



Court No. - 46/Reserved

Case :- CAPITAL CASES No. - 4505 of 2012

Appellant :- Ram Ashish Gaur & Others

Respondent :- State Of U.P.

Counsel for Appellant :- Amit Misra, Viresh Misra

Counsel for Respondent :- Govt. Advocate

Hon'ble Amar Saran, J.

Hon'ble Bachchoo Lal, J.

(Delivered by Hon'ble Amar Saran J)

We have heard Sri Viresh Mishra and Sri Amit Mishra for the appellants, and Sri Akhilesh Singh, learned Government Advocate, and Sri Anand Tiwari for the State of U.P., and perused the written submissions filed by the appellants and the State.

This Capital Appeal along with the connected Criminal Reference under section 366 Cr.P.C. arises from the judgement passed by the First Additional Sessions Judge, Chandauli dated 01.10.2012 awarding a sentence of death to the three appellants under section 302 read with 34 IPC.

The prosecution case as mentioned in the F.I.R. lodged on 18.06.2005 at 10 p.m. by P.W. 1 Onkar Nath Tiwari, P.W. 1, son of the deceased Raj Kumari Devi, aged 70 years was that Ram Ashish Gond had become mentally unstable and he used to roam about in the village. Chandradev Tiwari alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari had told his brother the appellant Ram Dheeraj Gond that if they made a sacrifice of some Brahmin, then his brother Ram Ashish would recover. P.W. 7 Geeta Devi, daughter-in-law of the deceased and P.W. 5 Chandrama Chauhan had over heard this conversation. On 18.06.2005 the appellants Ram Ashish, Ram Dheeraj, Chandra Dev Tiwari, alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari sent Mangari, the mother of Ram Ashish and Ram Dheeraj to call the deceased Raj Kumari Devi and they killed her in their house at 6.30 p.m. Vimla, P.W. 3 saw Mangri taking away Raj Kumari Devi with her. Raj Kumari Devi's

corpse was found in the house of Ram Ashish. On the basis of the informant's report at P.S. Dheena, a case was registered by P.W. 11 Head Moharrir Kislay Mishra against the present three appellants Ram Ashish Gond, Ram Dheeraj Gond and Smt. Mangari Devi and the co-accused Chandradev Tiwari alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari.

P.W. 8 S.I. Ram Prasad Yadav started investigation of this case. He proceeded to the village of incident, Sisaura. As light could not be arranged, the inquest could not be carried out in the night. The dead body was seen in the morning in the room in the house where the inquest was then conducted. After sealing the dead body it was handed over to the Constables Raj Kumar Yadav and Kalika Singh for carrying it for post-mortem.

P.W. 10 Dr. Arvind Singh conducted the post mortem on the body of Raj Kumari Devi on 19.06.2005 at 4.40 p.m. He found the following ante-mortem injuries:-

1. Lacerated wound 2 cm x ½ cm x bone deep over the outer aspect of right side forehead between the right eye and ear. On opening the temporal bone was found fractured.
2. Lacerated wound 3 cm x 1 cm x bone deep on the mid part of nose and right lower eyes on opening nasal bone was fractured.
3. Multiple contusions in an area of 18 cm x 16 cm on both side forehead and face.
4. Multiple contusions on the top of left shoulder, arm, elbow and hand on the back and outer aspect.
5. Multiple contusions in an area of 18 cm x 12 cm on the outer and post aspect of left side chest.
6. Multiple contusion all over the outer aspect of left upper hand.

The Investigating Officer also collected a blood stained wooden *patari* and blood stained and plain mud from the spot and sealed the items and prepared the recovery memos. He prepared the site plan (Ext. Ka-6). He returned to the police station, where the appellants Ram Ashish and Mangari were present, who gave confessional statements to him on 20.6.2005. He also sent Ram Ashish Gond, Aarti Devi and Mangari on 19.6.2005 for medical examination. The appellants Ram Ashish Gond, Aarti Devi and Smt. Mangari were medically examined on the same day at 4.30 a.m., 4 a.m. and 4.45 a.m. respectively.

The injuries of Ram Ashish Gond were as follows:-

1. Lacerated wound 1.5 cm x 1 cm x muscle deep on the back of the head. It was 15 cm above the nape of the neck.
2. Contusion of 12 cm x 4 cm upper outer part of right shoulder and right arm. Red in colour.
3. Contusion of 2.5 cm 1.5 cm upper right side of the back of the chest. It is 7 cm below the right shoulder blade. Red in colour.
4. Contusion of 5 cm x 1.5 cm upper back of right chest. It was 10 cm below the right shoulder blade. Red in colour.
5. Abrasion of 3cm x 1 cm upper back of right foot.

The injuries of Smt. Aarti Devi were as follows:-

1. Lacerated wound of 8 cm x 3 cm x bone deep upper right side of the scalp of the head. It is 11 cm above the right ear 3 cm above the right eye brow.
2. Lacerated wound of 4 cm x 1 cm x bone deep upper right side of the head. It is 6 cm above the right ear and reaching up to hair margin.

3. Lacerated wound of 2 cm x 1 cm x bone deep upper right side of the face 2 cm below the right lower eye lid.
4. Contusion of 6 cm x 2.5 cm upon outer part of right forearm. Deformity of the lines evident. Red in colour.
5. Contusion of 16 cm x 2.5 cm upon outer part of left arm. Red in colour.
6. Contusion of 5 cm x 3 cm upon outer part of (back of) left forearm in its middle. Red in Colour.
7. Contusion of 3 cm x 1 cm upon back of left hand. Red in colour.
8. Contusion of 20 cm x 4 cm upon outer part of the shoulder and chest wall. Red in colour.
9. Lacerated wound of 2 cm x 1 cm x muscle deep, 1 cm x 0.5 cm x skin deep upon back of right index and middle
- (10) Lacerated wound of 1 cm x 0.5 cm x bone deep upon front of right leg in its middle.
- (11) Lacerated wound of 3 cm x 1 cm x bone deep upon front of right leg in its middle.

The injuries of Smt. Mangari were as follows:-

- (1) Contusion of 5 cm x 1.5 cm upon back of right forearm. It was 5 cm above the right wrist. Red in colour.
- (2) Lacerated would of 2 cm x 0.5 cm x muscle deep upon outer surface of left wrist.
- (3) Contusion of 3 cm x 2 cm upon the prominence of the right cheek. Red in colour.

On 26.6.2005 the investigation of this case was taken over by P.W. 9 Station Officer Jagdhari Chaudhari, who recorded the statements of Geeta Devi and Chandrama Chauhan on 2.7.2005. He learnt that Ram Dheeraj had surrendered before the Court on 16.7.2005. On 9.9.2005 he submitted the charge sheet against the accused Ram Ashish Gond, Ram Dheeraj Gond and Mangari Devi under section 302 IPC. He did not find any material against Chandradev Tiwari alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari and excluded their names from the charge sheet.

The witnesses of fact in this case are P.W. 1 Onkar Nath Tiwari, P.W. 2, Ram Lakshan Tiwari, P.W. 3 Vimla Devi, P.W. 4 Pancham Gond, P.W. 5 Chandrama, P.W. 6 Phagu and P.W. 7 Geeta.

P.W. 1 Onkar Nath Tiwari is the informant and son of the deceased Smt. Raj Kumari Devi. He used to know the appellants Ram Ashish Gond, Ram Dheeraj Gond and their mother Mangari Devi because they used to reside at a distance of 50 paces from his house. The incident took place on 18.6.2005 at 7.30 p.m. Ram Ashish Gond had recently returned from Punjab and he used to roam about in the village saying that he had become a worshipper of Durga Maa and was her carrier. This upset his brother Ram Dheeraj Gond. The co-villagers Chandradev Tiwari alias Tengri Tiwari, Paramanand Tiwari and Chandra Shekhar Tiwari had told him that if he made a sacrifice of some Brahmin, then his brother would recover. He learnt this fact from Geeta Devi and Chandrama Chauhan. On the

date and time of incident the six above named accused persons had called Raj Kumari Devi through Mangari Devi to their house, where they beat her and caused her death. Vimla Devi had seen Mangari Devi taking away his mother to their house.

P.W. 2 Ram Lakshan Tiwari, the husband of Raj Kumari deposed that Mangari Devi had called his wife from his house for the purpose of making a sacrifice of her and had committed her murder. His wife's body was found in the house of Ram Ashish on 19.6.2005. The inquest of the dead body was conducted in his presence. There were a number of injuries on the dead body.

P.W. 3 Vimla Devi has turned hostile and has not supported her earlier version. She denied that in her 161 Cr. P.C. statement she had stated that she had met Raj Kumari Devi at 2 p.m. and Raj Kumari had told her that she would go to the house of Ram Ashish Gond and that she had not seen Raj Kumari going away with Mangari Devi. She could not say as to how the Investigating Officer had written these facts in her 161 Cr. P. C. statement. She denied colluding with the accused. She stated in her examination-in-chief that she used to put on a "ghooghat," when she used to go out and that she had heard the name of Ram Ashish and her mother Mangari Devi only sometimes when she visited their house.

P.W. 4 Pancham Gond, was a relation of the accused whose niece Aarti Devi had married the appellant Ram Ashish. He has also turned hostile and disclaimed any knowledge of the incident or of visiting the house of the accused on the date of the incident. He denies giving any 161 Cr. P. C. statement to the Investigating Officer. He also denies having given any such statement that he had gone to meet his niece Aarti Devi in Kabir Chaura Hospital and she had told him that on 18.6.2005 Ram Ashish's mother had brought the panditain "Raj Kumari" and that Ram Ashish had put a garland on the neck of Raj Kumari and then murdered her.

P.W. 5 Chandrama has again turned hostile and claimed that his house is at a considerable distance from the house of the informant. He claims that 2½ months before the date of incident, he had met with an accident because of which his left and right legs were fractured and he was bed ridden. He denies having over heard Chandradev Tiwari alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari telling Ram Dheeraj Gond that if he would make a sacrifice of some Brahmin, then his brother, who had become mentally deranged and who roamed about hither and thither, would become all right. He denied making any such disclosure to Onkar Nath Tiwari.

P.W. 6 Phagoo, who is the father of Aarti is also a hostile witness. His daughter Aarti was married to Ram Ashish. He was in jail in connection with a murder case. About one week before the incident, his daughter Aarti was staying with him and only one week prior to this incident, she had gone to Ram Ashish's house. His son Jagjivan had accompanied Aarti to her sasural His son had told him on his return that Ram Ashish was under the spell of Durga Maa. After one week of the incident, he learnt that his daughter was admitted in Kabir Chaura Hospital. He had visited her there and had seen that she was lying on the bed with injuries on both of her hands. No one from her sasural was present. He did not know how she had received the injuries. When his daughter had come home, she had informed him that she did not know how she had received the injuries, because she had fainted and when she became conscious, she found herself in the hospital. His daughter had not told him that on 18.6.2005 Ram Ashish's mother Mangari Devi had called Raj Kumari Panditain to her house or that Ram Ashish had put a garland on her neck and after beating her to death made a sacrifice of her. She denied giving any statement under 161 Cr. P. C. to the investigating officer.

P.W. 7 Smt. Geeta Devi, who is the daughter-in-law of Raj Kumari deposed that on the date of incident her mother-in-law Raj Kumari was at her home. At 12-1 O' clock she was present in the osara with her mother-in-law. Her co villager,

the appellant Mangari Devi had come and talked with her mother-in-law under the neem tree near their door. At that time one Munna Pathak asked her for water. At that time Mangari asked the deceased to accompany her. When Geeta asked her mother-in-law where she is going, then Mangari had stopped, but after sometime, she had left. At about 3-4 p.m. Mangari Devi again came to her house and took her mother-in-law with her. On that day, her mother-in-law had kept the fast of 'Ekadasi'. When she did not return up to 6 p.m. then the people of the house made enquiries about her in the village and made a search for her. Then they went to the house of Mangari. The house was bolted from inside. Her elder brother-in-law Onkar Nath Tiwari opened the door. She saw that in the house a mud worship place had been made and that there was a rope and a garland on her neck and there were some other flowers, sweets and other prayer items near her mother-in-law who was lying dead on the floor. Her mother-in-law had been murdered by Mangari Devi, Ram Ashish and Ram Dheeraj. The I.O. had interrogated her about the incident.

She denied the the suggestion that during the anushthan Raj Kumari Devi had climbed up the bamboo ladder for placing the prayer material on the roof for propitiating the gods and while climbing down from the ladder, her legs slipped from the top rungs of the ladder and she fell on the courtyard and died as a result of the injuries received.

According to the appellant Ram Dheeraj, he was in Alopur, Sultanpur Lodhi, Jalandhar, Punjab, where he along with his father has taken some fields on lease for growing vegetables. After the incident, his father had returned and learnt that the local police were searching for him. Then he returned back and surrendered in Court. He had no information about the incident.

In his 313 Cr. P. C. statement, the appellant Ram Ashish has denied the allegation against him and has pleaded that there was enmity between the other named co-accused Chandradev Tiwari alias Tengari Tiwari,

Parmanand Tiwari and Chandra Shekhar Tiwari and the informant's family over a land dispute and litigation was pending.

Ram Dheeraj also denied the allegations and pleaded ignorance in his 313 Cr. P. C. statement.

Smt. Mangari Devi aged 70 years also denied the allegations in her 313 Cr. P. C. statement. She mentions that her son Ram Ashish was ailing for quite sometime. The deceased Raj Kumari had told them they should get prayers arranged, then there would be happiness, peace and prosperity in the house. The deceased had joined the prayers and on her directions, prayers and havans were being conducted. On the completion of the prayers, she climbed up the roof carrying a mug (lota with water) on the ladder. When climbing down the top rungs, her legs slipped and she fell down, because of which she received a number of injuries and died of the same.

The defence has also examined Aarti Devi, wife of Ram Ashish as D.W. 1. She has deposed that she married Ram Ashish 3-6 years earlier. She admits the presence of her husband Ram Ashish, her mother-in-law Mangari Devi, at the time and place of incident. In her examination-in-chief she stated that her Jeth Ram Dheeraj was not present and he was in Punjab. But in her cross-examination by the prosecution she contradicted this fact and stated that Ram Dheeraj had never gone outside the village for the purpose of work. Her husband Ram Ashish was not keeping well and he had been advised by the deceased Panditain Raj Kumari to get a prayer ceremony conducted in her house. After the prayer was completed, Raj Kumari Devi climbed up on a wooden ladder along with a mug with water and prayer materials. When she was climbing down the upper rungs of the ladder, she slipped and fell on the courtyard and died as a result of the injuries received by the fall. After the incident, the co-villagers had arrived at their house and had beaten her because of which she fainted.

When she regained consciousness she found herself at the Varanasi Hospital. She did not know, who had beaten her and she did not know the names of the people because she was a home staying daughter-in-law of the house.

Learned counsel for the appellant submitted that the injuries on the deceased, which were mainly contusions and lacerated wounds, and were not the typical injuries that are received when a superstitious sacrifice of a person is made, rather those injuries were due to a fall, which were caused to the deceased whilst she was climbing down the bamboo ladder. There were injuries on the appellants Ram Ashish Gond, Smt. Mangari and the defence witness Aarti Devi. These injuries have not been explained in the prosecution version. No exclusive liability could be assigned to the appellants for this offence, as according to the initial prosecution case, there were six accused persons viz. Chandradev Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari, who were excluded from the charge sheet after conclusion of the investigation. Even the application under section 319 Cr. P.C. for summoning these accused persons was rejected. Also from the evidence, it appears that there were three other persons who resided in the house, i.e. Ram Ashish's wife Aarti Devi, one sister and one nephew of the appellants Ram Ashish and Ram Dheeraj, who might have committed this crime, but have not been implicated. Admittedly the informant Onkar Nath Tiwari was not even a witness of last-seen and Vimla Devi an aunt of the informant who was shown as a witness of last seeing the deceased along with the appellant Mangari Devi has turned hostile and has not supported the prosecution case. Likewise P.W.4 Pancham Gond, who was a relation of the accused has denied that Aarti Devi wife of Ram Ashish had disclosed to him at the Kabir Chaura Hospital, where she was admitted on 18.6.2005, that the appellants had murdered the deceased. P.W. 5, Chandrama, who is said to have overheard the conversation of the deceased with the other accused

Chandradev Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari regarding their exhortation to the appellants to sacrifice some Brahmin for freeing Ram Ashish from the clutches of the spirit and for facilitating his recovery has also turned hostile as he claims to have fractured his legs and to being bed ridden at that time. The deceased, who was on visiting terms in the house of the appellants could have gone to their house of her own. There was no reliable evidence of last seen or any evidence of over hearing the suggestion of sacrificing the deceased, who was a brahmin for propitiating the gods for enabling the appellant Ram Ashish Gond overcome his mental obsession, that he was the carrier of "Durga Maa". The evidence of P.W. 7 Geeta Devi, whose 161 Cr. P. C. statement was recorded after 15 days, also fails to provide any cogent evidence regarding the deceased having gone along with the appellant Mangari Devi to her house for the purpose of prayers. There was no evidence of the presence of the appellant Ram Dheeraj. The record of this case had got burnt out and the new record has not been properly reconstructed and it consisted of fabricated documents. The alleged motive of this case has not been substantiated. This is a case of circumstantial evidence and circumstances are not cogently established and the chain is not complete, so as to lead to the only inference of the guilt of the appellants. In any case if at all, only life imprisonment should have been awarded to the appellants and the award of sentence of death to the three appellants was unwarranted.

Learned Government Advocate, on the other hand, argued that there is no such universal rule that only a particular kind of injuries such as beheading the deceased would be caused at the time of a superstitious sacrifice. From their nature, it needs to be ruled out that the injuries on the deceased could be due to a fall as there were a large number of injuries on all sides of the body of the deceased including multiple contusions, which could not have been caused by a fall. The dead body was also not lying in

the courtyard, but it was found lying in a room, where prayers were being conducted. There was a wooden plank lying at the spot, which also had some blood on it, which was inconsistent with the deceased having received injuries by a fall. So far as the injuries of Ram Ashish Gond, Smt. Mangari and Aarti Devi are concerned, no plea was taken that the injuries had been received in self defence. In fact no argument had even been advanced by the counsel for the accused before the lower Court that the origin of the incident was shrouded in mystery, as the injuries on the appellants and on Aarti Devi were unexplained. Furthermore, the defence witness Aarti Devi has admitted that the injuries were caused to her by the villagers, who had assembled after the incident because of which she had even fainted and was taken to the hospital. The site plan does not show any ladder, but in fact there was a pacca staircase, which has been indicated in the site plan itself. There was no need for the 70 year old lady Smt. Rajkumari to have climbed up the stairs carrying water in the mug and prayer materials to the roof. The three other accused persons named in the F.I.R. were excluded from the charge sheet because no evidence was gathered against them. This was noted by the Investigating Officer. Even the application under section 319 Cr. P. C. for summoning these non-charge sheeted accused was dismissed by the Trial Court for this reason. Even if, some witnesses have turned hostile, the informant P.W. 1 Onkar Nath Tiwari, P.W. 2 R.L. Tiwari, the husband of the deceased and P.W. 7 Geeta Devi have spoken of the proposed sacrifice. The fact was that the deceased was done to death for carrying out a sacrifice by the appellants. So far as the other family members of the appellants are concerned, as no one has furnished any evidence against them, hence they have not been implicated in this crime. But so far as the three appellants are concerned, cogent evidence was available against them right from the initial stage. This crime could not have been committed only by the 70 year old lady Mangari Devi, the mother of the appellants Ram Ashish

Gond and Ram Dheeraj and also Ram Ashish Gond is said to have been mentally disturbed. In such circumstances Ram Dheeraj Gond must also have had a role in the crime. Because there was no evidence against three other persons i.e. Ram Ashish's wife, sister, and nephew of the appellants Ram Ashish and Ram Dheeraj, they were not made accused and their exclusion would not confer any benefit on the present appellants. Even if, for the sake of arguments, it was accepted that the motive for the crime was not established, as some of witnesses for proving motive have not been produced, but this fact was undeniable that the deceased had died a homicidal death in the house of the appellants and the onus lay on them to explain as to how the deceased had died in their house. Failure to discharge this onus, or offering a patently false explanation was an important circumstance for connecting the appellants with this crime. Evidence has been led that Mangari Devi had taken away the deceased Raj Kumari to her house. Geeta Devi, P.W.7, Raj Kumari's daughter-in-law would have knowledge of this fact and if the house was only 20-30 paces away, it would have been apparent to her and the other witnesses, and the informant that the deceased had gone to that house. In any case, even if, there was some inconsistency about the time, when the deceased had left for that house, or even if it is presumed that there was absence of last seen evidence of the deceased going along with appellant Mangari Devi to her house, at least this fact was indisputable that the deceased appears to have voluntarily gone to the house of the appellants, purportedly for carrying out prayers and thereafter, her dead body had been found in that house with homicidal injuries, hence the appellants could not have been absolved of the liability for the crime. The chain of circumstances is clear and complete for showing that the appellants were responsible for the crime of murdering the deceased in their house. After the record was burnt, an order was passed by this Court in a Bail Application to expedite the trial. Consequently, the record was

reconstructed and so far as other documents are concerned, it is pointed out by the learned G.A., no objection was made questioning the genuineness of the said documents by the counsel for the accused before the trial Court and in fact he has admitted to their genuineness. The said documents have been properly reconstructed and proved. The witnesses have thereafter been re-examined. In these circumstances it is submitted that the crime of killing of an old woman for carrying out her sacrifice after inviting her to their house under false pretexts, calls for the death penalty and the other option of awarding life sentences to the appellants was unquestionably foreclosed on the facts of this case.

On an analysis of the evidence and on examination of the post-mortem report, we find that there was a lacerated wound on the left side of the forehead of the deceased between the right eye and ear under which the temporal bone was fractured. There was also a lacerated wound on the middle of the nose fracturing the nasal bone. More significantly, there were multiple contusions on both sides of the forehead and face. In these circumstances in our view it has rightly been submitted by the learned Government Advocate that such multiple contusions could not be caused by a fall, but were in all probability the result of blows by some blunt object. Again, there were multiple contusions on the right side on the shoulder and the hand and also on the back on the outer aspect and multiple contusions in an area of 18 x 12 cm on the outer and posterior aspect of the left side chest. There were multiple contusions all over the outer aspect of the left upper hand. Such injuries were on the opposite sides of the dead body of the deceased and the presence of multiple contusions could never be caused due to fall and therefore it appears that the said injuries were caused homicidally by assaulting the deceased with some blunt object. Furthermore, if the deceased had fallen down from the ladder, the body would not have been lying inside the room along side the prayer material. The presence of a wooden plank i.e. a patari, which was

stained with human blood as per the report dated 10.5.2010 of the Forensic Science Laboratory was also wholly inconsistent with the case of the defence that the deceased had received injuries, while falling from the ladder in the courtyard. According to the site plan blood was seen only in the kothari, where the prayers were being conducted and the dead body was lying. The wooden plank containing human blood was also seen there. No blood was seen in the courtyard. The site plan also indicates that no wooden bamboo ladder was seen anywhere, but a stair way going upstairs has been shown in the site plan. The witness Geeta PW 7 may have been confused when she mentioned in her cross-examination that there were no stairs, and there was a bamboo ladder in the house of the appellants, as this fact is inconsistent with the site plan. There was also no rational reason why the old deceased lady would have wanted to climb a bamboo ladder for putting the prayer water or prayer material on top of the roof. For all these reasons, we think that the basic defence of the appellants that the injuries received by the deceased were accidental in nature cannot be accepted.

The contention that in matters of human sacrifice, usually the neck is amputated or sacrifices are made in a particular manner appears to be a speculative argument. If the deceased has died as a result of homicidal injuries in a house, then whether the death was due to a superstitious sacrifice or for any other reason, under section 106 of the Evidence Act the onus lay on the appellants who are owners of the house, and who alone have special knowledge of the facts, to explain the circumstances of the death of Smt. Raj Kumari.

So far as the injuries received by the appellants Ram Ashish Gond, Smt. Mangari, and the defence witness Aarti Devi wife of Ram Ashish are concerned, we are of the view that this is a novel argument advanced by Sri Viresh Mishra, the appellants' learned counsel at this stage. Such a plea was not even raised anywhere by cross examination of the witnesses, nor was a suggestion made in the statement under section 313 Cr. P. C. that the injuries were unexplained and

hence some benefit should accrue to the appellants. It appears that the plea was not raised, because the injured Aarti Devi, D.W. 1 herself stated that these injuries were caused to her by the villagers after the incident. In these circumstances we can easily appreciate that the villagers would naturally feel enraged if the 70 year old lady with whom there was no enmity, would be invited to the appellants' house and belaboured there probably for the purpose of some irrational sacrifice. That is why no plea, whatsoever of trying to seek any benefit from the injuries to the accused, had been raised before the Trial Court by the appellants. We are therefore of the view that the said plea, which has now been raised, is devoid of any substance, and must be immediately rejected.

From the mere fact that three of the accused persons, Chandradev Tiwari alias Tengari Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari, who were named in the F.I.R. by PW 1 Onkar Nath Tiwari, and against whom PW 1 also gave evidence of their involvement in Court, but no charge sheets were submitted, and the application for summoning them under section 319 Cr.P.C. was also rejected by the Trial Judge (on account of the fact that the Investigating Officer had found absolutely no evidence against them). This provides no ground for discarding the entire the prosecution case or for disbelieving the case against the present appellants. Also simply because there were some other members such as the wife of Ram Ashish, a sister and nephew, of Ram Ashish and Ram Dheeraj, who have not been implicated in this case because no one made any allegation against them, provides no ground for concluding that the appellants have also been falsely involved in this crime. In India the maxim "falsus in uno falsus in omnibus" has not received general acceptance and the Courts have always taken pains to separate the wheat from the chaff, and the mere acquittal or finding of non-involvement of some accused or non-accused family members or others in a crime provides no ground for disbelieving the case against accused persons against whom the evidence exists showing their complicity in a crime. This proposition of law has been laid down inter alia in Dalbir Singh v. State of Haryana, AIR 2008 SC 2389, Nisar Ali v. State of U.P.,

1957 Cri.L.J. 550 (SC) and Gurcharan Singh and another v. State of Punjab, 1956 Cri.L.J 827.

Even if, it is conceded for the sake of argument that the motive set up for this offence viz. conduct of a human sacrifice of a Brahmin lady in order to free the appellant Ram Ashish from his mental disorder, because of which he was claiming that he was carrying Durga Mata not been established to the hilt as the witness, PW 5 Chandrama Chauhan, has denied that he had told the informant that he had over heard the non-charge sheeted co-accused, Chandradev Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari telling the appellant Ram Dheeraj that if he got a sacrifice made of a Brahmin, then his brother, the appellant Ram Ashish would recover, and has been declared hostile and has not supported this version in Court. Also P.W.7 Geeta Devi has denied overhearing this conversation between the non-charge sheeted accused and Ram Dhiraj, and thus there was unsatisfactory proof by evidence led at the trial for establishing the motive for this crime. But this fact in itself will not help exonerate the appellants from this crime. The fact of the matter is that the deceased had gone to the house of the appellants probably to attend some religious ceremony (*anushtan*) for improving the health of the deceased, as was mentioned by the supporting witnesses, and even the appellant Mangari Devi in her 313 Cr.P.C. statement and in the evidence of DW 1 Smt. Aarti wife of Ram Ashish. Thereafter the dead body of the deceased was found in that house, with what appear to be blunt object injuries. Thereafter there was no reasonable explanation for her injuries or the cause of her death in that house by the appellants on whom the onus lay under section 106 of the Evidence Act to explain these facts within their knowledge, as to how the deceased had suffered the said injuries in their house which had proved fatal and resulted in her death. Rather they appear to have raised a false defence that the deceased had fallen down from some ladder, which had caused injuries to her, which as we have shown above is a completely false and unacceptable explanation. This failure to give any explanation as to how the deceased had received homicidal injuries in

their house and then furnishing a false explanation that the deceased had died accidentally by falling off a ladder were the most important circumstances for connecting the appellants with this crime. In *Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681 where there were some demands for money and the wife had died due to strangulation, in her marital home, but it was falsely claimed by the inmates that she had died due to snake bite, the Apex Court held that in such cases it is well nigh impossible for the prosecution to furnish evidence as to how the crime had been committed, and as these are facts within the special knowledge of the accused, it was the burden of the accused to explain how the deceased had died in view of section 106 of the Evidence Act. Paragraphs 14 and 15 of the law report may be usefully perused:

*"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions*, (1944) 2 ALL ER 13(HC) — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*, (2003) 11 SCC 271) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:*

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was

committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

Even so far as the last seen evidence of the deceased having been taken to the house of the appellants by the appellant Mangari Devi is based only on the testimony of P.W. 7 Geeta Devi and some minor inconsistencies about the time when the deceased left with the appellant Mangari Devi for the house of the appellant are pointed out in the testimony of P.W. 7 Geeta Devi as to whether the deceased had gone at 3 or 4 p.m. with Mangari Devi as mentioned in the examination-in-chief of Geeta Devi or whether as the informant Onkar Nath Tiwari, informant has stated in the F.I.R. that the deceased Raj Kumari had gone at about 6.30 p.m. with Mangari Devi to her house when Vimla Devi, P.W. 3 had seen the deceased and Mangari departing together. Even though Vimla Devi has turned hostile and disclaims having seen the deceased Raj Kumari and Mangari going together and even denies freely roaming around in the village as she says that she used to wear a ghooghat (veil). The fact of the matter is that as the deceased was residing hardly a few paces from the house of the appellants, and the witness Geeta Devi, who is the wife of Anil Tiwari and the daughter-in-law of the deceased and resident of the same house would certainly be having knowledge about the movements of her old mother-in-law Raj Kumari. At any rate, as it cannot be denied that Geeta Devi's mother-in-law had gone to the house of the appellants as her dead body was found in that house, hence these minor discrepancies, regarding the persons who had seen the deceased going to the appellants' house and the time of her departure and whether at that time she had gone with Mangari Devi or by herself to that house loses any importance. There can be no denial of the fact that the deceased had gone to the house of the appellants, where her dead body was found, with ante mortem injuries which as we have held above were homicidal in nature and which could not have been accidentally caused by a fall as pleaded by the defence.

Learned counsel for the appellants raised some doubt regarding the presence of Ram Dheeraj. As we are not inclined to think that this crime could have been committed by the appellant Ram Ashish alone, who used to roam around the village saying non nonsensical things such as his having the blessings of Mata Durga, or even that this crime could have been committed by Ram Ashish and his mother, the 70 year old Managari Devi. The kind of planning that took place for this offence, the fact that prayers were taking place in the house of the appellants for the past 7 days as deposed to by P.W. 7 Geeta Devi and from the number of injuries that the deceased had received, the said injuries could not be caused only by Managri Devi and Ram Ashish and we think that there is sufficient reason to hold that Ram Dheeraj was also fully involved in this crime, who has been nominated for this crime in the FIR and by the witnesses to the exclusion of his brother Ram Ashish's wife Aarti, sister and nephew who were also admittedly residents of the same house at that time. Also DW 1 Aarti has admitted in her cross-examination, that Ram Dheeraj used to reside and work in the village at that time and had never gone outside to work, hence his claim that he was working at Punjab at that time appears to be false.

It is not disputed that the record of this case had got burnt, but on a close perusal of the documents and records, we find that the documents could be retrieved only after orders were passed by the High Court on 22.4.2010 in a bail application for concluding the trial in six months and directing the District Judge to take steps for reconstruction of the records as soon as possible. Thereafter efforts were made for reconstructing the record. The documents, which were available from the police station were placed on the record and on those documents, no objections to their reception have been endorsed on behalf of the accused. We have carefully perused the endorsement and also noted that the charge was again framed and the witnesses were examined. Even when the charge under section 302/34 IPC was framed on 27.9.2012, full opportunity was given to the accused for cross examining the witnesses, but they declined to avail of the opportunity. All the necessary papers (16 Ka) are on record.

Learned counsel submitted that the record could only be reconstructed if a separate order was passed pursuant to some High Court Circular. In our view it is always expected that all efforts shall be made even by the District Judge even by issuing suo motu orders for reconstructing a lost or destroyed record. Much less can there be any objection to the admissibility of a record that was reconstructed pursuant to the High Court's directions in a bail application which also called for concluding the trial expeditiously. We also find that the accused through their counsel have admitted the genuineness of the papers. We, therefore find no substance whatsoever in these objections.

On an examination of the totality of the circumstances of this case and especially in the light of the the predominant fact that the body of the deceased was recovered from the room in the house of the appellants, with a large number of homicidal (and not accidental) injuries, which were present on all the sides of the body of the deceased, and there were also multiple contusions. The failure to discharge the burden under section 106 of the Evidence Act for explaining how the deceased had died in their house with the homicidal injuries, which was a fact especially within their knowledge, the adoption of a patently false defence by the appellants that the deceased had died as a result of fall from a bamboo ladder. The I.O. had found no such bamboo ladder in their house, but a brick staircase. There was also no reason for the old deceased lady to climb up any ladder for taking prayer materials to the roof. A blood stained patari, which contained human blood as per the forensic science laboratory report was found in the prayer room. The body of the deceased was not found in the courtyard, nor was any blood found there which might have lend some assurance to the defence version. Even if, some witnesses have been won over by the defence and have not supported the conversation between the other accused Chandradev Tiwari, Parmanand Tiwari and Chandra Shekhar Tiwari with the appellant Ram Dheeraj that they should make a sacrifice of a Brahmin, so that his brother Ram Ashish could be exorcised of the spirit which had afflicted him, and had caused his apparently mentally unbalanced behaviour. Likewise even if some witnesses

of last seen such as Vimla Devi, P.W. 3 have not supported the last-seen evidence of the deceased having gone along with Mangari Devi to her place, there was adequate material for showing that the deceased must have gone to the appellants' house, where the body was found, the circumstance that prayer material etc., were collected in the house of the appellants and the prayer was carried out for the past few days, for which the deceased had been invited, has also been established by the prosecution. However, the main circumstance against the appellants that they did not explain as to how the deceased had received homicidal injuries in their house, how her body was lying there and in fact had given a false explanation that the deceased had died by falling from a ladder are sufficient for completing the chain of circumstances for establishing the complicity of the appellants for this offence. For all these reasons, we are of the view that the prosecution has succeeded in establishing the complicity of the appellants in this offence beyond any shadow of doubt .

One last question, however, remains to be decided as to what would be the appropriate sentence in this case, whether the death sentence awarded by Trial Judge be confirmed or whether it be substituted by a sentence of imprisonment for life.

In *Sushil Murmu v. State of Jharkhand*, 2004 (2) SCC 338 death sentence was confirmed in a case of sacrificial killing of a nine year old boy by decapitating his head for propitiating the diety because he imagined that he could thus enhance his fortunes. The Apex Court law report in paragraphs 22 and 23 reads thus:

"22. A bare look at the fact situation of this case shows that the appellant was not possessed of the basic humanness and he completely lacks the psyche or mindset which can be amenable for any reformation. He had at the time of occurrence a child of the same age as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity. The brutality of the act is amplified by the

grotesque and revolting manner in which the helpless child's head was severed. Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, the nonchalant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of the most superlative degree in conception, and cruel in execution. The tendency in the accused and for that matter in anyone who entertains such revolting ideas cannot be placed on a par with even an intention to kill someone but really borders on a crime against humanity indicative of the greatest depravity shocking the conscience of not only any right-thinking person but of the courts of law, as well. The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so described, is the question. Superstition is a belief or notion, not based on reason or knowledge, in or of the ominous significance of a particular thing or circumstance, occurrence or the like but mainly triggered by thoughts of self-aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child.

23. Criminal propensities of the accused are clearly spelt out from the fact that similar accusations involving human sacrifice existed at the time of trial. Though the result could not be brought on record, yet the fact that similar accusation was made against the accused-appellant for which he was facing trial cannot also be lost sight of. In view of the above position, we do not think this to be a fit case where any interference is called for looking to the background facts highlighted above. This in our view is an illustrative and most exemplary case to be treated as the "rarest of rare cases" in which death sentence is and should be the rule, with no exception whatsoever. Appeal fails and is dismissed."

However in another case of triple infanticide after abduction and mutilation of the genitals of the two little boys and one girl in State of Maharashtra v. Damu, (2000) 6 SCC 269, at page 285, because the accused ignorantly and foolishly entertained a superstitious belief that the sacrifices would enable unearthing a treasure (gold) that was buried in a field, the Apex Court awarded a sentence of imprisonment of life in place of the death sentence awarded by the trial Court observing as follows in paragraph 47. "Now, we have to make up our mind regarding the sentence to be imposed on the three accused. Learned counsel for the State pleaded for restoration of the same sentence which the trial court has imposed, i.e., death penalty. The question is whether this case can be regarded as rarest of rare cases in which the lesser alternative is unquestionably foreclosed. Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremonially performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Even so, we persuade ourselves to choose the normal punishment prescribed for murder as for these accused. Accordingly, while restoring the sentence passed by the trial court in respect of other counts of offences, we order that the accused shall undergo imprisonment for life for the offence under Section 302 read with Section 34 IPC."

The present case also cannot be regarded a case of such extreme brutality, as there was no decapitating of the head of the deceased, but at the highest on the prosecution allegations the deceased appears to have been belaboured with some blunt objects to free the accused Ram Ashish from

the spirit which had afflicted him and for restoring his sanity. There was no forcible abduction or quest for any financial gain. As the incident had taken place in the house of the appellants, we are not sure about the roles played by each of the accused persons in the assault. There is also no consideration of the question whether the accused persons could have repeated such a crime and were incapable of reformation, which also needs to be considered before the extreme penalty of a death sentence can be awarded.

In a recent decision dated 21.2.2013, *State v. Jitender and Jitender v. State*, (reported in 2013 III AD(Delhi) 369: MANU/DE/0534/2013) the Division Bench of the Delhi High Court has compared the two Apex Court decisions *Sushil Murmu* and *State of Maharashtra v. Damu*. The Delhi High Court has also referred to another Apex Court decision: *Kalpana Mazumdar v. State of Orissa*: (2002) 6 SCC 536 where the accused had kidnapped and murdered a 4 year old child to offer as human sacrifice to appease the deities. The nails, the hair, and tongue of the child had been cut and offered as sacrifice. The prosecution case was that one Simanchal Padhi, a "tantrik" had told the other accused persons that if they sacrificed a child they would get a pot of gold and one of the appellants would get a son. The tantrik died during the trial. The Supreme Court upheld the conviction of one of the accused, but held that the case did not fall within the "rarest of rare" category to justify imposition of death sentence. After referring to this decision the Delhi High Court has given its reasons in paragraph 70 for preferring the view taken in *Damu* and *Kalpana's* cases to the view taken in *Sushil Murmu* which are as follows:

"70. It would therefore, be apparent that the question of imposition of death sentence, even in cases where homicidal death, or murder, is motivated by the desire to propitiate the gods or a deity, there is no

symmetrical approach; Sushil Murmu (supra), emphasizing the brutality of the crime, resulted in capital punishment to the accused, whereas in Damu S/o Gopinath Shinde (supra) and Kalpana Mazumdar (supra) a contrarian approach was adopted. In any event, the Court, in Sushil Murmu did not take into consideration any mitigating factor, such as the possibility of reformation of the accused. On the other hand, it appears to have taken into consideration allegations in some other case, for which the accused had not been convicted."

We are inclined to agree with these observations of the Delhi High Court. In the light of the aforesaid discussion we are of the view that the ends of justice would be served if the sentence of death awarded to the appellants for the offences for which they have been convicted be substituted with a sentence of imprisonment for life, and it is ordered accordingly.

Subject to the aforesaid modification the Appeal is dismissed. The death reference is rejected.

Order Date :- 8.7.2013
HSM