

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

Death Reference No. 8 of 2016

STATE OF WEST BENGAL

...APPELLANT

Vs.

MD. RAEES QURESHI @ HADI QURESHI

...RESPONDENT

With

C.R.A. No. 312 of 2017

MD. RAEES QURESHI @ HADI QURESHI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

For the Appellant

: Mr. Prabal Kumar Mukherjee, Sr. Adv.
Ms. Sreyashee Biswas, Adv.

For the State

: Mr. Abhra Mukherjee, Adv.
Ms. Pinak Kr. Mitra, Adv.

Heard on

: 07.03.2022, 10.03.2022, 11.03.2022,
16.03.2022, 23.03.2022, 28.03.2022,
11.04.2022, 18.04.2022, 25.04.2022,
26.08.2022

Judgment on

: 13.09.2022

INDEX

Serial No.	Topic	Page No.
1	Genesis of the appeal	3-5
2	Arguments at the Bar	5-7
3	Evidence on record: An Analysis	7-12
4	Law on circumstantial evidence	12
5	Incriminating Circumstances • Last Seen together • Recovery of dead bodies • Cause of death • Time of death • Whether 'live link' between 'last seen theory' and death is established • Reverse burden on the appellant • Abscondence of the appellant • Motive to commit the crime	13-27 13-17 17-18 18-19 19-20 20-22 22-24 24-26 26-27
6	Non-production of missing diary and delay in lodging F.I.R.	28
7	Incriminating circumstances: unerringly point to the guilt	29-31
8	Conclusion	31
9	Death Sentence	31-40

Joymalya Bagchi, J.:-

Genesis of the Appeal:-

The death reference and the criminal appeal have been directed against the judgment and order dated 25.07.2016 and 26.07.2016 passed by the Additional Sessions Judge, Uluberia, Howrah in Sessions Trial No. 91 of 2012 convicting the appellant for commission of offence punishable under sections 302 of the Indian Penal Code and sentenced him to death.

On 21st November, 2011 one Md. Firoz Qureshi (P.W. 1) lodged a police complaint at Howrah police station alleging on 14th November, 2011 his brother-in-law, the appellant herein, took his son, namely, Abdul Qadir (aged 6 years) and two daughters, namely, Rounak Khatun (aged 4 years) and Alisha Khatun (aged 2½ years) and also the son of Md. Murtaja, namely, Shahid Hasan (aged 6 years) from a wedding ceremony at Al-Hayat and proceeded towards Kukur Bhukha Bridge. Appellant did not return. Neither did the children. After few hours the de-facto complainant and others started searching for them. Around 1:30 hours on the next day, a missing diary was lodged at Howrah P.S. being G.D. Entry No. 1300/11. Wife of the appellant tried to contact him on his mobile phone which was switched off. They continued to search for the missing children. On Wednesday morning, that is, 16.11.2011 the de-facto complainant read the news in the newspaper that three bodies of children drowned at Bagnan had been recovered. He along with others went to Bagnan Police Station and identified the bodies as those of the

son and daughters of the appellant. After sometime another dead body of a child was brought to the Police Station. He was identified as Shahid Hossain, son of one Md. Murtaja. On that day, appellant called his younger brother Md. Mujahid Qureshi (P.W. 3). Subsequently, on 20.11.2011 at 3:05 p.m. appellant again called his brother and stated he had killed the children putting an end to the story. He also enquired whether the bodies of the children have been interred or not. Suspecting the involvement of the appellant in the murder of four minor children, P.W. 1, Md. Firoz Qureshi had lodged the aforesaid written complaint at Howrah Police Station. The case was transferred on the point of jurisdiction to Bagnan Police Station and was numbered as Bagnan Police Station Case No. 11/2012 dated 11.01.2012 under sections 302 and 201 I.P.C. Initially investigation in the instant case was conducted by S.I. Rabiul Haque (P.W. 25), attached to the Howrah Police Station; thereafter by S.I. Shyamal Dutta (P.W. 33), attached to Bagnan Police Station. Subsequently, investigation was transferred to C.I.D., West Bengal and taken over by S.I. Debasish Banerjee, (P.W. 34) attached to D.D.I. Howrah.

In the course of investigation, appellant who had absconded to Uttar Pradesh, was sought to be apprehended. P.W. 25 went to Pratapgarh to arrest him but failed. Finally, when he was admitted at Bagnan Rural Hospital on 05.12.2011, he was arrested on 07.12.2011. Charge-sheet was filed against him. In the course of trial, prosecution

examined 34 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, the trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid. Hence, the present reference as well as the appeal.

Arguments at the Bar:-

Mr. Mukherjee, Sr. Advocate with Ms. Biswas argued there is no legally admissible evidence connecting the appellant to the murder. The case is purely based on surmises and conjectures. Circumstances relied upon by the prosecution have not been proved beyond doubt. Neither do they unerringly point to the guilt of the appellant. Missing diary lodged by P.W. 1, Md. Firoz Qureshi was not exhibited and there is unexplained delay in lodging first information report. There is inordinate delay in examining witnesses particularly P.W. 2, Md. Ishtiyaque Khan who claims to have seen the appellant boarding a train at Tikiapara Railway Station proceeding towards Panskura with four children. No explanation was offered for such delayed examination. Version of P.Ws. 6, and 10 who claim to have seen the appellant with the minor victims near Kukur Bhukha Bridge suffer from various contradictions and embellishments. Extra-judicial confession of the appellant has not been proved. P.W. 3, Md. Mujahid Qureshi did not state in Court that appellant stated he had murdered the children. Version of other witnesses on this issue are hearsay and inadmissible in law. Mobile phone of P.W. 3 was not seized and no effort was made to ascertain the subscriber details of mobile No.

8100505825. Motive of crime has not been proved. P.W. 18, Md. Sahil Qureshi father-in-law of the appellant stated for the first time in Court that the appellant used to suspect the paternity of his children. Wife of appellant was not examined to prove such fact. On the other hand, deposition of P.Ws. 3 and 7 show relationship between the couple was good. Parents of one of the victims Shahid Hossain have not been examined. Time of death of the victims has not been ascertained. No external injuries or poison was found during post-mortem or FSL examination of the victims. Arrest of the appellant is shrouded in mystery. Though P.W. 25, S.I. Rabiul Haque claimed appellant was arrested from Bagnan Hospital on 07.12.2011, P.W. 30 attending doctor stated the appellant had been brought to the hospital by police on 05.12.2011. Prosecution case has not established beyond reasonable doubt and the appellant is entitled to an order of acquittal.

On the other hand, Mr. Mukherjee with Mr. Mitra for the State submitted that the circumstances proved in the case unerringly point to the guilt of the appellant. Elaborating the issue he submitted the appellant was last seen with the four minor victims prior to the incident. P.Ws. 1, 7 and 18 saw the appellant taking away the minor children from the marriage ceremony at Al-Hayat. P.Ws. 6 and 10 saw them at Kukur Bhakha Bridge. P.W. 2 saw the appellant board a train proceeding towards Panskura from Tikiapara Railway Station with the children. On the next day, that is, 15.11.2012 at 10:30 a.m. dead bodies of two female children were recovered and body of one male child was recovered in the

evening of the same day. On the next day dead body of another male child was recovered in the morning. Post-mortem doctor, Dr. Tapan Kumar Roy Chowdhury (P.W. 24) opined that the victims died due to ante mortem drowning. Victims were minor children aged between 4-10 years. Referring to medical treatises, learned Counsel argued homicidal drowning of infants and children is not uncommon. He further adverted to other incriminating circumstances, namely, abscondence of the appellant after the occurrence and his evasive answers with regard to the cause of death during examination under section 313 Cr.P.C. He also submitted motive to commit the crime has been proved. Appellant had acted in a cruel and inhuman manner and killed four minor and helpless children. Hence, the appeal be dismissed and the death sentence be confirmed.

Evidence on record: An analysis:-

Prosecution case is based on circumstantial evidence. A tabular chart of the prosecution witnesses and the circumstances transpiring from their deposition are set out hereinbelow:-

Witness Nos. and Names	Description of Particulars
P.W. 1: Firoz Qureshi (Complainant)	• Brother in Law of Accused • Attended ceremony at Al-Hayat • Lodged F.I.R. • Identified the bodies of 4 dead children at P.S. • Heard about the phone call by accused to Mujahid from his Sister. Accused had admitted to have killed the children.
P.W. 2: Md. Ishtiyaque Khan (Driver of Oil Tanker at Hindustan Petroleum Company, Haldia)	• Saw the accused with 4 Children standing on the UP Platform at Tikiapara Station boarding the train towards

	Panskura - Went to Bagnan PS along with P.Ws. 1, 6 and 10 to identify the dead bodies - Heard about the phone call of Accused to his brother Mujahid
P.W. 3: Md. Mujahid Qureshi (Brother of Accused) (Hearsay Witness)	- The Relationship of the couple was good - Received a Phone call from accused on 16.11.11 and thereafter, on the next two days - Did not the record the phone call - His phone was not seized
P.W. 4: Md. Sabi Qureshi (Brother of Accused)	Went to the Police Station to collect the dead bodies
P.W. 5: Md. Jahid Qureshi (Brother of Accused) (Declared Hostile)	- Accused made Phone call to Mujahid - Mental Disturbance of accused started 2 years prior to the incident - He rescued the accused once from Asansol and once from Pilkhana
P.W. 6: Md. Khurshid Alam (Villager)	Saw Accused and 4 children proceeding towards Tikiapara Station
P.W. 7: Md. Murtaja (Villager)	- Marriage Attendee - Identified the dead bodies - Mujahid told that accused called and he killed the 4 children as he had some problems with them - Not interrogated by Police
P.W. 8: Kamal Hajari (Villager)	Witness to recovery of 2 Female Dead Bodies on 15.11.11
P.W. 9: Yusuf Mallick (Villager)	Witness to Recovery of 2 Female Dead Bodies on 15.11.11
P.W. 10: Md. Sukur (Villager)	- Saw accused & 4 Children going towards Tikiapara Station - At Uluberia Hospital accused gave a phone call to his brother and asked whether the bodies have been interred
P.W. 11: Md. Arif (Advocate)	Scribe of F.I.R.

P.W. 12: Sk. Anwar Ali (Villager)	• Witness to recovery of 2 female dead bodies on 15.11.11
P.W. 13: Sk. Almasin (Villager)	• Witness to recovery of 2 female dead bodies on 15.11.11
P.W. 14: Sk. Faridul (Villager)	• Witness to recovery of 2 female dead bodies on 15.11.11 in Morning
P.W. 15: Uttam Dalapati (Villager)	• Witness to recovery of a male dead body on 16.11.11 at 10:00 a.m. [Shahid Hossain]
P.W. 16: Sudipta Dey (Supervisor at Tantia Construction Ltd.)	• Witness to recovery of 2 female dead bodies on 15.11.11) at 10-10:30 a.m.
P.W. 17: Rajesh Chauhan (Railway Contractor at Tantia Construction)	• Witness to recovery of 2 female dead bodies at 10:30-11:00 a.m.
P.W. 18: Md. Sahil Qureshi (Father in Law of the accused)	• Attendee at Marriage • Accused told him he was going to Kukur Bhukha Bridge for a walk along with 4 children • Came to know about the confession of accused to P.W. 3 from P.W. 1 • The accused created trouble with his wife and suspected she had illicit relation with elder son-in-law of P.W. 18 and paternity of the children • Accused suffered from mental illness and was getting treated at Kacchar Sarif Darga for 40 days • Identified the dead bodies at the Police Station
P.W. 19: Nazimuddin Mallick (Student)	• Witness to recovery of dead body of children
P.W. 20: Tapan Kumar Naga (ASI, Police Officer, Bagnan P.S.)	• On 15.11.11 held inquest over the dead bodies of Alisa and Raunak Khatun. At 18:00 hrs on the same day, he conducted inquest over dead body of Abdul Qadir • On 16.11.11 at 10:30 a.m. conducted inquest over dead body of Shahid Hossain
P.W. 21: Ajoy Kumar Mondal (Police Constable, Bagnan P.S.)	• On 16.11.11, he accompanied 4 dead bodies for PM to Uluberia

	Hospital
P.W. 22: Basanta Sharma (Judicial Officer)	Recorded the statement of P.W. 2 on 13.03.2012
P.W. 23: SK Pintu (Carpenter)	Witness to recovery of a dead body of a male child on 16.11.2011
P.W. 24: Dr. Tapan Kumar Roy Chowdhury (PM Doctor, Uluberia Hospital)	- Conducted Post Mortem on 16.11.11 - Stated that death of all the four children was due to drowning, ante mortem in nature - No Marks of external injuries - Water and mud found inside stomach of all dead bodies
P.W. 25: Rabiul Haque (SI, Police Officer, Howrah P.S.)	- Took charge of the investigation from 21.11.11 - Refers to UD cases registered in connection with the recovery of dead bodies of 4 children - As per the reports collected by the nodal officer the accused fled to Uttar Pradesh after committing the crime - Went to Pratapgarh on 23.11.11 to arrest the accused but returned empty handed on 27.11.11 - Received information that accused consumed Phenyl at relative's House at Bagnan - On 07.12.11 the accused was arrested and his phone was seized - Accused made Telephone call to his Brother in mobile No. 8100505825 on 16th, 17th, 24th, 28th and 29th November, 2011 from his number. - Did not examine the wife of accused as she was sick - P.W. 10 did not state that he had seen accused go towards Tikiapara Station - P.W. 18 did not state the issue of paternity before him. However, he stated that accused suffered from mental illness and was getting treated at Kacchar Sarif Darga for 40 days

P.W. 26: Arijit Das (Nodal Officer)	• Bagnan P.S. asked for call records of accused from 15.11.11 to 17.11.11 • Accused is the owner of No. 9748643708 • There were simultaneous to and fro calls from the accused phone to 8100505825 (Ext. 18A) • The name of the owner of phone No. 8100505825 was not ascertained as it was not sought for in requisition
P.W. 27: Amarnath Purkait (Senior Scientific Officer)	• Examined the viscera of the four dead bodies and no poison was detected in the viscera of the deceased
P.W. 28: Bhudeb Adhikary (Constable, Bagnan P.S.)	• Witness to seizure of mobile phone of accused and discharge certificate by P.W. 25
P.W. 29: Sk Jahed Ali (A.S.I., Police Officer, Bagnan P.S.)	• Was posted at Baganan P.S. as A.S.I. • P.W. 20 (Tapan Kumar Naga, A.S.I. Police) handed over the mobile phone of accused and discharge certificate to P.W. 25
P.W. 30: Piyali Banerjee (Medical Officer, Bagnan Rural Hospital)	• On 05.12.11 accused was brought to the hospital from police custody for <i>phenyl</i> poisoning • The patient was discharged on 07.12.11 and, thereafter, arrested on the same day
P.W. 31: Md. Shahid (Owner of Al-Hayat)	• Gave the house to Murtaja Qureshi for a function
P.W. 32: Hemanta Dey (A.S.I., Police Officer, Bagnan P.S.)	• Was posted as ASI, Bagnan P.S. • Drew the Formal F.I.R. after receiving the Written Complaint on 11.01.2012
P.W. 33: Shyamal Dutta (Police Officer, S.I., Bagnan P.S.)	• Received the charge of investigation on 11.01.2012 • Did not investigate the reasons for delay in lodging the F.I.R. • Could not get any person from either at Barbhagabatipur or Rabibhag village who said they saw the deceased children with the accused before the incident

P.W. 34: Debashis Banerjee (Police Officer, C.I.D., D.D.I., Howrah)	• Took Charge of the case on 25.02.12 from Bagnan P.S. • P.W. 1 Fully corroborated his version • On 26.02.12 examined P.W. 2 • The wife of accused was in traumatic condition and hence was not examined • Submitted the charge-sheet
--	---

Law on circumstantial evidence:-

In *Sharad Birdhichand Sarda vs. State of Maharashtra*¹ which is treated as a locus-classicus on circumstantial evidence, the Apex Court laid down the panchsheel of proof of a case based on such evidence:-

“153. ... (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

On the anvil of the aforesaid proposition of law, let me examine the prosecution case at hand.

¹ (1984) 4 SCC 116

Incriminating circumstances: whether proved:-

(i) Last seen together:-

Prosecution has relied on the evidence of P.Ws. 1, 2, 6, 7, 10 and 18 to prove the aforesaid circumstance.

P.W.1, Md. Firoz Qureshi deposed on 14.11.2011 a marriage ceremony took place at Al-Hayat marriage hall near Tikiapara Police Phari. He attended the marriage ceremony. Appellant also attended the marriage ceremony. Around 5 p.m., appellant left along with four children towards Kukur Bhukha Bridge. Thereafter, they never returned. He is the de-facto complainant. He has narrated such fact in the F.I.R. Culling out a sentence from his cross-examination that he did not see the appellant taking away four children to Kukur Bhukha Bridge and then to Tikiapara Railway Station, defence has sought to improbabilise his version. Deposition of P.W. 1 that the appellant left with the four children from the marriage hall in the evening of 14.11.2011 corroborates his version in the written complaint which is treated as F.I.R. Tenor of cross-examination shows he admitted that he had not seen the appellant with the children at Kukur Bhukha Bridge or Tikiapara Railway Station which does not militate against the prosecution case that the witness had seen the appellant leaving the marriage hall with four children. This fact is also proved by P.W. 18, Md. Sahil Qureshi, father-in-law of the appellant. He stated appellant had left the marriage hall with the four children. On query, he stated he was going near Kukur Bhukha Bridge for a walk.

P.W. 7, Md. Murtaja, a local villager also corroborated P.Ws. 1 and 18 that appellant had left the marriage hall with the four minor children. P.W. 31, Md. Shahid, owner of Al-Hayat marriage hall stated he had permitted Md. Murtaja, a relation of the appellant to use marriage hall for the engagement ceremony of his daughter. He proved the certificate of the marriage hall for the engagement ceremony of his daughter. These witnesses establish beyond doubt that the appellant had left along with four minor children from the marriage hall in the evening of 14.11.2011. Minor variation with regard to exact time when they saw the appellant taking away the minor children is based on approximation made by the witnesses and would not affect the credibility of their versions.

Thereafter, the appellant was seen near Kukur Bhukha Bridge with the four minor children by P.W. 6, Md. Khurshid Alam. P.W. 6 was sitting near Kukur Bhukha Bridge when he saw the appellant with four children proceeding towards Tikiapara Railway Station. Similarly, P.W. 10, Md. Sukur another co-villager corroborates P.W. 6 and stated he had seen the appellant along with four children proceeding towards Tikiapara Railway Station. Minor variations between their depositions in Court and their earlier statement before police cannot be treated as material contradictions. It is not possible that every minute detail in the deposition of a witness would be stated to the police. It is common knowledge police ordinarily records statements of witnesses in a cryptic fashion. Unless there is material omission in the earlier statement, minor variations would not impeach the credibility of the witness. Gist of the deposition of

the aforesaid witnesses resonates with their earlier statements to police and their versions cannot be disregarded on the score of minor variations or omissions.

Finally, Md. Ishtiaque (P.W. 2) saw the appellant board a train towards Panshkura along with four minor children from Tikiapara Railway Station. His deposition has been severely attacked by the defence on the ground he was examined by the third investigating officer after three months and his statement before Magistrate was recorded after two weeks later. Delayed examination of a witness by itself is not a ground to reject his evidence (see ***Shyamal Ghosh vs. State of West Bengal***² and ***V. K. Mishra and Another vs. State of Uttarakhand and Another***³).

In the present case, investigation was initially conducted by the local police attached to Howrah and Bagnan Police Station. On 25.02.2012, investigation was taken over by C.I.D. West Bengal and entrusted to P.W. 34, Debasish Banerjee, attached to D.D.I. Howrah. On the next day, he examined P.W. 2, Md. Ishtiaque and, thereafter, his statement was recorded before Magistrate on 13.03.2012.

Handing over the rein of investigation to a specialized agency resulted in a more intense and thorough investigation and P.W. 2 a vital witness was examined. This explains the delay in his examination. P.W. 2 was a neighbour. He knew the appellant and in his deposition stated he was the driver attached to Hindustan Petroleum Company at Haldia. On

² (2012) 7 SCC 646

³ (2015) 9 SCC 588

14.11.2011 he had got out at Tikiapara Station around 5:30 p.m. and had seen the appellant was standing in the UP platform along with four children. He also saw the appellant boarding a train towards Panskura with the children. Thereafter, he went to his residence. He had informed local people including P.Ws. 1, 6 and 10 he had seen appellant along with children at Tikiapara Police Station.

Laxity on the part of the investigating agency to record the statement of P.W. 2 is a remissness in investigation. Such remissness was sought to be cured by the specialized agency, that is, C.I.D. which took over investigation on 25.02.2012. No question was put to P.Ws. 25 and 33, investigating officers attached to the local police station why they did not interrogate P.W. 2. This remissness in investigation does not cast a shadow on the deposition of P.W. 2 who is a neighbour and has no reason to falsely implicate the appellant.

Failure of P.W. 1 to disclose that P.W. 2 had narrated the incident to him in F.I.R., in my estimation, is a minor omission and does not affect the credibility of the witness. Moreover, statement of P.W. 2 was also recorded before Magistrate (P.W. 22).

I have analyzed the deposition of P.W. 2 in Court vis-à-vis his statement before Magistrate. There is substantial corroboration between the two. No enmity between the appellant and P.W. 2 has been brought on record. In my opinion reason for delayed examination of P.W. 2 is self-evident from the facts of the case and there is nothing on record to discredit the version of the said witness.

Thus, prosecution has been able to prove that the appellant was seen taking away four minor children from Al-Hayat marriage hall to Kukur Bhuka Bridge and between 5/5:30 p.m. boarded a train proceeding towards Panskura from Tikiapara Railway Station on 14.11.2011.

(ii) Recovery of dead bodies:-

P.W. 20, ASI Tapan Kumar Naga of Bagnan Police Station deposed on 15.11.2011 he went to village Barbhagabatipur and found dead bodies of two female children on the bank of river Damodar. He held inquest over the dead bodies and prepared inquest reports in connection with U.D. Case No. 102/2011 and U.D. Case No. 101/2011 being Exhibit- 7/2 and Exhibit- 8/3 respectively. At 18:00 hours he went to village Rabibhag and held inquest over the dead body of a 10 year old male child. He prepared the inquest report in connection with U.D. Case No. 103/2011 marked as Exhibit- 11/1. On the next day, he recovered dead body of another male child at Rabibhag and prepared inquest report of U.D. Case No. 104/2011 marked as Exhibit- 9/1. Wearing apparels including footwear of the deceased children were recovered.

P.Ws. 8, 9, 12, 13 and 14 witnessed the recovery of the bodies of female children, namely, Rounak Khatun and Alisha Khatun while P.W. 15 witnessed recovery of the male child, namely, Shahid Hossain on 16.11.2011. P.Ws. 19 and 23 witnessed recovery of the male child, namely, Abdul Qadir.

All the dead bodies were brought to Bagnan Police Station. P.Ws. 1, 2, 6 and 18 went to Bagnan Police Station. P.W. 18, Md. Sahil Qureshi, grandfather of the children identified their bodies. After post mortem, the bodies were handed over to P.W. 18.

(iii) Cause of death:-

P.W. 24, Dr. Tapan Kumar Roy Chowdhury is the post mortem doctor. He held post mortem over the bodies of the minor children. He opined death was due to drowning, ante mortem in nature. He proved the post mortem reports marked as Exhibits- 15, 15-A, 15-B, 15-C. He further stated he did not find any mark of violence on the dead bodies. There was mud and water inside the stomach of all the dead bodies. He opined cause of death written in the post mortem reports were final.

It is contended post mortem doctor has not opined the victims suffered homicidal death. Time of death has also not been proved.

On the other hand, learned Counsel referring to medical treatises argued homicidal grounds, though rare, may occur in case of children and helpless person. In **Medical Jurisprudence and Toxicology, 11th Edition by John Glaister** it is observed:-

“Although homicidal drowning by pushing the victim into the water may be comparatively easy, it is very uncommon, but occurs occasionally in the case of children or of helpless persons.”

In **Modi's Text Book of Medical Jurisprudence and Toxicology, 10th**

Edition by N.J. Modi similar view has been expressed:

“Homicidal drowning is rare, except in the case of a infants and children. It is a common practice to rob children of their ornaments and then to throw them into a well or a tank.”

In the present case, all the victims were minor children aged between 4-10 years. Possibility of their committing suicide is wholly improbable. Evidence on record, particularly, recovery of their dead bodies in close proximity of one another gives an impression all of them drowned in the course of the same transaction. It is most unlikely all the minor victims would simultaneously suffer accidental drowning. No such suggestion has also been made on behalf of the defence. Theoretical possibility regarding cause of death which are not compatible with the attending facts and circumstances of the case cannot be treated as a reasonable doubt causing dent to the prosecution case. Owing to the extreme tender age of the victims and the attending circumstance of the near simultaneous recovery of their dead bodies from adjoining places i.e. Barbhagabatipur and Rabibagh the only irresistible conclusion that may be drawn is their deaths were homicidal in nature.

(iv) Time of death:-

Exact time of death has not been given by the post mortem doctor. I have examined the post mortem report. There is no noting in the said reports that the bodies were in a stage of putrefaction. Appellant was last seen with victims in the evening of 14.11.2011 and the dead bodies were

recovered on or after 10:00-10:30 a.m. of the next day. The aforesaid materials leave no doubt in my mind that the victims were done to death by drowning between 5:30 p.m. of 14.11.2011 and 10:00-10:30 a.m. of the next day.

(v) Whether 'live link' between 'last seen' theory and death is established:-

From the evidence on record it appears prosecution has established that the appellant was last seen with the children boarding a train towards Panskura from Tikiapara Railway Station in the evening of 14.11.2011. Dead bodies of the minors were recovered on and from the morning at 10:00-10:30 a.m. of the next day. They had died due to ante mortem drowning and the attending circumstances leave no doubt in one's mind such drowning was homicidal in nature. It is contended live link between the 'last seen' theory and the deaths of the minors have not been established. No witnesses were produced by the prosecution who had seen the appellant with the minors at Bagnan or near the bank of river Damodar where the dead bodies were found. Hence, there is a snap in the chain of circumstance and the onus ought not to be shifted upon the accused to explain the cause of death.

Whether there is a live link between the 'last seen' theory and the homicidal death of a victim must be determined on the facts and circumstances of each case. Tender age and vulnerability of the victim, relationship of the victim and the accused in whose custody he/she is last

seen and the nature of control the custodian i.e. the guardian exercises over the ward are relevant considerations to test the existence of live link between the last seen theory and the death of the victim. When it is established that minor children of tender age are in the exclusive control of parents/relations and owing to his/her immature age would not be in a position to exercise free will or movement without his supervision, it becomes incumbent on the said guardian to explain the circumstances in which the child had gone out of his custody. A natural guardian having custody of his minor child has overwhelming control over the movements of the latter. This situation creates a graver circumstance than one where two adults are last seen in the company of one another. It becomes further acute when it is proved the minor suffered homicidal death after he/she was last in the custody of his/her natural guardian. The present case shows the appellant was the father of three of the four children aged between 4-10 years who were in his exclusive custody since the evening of 14.11.2011. By the next morning their dead bodies were recovered under circumstances which irresistibly indicate a case of homicidal drowning. It is strenuously argued the live link has snapped as no one was examined who saw the appellant with the four children on the bank of the river Damodar either at Barbhagabatipur or Rabibagh. Appellant relied on ***Shailendra Rajdev Pasvan and Another vs. The State of Gujarat and Others***⁴ in support of his submission. From the evidence on record it appears that appellant with the four children had boarded a train

⁴ (2020) 14 SCC 750

proceeding towards Panskura from Tikiapara Railway Station around 5/5:30 p.m. on 14.11.2011. Admittedly, the train proceeding towards Panskura goes through Bagnan which proves that the appellant had reached the bank of river Damodar by using such transport. By the time appellant reached the bank of river Damodar it was late evening. Nothing is placed on record to show that the river bank was a populated one. Appellant had taken the children to a deserted river bank to drown them. He chose a deserted place to commit the crime. Hence, it is all but natural no witness could be found who saw the appellant with the children at the river bank. Thus, the live link between the appellant being last seen with the victims boarding the train towards Panskura and the recovery of their dead bodies from river Damodar on and from the next day is established beyond doubt.

Shailendra Rajdev Pasvan (supra) is factually distinguishable. In the cited case prosecution primarily relied on extra-judicial confession. Witnesses who deposed to prove the last seen theory were not believed. Even the time gap between the 'last seen' circumstance and the recovery of dead body was nine days which snapped the live link between the two.

(vi) Reverse burden on the appellant:-

In a catena of decisions the Apex Court advertent to the reverse burden engrafted in section 106 of the Evidence Act had held the word "specially within the knowledge of any person" does not mean "exclusive knowledge of the said person". When it is disproportionately difficult for

the prosecution to establish the facts which are specially within the knowledge of the accused and which the latter can without difficulty or inconvenience prove, the onus shall shift upon the accused to prove such fact. Reference may be made in ***Shambu Nath Mehra vs. State of Ajmer***⁵, ***State of W.B. vs. Mir Mohammad Omar And Others***⁶, ***Pattu Rajan vs. State of Tamil Nadu***⁷ and ***Arvind Singh vs. State of Maharashtra***⁸.

It is trite law initial burden always lies on the prosecution to prove its case. When the prosecution has discharged its initial burden and the facts proved show the circumstances leading to the homicidal death of a victim are within the special knowledge of the accused, the onus shifts upon the latter. In the present case, the victims were minor children aged between 4-10 years. Appellant was their natural guardian. Owing to their tender age and the control exercised by the appellant over his wards, it is most improbable if not impossible that the children would go out of his keeping without his knowledge or consent. These peculiar facts cast a heavy burden on the appellant to explain the circumstances in which the victims drowned. Appellant has singularly failed to discharge such onus and gave evasive replies during his examination under section 313 Cr.P.C. This creates an adverse inference upon the appellant and provides additional link in the chain of circumstances which shows that it was the appellant and none else who had drowned the victims to death.

⁵ AIR 1956 SC 404 (para 11)

⁶ AIR 2000 SC 2988 (para 38)

⁷ (2019) 4 SCC 771 (para 63)

⁸ (2021) 11 SCC 1 (para 79 and 80)

Authority relied upon by the defence is inapposite. In ***Nagendra Sah vs. State of Bihar***⁹ the Apex Court refused to draw adverse inference with regard murder of the housewife at matrimonial home against her husband since the other in-laws were also residing in the house. The cited case does not deal with homicidal death of four minor children who were found with their natural guardian, that is, the appellant in the evening prior to their death.

(vii) Abscondence of the appellant:-

Another additional link to the chain of incriminating circumstances is also provided by the abscondence of the appellant. From the day the victims went missing, the appellant had absconded. His mobile phone was switched on only when the bodies of the victims were recovered on 16.11.2011 and such event had been published in the newspapers, appellant made a phone call to his brother Mujahid (P.W. 3). Again, on subsequent days he contacted P.W. 3 over mobile phone. But he did not return to his residence. P.W. 26, nodal officer of Bharti Airtel proved phone calls from the mobile phone of the appellant had made from U.P. P.W. 25, first investigating officer deposed as per report collected from nodal officer appellant had fled to U.P. Pursuant to such lead he went to Pratapgarh, U.P. on 23.11.2011 but could not arrest the appellant. Finally, appellant hid himself in a relative's house and attempted to commit suicide by consuming *phenyl*. He was taken to Bagnan Rural Hospital wherefrom he was arrested. Learned Counsel for the appellant

⁹ (2021) 10 SCC 725

submits appellant was in constant touch with his relations and cannot have said to be absconded. I find little substance in such submission. Appellant had absconded from the day the victims went missing. His mobile phone was switched off till dead bodies were recovered on 16.11.2011. Out of fear, he contacted his brother P.W. 3 from his hide out in U.P. and wanted to know whether the children had been interred. Though he continued telephonic contact with his family members, investigating officer inspite of raid in Pratapgarh, U.P. was unable to trace out the appellant. Finally, he could be caught when he tried to commit suicide at a relative's house where he was hiding.

In ***Kartarey And Others vs. State of U.P.***¹⁰ the Apex Court held as follows:-

“42. ... To be an ‘absconder’ in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home.”

Appellant kept himself abreast of the subsequent developments after committing the crime from his place of hiding in U.P. through telephonic communications with his brother. He, however, did not divulge his whereabouts. He evaded the process of law and continued to remain elusive. He was finally apprehended when he attempted to commit suicide after consuming *phenyl* in a relative's place where he was hiding. Abscondence by itself may not be sufficient to establish guilt. However, it provides an additional link to chain of incriminating circumstances as in

¹⁰ AIR 1976 SC 76

the present case. Reference may be made to ***Dhananjoy Chatterjee @ Dhana vs. State of West Bengal***¹¹ and ***Mritunjay Biswas vs. Pranab @ Kunti And Another***¹².

However, the evidence on record does not inspire me to come to a firm conclusion that the conversation between the appellant could be treated as an extra-judicial confession. An accused can be said to confess to a crime when he acknowledges committing the crime. P.W. 3 with whom the appellant had telephonic conversations is silent with regard to nature of conversation. Evidence of other witnesses, namely, P.Ws. 1 and 18 in this regard are hearsay in nature. Even P.W. 10 who claims to have overheard the conversation merely stated appellant had asked his brother whether the bodies had been interred. From the aforesaid evidence on record, it cannot be concluded that the appellant had confessed his guilt. However, the evidence establishes the post occurrence conduct of the appellant who kept himself abreast of the developments after the recovery of the dead bodies while he continued in hiding and did not even come to attend last rites of his own children. This is an incriminating circumstance and is admissible as conduct of the appellant under section 8 of the Evidence Act.

(viii) Motive to commit the crime:-

P.W. 18, father-in-law of the appellant has proved the motive to commit the crime. He deposed appellant suspected his wife had illicit

¹¹ (1994) 2 SCC 220

¹² (2013) 12 SCC 796

relation with one Firoz, her brother-in-law. There were quarrels between them over such issue. He also suspected paternity of the children. As a result, he committed the crime. Learned Senior Counsel for the appellant submits P.W. 18 stated such fact for the first time in Court. No other witness has corroborated him. On the other hand, P.W. 3, Md. Mujahid Qureshi stated relationship between the couple was good. P.W. 3 is the brother of the appellant. He is a man of confidence with whom the appellant continuously conversed while in hiding. Naturally, he has given a rosy impression with regard to the relationship between the couple. Suspicion over the infidelity of one's wife and doubt regarding paternity of one's own children are extremely sensitive and personal matters. They are not ordinarily discussed beyond the four walls of the home of the couple. P.W. 18, father-in-law of the appellant was the closest relation to his wife and was aware of the dispute between the couple. Wife of the appellant continued to suffer from trauma due to loss of her minor children and could not be examined. P.W. 33, third investigating officer deposed he was unable to examine her as she was in severe trauma. Adequate reasons are forthcoming why wife of the victim was not examined. In this backdrop, proof of motive through P.W. 18, father-in-law of the appellants, does not affect the unfolding of the prosecution case. Accordingly, I am of the opinion motive to commit the crime has been established beyond doubt.

Non-production of missing diary and delay in lodging F.I.R.:-

P.Ws. 1, 7 and 18 had attended the marriage ceremony at Al-Hayat on 14.11.2011. Appellant was also present in the marriage ceremony. He left the marriage hall with four minor children. Three of whom were his own and other was the son of one Md. Murtaja Qureshi, a relation of the appellant. Appellant and the children did not return. P.Ws. 1 and others searched for the children and lodged missing diary on the next day at 1:35 a.m. In view of the aforesaid ocular overwhelming evidence that appellant had left with the minor children, failure to produce the missing diary does not affect the unfolding of the prosecution case.

On 15.11.2011 bodies of three missing children were recovered from the bank of river Damodar. Such news was reported in newspapers on the next day i.e. 16.11.2011. Hearing the news, P.Ws. 1, 18 and others went to Bagnan Police Station. On that day, body of another child was recovered. They identified the bodies. At that time, appellant made phone call to his brother (P.W. 3) and enquired whether the children have been interred or not. This was intimated to the police. On subsequent days, appellant again contacted his brother over phone from a place of hiding. But he did not return. Nor did he attend the last rites of his children. Traumatized by the unfortunate death of the four minor children and the suspicious conduct of the appellant, P.W. 1 and others entertained reasonable suspicion with regard to his involvement in the murder and lodged F.I.R. on 21.11.2011. The aforesaid narration clearly explains the reason for delay in lodging the F.I.R.

Incriminating circumstances: unerringly point to the guilt:-

From the aforesaid discussion, I am of the opinion the following circumstances have been wholly proved and unerringly point to the guilt of the appellant and rule out any reasonable hypothesis of innocence:-

- (a) Appellant was seen leaving the Al-Hayat marriage hall with four minor children by P.Ws. 1, 7 and 18.
- (b) Appellant told P.W. 18 he is proceeding towards Kukur Bhukha Bridge for a walk. P.Ws. 6 and 10 saw the appellant with the children at Kukur Bhukha Bridge. He was proceeding towards Tikiapara Railway Station.
- (c) At Tikiapara Railway Station P.W. 2 saw the appellant with four minor children boarding a train proceeding towards Panskura around 5/5:30 p.m. Admittedly, the train goes through Bagnan.
- (d) On the next day, that is, 15.11.2011, bodies of two female children, namely, Alisha Khatun and Raunak Khatun were recovered at Bagnan at 10:00-10:30 a.m.
- (e) On the same day around 6:00 p.m. body of another male child, namely, Abdul Qadir was recovered from the bank of river Damodar at Rabibagh. Both places are at a distances of 10 minutes walk from each other.
- (f) News of recovery of dead bodies of the children were published in newspapers on 16.11.2011. Receiving the news P.Ws. 1, 18 and others went to the Bagnan Police Station. Body of another child,

namely, Shahid Hossain was recovered on that day. P.W. 18 identified the dead bodies.

- (g) At that time appellant made phone call to P.W. 3 and enquired whether the bodies have been interred or not. Subsequently, he made a number of phone calls to P.W. 3 but did not return to his residence for the last rites of his own children.
- (h) Post mortem doctor opined that the death of the victims were due to ante mortem drowning. Tender age of the victims and other attending circumstances irresistibly point to a case of homicidal drowning.
- (i) Appellant had doubted the fidelity of his wife and the paternity of his children. He had motive to commit the crime.
- (j) Appellant had absconded and hid himself at Pratapgarh, U.P. from where he had telephonic conversations with P.W. 3 to keep track with regard to the developments after the recovery of the dead bodies of the children.
- (k) In spite of effort by P.W. 25, he could not be apprehended. His abscondence after the occurrence and his conduct of keeping track of the activities after the recovery of dead bodies without returning home is an incriminating fact admissible under section 8 of the Evidence Act.
- (l) Appellant was finally apprehended from hospital after he had attempted to commit suicide by consuming *phenyl* while hiding in the house of a relative.

(m) No case of accidental or suicidal drowning has been probalised by the appellant. In fact, appellant has singularly failed to discharge his onus with regard to the circumstances how the four minor victims who were in his custody suffered simultaneous deaths by drowning. This leads to an adverse inference against him.

Conclusion:-

In the light of the aforesaid discussion, I uphold the conviction of the appellant.

Death sentence:-

Trial Judge has awarded the irreversible sentence of death. He held the case fell within the category of 'rarest of rare' cases. The special reasons given by the trial Judge to come to such conclusion are as follows:-

- (i) Offence involved murder of four children;
- (ii) Appellant was the father and natural guardian of three of four the children;
- (iii) Offence was committed in a pre-ordained manner and there was nothing to show appellant was labouring under any circumstance which made him believe that he was morally justified to commit the crime. Nor was he subjected to duress or domination by another person to commit the crime;

- (iv) Dwelling on the heinousness of the offence which involves murder of four innocent children and the depravity of the mind of a parent who perpetrated such inhuman act, the trial Judge was of the view that it shocked the collective conscience of society and there was no possibility of reformation and rehabilitation of the convict.

In ***Bachan Singh vs. State of Punjab***¹³ the Apex Court gave a stamp of approval to the illustrative list of aggravating and mitigating circumstances which may be considered to come to a conclusion whether a case falls in the category of 'rarest of rare case' as follows:-

"202. Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

¹³ (1980) 2 SCC 684

“206. Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.**
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.**
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.**
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.**
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.**
- (6) That the accused acted under the duress or domination of another person.**
- (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”**

In *Machhi Singh vs. State of Punjab*¹⁴ analyzed the ratio in *Bachan*

Singh (supra) and held as follows:-

“38. In this background the guidelines indicated in *Bachan Singh* case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh* case:

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

¹⁴ (1983) 3 SCC 470

imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have 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.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

In determining whether a case falls in the category of rarest of rare cases attracting death penalty the Court in ***Machhi Singh*** (supra) held the manner of commission of the crime, motive behind the crime, anti-social and abhorrent nature of the crime, its magnitude and the personality of the victim are relevant considerations.

In the present case, it is undeniable four innocent children have lost their lives. This is certainly an aggravating circumstance. However, the aggravating circumstances must not be seen in isolation but on an overall global perspective of all circumstances including the mitigating ones to answer the question whether the imprisonment for life is wholly inadequate and there is no possibility of reformation and rehabilitation of the appellant. From the evidence on record, it appears that the appellant

had a prior history of mental illness. P.Ws. 3 and 18 have stated that he suffered from mental illness and had been provided treatment. A pre-sentencing history necessitates the Court to examine the mental and psychological state of the convict more particularly when evidence is forthcoming with regard to a degree of mental impairment. Emphasizing the psychiatric and psychological evaluation of the appellant to determine the mitigating circumstances the Apex Court in ***Manoj And Others vs. State of Madhya Pradesh***¹⁵ issued guidelines with regard to manner of collection of evidence in pre-sentencing herein. The Court held as follows:-

“227. To do this, the trial court must elicit information from the accused and the state, both. The state, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh. Even for the other factors of (3) and (4) - an onus placed squarely on the state - conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

228. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

- a) Age***
- b) Early family background (siblings, protection of parents, any history of violence or neglect)***
- c) Present family background (surviving family members, whether married, has children, etc.)***
- d) Type and level of education***

¹⁵ 2022 SCC OnLine SC 677

- e) Socio-economic background (including conditions of poverty or deprivation, if any)***
- f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)***
- g) Income and the kind of employment (whether none, or temporary or permanent etc);***
- h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.***

229. This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

230. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e., probation and welfare officer, superintendent of jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be - a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for an more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any."

Pursuant to such direction this Court directed psychological and psychiatric evaluation of the appellant through a forensic psychiatry. Unfortunately, due to non-availability of any consultant specialized in forensic science available in the service of Department of West Bengal, the convict had to be sent to National Institute of Mental Health and Neuro Sciences, Bangaluru for assessment. This Court requested the consultant attached to the aforesaid institute to have a psychiatric/psychological assessment of the appellant with special emphasis on any existing or prior mental illness of the prisoner, propensity to commit crime in future, possibility of his rehabilitation/ reintegration in society.

Pursuant to such direction report has been filed by the medical board. In the report, the board was unable to make any comment with regard to the mental illness of the convict at the time of commission of offence. It however observed that the convict is presently not suffering from medical illness and his propensity to crime is mild. Report obtained from the correctional home also shows the conduct of the convict towards other inmates and correctional home authority is satisfactory. He had been released on parole to attend the last rites of his deceased mother. His conduct during parole was also satisfactory. The reports from NIMHANS and the correctional home show there is good possibility of the appellant being reformed and rehabilitated. His propensity to crime is mild. In ***Gudda vs. State of M.P.***¹⁶ (case involving murder of three persons including a pregnant lady and young child) and ***Ram Pal vs. State of U.P.***¹⁷ (death of 21 persons) the Apex Court held number of deaths cannot be the sole criteria for awarding maximum sentence of death.

Evidence has come on record appellant suffered from a history of mental illness. He had been kept in a dargah for 40 days for rehabilitation. He suspected his wife had an affair with his brother-in-law, Md. Firoz. Labouring under such disillusion, he murdered his own children. In ***Manoj Suryavanshi vs. State of Chhattisgarh***¹⁸ the Apex Court held the accused who had murdered three minor children under extreme mental depression as his wife had ran away with their uncle was

¹⁶ (2013) 16 SCC 596

¹⁷ (2003) 7 SCC 141

¹⁸ (2020) 4 SCC 451

a mitigating circumstance which justifies alteration of sentence of death to life without remission for 25 years.

Similarly in ***Vijay Kumar vs. State of Jammu & Kashmir***¹⁹ murder of three children of the sister-in-law who was preventing the wife of the appellant to return to him was not a rarest of rare case justifying the death penalty remission. In ***Brajendrasingh vs. State of Madhya Pradesh***²⁰ appellant suspecting his wife having illicit relationship with the neighbour, killed her and their three young children. Subsequently, he attempted to commit suicide. This was considered as a mitigating circumstance to convert death sentence to life. Appellant suspected the fidelity of his wife. Out of suspicion, he committed the murders. Subsequently, out of remorse he had attempted to commit suicide. In ***Santosh Kumar Satishbhushan Barriyar vs. State of Maharashtra***²¹ the Apex Court pre-sentencing procedure in death jurisprudence requires comparative analysis of the facts of the case with earlier precedents. Without compromising on the discretionary latitude of individualist sentencing, such practice would eschew the vice of arbitrariness. The aforesaid cited cases show multiple murders of children including one's own by an accused when labouring under suspicion of infidelity may not be treated as 'rarest of rare' crimes justifying death penalty.

In the present case, appellant was suffering from prior mental illness. He suspected his wife's fidelity and the paternity of his children.

¹⁹ (2019) 12 SCC 791

²⁰ (2012) 4 SCC 289

²¹ (2009) 6 SCC 498

Owing to his weak mental condition he may have impulsively committed the crime. Trial Court failed to appreciate the aforesaid circumstance pertaining to the appellant and incorrectly came to the conclusion that the offence was a pre-ordained, cold blooded murder. Evidence relating to unstable mental history and the suspicion of the appellant with regard to his wife's fidelity may have impaired his value judgment and impulsively driven him to crime. He is certainly not a hardened criminal who cannot be reformed or rehabilitated.

In view of the aforesaid discussion, I am inclined to convert the sentence of death imposed on the appellant to one of rigorous life imprisonment without remission for 25 years and pay a fine of Rs. 10,000/-, in default, to suffer imprisonment for one year more.

Death Reference No. 8 of 2016 and Criminal Appeal No. 312 of 2017 are accordingly disposed of.

The period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

PA (Sohel/Sourav)