

(2007) 05 PAT CK 0114

In the Patna High Court

Case No : Death Reference No. 8 with Criminal Appeal No. 745 of 2004

The State of Bihar

APPELLANT

Vs

Dinesh Kumar Mahto
 Dinesh Kumar Mahto Vs The
State of Bihar

RESPONDENT

Date of Decision : 03-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366
Penal Code, 1860 (IPC) — Section 302

Citation : (2007) 4 PLJR 729

Hon'ble Judges : Chandramauli Kr. Prasad, J;Abhijit Sinha, J

Bench : Division Bench

Advocate : B.N. Sinha "Suman" and Lalit Kumar Singh for the State, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Prasad & Abhijit Sinha, JJ.—Judgment and order dated 15.9.2004 and 22.9.2004 passed by the Additional Sessions Judge, Fast Track Court No. 4, Samastipur in Sessions Trial No. 172 of 1997 (287 of 2002), awarding the sentence of death to accused Dinesh Kumar Mahto, upon his conviction u/s 302 of the Indian Penal Code has necessitated this reference u/s 366 of the Code of Criminal Procedure. Said Dinesh Kumar Mahto aggrieved by aforesaid judgment of conviction and sentence has also preferred appeal, which has been registered as Criminal Appeal No. 745 of 2004. Both the cases arise out of the same judgment and order and hence having been heard together are being disposed of by this common judgment. We shall refer Dinesh Kumar Mahto, the accused found guilty and sentenced to death as appellant hereinafter.

2. At the very outset for the purpose of appreciation, we deem it expedient to give the relationship between the informant, the deceased and the appellant. Informant and appellant are step-brothers, the latter being the child from the second wife. Their father Yugeshwar Mahto and grand parents Amir Lal Mahto

and Suraji Devi had died in this incident.

3. Prosecution started on the basis of an oral statement (fardbeyan) given by P.W. 4 Ramashray Mahto on 16.9.1995 at 11 O'clock by the side of the dead bodies of his grandfather, grandmother and father at his darwaja in village Kamraow within Police Station Daisinghsarai in the district of Samastipur before the Sub-Inspector of Police of Daisinghsarai Police Station. According to the first information report, on 16.9.1995 at 9 A.M. a quarrel took place between his step-brother appellant Dinesh Kumar Mahto and grandfather Amir Lal Mahto and father Yogeshwar Mahto involving some domestic affair. On account of the aforesaid quarrel the appellant got angry, went into his house and brought a garasa and dealt a blow on the neck of his grandfather Amir Lai Mahto, who died there on sustaining the injury on the neck. According to the informant, when their father Yogeshwar Mahto tried to save his father i.e. Amir Lal Mahto appellant gave a blow on his neck with garasa, who also died on the spot. Seeing this, informant's grandmother Suraji Devi tried to save them, appellant also killed her by cutting her neck by garasa and waving the same fled away towards Chaur. According to the informant, he and other villagers chased him but he could not be apprehended and managed to escape. In the first information report, it has been stated that his wife Sunaina Devi and neighbours, namely, Karamchand Bhagat (P.W. 5), Ram Kishun Ram (P.W. 3), Baldeo Singh (P.W. 2) and Ram Bilash Mahto (P.W. 1) had witnessed the crime. On the basis of the aforesaid information, Daisinghsarai P.S. Case No. 120 of 1995 was registered against the sole appellant u/s 302 of the Indian Penal Code. Police after investigation submitted a chargesheet against the appellant and he was ultimately committed to the Court of Session to face the trial, where he was charged for intentionally causing the death of Amir Lai Mahto, Yogeshwar Mahto and Suraji Devi punishable u/s 302 of the Indian Penal Code.

4. Appellant pleaded not guilty and claimed to be tried.

5. Prosecution in support of its case had altogether examined fifteen witnesses, out of whom, P.W. 1 Ram Bilash Mahto, P.W. 2 Baldeo Singh, P.W. 3 Ramkishun Rai, P.W. 6 Nand Kishore Mahto, P.W. 7 Deo Narayan Rai and P.W. 8 Ramashish Mahto had gone unfriendly to the prosecution and on being declared as hostile were cross-examined by the prosecution. PW 4 Ramachray Mahto is the informant of the case and grandson of the deceased Amir Lal Mahto and Suraji Devi and son of deceased Yogeshwar Mahto. P.W. 5 Karamchand Bhagat is not a witness to the actual assault but has been examined to corroborate the case of the prosecution. P.W. 9 Ganaur Mahto, P.W. 10 Devendra Kumar Rai, P.W. 13 Rajbanshi Ram, P.W. 14 Bishwanath Rai and P.W. 15 Surendra Pathak are formal witnesses. P.W. 11 Dr. Vinay Kumar Verma is the Medical Officer, who had conducted the postmortem examination on the dead body of the deceased. P.W. 12 Lalan Prasad Singh is a Police Officer, who partly investigated the case and submitted the charge-sheet.

6. The plea of the appellant is of false implication and from the trend of the cross-

examination his defence further seems to be that his father deceased Yogeshwar Mahto had kept a lady, namely, Ramkaliya Devi in the room belonging to his father and mother i.e. the deceased and quarrel used to take place for that and in fact, his father had killed his parents. As regards his father Yogeshwar Mahto, it has been suggested by the appellant that in fact the informant's wife killed him. However no witness on this point has been examined by the defence.

7. It is relevant here to state that the appellant also claimed to be a juvenile and in order to prove the same had examined the Headmaster of the School, namely, Kailash Rajak as D.W. 1.

8. The court below on appraisal of evidence did not accept the plea of the appellant being a juvenile. It came to the conclusion that prosecution has been able to prove its case beyond all reasonable doubt and accordingly convicted and sentenced the appellant as above.

9. At the very outset we shall consider the evidence of informant P.W. 4 Ramashray Mahto. He has stated in his evidence that on the date and time of occurrence he was at his darwaja and his grandfather Amir Lal Mahto was taking meal in the house where appellant came and started quarrelling with him. Thereafter the appellant went to his house in anger, returned with a katta (sharp edged weapon) and cut his neck who died there. His father Yogeshwar Mahto came to save his father, namely, Amir Lal Mahto but appellant cut his neck also with that very katta and he died. According to this witness, thereafter his grandmother Suraji Devi came crying, she was dashed down by the appellant and her neck was cut and she too died there. Appellant thereafter went towards north alongwith katta. threw the same in the maize field and ran away towards chaur. Motive for the occurrence, according to this witness, is that as the appellant and his mother did not do household work and for that his father and grandfather used to scold them. According to him, his wife, Karamchand Bhagat (P.W. 5), Ram Kishun Rai (P.W. 3), Baldeo Singh (P.W. 2) and Ram Bilash Mahto (P.W. 1) and many villagers collected and had seen the occurrence.

10. According to this witness, after information the Sub-Inspector of Police came and recorded his statement (Ext.-1) and during the course of investigation the Sub-Inspector of Police recovered the blood stained katta from the maize field. In the cross-examination he had denied the suggestion that his father Yogeshwar Mahto had kept a women, namely, Ramkaliya Devi in the room belonging to his parents i.e. grandfather and grandmother of this witness, which was objected to by them and on that account they were killed by his father. He has also denied the suggestion that his wife Sunaina Devi had killed his father. In paragraph 8 of the cross-examination he had stated that the blade of garasa used for cutting fodder is straight and resembles a katta and katta and garasa are different types of weapons. He had also denied the suggestion that Dinesh was 14-15 years of age when the occurrence had taken place.

11. P.W. 5 Karamchand Bhagat although is not a witness to the actual incident,

but has stated that on the date and time of occurrence while he was returning from the field and reached near the house of the appellant, he saw the appellant fleeing away from there armed with a kaita which he threw in the maize field. According to him, the katta was blood stained and when he went to the dalan of Amir Lal Mahto he saw three dead bodies i.e. dead bodies of Amir Lal Mahto, his wife and son with their necks cut. Informant Ramashray Mahto disclosed to him that the appellant after cutting the necks of all the three persons had fled away. According to his evidence, the Sub-Inspector of Police had recovered katta in his presence. He had admitted that the informant is the step-brother of the appellant and the appellant is the son from the second wife of deceased Yogeshwar Mahto.

12. P.W. 11 Dr. Vinay Kumar Verma, at the relevant time, was posted as Medical Officer at Sadar Hospital, Samastipur and had conducted the postmortem examination of all the three deceased on 17.9.1995. According to him, he conducted the postmortem examination on the said date at 8.15 A.M. of Suraji Devi and found the head completely severed at the level of the trunk except a tag of skin attached with trunk. All the neck muscles, vessels around larynx, trachea, oesophagus and cervical vertebrae were cut.

13. At 8.30 A.M. on the same day he conducted postmortem examination on the dead body of Yogeshwar Mahto and found incised wound on the front of the neck of the size of 6" x 3" x vertebrae deep. He also found his neck muscle, larynx, trachea, oesophagus, blood vessels and cervical vertebrae cut. Another injury was also found on his left shoulder of the size of 1 1/2" x 1/2" x bone deep.

14. He had also conducted postmortem examination on the dead body of Amir Lai Mahto at 8.45 A.M. on the same day and found incised wound on the front of the neck of the size of 5 1/2" x 2 1/2" x vertebrae deep with the neck muscles, larynx, trachea, oesophagus and blood vessels cut.

15. All the injuries found on the person of the three deceased, according to the doctor, were ante mortem in nature caused by sharp cutting weapons, namely. dabiya or katta. In his opinion, death had occurred within 24 hours of their examination on account of shock and haemorrhage caused by the injuries found on their person.

16. It is well settled that the evidence of hostile witness is not totally wiped out from the record of the case and same can be referred to for the purpose of appreciation of evidence. As stated earlier P.W.1 Ram Bilash Mahto, P.W.2 Baldeo Singh, P.W.3 Ram Kishun Rai, P.W.6 Nand Kishore Mahto, P.W.7 Deo Narayan Rai and P.W.8 Ramashish Mahto have been declared hostile by the prosecution

17. P.W. 1 Ram Bilash Mahto although has failed to disclose the names of the assailants but in his evidence he had stated to have seen the dead bodies of Amir Lal Mahto, Yugeshwar Mahto and Suraji Devi at the house of Amir Lal Mahto with their necks cut and blood fallen down there. In the cross-examination he had disclosed that many people, who had collected there, expressed surprise as to

how appellant, a boy of 18-20 years, killed his grand parents and father by a dabiya. In answer to a question, he had stated that wife of the informant was raising hulla that the appellant had killed the three persons.

18. P.W.2 Baldeo Singh has also been declared hostile but had deposed about the presence of the dead bodies at the darwaja of Amir Lal Mahto. He had further stated that the informant was saying that the appellant had killed the three persons. He was declared hostile by the prosecution when he disclosed that he did not see anyone committing the crime with his own eyes. He had denied the suggestion that during the course of investigation he had disclosed to the Investigating Officer that the appellant had cut the neck of his father as also his grand parents by dabiya.

19. P.W. 3 Ram Kishun Rai has also been declared hostile but has stated that when he reached at the place of occurrence, he saw Yugeshwar Mahto and his parents lying dead. According to him, when he was scolded by the Sub-Inspector of Police he fled away and could not know as to which grandson of Amir Lal Mahto killed him. He had denied the suggestion that during the course of investigation he had stated to the Investigating Officer of having seen the appellant cutting the neck of his father and grand parents.

20. P.W. 6 Nand Kishore Mahto is another witness who has been declared hostile when he stated that he did not know about the time of occurrence but has identified the writing and signature of Amar Kant Jha, Officer-Incharge of Dalsinghsarai Police Station in the case diary from pages 1 to 27 (Exhibit-2). Although he had stated that the blood stained earth was not recovered in his presence but his signature was obtained by the Sub-Inspector of Police in the seizure list.

21. Similarly P.W.7 Deo Narayan Rai has been declared hostile by the prosecution but admits his signature on the Inquest report, seizure lists of blood stained earth as also blood stained dabiya.

22. P.W. 8 Ramashish Mahto has also been declared hostile when he stated that he heard some persons have been killed. However he had stated that the dead bodies of Amir Lal Mahto, Yugeshwar Mahto and a lady, who was wife of Amir Lal Mahto, were lying with their necks cut. He is also a witness to the Inquest report and admits to have put his signature on that. He was declared hostile when he disclosed that he did not recognise the accused.

23. P.W. 9 Ganaur Mahto, P.W.10 Devendra Kumar Rai, P.W.13 Rajbanshi Ram, P.W.14 Bishwanath Rai and P.W.15 Surendra Pathak are formal witnesses. P.W.9 Ganaur Mahto had brought the postmortem register in which the postmortem reports of Suraji Devi, Yugeshwar Mahto and Amir Lal Mahto have been entered. P.W.10 Devendra Kumar Rai had stated that one Lalan Prasad Sinha was posted as Officer-Incharge of Dalsinghsarai Police Station and paragraphs 95 to 125 and 129 of the case diary of P.S. Case No. 120 of 1995 were in his pen and he has proved the same. P.W.13 Rajbanshi Ram, at the relevant time, was the Malkhana

Incharge and stated about the deposit of blood stained earth and blood stained gamchha in the Malkhana by the Investigating Officer.

24. P.W. 14 Bishwanath Rai is an Advocate's clerk and has deposed that he identifies the writing and signature of Amar Kant Jha, the then Officer-Incharge of the Police Station and the fardbeyan of the informant is in his pen. He has proved the same. Similarly he had stated that Inquest reports of the deceased are in the pen and signature of Amar Kant Jha aforesaid and had proved the same.

25. P.W.15 Surendra Pathak is another advocate's clerk, who has also stated that the fardbeyan of the informant is in the pen of and bears the signature of Amar Kant Jha, the then Officer-Incharge of the Police Station. He had also identified the signature of Nand Kishore Mahto on the fardbeyan and proved the same. He had also stated about the preparation of seizure list of a blood stained katta by the Investigating Officer bearing the signature of the witnesses Deo Narayan and Mahendra and had identified the same.

26. P.W. 12 Lalan Prasad Singh, at the relevant time, was posted as Sub-Inspector of Police and according to him he took charge of the case from Amar Kant Jha on 27.4.1996. He recorded the statement of the accused in jail and ultimately submitted the charge-sheet.

27. D.W.1 Kailash Rajak, at the relevant time, was a teacher at Rajkiya Primary Vidyalaya, Kamraun and had produced the admission register of the year 1986. According to the admission register, the date of birth of this appellant is 6.1.1980. He had identified the signature of the then Headmaster of the School on the admission register.

28. Mr. B.N. Sinha "Suman", appearing on behalf of the appellant submits that as the appellant had taken the plea of juvenility, hence the court below ought to have held an enquiry and then decided about his claim. He points out that this plea can be raised at any stage of the proceeding. However when confronted that in fact the appellant's plea of juvenility was considered by the court below he takes the stand that in the face of the certificate produced by the appellant showing his date of birth to be 6.1.1980 and the date of occurrence being 15.9.1995, same ought to have been accepted and the court below ought to have held him to be a juvenile and should not have rejected his plea on surmises and conjectures. In support of his submission, reliance has been placed on a decision of the Supreme Court in the case of Bhoop Ram Vs. State of U.P., and our attention has been drawn to the following passage from paragraph 7 of the judgment, which reads as follows:-

"The first is that the appellant has produced a school certificate which carries the date 24.6.1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the

opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30.4.1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in school for securing benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12.9.1977 on the ground the appellant was a boy of 17 years of age. The observation of the Trial Judge would lend credence to the appellant's case that he was less than 10(16) years of age on 3.10.1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30.4.1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts."

29. Mr. Lala Kailash Bihari Prasad Additional Public Prosecutor, appearing on behalf of the State very fairly submits that the plea of juvenility can be raised at any stage, but according to him for the decision in the present case said principle has no application. He points out that in fact appellant raised this plea and on consideration of the material on record the court below came to the conclusion that the plea raised by him was untenable. He submits that in the state of evidence on record no other view is possible.

30. Having appreciated the rival submissions, we do not have the slightest hesitation in accepting the broad submission of Mr. Suman that plea of juvenility even if not raised before the court below can be raised before this court, but in the present case we are not called upon to decide this question as in fact the appellant had raised this plea before the court below itself and on appraisal of the material the court below has come to the conclusion that the appellant's plea is not fit to be sustained by order dated 27.7.2004. It is relevant here to state that this appellant was examined for the first time u/s 313 of the Code of Criminal Procedure on 9.4.2003. There he did not raise the plea of juvenility nor at any point of time prior thereto had any such plea been raised. At his request the court by order dated 5.6.2003 ordered for his further examination u/s 313 of the Code of Criminal Procedure and on account thereof he was again examined on 18.6.2003 and for the first time then, he asserted that his age is 21 years. Thereafter Kailash Rajak was examined as defence witness no.1 on 29.3.2004, who produced the admission register which shows the appellant's date of birth

as 6.1.1980. Only thereafter for the first time on 27.5.2004 appellant filed application under the Juvenile Justice Act, 1986 for holding an inquiry in regard to his age. The court below by order dated 27.7.2004 rejected his application. It has to be borne in mind that before an inquiry is held, prima facie satisfaction of the court is sine qua non. It is relevant here to state that when this appellant was examined on 9.4.2003, he disclosed his age 32 years and the court also assessed his age to be the same. In view of the self-assertion of the appellant that on 9.4.2003 his age was 32 years, he cannot be said to be a juvenile. The court below on consideration of the material on record came to the conclusion that appellant is not a juvenile. We do not find any error in the same. In fact, the appellant had taken this plea belatedly to avoid rigours of law. Accordingly we reject this submission of the learned Counsel.

31. Assailing the conviction of the appellant on merit, Mr. Suman submits that there is a vital contradiction in regard to the weapon of crime. In this connection he has drawn our attention to the first information report wherein the informant had stated that the weapon of crime is garasa, whereas during the trial the informant P.W.4 Ramashray Mahto had stated that the crime was committed by katta. This vital contradiction, according to Mr. Suman, goes to the root of the matter and the appellant deserves to be given the benefit of doubt.

32. Mr. Prasad, however, contends that garasa and dabiya both are sharp edged weapon and the informant having lost his father and the grand parents, this contradiction if at all is not so vital so as to create any doubt to the veracity of the prosecution case.

33. We do not find any substance in the submission of Mr. Suman, True it is that the informant had disclosed garasa as the weapon of crime in the first information report, but during the course of trial he had asserted that the crime was committed by katta. However, in paragraph 8 of his cross-examination he had clearly stated that although katta and garasa are different type of weapons but they resemble each other. The informant had lost three of his kith and kin and in that state of mind not appreciating difference between the two weapons at the time of giving his fardbeyan, is not that vital, so as to discredit the case of the prosecution.

34. Mr. Suman, submits that according to the prosecution, the weapon of crime although was seized but neither same was produced as material exhibit nor sent for forensic examination and this by itself vitiates the case of the prosecution. In support of his submission, reliance has been placed on a decision of the Supreme Court in the case of State of U.P. Vs. Arun Kumar Gupta, and our attention has been drawn to the following passage from paragraph 17 of the judgment, which reads as follows:-

"It is not possible to reconcile these two facts if actually P.W.9 was the person responsible for preparing the recovery memos then, the date 29th May does not fit into prosecution case since according to this witness himself he left about

11.30 in the night of 28th of May, 1988. Therefore, there is force in the arguments of the learned Counsel for the respondent that these recoveries cannot be believed more so in the background of the fact that the blood stained knife, the blood stained earth was not sent to the serologist."

35. Mr. Prasad submits that the failure on the part of the Investigating Officer to send the weapon of crime for forensic examination and its non-production in Court are not sufficient enough to discredit the case of the prosecution. Reliance has been placed on a decision of the Supreme Court in the case of State of Punjab Vs. Hakam Singh, and our attention has been drawn to paragraph 13 of the judgment, which reads as follows:

"It was also pointed out by learned counsel for the respondent that no firearms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the firearms and recovering the empties and sending them for examination by the ballistic expert would have only corroborated the prosecution case but by not sending them to the ballistic expert in the present case is not fatal in view of the categorical testimony of P.W.3 about the whole incident."

36. We do not find any substance in the submission of Mr. Suman and the authority relied on is clearly distinguishable. In our opinion it would have been better for the prosecution to have sent the weapon of crime for forensic examination and also produce the same as material exhibit, but this failure on part of the Investigating Officer, itself shall not be enough to discredit the evidence of the eye-witnesses. In the case of Arun Kumar Gupta (supra) non-sending of the weapon of crime was one of the factors which was considered alongwith other factors to come to the conclusion that the prosecution had not proved the case beyond all reasonable doubt, in our opinion non-production of weapon of crime and failure to send it for forensic examination itself is not enough to discredit the case of the prosecution.

37. Mr. Suman, then submits that from the injuries sustained by the deceased, it is quite unnatural that occurrence has taken place in the manner unfolded by the prosecution. He points out that according to the prosecution case, it is the appellant who had committed three murders. According to him, had the occurrence taken place in the manner suggested by the prosecution, the victims of crime ought to have sustained injuries on other parts of the body and excepting deceased Yugeshwar Mahto, two other deceased had sustained only one injury in the neck as if the necks of the deceased were slashed without any resistance.

38. The argument prima facie seems attractive but on deeper scrutiny we do not find any substance in the same. We have to bear in mind the relationship between the appellant and the deceased. As stated earlier the deceased are none other than the father and grand parents of the appellant. The crime had taken place so suddenly that they were totally unguarded and in such circumstance

sustaining only one injury itself shall not be sufficient to discard the case of the prosecution.

39. Mr. Suman, then submits that the informant admittedly is a step-brother and it shall be hazardous to sustain his conviction only on his sole testimony.

40. It is well settled that conviction can be sustained on the basis of sole testimony of a witness, if he is found wholly reliable. We do not find any ground to reject his testimony. He has clearly stated that the manner in which the occurrence has taken place P.W.6 Nand Kishore Mahto who had arrived at the place of occurrence immediately after the incident had seen the appellant fleeing away with Katta. Even P.W.2 Baldeo Singh who has been declared hostile had stated that when he reached at the place where the dead body was lying, informant disclosed that it is the appellant who had killed all the three persons. P.W.11 Dr. Vinay Kumar Verma, who had conducted the post mortem examination, has very categorically stated that the crime has been committed by a sharp cutting weapon may be dabiya or katta. Thus the evidence of the eye-witness P.W.4 Ramashray Mahto is not only corroborated by the evidence of P.W.5 Karamchand Bhagat but also gets support from the evidence of P.W.2 Baldeo Singh. P.W.11 Dr. Vinay Kumar Verma, who had conducted the postmortem examination, has found injuries on the person of the deceased which was possible to be caused by katta as disclosed by the prosecution. This also corroborates the case of the prosecution.

41. Assailing the sentence, Mr. Suman submits that the case in hand does not come within the category of rarest of rare cases and, as such, extreme penalty of death is not called for. Reliance has been placed on a decision of the Supreme Court in the case of Prakash Dhawal Khairnar (Patil) Vs. State of Maharashtra, and our attention has been drawn to paragraph 23 of the judgment, which reads as follows:

"From the record, it is revealed that the accused Prakash Patil did not have any criminal tendency. He was working as Water Analyser (Sr. Scientific Assistant). The facts and circumstances of the case reveal that he killed his brother, brother's wife and children because of frustration, as he was not partitioning the alleged joint property. No doubt, it is heinous and brutal crime but at the same time it will be difficult to hold that it is rarest of rare case. It is also difficult to hold that appellant is a menace to the society and there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society, (Re: Om Prakash vs. State of Haryana). Even A-2 in his confessional statement has stated that after the commission of the offence, he found tears in the eyes of his father, A-1. This may indicate that A-1 may repent for the rest of his life for commission of such ghastly act. However, at this stage, for imposing appropriate punishment, we would refer to the decision rendered by this Court in Shri Bhagwan vs. State of Rajasthan wherein while reducing the death sentence to imprisonment for life, the Court considered Section 57 IPC and referred to the

following observations in Dalbir Singh vs. State of Punjab. (SCC p. 753, para 14)."

42. Mr. Prasad, however, contends that the State does not want the blood of the appellant but the crime committed is so heinous and cold blooded that no leniency deserves to be shown to the appellant and the extreme penalty of death is called for. Reliance has been placed on a decision of the Supreme Court in the case of Ram Singh Vs. Sonia and Others, and our attention has been drawn to paragraph 66 of the judgment, which reads as follows:

"The instant case is one wherein accused Sonia, alongwith accused Sanjiv (her husband) has not only put an end to the lives of her step-brother and his whole family, which included three tiny tots of 45 days, 2 1/2 years and 4 years, but also her own father, mother and sister in a very diabolic manner so as to deprive her father from giving the property to her step-brother and his family. The fact that murders in question were committed in such a diabolic manner while the victims were sleeping, without any provocation whatsoever from the victim side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of the most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mindset which can be amenable for any reformation. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so. In view of these facts we are of the view that there would be failure of justice in case death sentence is not awarded in the present case as the same undoubtedly falls within the category of the rarest of the rare cases and the High Court was not justified in commuting death sentence into life imprisonment."

43. On a consideration of various authorities of the Supreme Court and this Court, a Division Bench of this Court in Death Reference No.1 of 2004 Ed.- Reported in The State of Bihar Vs. Prajeet Kr. Singh, disposed of on 2nd March, 2007 held as follows:

"The authorities on the question leads us to conclude that death sentence can be inflicted in rarest of the rare case and the number of persons killed is not decisive. Crime being brutal and heinous itself do not turn the scale towards death sentence. If these factors are present the Court has to see as to whether the accused is a menace to the society and continue to be so, threatening the peaceful and harmonious co-existence of society. The Court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance-sheet is to be prepared while considering the imposition of extreme penalty of death of aggravating and mitigating circumstances and just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, the holders of judicial power will not

stammer, de hors their personal opinion and inflict death penalty."

44. Bearing in mind the aforesaid, when we proceed to examine the facts of the instant case, we are of the opinion that the same does not fall within the ambit of the rarest of rare case so as to call for the extreme penalty of death. Appellant at the time of commission of crime was young and although the crime has been committed in a heinous and brutal manner, but there is nothing on record to show that he shall be a menace and continuous threat to the society threatening its peaceful existence. Further there is no reason to believe that he cannot be reformed and likely to continue with the criminal activities. Accordingly we are of the opinion that the case in hand does not fall within the category of the rarest of the rare case. The extreme penalty of death is not called for in the facts of the present case.

45. In the case of Prakash Dhawal Khairnar (supra), the Supreme Court while setting aside the death sentence directed that accused found guilty "shall not be released unless he had served out at least 20 years of imprisonment". In our considered opinion the facts and circumstances of the case justify such direction. Accordingly while maintaining the conviction of appellant u/s 302 of the Indian Penal Code, we commute it to life imprisonment with a direction that he shall not be released unless he serves out 20 years of imprisonment. For the reasons aforesaid, we decline to confirm the death sentence. In the result, we do not find any merit in the appeal and it is dismissed accordingly with the modification in the sentence. Reference is answered in the negative.