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**(1994) 02 SC CK 0030**  
**In the Supreme Court Of India**  
**Case No : Criminal Appeal No. 582 of 1993**

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| Vithal               | Vs | APPELLANT  |
| State of Maharashtra |    | RESPONDENT |

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**Date of Decision :** 01-02-1994

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302, 323, 326

**Citation :** (1994) 1 Crimes 555 : (1994) 1 JT 275 : (1994) 1 SCALE 276 :  
(1994) 1 SCC 639 Supp

**Hon'ble Judges :** K. Jayachandra Reddy, J;G. N. Ray, J

**Bench :** Division Bench

**Final Decision :** Partly Allowed

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## Judgement

1. This is an appeal u/s 2-A of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act. The sole accused in the case Vithal is the appellant. He was tried for offences punishable u/s 302 I.P.C. and also under Sections 326 and 323 I.P.C for causing the death of Smt. Kusum (deceased No. 1) wife of his own brother and her son Bandu, a boy aged about seven years (deceased w No. 2). The trial court acquitted the accused. The State preferred an appeal and the High Court set aside the acquittal and convicted the accused u/s 302 I.P.C. and sentenced him to death. The appellant is further convicted for other minor offences but no sentence is -awarded. Hence the present appeal.

2. The prosecution case is as follows:

3. Namdeo, P.W. 7, an agriculturist owned 16 acres of land at Village Shivan Khurd. Ramesh, P.W. 6 and Vithal, the accused are his two sons. Few months before the present occurrence there was partition between the brothers and the accused Vithal and his brother P.W. 6 was each allotted four acres of land. The remaining eight acres was kept in the name of their father P.W. 7. The house was also divided into two portions. Northern portion of the house was given to the accused Vithal and Southern portion to Ramesh, P.W. 6. As per the terms of the partition, P.W. 7 used to reside with P.W. 6 while the wife of P.W. 7 used to reside

with the accused Vithal. It is alleged that the accuse wanted that the land which he was cultivating for the maintenance of his mother should be mutated in his name but P.W. 7 did not agree. Therefore there used to be some bickerings between the accused and his father and it is alleged that he also assaulted his father once or twice. A few days before the present occurrence, the accused sent his mother to Akola and his wife and children to his father-in-law's house.

4. On the intervening night of 8th and 9th December, 1987 P.W. 6 and his another son Vijay slept on one wooden cot. His wife, deceased No. 1 slept on another cot with Bandu, deceased No. 2 and the third cot was occupied by P.W. 7 and the child Mamta, his grand-daughter. The door of the room was locked from aside and the room was supplied with electricity. On that night the electricity supply/was not available. Therefore P.W. 6 lighted a kerosene lamp in the room. In front of the residential portions of the accused and P.W. 6 there was a courtyard and at the entrance of the Wada, there was a gate which was also latched from iaside. Southern side of/the compound wall of the house was dilapidated. On the fateful night at about 3 A.M. when all the occupants in the room of P.W. 6 were asleep, it is alleged that the accused entered his house by removing the latch from outside and assaulted P.W. 6, deceased No. 1, P.W. 7 and the children Mamta and Vijay by means of a crow-bar (sabbal) Exh. 23. The injured P.W. 6 woke up after getting a blow on left ear and had seen the accused but because of the injury he could not get up. It is further alleged that the accused had by then assaulted deceased No. 1 and he also dealt another blow on P.W. 6 who became unconscious. P.W. 7 also woke up after hearing the cry when he also saw the accused, who dealt blows on his head and other parts of the body. Bhimrao, P.W. 3 who is a neigh bourer, was woken up by his mother. Hearing the shouts P.W. 3 gave call to the neighboured and thereafter he rushed towards the entrance door of the Wada and found that it was latched from inside. He shouted and the accused, a little later opened the door. Thereafter P.W. 3 and Ors. went iaside the Wada. The accused told them that the door of the house of Ramesh was latched from outside. The accused removed the latch and came out and reported that there was a pool of blood inside. P.W. 6 responded to the calls given by the visitors from inside. Therefore the visitors went out of the Wada. By that time, Bandu, deceased No. 2 came out from the room as he was feeling cold and went near the fire which was kept burning in the court-yard. Then it is alleged that the accused took deceased No. 2 saying that he would warm hip up and he took him inside his house. Then after some time he came out of the house and told them that Bandu has died. The other injured namely P.W. 7 was warming himself near the fire and his clothes also were stained with blood. Among the people who had assembled there, Rambharti, P.W. 8 asked P.W. 7 as to who had hit him. P.W. 7 told him that he was assaulted by his son Vithal. Then they went inside the house of Ramesh and found deceased nos. 1 and 2 dead on two different cots and on the third cot P.W. 6 was lying in semi-conscious state. They found that a kerosene lamp was burning inside the room. Then a report Exh. 8 was lodged by P.W. 2 Maroti. In that report he expressed his suspicion against Vithal. The A.S.I,

registered the crime and went to the scene of occurrence and set the injured to the hospital and arrested the accused and at his instance a crow-bar Exh. 23 was recovered. Injured P.Ws 6 and 7 were referred to the Main Hospital, Akola. He held the inquest over the dead bodies and sent the same for post-mortem. The Doctor, who conducted the postmortem, found on Smt. Kusum, deceased No. 1, four lacerated wounds and some contusions on the head and on hands. The head injury proved fatal and he opined that all the injuries could have been caused by blunt weapon. The Doctor, who examined P.W. 6, found on him an incised injury near the left ear and a contusion on the inter-coastal space and tenderness over the clavicle present and he opined that injury No. 1 was caused by a sharp object and that other by blunt object. Likewise on P.W. 7 he found two incised wounds and two contusion and on the two children Vijay and Mamta, he found one contusions each. The Doctor, who conducted the post-mortem on the dead body of deceased No. 2, found that pupils were dialated, lips were blue, tongue protruding and swollen and on internal examination he found that the lungs were congested and he opined that the death was as a result of asphyxia due to strangulation. After completion of the investigation, the charge-sheet was laid.

5. The prosecution mainly relied on the evidence of P.Ws 6 and 7 who are no other than the brother and father of the accused and other circumstantial evidence. The accused pleaded not guilty and denied every circumstance appearing against him. The trial court acquitted the accused on the ground that in the earliest report given by P.W. 2 his name was not mentioned as assailant, though by then P.Ws. 6 and 7 are alleged to have told the people gathered there that it was the accused who committed the crime and that P.Ws. 6 and 7 came out with their version only on 11th December, 1987 and the trial court also held that because of suspicion they have implicated the accused. The trial court in arriving at this conclusion very much relied on the circumstance that these two witnesses were examined only on 11th December, 1987 and it is only then that they came out with the version that it was the accused who committed the crime. The learned Judges of the High Court, on the other hand, accepted the evidence of P.Ws. 6 and 7 saying that they would be the last persons to implicate the accuse falsely and that it would not have been possible for anybody else to commit the crime on that night and that the appellant had the motive to commit the offences. The High Court awarded death sentence holding that the accused acted in a brutal manner and he attacked every member of the family of P.W. 6 just to grab the property after their deaths and that this is one of the rarest of rare cases 5 where death sentence should be awarded.

6. In this appeal, the learned Counsel for the appellant submitted that the very fact that P.Ws 6 and 7 did not name the accused as the assailant till 11th December, 1987, would show that they did not identify the assailant and that on suspicion they implicated the accused. He also submitted that the medical evidence shows that two weapons must 10 have been used whereas the version of P.Ws. 6 and 7 is that only one weapon was used. Therefore the evidence of P.Ws. 6 and 7 that the injuries were inflicted with crow-bar (Exh. 23) only can

not be believed. He further submitted that the conduct of the accused is inconsistent with his being guilty. One another important submission made by the learned Counsel is that the accused can not be connected with the murder of Bandu, deceased No. 2 as there is no evidence whatsoever. At any rate the reasons given by the trial court are sound and the High Court ought not to have interfered in an appeal against acquittal.'

7. From the above narration it can be seen that the appellant is no other than the son of P.W. 7 and the brother of P.W. 6 and they got their properties divided and their families were living into two adjacent portions with a common courtyard. The occurrence took place on that night and during the same P.Ws. 6 and 7 received injuries, is beyond any dispute. The medical evidence also corroborates the same. P.W. 7 is no other than the father of the accused. He would be the last person to implicate him falsely. His evidence is further corroborated by the evidence of P.W. 6. The reasons given by the learned Sessions Judge for rejecting their evidence are wholly unsound and untenable. One of the reasons given by him is that P.Ws. 6 and 7 did not immediately disclose the incident and that on 11th December, 1987 only they disclosed the incident. This aspect has been considered in detail by the High Court. Both these witnesses witnessed a ghastly crime perpetrated by the accused, who is no other than a member of their own family. That apart, no father would immediately / come out and speak against his own son and for that reason P.W. 6 also could not have immediately disclosed the incident. However, P.W. 8, who went there and enquired was told by P.W. 7 that they had to blame their own fate. Learned counsel, however, submitted that due to suspicion they might have implicated the accused. We do not think that any father on mere suspicion would implicate his own son falsely without witnessing the occurrence as such. If really some outsider has committed the crime as suggested by the learned Counsel, P.W. 7, the father, would be the last person to implicate his own son. Therefore the evidence of P.Ws. 6 and 7 corroborated by other evidence amply establishes beyond all reasonable doubt that the accused committed the murder of deceased No. 1 by causing injuries on her person with crow-bar and also during the same occurrence he also caused injuries to P.Ws. 6 and 7.

8. Now coming to the murder of deceased No. 2, there is no direct evidence. The doctor, who conducted the post-mortem, has clearly stated that he died as a result of asphyxia due to strangulation. The dead body was found in the same room in which the dead body of deceased No. 1 was also found and which room was under the occupation of P.Ws. 6 and 7. But, according to the prosecution, after inflicting injuries on deceased No. 1 and P.Ws. 6 and 7 the accused and Ors. were sitting around the fire and Bandu, deceased No. 2 came out and said that he was feeling chill and thereupon the accused took him saying that he would warm him and so saying he took the boy inside the house and afterwards the boy was found dead. Learned counsel submitted that the prosecution story is that the accused strangled deceased No. 2. But when so many persons were around and particularly when the accused took away the boy mentioning

everybody that he would warm him up, he would not have killed him in the manner suggested by the prosecution. But the accused had no explanation at all as to how he parted with the company of deceased No. 2 when he himself had taken him inside his house. Taking the other circumstances particularly attack on P.Ws. 6 and 7 and deceased No. 1 into consideration, the only irresistible conclusion is that the appellant alone must have caused the death of Bandu, deceased No. 2. Therefore the accused has been rightly convicted u/s 302 I.P.C. So far the sentence is concerned, the High Court held that the accused committed these offences only with a view to grab the property and with that greedy motive he did not even spare the young boy and designed to extinguish the entire family of P.W. 6. At more than one place, the High Court observed that "The only intention as explicit is to extinguish all the members of the family and grab the land which was in the name of his father and brother." With that motive the accused, according to the High Court, acted in beastly and ghastly manner and that this is one of the rarest of rare cases where the crime was perpetrated to grab the property. In this context the High Court also observed that "With the elimination of the accused, the society would be much better off and its safety will no longer be endangered" and accordingly awarded the death sentence. So far the motive aspect namely that the accused with a view to grab the property of P.W. 6 designed to eliminate all the members of his family, can not, in our view, readily be inferred because if that was the only motive, then P.W. 6 should have necessarily been done away with. The Doctor, P.W. 13, who examined P.W. 6 found only one incised injury near the left ear and it resulted in separating pinna of the ear and resulted in bleeding. Injuries nos. 2 and 3 are described as follows:

2. Contusion left 2nd Inter cast at space 2"X 1", tenderness over clavicle present.

3. Patient was complaining pain in neck. Tenderness over servical spine present.

The third injury was not an injury as such and the pain complained of would be due to injury No. 2 or injury No. 1. It can thus be seen that injury No. 1 alone if at all was a serious injury but that was also comparatively not serious so as to infer that whoever inflicted this injury wanted to kill him. It is only after attacking P.W. 6 that the accused is said to have dealt some blows on P.W. 7. If as suggested his motive was to eliminate P.W. 6 and his family members to grab the property, this would not have been the nature of attack. Even P.W. 7 after receiving the injury coolly sat for some time near the court-yard warming himself. We are referring to these aspects only to show that these deaths were not caused only to grab the property and there was no reason why he should cause the death of deceased No. 1 without causing any serious injuries to Ramesh, P.W. 6 himself. We think that something must have preceded this occurrence which has not come to light.

9. The High Court has referred to a decision of this Court which deals with circumstances under which death sentence could be imposed. It may not also be necessary to refer to all those cases cited by the counsel. In *Bachan Singh Vs. State of Punjab*, this Court considered the circumstances under which the death

sentence could be imposed and finally observed that taking life by imposing death sentence should be done only in the rarest of rare cases when the alternative option is unquestionably foreclosed. In *Machhi Singh and Others Vs. State of Punjab*, after referring to the ratio laid down in *Bachan Singh's* case this Court observed that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

10. The High Court in awarding the death sentence relied on a judgment of this Court in *Sarveshwar Prasad Sharma Vs. State of Madhya Pradesh*, . In that case the Supreme Court confirmed the death sentence taking into consideration that gruesome murders wiping out an entire family of nine persons including aged parents and two infants were committed by the accused with a deliberate motive of wrongful gain and that there were no extenuating circumstances to award a lesser sentence.

11. As discussed above we are not able to agree with the High Court that the appellant, in the instant case, committed the murder of deceased nos. 1 and 2 and inflicted injuries on P.Ws. 6 and 7 with a deliberate motive of wrongful gain and with extreme greediness and therefore he does not deserve to exist to be a member of the society and that the death sentence is the only appropriate sentence to be awarded and that there are no extenuating circumstances at all. The High Court in arriving at his conclusion has failed to note that P.W. 6, who is the main person to be eliminated, has not been attacked by the accused in the manner expected of him with such motive. As already pointed out, what has exactly preceded the attack is not clear. However, the participation of the accused is proved. But what prompted him to inflict those injuries on his own kith and kin is not clearly established by the prosecution. Therefore we can not say that this is one of the rarest of rare cases where death sentence alone should be awarded. For these reasons while confirming the conviction under Sections 302, 323 and 326 I.P.C., we reduce the sentence to imprisonment for life.

12. Accordingly the appeal is partly allowed to the extent indicated above.