

## **HIGH COURT OF ORISSA : CUTTACK**

**DSREF No.1 of 2010**

**A n d**

**CRLA No.133 of 2010**

From the judgment and order dated 23.02.2010 passed by Shri S.K.Paty, Addl. Sessions Judge, Kuchinda in S.T. Case No.3 of 2009.

**DSREF No.1 of 2010**

State of Orissa

Versus.

Arjun Teli ..... Accused

For State : Addl. Government Advocate

For accused : M/s. Bijaya Kumar Ragada,  
Laxmi Narayan Patel,  
N.K.Das and D. Sethi.

**CRLA No.133 of 2010**

Arjun Teli ..... Appellant

Versus.

State of Orissa ..... Respondent

For Appellant : M/s. Bijaya Kumar Ragada,  
Laxmi Narayan Patel,  
N.K.Das and D. Sethi.

For Respondent : Addl. Government Advocate

**PRESENT**

**THE HON'BLE SHRI JUSTICE PRADIP MOHANTY**

**A N D**

**THE HON'BLE SHRI JUSTICE B.K.NAYAK**

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***Date of hearing : 25.06.2010 : Date of judgment: 25.08.2010***

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**B.K.NAYAK, J.** The learned Additional Sessions Judge, Kuchinda having found the accused guilty of offences under Sections 302/376/511 of the

I.P.C. and sentencing him to death under Section 302 of the I.P.C. and rigorous imprisonment for ten years and fine of Rs.10,000/-, in default, further rigorous imprisonment for one year under Sections 376/511 of the I.P.C. has submitted the proceedings in S.T. Case No.3 of 2009 of his Court for confirmation. The convict has also filed Criminal Appeal No.133 of 2010 challenging the aforesaid order of conviction and sentence. Therefore, both the Death Reference and the criminal appeal were heard together and being disposed of by this common judgment.

2. The prosecution case is depicted as under:

The accused is the brother-in-law (sala) of the younger brother of the husband of the informant, Shanti Raksa. In the afternoon of 24.4.2008 the informant, Shanti Raksa along with Dharanidhar Sandha (P.W.5) was watering Chilli plants in the field. At about 5.30 P.M., the accused came to the field, offered to take Arpita, the five years old daughter of the informant, for giving her biscuits. Arpita was then playing in the field near her mother. Neither the informant nor Arpita agreed to the proposal of the accused. Without heeding to their objections, the accused took Arpita with him and went away. Since Arpita did not return home till evening, the informant along with her brother-in-law, Sambaru started searching for Arpita. When she found the accused and asked him about Arpita, the accused gave out that he had left Arpita near the 'Nala' and then he went towards the Railway Station, further stating that he was going in search of Arpita. The informant informed the matter to some of the villagers and they all went

in search of the accused. At Bamra Railway station they found the accused and from there they brought him to village-Pandripathar where the accused had fed biscuits to Arpita. In the village, it was learnt from Tulasi Munda that the accused had gone to her house with a young girl and asked for water and she supplied water whereafter the accused and the girl went towards the cultivable lands. Thereafter the search party went towards the cultivable lands along with the accused and found some blood stains there. The dress and hair of Arpita were lying scattered on the cultivable lands. The belt of the accused was also found lying there. Then on being asked, the accused confessed to have committed murder of Arpita. A further search being made, the dead body of Arpita was found lying near a 'Falsa' bush on the land of Sambaru Munda. Two of the villagers kept guard on the dead body and the informant went, got an F.I.R. scribed and lodged the same at the Police Station, on the basis of which the O.I.C., Govindpur Police Station registered P.S.Case No.33 of 2008 and took up investigation. During the course of investigation, the I.O. examined the informant, sent requisition to Sambalpur for deputation of Scientific Officer, proceeded to the spot and found the dead body of Arpita having injuries and also other incriminating materials lying in the field. The I.O. brought the accused to the police station and sent him for his medical examination. He also conducted inquest on the dead body of the deceased and thereafter sent the body for post mortem examination. He seized different incriminating materials including the belt of the accused

which were lying on the spot. About a month after the occurrence the O.I.C. of the Police Station having been transferred, the investigation of the case was taken over by his successor, Mr. B.P. Panda, who on completion of investigation submitted charge-sheet against the accused.

3. The plea of the accused is one of denial simplicitor.

4. In order to establish the charges against the accused-appellant, the prosecution examined 14 witnesses. P.W.2 is the informant, who is also the mother of the deceased. P.W.3 is the younger brother of the husband of the informant and also the brother-in-law (Bhinoi) of the accused. P.W.5 is the person, who was present with P.W.2 in the field when the accused took Arpita with him. P.W.6 is Tulasi Munda of Pandripathar, who had given water to the accused and the girl in the evening of the occurrence. P.W.8 is a Shopkeeper of Pandripathar, who had sold biscuits to the accused, who had gone to the shop along with the girl in the fateful evening. P.W.7 is the co-villager of the informant, who had seen the accused with Arpita near the shop of P.W.8. P.Ws.1, 4 and 11 are post occurrence witnesses, who helped the informant in searching out the accused and detecting the offence. P.W.11 is also the scribe of the F.I.R. P.W.9 is the Grama Rakhi to whom soon after the occurrence the accused informed to have committed the murder of a person. P.Ws. 10 and 13 are two seizure witnesses. P.W.12 is the doctor, who conducted autopsy over the body of the deceased. P.W.14 is the Investigating Officer. The prosecution also proved several documents including post-mortem report, medical

reports, seizure lists, chemical examination report and also some incriminating material objects.

The accused did not lead any evidence in his defence.

5. The fact that the death of the deceased girl is homicidal in nature is neither disputed nor challenged by the appellant. From the testimony of prosecution witnesses including P.W.2, the informant, it reveals that they found the dead body of the deceased in the night of the occurrence in the cultivable lands with several injuries on her person and her wearing apparels were also lying scattered. P.W.12, the Medical Officer, who conducted post-mortem examination of the deceased on the next day, found multiple abrasions and lacerations on the face, swelling on the left side of the head and the face with bleeding injuries, laceration and nail scratches on the middle and both sides of the neck, multiple abrasions over the front upper part of the chest. Those apart, there was also fracture of the left arm above the elbow, fracture of left temporal bone and fracture of left and right parietal bone. On dissection the scalp was found swollen due to haematoma on the left side. Membrane was ruptured at various places inside the skull. Brain had been lacerated with haematoma inside it. The cause of death of the deceased, as per evidence of P.W.12 and the post-mortem report Ext.7, was due to shock and brain haemorrhage caused by hard blows by rough and hard object with asphyxia due to throttling. Although P.W.12 has not mentioned in the post-mortem report whether the injuries were ante-mortem or post-mortem and whether the death is homicidal or

suicidal in nature, he has explained in his cross-examination that the haematoma on the skull bone i.e., on the left temporal region and the other haematoma suggest that they were ante-mortem in nature and number of skull injuries suggest that it could not have been a suicidal death. Keeping in view the number and nature of injuries found on the body of the deceased, which were ante-mortem in nature, and the cause of the resultant death, there can not be any room for doubt that the deceased died a homicidal death. The learned counsel for the appellant has rightly not challenged this aspect.

6. With regard to the question whether the appellant committed the murder of the deceased, it is seen that there is no direct evidence and the entire prosecution case is based on circumstantial evidence. In order to hold the appellant guilty of the offence of murder, the trial court, on the basis of evidence on record, has relied upon the following circumstances :

- (a) Deceased was last seen in the company of the appellant.*
- (b) Extra judicial confession of the appellant, once before P.W.9, the Grama Rakhi and the second time before other witnesses after detection of the dead body of the deceased.*
- (c) The conduct of the appellant in giving a false statement as to whereabouts of the deceased and soon thereafter trying to abscond.*
- (d) Recovery of the belt of the accused from the spot where the dead body was found.*
- (e) Blood stains found on the aforesaid belt and that found on the trouser of the accused, which was seized from the appellant, matching with blood group of the deceased.*

With regard to the proof of guilt of the appellant for the offences under Sections 376/511 of the I.P.C., the trial court has relied on the presence of one small scratch injury on the private part and the multiple small abrasions over the front upper part of the deceased, who was lying naked, and the recovery of the belt of the appellant from the spot.

7. In assailing the impugned judgment, the learned counsel for the appellant submits that with regard to last seen theory the evidence of P.Ws. 2 and 3 should not be believed as they are relations of the deceased and similarly the evidence of P.Ws.6 and 8 is of no relevance since they had not identified the girl, who was in the company of the appellant in the evening of the occurrence. It is further submitted that the confession said to have been made by the appellant for the first time before P.W.9 and for the second time before other witnesses cannot be relied upon as because P.W.9 is a Grama Rakhi and the confession before him is not admissible and that the second confession before other witnesses was the out come of coercion and assault on the appellant, who was under influence of liquor. It is his further submission that the presence of the blood stains on the belt and the trouser of the appellant does not incriminate him. The learned counsel for the appellant submits that the circumstances relied upon by the trial court for conviction under Sections 376/511 of the I.P.C. by no means unequivocally point to the guilt of the appellant for the offence.

The learned Additional Government Advocate contends that there is nothing on the record to suspect the credibility of the prosecution witnesses and that there is a complete chain of well proven circumstances which is fully consistent with the hypothesis that the appellant and no other is guilty.

8. The five golden principles otherwise known as the 'Panchsheel' with regard to proof of a case based on circumstantial evidence have been stated by the Apex Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra**: AIR 1984 SC 1622 are as follows :

- (i) *the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;*
- (ii) *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;*
- (iii) *the circumstances should be of a conclusive nature and tendency;*
- (iv) *they should exclude every possible hypothesis except the one to be proved; and*
- (v) *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.*



9. We have gone through the evidence on record carefully. P.W.2 is none other than the mother of the deceased girl, who is also the informant. She has stated in her evidence that while she and Dharanidhar Sandha (P.W.5), were working in chilli field and the deceased, Arpita and some other children were playing nearby, at about 5.30 P.M. the accused-appellant came there and offered to take the deceased to feed her biscuits. Though the deceased refused to go with the appellant and P.W.2 also protested, without paying any heed to their protest the appellant forcibly took the deceased with him and went away. On her return from the field in the evening, P.W.2 having not found the deceased in the house started searching for her. Although she failed to depose in the evidence in chief, in her cross-examination she has further stated that she found the appellant in the house of Sambaru Raksa (P.W.3) and on her query the appellant stated that he left the deceased near the 'Nala'. The appellant then went towards village-Pandripathar saying that he was going in search of the deceased. Evidence of P.W.2 further reveals that she having disclosed about the missing of the deceased, some co-villagers helped her in search. During the course of search it was learnt from P.W.9 in village- Pandripathar that the appellant had confessed before P.W.9 of having committed murder and then fled away towards Bamra Railway Station. P.W.2 and others went to Bamra Railway Station and finding the appellant sleeping on platform no.1, they woke him up and brought him to Pandripathar where it was learnt that he had gone with the deceased to

the shop of P.W.8 where from he had purchased biscuits and then he along with the deceased drank water from P.W.6. It was learnt from P.W.6 that after drinking water the appellant took the girl and went towards the cultivable lands. In course of search in the cultivable lands, P.W.2 and others detected the shirt (torn) and the pant of the deceased, belt of the appellant and some blood stains on the cultivable land. A little distance away the dead body of the deceased was found lying near a Falsabuda. Then, on being asked the appellant confessed to have killed the deceased. While two persons guarded the dead body, P.W.2 came, got the F.I.R. scribed by P.W.11, and lodged the same before the O.I.C., Govindpur Police Station in the same night. P.W.2 has proved her F.I.R., Ext.1. It is also in evidence that the police conducted inquest over the dead body of the deceased and prepared the inquest report, Ext.2. She also during the course of evidence identified the torn pieces of shirt of the deceased as M.Os. I & II., pant of the deceased, M.O.III and the belt of the accused, M.O.IV. In her cross-examination P.W.2 has stated that she left the Chilli field at 6.30 P.M. on the date of occurrence and came back to her house and having not found the deceased in the house at 7.00 P.M. went in search of her. At about 9.00 P.M. P.W.2 and others detected the dead body of the deceased. She has also stated to have no enmity with the appellant and nothing has been suggested to her by the defence that she had any inimical relationship with the appellant. Admittedly, the appellant is the brother-in-law (Sala) of P.W.3, who is the younger brother of the husband of P.W.2. In other

words, the appellant is a relation of P.W.2 and without there being any inimical relationship between them, there is no reason for P.W.2 to falsely implicate the accused. It is very much clear from the evidence of P.W.2 that the gap between the time when the appellant took the deceased with him from the field and the time when the body of the deceased was detected is only about three and half hours.

The evidence of P.W.2 with regard to the appellant taking the victim with him for giving biscuits despite the refusal of P.W.2 and the deceased stands fully corroborated by P.W.5, who has testified that at about 4.00 P.M. on the date of occurrence, he accompanied P.W.2 and the deceased to the field of P.W.2 for watering chilli plants and while they were in field the appellant arrived and took away the deceased with him offering to give her biscuits without heeding to the protest of P.W.2 and the deceased. It is also in his evidence that he is one of the co-villagers, who went with P.W.2 in search of the deceased and having learnt in village- Pandripathar that the appellant was at the Bamra Railway Station, they went to the Station and found the appellant sleeping there. They brought the appellant with them to village- Pandripathar where they learnt from the wife of Shibu Munda that accused had administered water to the deceased at her house and had gone towards the cultivable lands. The search party went to the cultivable lands and detected the dress of the girl in torn condition and thereafter detected the dead body of the deceased. In his cross-examination, P.W.5 has further explained that they detected the

appellant at the Railway Station at about 8.00 P.M. and discovered the dead body of the deceased at 8.30 P.M. Nothing has been brought out in the cross-examination of P.W.5 to impeach his credibility. Evidence of P.W.3, who is the younger brother of the husband of P.W.2 and the brother-in-law (Bhinoi) of the appellant, and the evidence of P.W.1 also clearly supports the prosecution case that they along with P.W.2 and others went in search of the deceased in the evening and brought the appellant from the Railway Station and having learnt in village-Pandripathar from P.W.6 that the appellant after administering water to the deceased had gone towards the cultivable lands with her, they searched and discovered the dead body and other incriminating materials on the cultivable lands. The evidence of P.Ws. 1 and 3 on the above aspect is quite clear and cogent. This aspect of the prosecution case has also been supported by P.Ws. 4 and 11. The evidence of these P.Ws. and that of P.Ws. 2 and 5 is quite clear and cogent, except some minor discrepancies about the time of discovery of the dead body and about the condition of the appellant when he was found at the Railway Station. P.W.3 has stated that dead body of the deceased was detected at about 8.30 P.M., though he has subsequently explained that he cannot say the exact time. Whereas the evidence of P.W.2 shows that the dead body was detected at about 9.00 P.M. Similarly, some witnesses say that the appellant was drunk when he was found at the Railway Station, which is not supported by others. Some of these witnesses have not at all spoken about the time of detection of the

dead body of the deceased. The witnesses are rustic villagers and, therefore, it is quite natural that they cannot speak about exact time and there is likely to be some discrepancy in their evidence. However, the aforesaid discrepancies are quite minor and insignificant and do not in any way impeach the credibility of the witnesses.

10. P.W.8 is a shopkeeper of village- Pandripathar. As per his testimony, the appellant came to his shop on the date of occurrence at about 6.00 P.M. along with a girl and purchased biscuits. His cross-examination reveals that village-Mitupada, i.e., the village of the deceased is about half a kilometre from his village. Not even a suggestion was given to him that the accused and the girl did not come to his shop. Evidence of P.W.7, who is a co-villager of the deceased, corroborates the evidence of P.W.8 to the extent that he had seen the appellant and the deceased standing in front of the shop of P.W.8. His evidence totally goes unchallenged. P.W.6 is the wife of Shibu Munda of village- Pandripathar who deposed that in the evening hours of the date of occurrence the accused along with a girl reached near her house and asked for water and that she supplied water where after the appellant and the girl went on the route towards the cultivable lands. It is also in her evidence that later on being asked by P.W.2 she narrated such facts to her. In her cross-examination, she stated that it was slightly dark when she supplied water to the appellant. The evidence of this witness has also not at all been challenged by the defence, for which there is no reason at all to doubt the veracity of P.Ws.6, 7 and 8. Learned counsel

for the appellant submits that as P.Ws. 6 and 8 only stated that a girl was with the appellant and they have not stated that the girl was the deceased, their evidence does not prove that the deceased was in the company of the appellant at that time. P.Ws.6 and 8 are of a different village than that of the deceased. Therefore, they had no occasion to know the identity of the small girl who was with the appellant in the evening of occurrence. But the fact remains that P.W.7, who is a co-villager of the deceased and knew her, has stated that the appellant and the deceased were present in front of the shop of P.W.8. So, the girl, who was seen in the company of the appellant by P.Ws. 6 and 8, was none other than the deceased. Therefore, the contention of the learned counsel for the appellant is of no substance.

11. The evidence of the prosecution witnesses as discussed above makes it crystal clear that the deceased was last seen in the company of the appellant before her death. Learned counsel for the appellant placed reliance on a decision of this Court in the case of **Jagata Singh v. State:** (1997) 13 OCR-245 where the court did not accept the last seen theory as an incriminating circumstance inasmuch as there was a long time gap between the deceased having been last seen in the company of the accused and the time of discovery of the dead body of the deceased for which the possibility of any other person coming in between could not be ruled out. That decision will have no application in the present case, since the deceased was taken away by the appellant at about 5.30 P.M. and her dead body was discovered

between 8.30 to 9.00 P.M. on the same day and in between the deceased was also seen in the company of the appellant by P.Ws.6, 7 and 8, which was shortly before the discovery of the dead body of the deceased and, therefore, possibility of any other person coming in between and committing the murder of the deceased must be ruled out.

12. With regard to extra judicial confession it is in the evidence of P.W.9, who is the Grama Rakhi of village- Pandripathar, that at about 8.00 P.M. the appellant came to his house and informed him that he had committed murder of a person and that he was going to the Railway Station so that he could flee away. It is further stated by P.W.9 that he did not give much importance to such confession as the appellant was slightly drunk. It is also in his evidence that shortly thereafter P.W.2 and others came to his house and he informed them that the accused had gone away to the Railway Station. The prosecution also relied upon a second confession of the appellant which he made on the agricultural land after the dead body of the deceased was detected. Evidence to such confession comes from the mouths of P.Ws.1 to 4 and 11. However, it is also there in the evidence of P.Ws.1 and 4 that when they brought the appellant from Bamra Railway Station, where they found him, and when the appellant made confession, he was under influence of liquor. It is also admitted by P.W.4 in his cross-examination that the accused confessed his guilt after he was slightly assaulted by his family members. The Apex Court in the case of **C.K. Raveendran v. State of Kerala**: (2000) 18 OCR (SC) 233 have held that confession made by the

accused after consuming liquor cannot be said to be voluntary and, therefore, cannot be relied upon. Since in the instant case, the appellant while making confessions on both occasions was in drunken condition and also the second confession was made after he was slightly assaulted, we are not inclined to accept the confession as a reliable piece of evidence.

13. It is seen that at different stages, the appellant has misrepresented and given false statement as to whereabouts of the deceased. It is in the evidence of P.W.3, who is brother-in-law of the appellant, that after he was informed by P.W.2 that the appellant took away the deceased from the Chilli field and had not returned back with her, the appellant came to his house and on enquiry by him the appellant replied that he came back with the deceased and that the deceased might have gone towards the village. P.W.2 in her cross-examination has stated that after returning home from the Chilli field in the evening she saw the appellant in the house of P.W.3 and enquired from him as to the whereabouts of the deceased and that the appellant replied that he left the deceased near 'Nala' and then the appellant fled away towards Pandripathar saying that he was going in search of the deceased. This evidence of P.W.2 finds corroboration from the F.I.R. (Ext.1). The subsequent conduct of the appellant in fleeing away to the Railway Station without joining the P.Ws. in the search of the deceased makes it amply clear that he made deliberate false statement as to whereabouts of the deceased. The appellant is the uncle of the



deceased, who was only aged about five years. He took her away from the custody of her mother and, therefore, it was his bounden duty to return the child to the custody of her mother or to any other family members. In stead of doing that, he gave different statements to the witnesses as to the whereabouts of the deceased. The appellant must be held to have resorted to deliberate falsehood in making such discrepant statements. Although, he went away saying that he was going in search of the deceased, in fact he went away to the Railway Station in order to flee from justice. Though evidence of P.W.9 with regard to the confession made by the appellant before him is not acceptable as being not voluntary, there is no reason why the statement of the appellant before him that he was going to the Railway Station in order to flee away shall not be believed. Such evidence rather inspires more confidence as because it is on the basis of this information given by P.W.9, the other P.Ws. went to the Railway Station and found the appellant there. The conduct of the appellant giving different false statements to different persons as to whereabouts of the deceased and thereafter trying to flee away is a strong incriminating circumstance against him.

14. Another strong and clinching circumstance is the recovery of the blood stained belt of the accused from the spot where the dead body was found and the seizure of his trouser stained with blood and such blood stains matching with blood group of the deceased. It is in the evidence of P.W.2 that in the cultivable land they found the torn shirt

and pant of the deceased and the belt of the appellant all of which had marks of blood. The belt of the appellant has been identified in court as M.O.IV. It is in the evidence of the I.O. (P.W.14) that after reaching the spot he requisitioned the services of Scientific Officer from District Forensic Science Laboratory, Sambalpur. Scientific Officer came to the spot, collected the aforesaid articles from the spot, prepared separate sealed packets and handed over the same to P.W.14, who seized the same under seizure list Ext.3. P.W.2 has stated in her evidence that she had seen the accused putting on belt (M.O.IV). No question has been put to her about the identification of the belt, nor any suggestion was given that the M.O.IV was not recovered from the spot. P.W.3 has also stated in his evidence that on the spot they found the belt of the accused lying, apart from the wearing apparels of the deceased. In the cross-examination, he has further explained that he had seen the appellant putting on that belt on earlier occasion. No suggestion was given to him by the defence that the belt was not recovered from the spot or that it did not belong to the appellant. P.W.3 is none other than the brother-in-law (Bhinoi) of the appellant and there is no reason for him to implicate the appellant falsely. P.W.4 also corroborates the evidence of P.Ws.2, 3 and 14 about the recovery of the belt from the spot, though he has not stated whose belt it was. Apart from the wearing apparels of the deceased (M.Os. I to III), the belt had also contained blood stains. Under Ext.13, i.e., the forwarding report of the S.D.J.M., all the incriminating articles along with the trouser of the

appellant having stains of blood and seized under Ext.12 by P.W.14 were sent to the Regional Forensic Science Laboratory, Sambalpur for chemical examination. The chemical examination report vide Ext.14 reveals that the trouser of the appellant contained human blood of 'O' group and the belt also contained human blood stains, though its group could not be opined. The deceased had 'O' group blood which was also found on her wearing apparels recovered from the spot. The blood group of the appellant is 'B-positive' as revealed from his medical examination report under Ext.6. There is no reason to disbelieve the evidence of the witnesses and the documentary evidence as referred to above. No explanation has come forward from the appellant about the presence of stains of human blood on his belt and trouser, which, having regard to the circumstances, must be held to be that of the deceased. Therefore, the recovery of the belt of the appellant from the spot with stains of human blood and the blood stains on the trouser of the appellant matching with the blood group of the deceased and not that of the appellant are strong circumstances which are unequivocally consistent only with the hypothesis of the guilt of the accused with regard to the commission of murder of the deceased.

15. Even if the extra judicial confession of the appellant is disbelieved, the other circumstances as seen above have been fully established forming a complete chain which is consistent with the hypothesis that it was the accused and none else who committed murder of the deceased. Learned counsel for the appellant has relied

upon the decision of the Apex Court in the case of **Jaharlal Das v. State of Orissa**: (1991) 4 OCR (SC) 278 and contended that in similar circumstances in that case, the Apex Court held the accused not guilty. On going through the said decision, it is found that the Apex Court disbelieved the prosecution story as because there were several suspicious features in the prosecution case. There the F.I.R. was lodged prior to detection of the dead body of the deceased on the basis of disclosure made by the accused, but there was mention in the F.I.R. about such disclosure. The Apex Court also disbelieved the evidence with regard to the last seen theory and also the discovery of the dead body at the instance of the accused. The decision is, therefore, not applicable to the facts and circumstances of the present case, where the circumstantial evidences have been fully established beyond reasonable doubt pointing only to the guilt of the accused. On the contrary, the facts of the present case are very much similar to the case of **Laxman Naik v. State of Orissa**: (1994) 3 SCC 381 which was a case of rape and murder of a seven years old girl by one of her agnates. In that case, relying upon the circumstances of last seen together, misrepresentation or intentional and false statement of the accused as to whereabouts of the deceased and seizure of incriminating articles, which were fully established, the Apex Court held the accused guilty.

We are therefore of the considered view that the trial court has rightly convicted the appellant under Section 302 of the I.P.C.

16. With regard to charge of attempted rape, the medical evidence is quite material. Referring to his report vide Ext.5, P.W.12 (doctor) has stated in his evidence that on examination he found no sign or symptom of sexual assault on the deceased except a small scratch on the lateral aspect of the vagina. The doctor also examined the appellant medically at 8.15 A.M. on the next day of the occurrence and found no injury on his private part or any other carnal injury and no sign and symptom of recent sexual intercourse by the appellant. The trial court has found the accused-appellant guilty under Sections 376/511 of the I.P.C. relying on the presence of the small scratch injury on the private part and some abrasion on the chest of the deceased, who was lying naked. It is seen that there are more serious injuries on the head, neck and hands of the deceased, apart from abrasions on the chest. It was hardly possible on the part of a five year old girl to resist an able bodied adult male, if the latter wanted to commit rape on her. Possibility of tearing and removal of wearing apparels of the deceased from her body and a small scratch on the private part and some abrasion on the chest in the process of tussle while the appellant was in the process of inflicting injuries to cause death cannot be ruled out. Therefore, it cannot be said that these circumstances prove beyond reasonable doubt that the appellant attempted to commit rape on the deceased. The conviction of the appellant under Sections 376/511 of the I.P.C. cannot therefore, be sustained and we accordingly set aside the said conviction and the punishment imposed for such offences.

17. Now, the question is whether for the appellant's conviction under Section 302 of the I.P.C. death sentence is called for ?

It is trite law that in order to impose death penalty, the crime must fall into the category of rarest of rare cases. If life imprisonment is the rule, the death sentence is the exception and that death sentence must be imposed only when life imprisonment appears to be altogether inadequate punishment having regard to the relevant circumstances of the crime. In the case of **Bachan Singh v. State of Punjab**: AIR 1980 SC 898, it has been observed that in a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist for imposition of death sentence.

The trial court, as it appears, was quite aware of the aforesaid proposition but it has observed that in the attending circumstances if such crime is not dealt with pragmatic approach, the mental condition of this backward society will not improve and that the convict has committed a barbaric and heinous crime without any provocation which adumbrates his depraved character.

Keeping in view the principles as cited above, we find that in the instant case, the motive for the crime was quite obscure and the killing was not for any gain. Even though the assault has been brutal and on the helpless child, it cannot be said that it is one of those rarest of the rare cases where the extreme penalty of death should be

awarded. Therefore, we set aside the punishment of death imposed on the appellant for his conviction under Section 302 of the I.P.C. and instead impose on him the alternative punishment of imprisonment for life. The reference made by the learned Additional Sessions Judge under Section 366 of the Code of Criminal Procedure is accordingly discharged and the criminal appeal filed by the appellant is partly allowed.

The death reference and criminal appeal are accordingly disposed of.

.....  
**B.K.Nayak,J.**

**Pradip Mohanty, J.** I agree.

.....  
**Pradip Mohanty, J.**

*Orissa High Court, Cuttack*  
*The 25<sup>th</sup>.August, 2010/Gbs*