yadav, who was posted as Havildar at Nawada, Town Out Post, took the injured Silpi Kumari to the Pilgrim Hospital treatment. P.W. 4 is Dr. Mithilesh Kumar Sinha, who held post-mortem examination over the dead body of deceased. Devi, which has been marked as He has also proved the post report of Silpi Kumari, which was Dr. Kapildeo Prasad, who had died P.W. 5 is Nand Lal Choudhary, who has his shop near the place where deceased Kumari was lying on the ground in injured condition, but he has not supporter earlier version and has been declared hostile. P.W. 6 Ravi Bhushan Choudhary had taken the male child to Pilgrim Hospital. P.W. 7 Sudan Choudhary and Mano Kumar accompanied P.W. 8 Bhushan Choudhary and they have been tendered. P.W. 9 Ashok Kumar Sinha was posted as Deputy Station Superman. at Gaya Railway Junction and he had sent the memo to the Government way Police (Gaya) regarding the presence of the dead body in the comported he got the bogie detached from the P.W. 10 Mahendra Singh and P.W. 12 Sona Devi are the father and mother of deceased Saroj Devi, respectively P.W. 11 Sudhir Kumar Singh and P.A. Randhir Kumar (tendered) are her brothers. P.W. 14 Ashok Pas-war Choukidar of the village of the appellant P.W. 15 Mahendra Prasad. Stigma formal witness who has submitted charge-sheet. P.W. 16 Ram Sajeewan Singh is the Investigating Officer and P.W. 17 Binay Kumar Sinha was posted at the relevant time as the Judicial Magistrate who had recorded the statements P.Ws. 10, 11 and 12 u/s the Code.

10. The defence of the appellant the total denial of the occurrence. His further defence is that he was never married to the deceased, on the other hand, she was married or was kept of one Yogendra Singh and at his instance, he has been implicated in this case. The defence has also examined four witnesses. D.W. 1 is Dilip Kumar, brother of the appellant and he is a witness on the point that the appellant was married with the daughter of one Sarju Prasad and his wife is alive and he was not married with deceased Saroj Devi. D.W. 2 is Ram Chandra Prasad, who has been posted as Head Clerk in the Lady Elgin Zanana Hospital, Gaya and he has brought the Admission Register of aforesaid Hospital and according to him registration no. 366 dated 6.3.1986 in the Register bears the name of Saroj Devi and the name of her husband is mentioned as Yogendra Singh. He has also proved the birth certificate in the writing of one Deo Nandan Singh, Store keeper of the said Hospital as Ext. A. D.W. 3 is Birendra Singh, an Advocate's clerk, who has proved the caste certificate Ext. 3. D.W. 4 is Bhushan Kumar and he has identified the writing of Gaya Prasad Sinha, who was Head Clerk in the said Hospital and has proved his writing being serial no. 336 in the aforesaid register as Ext. C.

11. Learned counsel appearing for the accused-appellant submitted that the dying declarations of deceased Silpi Kumari are not reliable as she having received such serious injuries was not in a position to make statement and if the

said dying declarations are not relied upon then there is no material to connect the appellant with the crime. He further submitted that there is no material on the record to show that deceased Saroj Devi was the wife of the appellant and deceased Silpi and the minor male child were his daughter and son, respectively. The deceased was married with one Yogendra Singh and at the latter's instance, he has been implicated in this case. Learned counsel for the appellant further submitted that even if the case is found to be proved against the appellant, the present case is not the rarest of rare cases, justifying imposition of death penalty.

1. Learned counsel for the State, on the other hand, contended that the dying declarations coupled with the other evidence, including circumstantial evidence and the conduct of the appellant proved the complicity of the appellant in the crime. The crime committed by the appellant is cruel, horrendous and blood-curdling and as such he deserves extreme penalty as awarded by the trial court.

14. The fact that Silpi and her mother Saroj Kumari died homicidal death receiving injuries has not been challenged by the defence. The evidence on the record shows that both of them died a homicidal death. P.W. 4 Dr. Mithilesh Kumar Sinha held post-mortem over the dead body of Saroj Devi (Ext. 4) and has also proved the post-mortem report on the dead body of Silpi Kumari done by Dr. Kapildeo Prasad, who has already died. The injuries found on the person of Saroj Devi are as follows:

(i) Incised penetrating wound size "1 3/4" x 1/4" x bone deep located over middle of right aspect of neck and skin muscle carotid and internal jugular vein etc. Sharply cut-floor of the wound was grossly infiltrated with dark blood clots.

(ii) Incised wound of size 2-1/4" x 1/2" x bone deep located over lateral aspect of upper part of leg approximately 2" below left knee joint. Floor grossly infiltrated with dark blood clots.

(iii) Incised wound of size 2" x 1/2" x bone deep located over middle of back of left thigh-muscle and blood vessel sharply cut floor of the wound infiltrated with dark blood clots.

(iv) Incised penetrating wound of size 3/4" x 1/4" x bone deep located over back of right scapular region of chest floor containing dark blood clots.

(v) Incised penetrating wound of size 3/4" x 1/2" x chest cavity located in left sixth intercostal space in left middle clavicles line below left nipple, There was sharp cut of left sixth rib to depth of 1/4" and perforation of left lung pericardium and left ventricle of heart. Chest cavity filled with dark blood and blood clots." According to the evidence of the Doctor, on the persons of deceased Saroj Devi, he found five incised wounds, which were caused by pointed portion of dagger or sharp portion of blade of Chhura.

In his opinion, all the injuries were dangerous to life and the death was caused due to shock and hemorrhage of the aforesaid injuries. On the person of deceased Silpi Kumari, following injuries were found :

(i) Bandaged wound was found over abdomen. On removal of bandage, stitched wound of size 4" in length was found just above the umbilicus. On removal of stitched under line portion of small intestine was found stitched.

(ii) Bandaged wound was found over the head. On removal of bandage stitched wound of size 2" in length was found over right parietal region of the skull. On removal of stitches, underlying soft tissues were found lacerated and infiltrated with blood.

(iii) Bandaged wound was found over the left knee-joint on removal of bandaged stitched wound of size 3" in length was found over the left knee joint, on removal of stitches underlying soft tissues were found lacerate and infiltrated with blood.

(iv) Two incised wounds 1" apart from each other were found over the right cheek each of size 1/2" x 1/4" x skin deep.

(v) Incised wound of size 1" x 1/4" x skin deep was found over the right side of the chest.

(vi) Incised wound of size 1" x 1/4" x skin deep was found over the right side of abdomen.

The post-mortem report of Silpi Kumari shows that she has also received injuries by sharp cutting weapon and she died of shock and hemorrhage due to the injuries sustained by her

15. Deceased Saroj Devi employed as a Peon and was work Apna Bazar, Gandhi Maidan, Patna was living in a rented house P.V. Mahendra Singh, father of deceased Saroj Devi, has stated that the deceased was first married with Krishna Sing Ranipur and after the death of her band, there was a court- marriage between the appellant and the deceased Gaya. The relation between them was good as the appellant used to forcibly take away money from her, as a result thereof there was a dispute between them. He has further stated that Sudhir Kumar Singh (P.W. 11) had to Patna Railway Station on 23.2 1998 the night to see off deceased, appellant and their two children. He has also stated that deceased Silpi Kumari and the minor son were born from the wedioeh appellant and his daughter, in cross animation, he has elaborated the motive by saying that there was a dispute regard to purchasing of land at Gay. construction of house and the; appellant was demanding money. He identifies appellant in the dock and has clearly stated that he had visited his house to meet his wife (deceased Saroj Devi). There is nothing in his cross-examination to discredit his testimony. The only material fact brought to the notice by the learned counsel for the appellant is that in his statement before the Police P.W. 10 has not stated that his son Sudhir Kumar Singh had gone to see them off at the Patna Railway Station on 23.2.1996. This, in my view, is an omission, but that does not in any way create a doubt about the version given by this witness.

16. P.W. 11 Sudhir Kumar Singh is the brother of deceased Saroj Devi and son of P.Ws. 10 and 12. He has stated that his sister was earlier married to Krishna

Singh and after his death, she was re-married to the appellant. He further stated that the appellant used to grab the salary of his sister and also talked of purchasing land at Gaya by selling ornaments possessed by his sister. In course of talk, he used to assault his sister. He has further stated that he came at the Patna Railway Station to see off his sister, the appellant and their children. He also stated that deceased Saroj Devi was married with the appellant in 1985 and the marriage took place in a court at Gaya. He or his parents were not present at the time of marriage. The deceased told him about her marriage with the appellant when he had visited Gaya. He has also stated that he had visited the native village of the appellant. He also identified the appellant in the dock. Though attempts were made in his cross-examination to show that he did not visit the native village of the appellant, but his cross-examination shows that he had an idea of the village in question. His evidence further shows that marriage of the appellant with the deceased Saroj Devi was a court-marriage.

17. P.W. 12 Sona Devi is the mother of the deceased. She has also stated that the husband of her deceased daughter used to take ornaments and money of Saroj Devi and because of that, the dispute arose and as a result of which, he has committed murder of her daughter Saroj Devi and her grand daughter Silpi Kumari (Natini) and caused injuries to her grand-son (Nati). She has also stated about the birth of the two children. Thus, the evidence of all the three witnesses (P.Ws. 10, 11 and 12) shows that the deceased was married with the appellant.

18. At this stage, I would like to discuss the defence witness, who has been produced to show that the deceased was not married to the appellant. D.W. 1 Dilip Kumar is the own brother of the appellant and he has stated that his brother is married to the daughter of one Saroj Prasad and his wife is alive and he had no acquaintance with the deceased Savitri Devi. He also admitted in his cross-examination that his brother had no issue from the daughter of Saryu Prasad, whereas, a suggestion was made to P.W. 11, brother of deceased Saroj Devi in paragraph 23 of his cross- examination that the appellant had two children from his wife. This witness is the brother of the appellant and as such he is a highly interested witness and as such his evidence on the point that the deceased Saroj Devi was not the wife of the appellant is not reliable.

19. The defence has examined D.Ws. 2 and 4 to prove Exts. A and C. D.W. 2 is Ram Chandra Prasad, who has been produced to prove an entry in the Admission Register of Lady Elgin Zanana Hospital but he could not prove the same as the same was not marked for identification. However, he proved the birth certificate issued in pursuance of that entry, which is marked as Ext. A.

20. D.W. 4 has proved the writing with regard to serial number in the aforesaid register, which has been marked as Ext. C. The entry in the register bearing registration no. 366 dated 6.3.1986 shows the name of the patient as Saroj Devi and her husband as Yogendra Singh and in pursuance of that, a certificate marked as Ext. A has been issued.

21. D.W. 2, who has brought the admission register has admitted that the register bears the certificate of the Office-Head with regard to number of pages etc. The register, which was brought by him, did not bear the said certificate. He also admitted that the serial numbers in the said register are irregular. There are serials no. 63, 65 and 66, but serial no. 64 is missing. He has further admitted that there is overwriting in the date of admission of registration number 366. Thus, it is evident from his evidence that the entry is a created one and, accordingly, the certificate issued on the basis of the said entry showing that a child was born to deceased Saroj Devi, whose husband was Yogendra Singh cannot be relied upon as it is also a created document on the basis of the said entry.

22. Thus, the documents produced by the appellant and the evidence of D.Ws. 1, 2 and 4 do not show that Saroj Devi was not the wife of the appellant. From the evidence led by the prosecution coupled with the statement of deceased Silpi Kumari that the appellant was her father, the irresistible conclusion is that the appellant was married with deceased Saroj Devi and the two children were born out of their wedlock. Their evidence further prove that the appellant was not on good terms with his wife.

23. The main evidence against the appellant are the three dying declarations and as such they are to be scrutinised carefully with a view to find out whether they are reliable or not.

24. The dying declaration is a species of hearsay evidence and " and is an exception against the admissibility of hearsay evidence. No doubt, great sanctity has to be given to his document as it is a statement of a dying man and he or she would be the last person to screen the real offender and implicate the innocent persons. But as the dying declaration is recorded/made behind the accused, who has no opportunity to cross-examine the maker thereof, before the dying declaration is to be accepted, the court should scrutinize it with greater circumspection before it is relied upon. The relevant factors to be taken note of to decide as to whether the dying declaration has to be relied upon or not are to whether the deceased was in fit state of mind to make the statement after having a clear opportunity to observe the identity of his or her assailant and whether he or she was making any statement without any influence or rancor or tutoring or prompting. Once it is found that the dying declaration is true and voluntary statement of the maker then the conviction can be based on the same without further corroboration.

25. First it has to be considered as to whether deceased Silpi Kumari was in a fit state of mind or not to make the three statements which have been treated as dying declarations. She was lying near Nawada Gumti by the side of Railway line. She was noticed by the person of the nearby place and in the morning on 24.2.1996, P.W. 3 Havildar Subodh Kumar Yadav was informed about said fact and he reached the place where the injured was lying. She disclosed her name as well as the names of her parents and also disclosed that quarrel had taken

place between her mother and father. She also stated that her younger brother was also there in the train. Her mother was assaulted by the appellant and she was pushed out of the train by her father. Thereafter, she was taken to the Pilgrim Hospital and her injuries were examined by Dr. Purendu Shekhar (P.W. 2) at 7.40 A.M. and he found the following injuries on her person :

(i) lacerated wound of scalp on the vertex 2 1/4" x 1/4" muscle deep touching hair line.

(ii) Abdominal rupture in the right side of abdomen touching umbilical and lumbar region with intestinal loops protruding.

(iii) Two lacerated wounds on the left knee joints in the front each 1/2" x 1 1/2" skin deep.

(iv) Two lacerated wounds on the left side of face and one on the neck each 1/2" x 1/2" x muscle deep. In the opinion of the Doctor, injury no. (ii) was caused by sharp cutting substance, whereas, the remaining three injuries were caused by hard and blunt substance and the nature of the injuries were grievous. He clearly stated that though voice of Silpi Kumari was feeble, but her voice was clear and she was speaking with much difficulty. He denied the fact that she was not in a position to speak.

26. P.W. 16 Ram Sajeewan Singh reached Pilgrim Hospital and recorded the farebeat of Silpi Kumari and he has also stated that she was in a fit state of mind to make her statement and the said statement was recorded in presence of P.W. 2 Dr. Purendu Sekhar, who after making an endorsement that the statement was recorded in his presence put his signature. She in her statement has clearly stated about the same.

27. The service of P.W. 1 Shailendra Kumar Choudhary were requisitioned to record the dying declaration of Silpi Kumari and he has also stated in his evidence that after recording her statement, the same was read over to her and she put her L.T.I. He clearly stated that though the condition of Silpi Kumari was critical but she was conscious when he had gone to record her dying declaration. He has further stated that the Doctor was present, but he could not take signature of the Doctor at that time.

28. Thus, there is no reason to disbelieve the statements of the aforesaid witnesses, including P.W. 1, who have clearly stated that the injured Silpi was in fit state of mind to make her statements. Her farebeat was recorded at 8 A.M. and the dying declaration was recorded at 9.30 A.M. Admittedly, at that time no relation of Silpi Kumari was present there. On the other hand, they had no information about such ghastly crime up to that time. The suggestion by the defence that Yogendra Singh, with whom deceased Saroj Devi was married, had managed everything, has been stated only for the purpose of rejection as there is no material to show that Yogendra Singh was present at any place at the time of recording of the aforesaid dying declarations. It is difficult to conceive that so

many public servants will connive with Yogendra Singh in the early morning on 24.2.1996 when Silpi Kumari was brought in injured condition in the Pilgrim Hospital.

29. Thus, the materials on the record clearly show that Silpi Kumari was in a fit state of mind to make the statement and no one was present there either to prompt her or tutor her to make the aforesaid statements.

30. Learned counsel for the appellant submitted that the dying declaration recorded in the Pilgrim Hospital was managed by one Madheshwar Singh, A.S.I, of Government Railway P.S. at the instance of Yogendra Singh, who, according to the appellant, was the husband of the deceased. In support of the said submission, it was stated that said Madheshwar Singh, though not deputed by the Officer-in-charge of Government Railway P.S., was present at the Pilgrim Hospital while the fardbeyan was recorded. The presence of Madheshwar Singh in the Pilgrim Hospital will not be a ground to infer that he was set up by Yogendra Singh and at his instance the farebeat was recorded. There is no reason for the Doctor, the Magistrate and the Police Officer to prompt Silpi Kumari to make a false statement. The Investigating Officer has stated in his evidence that the order for deputation is mentioned in the station diary and Madheshwar Singh was present with him at the Pilgrim Hospital for 8 A.M. to 9 A.M. and inquest report bears his signature. Hence the deputation of Sri Madheshwar Singh at the Hospital by the Officer Incharge cannot be ruled out.

31. Learned counsel for the appellant also submitted that brother of Silpi Kumari, a minor boy, was thrown away from the train earlier to throwing of Silpi Kumari as he was found lying in an injured condition north to the place where Silpi Kumari was found at a distance of 2 Kms. and omission of this fact in the dying declaration creates a doubt about the veracity of the dying declaration.

32. The train was going from north to south and in the running train, the appellant is alleged to have started giving dagger blows to his life. Twelve years old Silpi wanted to intervene and in that course, she was also stabbed. This episode continued for some time and if during this period, the boy was thrown by the appellant and the same was not noticed by Silpi Kumari that cannot be ground to reject her consistent statements about the cause of her death.

33. Another noticeable feature in this case is that Silpi Kumari in her all the three statements one made before P.W. 3, the second made before P.W. 16 at the Pilgrim Hospital and the last one recorded by the Executive Magistrate P.W. 1 as dying declaration, have consistently said that there was a quarrel between her parents with regard to partition of the house in the preceding night. She, her parents and younger brother left by 15 P.G. train and while the train was in motion, the appellant started stabbing her mother and her also. When he wanted to throw her out of the train, her mother intervened and, thereafter, Silpi Kumari was thrown out from the train.

34. Thus, the dying declaration made by Silpi Kumari do not suffer from any legal

infirmity.

35. There are other evidence also against the appellant. The evidence of P.W. 11, brother of deceased Saroj Devi, shows that she left in the company of the appellant along with her children by 15 P.G. Train. The said train leaves Patna Railway Junction at about midnight. Thereafter, both children were found lying by the side of the Railway track and Silpi had received injuries by dagger also. The dead body of Saroj Devi was found in one of the compartments of the said train and the Doctor has found injuries caused by sharp-cutting weapon (chhura). The appellant did not report the missing of his wife and the children, on the other hand, he remained absconding and was apprehended by the Police. The Investigating Officer found the dead body of the deceased in the compartment of the said P.G. Train. He found blood at the place where deceased Saroj Devi was lying. He also seized Hawai Chappal, a dagger, an empty white plastic bag, a terri-cotton frock, a gent's woollen shawl etc., which shows that the murder of Saroj Devi was committed in the said compartment.

36. Thus, the dying declarations of deceased Silpi Kumari as well as the circumstances available on the record leave no manner of doubt that the injuries inflicted by the appellant caused the death of Saroj Devi and Silpi Kumari, his wife and daughter, respectively.

37. So far as the attempt to commit the murder of the minor boy is concerned, the dying declaration of Silpi Kumari itself shows that the boy was also accompanying them. The boy was found lying in injured condition by the side of the Railway line at a place known as Dumri-2 Kms. ahead of Chakand Railway Station. P.W. 6 and others noticed injuries in his Panjara and, thereafter, they took him to the Pilgrim Hospital, Gaya, in the injured condition and when he was not admitted there, he was taken to the Magadh Medical College Hospital, Gaya, for treatment. The Investigating Officer went to the Magadh Medical College Hospital and found the boy lying by the side of the bed of Silpi Kumari. He prepared an injury report, which has been proved as Ext. 11, wherein there is mention of two injuries one on the left Panjara and the other on the right hand. P.W. 16 also visited village Dumri, where the boy was lying in the injured condition by the side of the Railway and found blood-stain thereon. P.W. 11 Sudhir Kumar Singh, maternal uncle of the boy, has said that i.e., saw his sister's son lying in the Hospital on the one being pointed out by Darogaji, Medicine and horlics were given to the boy. P.W. 12 maternal grand-mother (Nani) of the boy has also stated that her Nati (daughter's son) was lying in the hospital in the injured condition. Unfortunately in this case, the Doctor has not been examined with regard to the nature of the injuries found on the person of the injured son of the appellant, but the fact remains that the boy, who was in the custody of the appellant, was found lying by the side of the Railway line and he had received injuries. No explanation is coming from the side of the appellant as to what happened with his son, who was with him in the train. In such circumstances, only conclusion would be that the intention of the appellant was

to kill him also and with that intention he threw him from the running train, but due to God's grace the boy survived. Thus, the offence u/s 307 of the I.P.C. is also proved against the appellant.

38. Now the question arises as to why the appellant committed this crime? According to the prosecution, the motive is two-fold, firstly that the dispute regarding a partition was going on between the husband and wife and secondly that the husband used to take away the money from his wife. The motive has been proved by adducing evidence. The victim girl Silpi Kumari in her two dying declarations had also stated about the dispute regarding partition, which was the cause of difference between the appellant and his wife Saroj Devi and the parents of the deceased Saroj Devi have spoken about the forcible taking away of the money by the appellant resulting into a bad relationship between them. Thus, the prosecution has proved that the appellant committed the murder of his wife and daughter and also attempted to commit murder of his son in the manner as alleged by the prosecution.

39. Coming to the sentence, the appellant has been awarded capital punishment for committing the murder of his wife and daughter. The trial court has awarded the capital punishment on the ground that the murder has been committed with utmost brutality and special circumstances are present in the case.

40. Sub-section (3) of Section 354 provides that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. Thus, according to the said provision, in case of imposition of death punishment, special reasons have to be assigned.

41. The vires of the provisions imposing death penalty was considered by the Supreme Court in the case of Bachan Singh Vs. State of Punjab, and it was held that the provision of death penalty is not violative of Articles 14 and 21 of the Constitution. However, it was held that the said penalty has to be imposed in rarest of the rare cases.

42. The guidelines indicated in Bachan Singh's case (supra) have been culled out in the case of Machhi Singh and Others Vs. State of Punjab, . The same are as follows :

- (i) The extreme penalty need not be inflicted except in gravest cases of extreme culpability
- (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
- (iii) Life imprisonment is rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances

of the stand provided, and only provided option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the circumstances of the crime the relevant circumstances

(iv) A balance sheet of aggravating and mitigating circumstances has been drawn up and in doing so the circumstances have to be fully weighed and a just balance to be struck between the aggravating and the mitigating circumstances before the option is exercised

43. In *Machhi Singh's* case the Apex Court held that while the question of imposition of death sentence, the Court has to consider the facts of commission of murder, motive, accused, nature of the crime, the crime on the society, magnitude of crime and personality of the murderer and the following question be asked and answered "(a) Is there something unusual about the crime which tender sentence of imprisonment for life would not call for a death sentence (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence after weighing the mitigating circumstances speak in favour of the offence

44. Again in the case of *Dhananjay Chatterjee vs. State of West Bengal*, reported in 1994 (2) S.C.C. 358 the Court having noticed that it is not possible to lay down any cut and dry formula for imposition of sentence, it follows

The object of sentencing is to see that the crime does not go unpunished and the victim also the society has the satisfaction that justice has been done. In imposing sentence in the absence of specific legislation, judges must consider a variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. In our opinion the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts impose punishment befitting the crime so that the courts reflect public adherence to the crime. The courts must only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

45. Thus, according to the law laid down by the Apex Court, no hard and fast rule can be laid down as to the circumstances which will justify the imposition of capital punishment as each case has its own facts. While considering the question, the court should take into consideration that the life imprisonment is the rule and death sentence is an exception and the nature of the crime, circumstances of the criminal, manner of crime, impact of the crime on the society, barbaric or heinous nature of the crime and other relevant factors are to be taken into consideration while deciding the question of imposition of sentence. If the crime is such, which shakes the judicial conscience, then the maximum

penalty should be awarded.

46. Coming to the facts of this case, no doubt, it is apparent that the appellant has committed the murder of his wife and daughter and also attempted to kill his son and as such the crime committed by the appellant is heinous and gruesome. But the mitigating circumstances are that the offence appears to have been committed by the appellant due to family feud and frustration. There is nothing on the record to show that the murder of deceased Saroj Devi and Silpi Kumari were committed on account of any criminal tendency. It is not the rarest of rare cases justifying imposition of extreme penalty. In the case of Shaikh Ayub vs. State of Maharashtra, reported in AIR 1998 Supreme Court 1285, the appellant committed murder of his wife and five children and the Apex Court having taken note of the fact that the appellant had killed his wife and five children because of unhappiness and frustration and not because of any criminal tendency, altered the sentence from capital punishment to life imprisonment.

47. Thus, taking into consideration the facts and circumstances of this case, as indicated above, I am of the view that the extreme penalty of death sentence is not warranted in this case. Accordingly, while maintaining the conviction of the appellant u/s 302 of the I.P.C, the sentence of capital punishment as awarded to the appellant by the court below u/s 302 of the I.P.C. is altered to life imprisonment. The conviction and sentence u/s 307 of the I.P.C. is maintained. However, both the sentences shall run concurrently.

48. In the result, the reference made by the trial court is rejected and the appeal filed by the appellant is partly allowed as aforementioned.