

(2005) 08 AHC CK 0199

**Allahabad High Court****Case No:** Criminal (Capital) Appeal No. 3186 of 2004 Connected with Reference No. 13 of 2004

Jay Prakash

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Aug. 29, 2005**Acts Referred:**

- Constitution of India, 1950 - Article 14, 20(3)
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313, 366
- Evidence Act, 1872 - Section 106, 24, 25, 26, 27
- Penal Code, 1860 (IPC) - Section 201, 302, 364

**Citation:** (2005) CriLJ 235**Hon'ble Judges:** Imtiyaz Murtaza, J; Amar Saran, J**Bench:** Division Bench**Advocate:** Gopal S. Chaturvedi and Samit Gopal, for the Appellant; A.G.A., for the Respondent

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**Judgement**

Amar Saran, J.

The appellant Jay Prakash and co-accused Smt. Rajesh were charged u/s 302 IPC for having committed the murders of the appellant's wife Smt. Guddi by strangulating her and the appellant's children, Gaurav and Km. Monika, by drowning them in a well. The two co-accused were also charged u/s 201 IPC for having concealed the dead body of Smt. Guddi in a haystack in a room in the appellant's house and for concealing the dead bodies of Gaurav and Monika in the well. The appellant Jay Prakash was sentenced to death u/s 302 IPC by the I Additional Sessions Judge, Bagpat. However, co-accused Smt. Rajesh was given benefit of doubt as apart from an allegation of having a motive to murder the deceased along with Jay Prakash there was no other evidence against her on record. She was living in a separate house from the deceased and Jay Prakash. On the night of incident no one had seen or heard Smt. Rajesh in the vicinity of the incident. No dead bodies had been

recovered on her information or pointing out. Both the co-accused persons were acquitted on the charge u/s 201 IPC, as Guddi's dead body was lying in the house itself, and the children's bodies had been recovered from a well, and there was no material to substantiate the charge that the accused had made any effort to conceal the evidence. The present criminal appeal and criminal reference u/s 366 Cr.P.C. for confirmation of the sentence of death arise from the aforesaid judgment of the learned Sessions Judge, Baghpat, dated 5.6.2004.

2. An FIR was lodged by Ramvir, father of the deceased, Smt. Guddi, at PS Balaini, alleging that his daughter Guddi had been married to the appellant Jay Prakash 12 years earlier. The appellant was involved in wrong doings, which were resented by Guddi. The informant and others also tried to check the appellant but to no avail. On 26.8.2000 information was received by Ramvir in the morning that Jay Prakash had throttled Guddi in the night and committed her murder and that Guddi's daughter, Monika, aged 10 years, and son Gaurav, aged 7 years, were absent from the house. It appeared that Jay Prakash with the help of some others had also murdered the children and hidden them somewhere. Many villagers were present near the dead body of Guddi in the village. On the basis of the information furnished by Ramvir, an FIR was registered under Sections 302 and 364 IPC against the appellant by Head Moharrir Sukhvir Singh, PW 8, on 26.8.2000 at 7.35 a.m. The report was lodged in the presence of PW 9, SI, Digambar Singh, SHO, PS Balaini, who commenced investigation in the case. He took down the statements of the witnesses concerned with the preparation of the report and inspected the site after reaching there and prepared the site-plan (Ext. Ka-12). He conducted inquest on the dead body of Smt. Guddi (Ext. Ka-13) and duly sent the dead body for postmortem. He also effected the arrest of the appellant Jay Prakash on the same day with the aid of Sri Preetam Singh, PW 6, SO of PS Aminnagar Sarai. He recorded the confessional statement of the appellant Jay Prakash and on the pointing out of Jay Prakash, in the presence of other members of the appellant's family and the public and with the help of SO Preetam Singh, he got the dead bodies of Monika and Gaurav recovered from a well. The recovery memos of the dead bodies (Ext Ka 4) were scribed by SI Moti Singh on his dictation. SI Moti Singh also prepared the inquest papers of the bodies of Monika and Gaurav and sent the same for postmortem. A site-plan (Ext. Ka-14) of the place of recovery of the dead bodies of Monika and Gaurav were also prepared by SI Digambar Singh, PW 9.

3. Postmortems were conducted on the bodies of Smt. Guddi, Master Gaurav and Km. Monika on 26.8.2000 at 5 pm, 5.30 pm and 6 pm, respectively, by Dr. P.K. Sharma, PW 3, Medical Officer, Upgraded PHC, Bagpat.

4. Dr. Sharma mentioned the probable age of Smt. Guddi to be 32 years and probable time since death as about % days. Rigor mortis was present all over and there was no decomposition of the body. Bleeding was present in the vagina, and no bleeding from any other orifice. He found the following ante mortem injuries:

1. Contusion - 3 1/2 cms x 2 cms below chin on right side, inside mandibular margins.
2. Abraded contusion - 6 cms x 3 1/2 cms in front of neck and nose on right side.
3. Contusion - 3 cms x 7 1/2 cms on left side below chin inside mandibular margins.
5. Internal examination revealed extravasation of blood underlying the skull. Larynx, trachea and bronchi were frothy and congested. Both the lungs were congested and air was coming out from the tissues on cut and the lungs floating in water. The cause of death was asphyxia due to airway obstruction with throttling.
6. On the postmortem examination of Master Gaurav, the doctor gave his probable age to be 7 years and probable time since death as about % day. Rigor Mortis was present all over, and decomposition was nil. There was no ante-mortem injury. Fine white lathery tenacious froth was coming out from the left nostril especially on pressing the chest. Both lungs were distended and pale, and on dissection frothy and bloody material came out. The larynx, trachea and bronchi showed white tenacious, froth which was coming out of the nose. There was blood-stained fluid in pericardium. The cause of death was asphyxia as a result of drowning.
7. On the postmortem of Km. Monika, the Dr. P.K. Sharma, PW 3 gave her probable aged to be 9 years and the probable time of death as about 3/4 day. Rigor mortis was present all over, with no decomposition. There was a contusion 2 cms x 1 cms on the left forehead. Also, white lathery tenacious froth was coming out from right nostril and on compression of chest water/fluid were coming out from mouth and nostril.
8. On internal examination larynx, trachea and bronchi showed white froth water/fluid etc. In the right and left lungs mucous membrane was congested and distended and pale and on incision, blood-stained fluid and water were coming out. There was water in the oesophagus and stomach. In the opinion of the doctor, death was caused due to asphyxia as a result of drowning.
9. After obtaining the postmortem report and completing his investigation and after recording statements of the witnesses u/s 161 Cr.P.C. the investigating officer PW 9, Digambar Singh, submitted charge-sheet before the CJM on 30.9.2000. The case was committed to the Court of Sessions by the CJM on 20.12.2000. The accused pleaded not guilty to the charges under Sections 302 and 364 IPC and claimed to be tried.
10. The prosecution has examined PW 1 Ramvir Singh, PW 2 Dharam Singh, PW 4 Ved Prakash, PW 5 Jai Singh, PW 7 Smt. Santara as witnesses of fact, and PW 3 Dr. P.K. Sharma, PW 6 SI Preetam Singh, PW 8 Head Constable Sukhbir Singh, PW 9 Digambar Singh and PW 10 Subhash Chandra as formal witnesses.
11. PW 1 Ramvir Singh is the father of Smt. Guddi and the informant of this case. He deposed that Jai Prakasah was married to Guddi 13-14 years back. His son-in-law was a bad character who had illicit relations with his aunt, co-accused Smt. Rajesh.

About 2 to 21/2 years earlier his daughter had informed Ramvir about the illicit relations of her husband with Smt. Rajesh, but in spite of his advice Jay Prakash persisted in his wrong ways. On 25/26.8.2000 at about 6 a.m. Malkhan informed him that in the night Jay Prakash had murdered his daughter. Ramvir reached the house of Jay Prakash immediately at about 6.30/6.40 am that day where he found his daughter lying dead in the kotha of the house. Thereafter he proceeded to PS Balaini for lodging the report. Prior to this Jay Prakash, who was present in the house, told him that he had murdered Guddi as that would end the daily disputes between them. He also claims to have seen Guddi's dead body which bore marks of hanging. After he left for the police station Jay Prakash absconded. He got the report (Ext. Ka-1) written outside the police station by one Virendra. After lodging the report he went to Jay Prakash's house where he found the daughter of Jay Prakash and Smt. Guddi, aged 10 years and their son, Gaurav, aged 7 years, missing. PW 7, SO, Preetam Singh, got the bodies of the two children recovered from the well on the pointing out of the appellant Jay Prakash.

12. PW 2, Dharam Singh, a resident of village Habibpur Nagla, who accompanied Ramvir to the house of Jay Prakash in village Burhsaini, claims to have seen the dead body of Guddi lying in the house. He is also a witness of extra-judicial confession of Jay Prakash who is said to have stated that as Guddi used to quarrel everyday he murdered her. When Jay Prakash was asked about the children, he gave no reply and went away. He further deposed that thereafter the police arrived at about 9 a.m., caught hold of Jay Prakash, who disclosed at the police station in his presence that the dead bodies of the children were lying in the well. After that the police took Jay Prakash to the well and in the presence of this witness and a large gathering of the public Jay Prakash got the dead bodies of Monika and Gaurav taken out from the well through a well mechanic. The police prepared the memo of recoveries of the dead bodies (Ext. Ka-4) in his presence and obtained his signature on the same.

13. PW 4, Ved Prakash, who is a nephew by relation of the informant Ramvir and also a resident of village Habibpur Nagla deposed that Ramvir's daughter Guddi was married to Jay Prakash about 3 years back. He learnt in the morning in his village that Jay Prakash had murdered Guddi and his children with the aid of his aunt. At about 10.30 am when he was going on a motorcycle he met the police ahead of Sarai crossing. He inquired from the police about the whereabouts of the police and later accompanied the police to the ice factory. While he waited outside the ice factory, the police went inside the factory and brought out the appellant Jay Prakash who had an injury on his foot. The appellant did not make any disclosure at that stage, but he made a disclosure in the police station that he along with his aunt had strangled Guddi and thrown the two children alive into the well. The appellant also offered to get the children recovered at the police station. Thereafter the police took Jay Prakash with them and in the presence of many public persons and this witness, got the two dead bodies of the boy and the girl taken out from the well in Jay Prakash's field. He was also a signatory of the memo of arrest and recovery (Ext.

Ka-8).

14. PW 5 Sher Singh, another resident of village Habibpur Nagla deposed that on the fateful day at about 1 or 1.30 pm when he was going to village Shadepur, he learned that two grand children of his village Burhsaini had been thrown into a well. Thereafter, he reached the well where the police sent a man down and got the dead bodies of the two children recovered. The appellant Jay Prakash was already present there and the work of taking out the children had started before his arrival near the well.

15. PW 7, Smt. Santara, the mother of Guddi, a resident of village Habibpur Nagla, is a witness of motive. She deposed that her daughter Guddi was married to Jay Prakash of village Burhsaini. Initially the relations of Jay Prakash and Guddi were alright and the two children, Gaurav and Moni were born to them. Later the relations of Guddi and Jay Prakash became strained because Jay Prakash began having illicit relations with his aunt Rajesh and then he started troubling Guddi. Guddi had told her that when she tried to stop Jay Prakash from having relations with Rajesh, he would beat her and give threats that he would murder Guddi and their children. She had learned that Jay Prakash had murdered Guddi and the two children and thrown them into the well and that Smt Rajesh had a hand in this murder.

16. PW 3, Dr. P.K. Sharma, conducted the postmortems on the three dead bodies of Smt. Guddi, Km. Monika and Master Gaurav, as described above.

17. PW 6, SI Preetam Singh, who was posted as S.O., in the adjoining PS Aminnagar Sarai, deposed that he had reached the spot along with the other police personnel. SO Digambar Singh, of PS Balaini, was already present at the spot when he reached. The inquest on the dead body of Smt. Guddi was conducted by SO Digambar Singh. After that the appellant Jay Prakash was searched and on an information from an informer he was apprehended at the Barafkhana (ice factory) near Aminnagar Sarai bus stand at about 12.15 pm. In front of this witness and the public, Jay Prakash confessed to have murdered his wife Guddi and to have drowned his two children in the well in his fields and thereafter on his pointing out he got the dead bodies of the two children recovered from the well.

18. PW 8, HC Sukhvir Singh, who was posted as Head Moharrir at PS Balaini on 26.8.2000 at 7.30 a.m. prepared the chik report. Ramvir Singh, resident of village Nagla Habibpur arrived at the police station accompanied by Ramdas and Vijendra and on the basis of their report a case was registered at case Crime No. 86 of 2000 under Sections 302 and 364 IPC and a chik report was prepared (Ext. Ka-9). The GD entries (Ext. Ka 10), which was also in his hand, was also proved by this witness. He also proved the carbon copy of the GD of the report of SO Digambar Singh at 5.35 pm (Ext. Ka -11 and Ka-12) and pointed out that on 27.8.2000 at 12.10 pm the accused, Smt. Rajesh, was brought to the police station.

19. PW 9, SI Digambar Singh is the investigating officer of this case. The steps taken for investigation have already been described above. He also claimed to have recorded the statement of scribe of the FIR on 26.8.2000 and also the statements of the appellant Jay Prakash's uncle Rajvir and mother Smt. Bina and to have recorded the statements of Smt. Santara and Jaivir on 4.9.2000. On 15.9.2000 he recorded the statement of Mukesh, Durga Singh and Sher Singh. On 19.9.2000 he recorded the statement of the inquest witnesses and of the witnesses Ved Prakash, Ashok Pal, Dhanushvir and Dharamvir. On 20.9.2000 he recorded the statement of SO Preetam Singh. On 30.9.2000 he recorded the statement of SI Moti Singh and submitted the charge-sheet (Ext. Ka-15) as mentioned above.

20. PW 10, Constable Subhash Chandra, claims to have been posted at Baraut along with SI Moti Singh and he was familiar with the writing of SI Moti Singh. He proved the documents prepared by Moti Singh, which included photo lash (Ext. Ka-16), report of PS Balaini dated 26.8.2000 (Ext. Ka - 17), police form GD No. 54 at 5.30 pm dated 26.8.2000 (Ext. Ka-18), photo lash (Ext. Ka-19 and Ka-20) and police form (Ext. Ka-21). The accused in their statements u/s 313 Cr.P.C. denied all the prosecution allegation against them and the appellant Jay Prakash even deposed that he was given a beating and made to sign on the documents and false evidence had been concocted against him when he demanded return of his money which had been misappropriated by his in-laws. He had been arrested from his house and falsely challenged in this case. The accused also examined DW 1 Rajvir and DW 2 Surajpal in their defence.

21. DW 1 Rajvir resident of village Budhsaini deposed that on 25/26.8.2000 the peon Kalu Ram came to him at 5 am and disclosed that Guddi had committed suicide and, thereafter, he sent his car to Ramvir's house and to the police station. Ramvir and Kalu Ram travelled in this car but he himself did not accompany them. A letter had been found at the spot which mentioned that Guddi had committed suicide because her father owed 1½ lakh rupees to Jay Prakash. The letter also mentions that the children had been drowned in the tank behind the house. He claims to have given the letter to the investigating officer and to have disclosed these facts. His and his brother Mahipal's house was at a distance of 200 to 250 paces from the house of Jay Prakash. Jay Prakash had been picked up by the police from his house at about 7.30 to 8 am. There was no boundary wall in the barafkhana(ice factory). The police had taken signatures of this witness and his co-villagers on blank papers. The dead body of the children were sealed at about 9 or 10 am and were taken to the police station. He had supplied the cloth and had also gone to the police station. On 27.8.2000 this witness Rajvir, his wife Kamlesh and Rajesh were all interrogated by the police but he and Kamlesh were let off whilst Smt. Rajesh was challaned. The place where Guddi had died was in the portion of the house which was in the possession of Jay Prakash. In the partition between the brothers, Jay Prakash was to give Rs. 70,000/- to Mahipal whilst this witness Rajvir was to give Rs. 30,000/- to Mahipal. Jay Prakash used to give all his earning from driving the truck to the Sasural people and that was

the cause of partition in the family. Guddi had committed suicide. Ramvir had taken his buffalo. Dharamvir was the Sarhu of Ramvir and all the witnesses were relations. Jay Prakash had told him that the police were demanding Rs. 50,000/-.

22. DW 2, Suraj Pal, resident of village Budhsaini had deposed that Guddi and the two children of Jay Prakash had died on 26.8.2000 and when he reached the house of Jay Prakash at about 7 or 7.15 pm he found Jay Prakash's wife lying dead there. Others had also arrived. They found a paper near the dead body which he did not read which Rajvir, the uncle of Jay Prakash read and handed over to the police, which the police also read. The villagers had taken out the bodies from the well before the arrival of the police. The bodies were recovered from the tank which was 10 to 12 paces from the house of Jay Prakash. There was plenty of water in the tank which was about 9 bighas in area. The police had come at about 8 a.m. He had learnt that it was written in the letter that Guddi and her two children had committed suicide because her father had taken some money from Jay Prakash about 1 1/2 years ago. Only Jay Prakash resided in that portion of the house where Guddi's body was found. The police had taken his and Shyam Singh's signatures on blank paper. They had suggested that Guddi had committed suicide. Jay Prakash was present there. The police arrested Jay Prakash at about 9 am.

23. We have heard Sri Gopal Chaturvedi, learned Senior Advocate, for the appellant and the learned AGA for the State.

24. Initially it was contended by the learned counsel for the defence that on account of suspicion entertained by Smt. Guddi against her husband for having illicit relations with Smt. Rajesh, his aunt, Guddi appears to have thrown the two children, Monika and Gaurav, into the well in a fit of anger and, thereafter, she herself committed suicide. The postmortem report of Smt. Guddi indicated that her lungs were floating in water and there was hardly any reason for Jay Prakash to have murdered Smt. Guddi and none whatsoever for murdering his two little children aged 7 and 10 years respectively. The two children could also have died accidentally while playing by falling in the well. Furthermore learned counsel submitted that the sheet anchor of the prosecution case, i.e. the discoveries of the two children from the well at the pointing out of Jay Prakash and his confessional statement to the police and witnesses was inadmissible u/s 27 of the Evidence Act as the same was obtained as a result of torture, duress and third degree measures practised against him by the police, and the same would amount to testimonial compulsion which violated the Constitutional guarantee against self-incrimination under Article 20(3) of the Constitution of India. In this connection reliance was placed on the decision of [Dhoom Singh Vs. The State](#), wherein, in paragraph 27, this Court has observed that:

"(27) It would appear thereafter that the evidence of discovery of the dead body at the instance of the appellant is hit by the provisions of Article 20(3) of the Constitution. There does not, however, seem to be any necessity for laying that provision under Constitution, or of considering the effect of that provision or the

interpretation of Section 27 of the Evidence Act as contained in decisions like ILR 31 All 592 (FB) (A), since it appears to be possible to dispose of the evidence relating to the alleged discovery of the dead body of Ranbir at the instance of the appellant on a shorter ground. Irrespective of whether any such discovery is protected by Section 27 of the Evidence Act or whether it falls within the mischief of Article 20(3) of the Constitution, where facts disclosed point, as they clearly do in this case, to the accused having been subjected to third degree methods prior to the discovery, the genuineness of the discovery is rendered doubtful and the discovery becomes worthless as a piece of evidence. The reason behind the view that threat, promise and inducement are irrelevant for admissibility of evidence of discovery within the purview of Section 27, Evidence Act seems to be that discovery by itself is a guarantee of the genuineness of the discovery."

25. The postmortem examinations of the two children showed that there was white leathery tenacious froth coming out from their nostrils and on pressing of the chest wall, water emanated and froth and fluid were present in the larynx, trachea and bronchi, and in the opinion of the doctor the deaths could be due to asphyxia as a result of drowning. Hence the prosecution case that the two children died as a result of drowning is not assailable.

26. However, so far as Smt. Guddi was concerned, a close analysis of the postmortem report and the circumstances of the case rule out the possibility of her death being suicidal and only one inference can be arrived at, that her death was homicidal. Dr. P.K. Sharma, PW 3, who conducted the postmortem examination has opined that the cause of her death was asphyxia due to airway obstruction with throttling. Throttling is normally homicidal. Moreover, unlike the other two deceased Master Gaurav and Km. Monika, who have died as a result of drowning and not from any ante mortem injury, Dr. P.K. Sharma has found a contusion 3 1/2 cm x 2 cm below chin on right side inside the mandibular margins, an abraded contusion of the size of 6 cms x 3 1/2 cms in front of neck and nose on right side and another contusion of the size of 3 cms x 7 1/2 cms on left side below chin inside mandibular margins on the person of Smt. Guddi. There was also extravasation of blood underlying skull and blood in the lungs. These symptoms are not likely to arise if the death has been caused from drowning or hanging, which may possibly be suicidal. No doubt, in the description of the lungs it was mentioned that both were congested and air was coming out from the tissues on incision and the lungs were floating in water. But no suggestion has even been made to Dr. P.K. Sharma, PW 3, that the water was present near the lungs of Smt. Guddi because she had died due to drowning. No doubt at one point the doctor has mentioned in his examination-in-chief that the injury on the neck of Guddi could be the result of pressing the neck and that this was a case of suicide but he appears to have made this statement by mistake as on the very next line he mentions that in suicide the ligature mark is of a different kind. In his cross-examination the doctor has made it absolutely clear that Guddi's death was the result of throttling, and that the death



was not the result of hanging, as there was no ligature mark, but contusion marks on both sides of the neck, which are attributable to throttling. He further clarified that he had even mentioned in the postmortem report that this could not be a case of suicide and that by mistake he had stated in that one line that this could be a case of suicide. Therefore, the defence cannot make any capital from the noting in the postmortem report that the lungs were floating in water. In some diseases of the human body water is known to collect in the lungs. Moreover, it has not even been suggested anywhere to the witnesses that the body of Smt. Guddi was also recovered from the well similar to the bodies of Gaurav and Monika. From the stage of the FIR, the body of Smt. Guddi was shown to have been found in the house. The FIR was a natural and untutored document when it was lodged on 26.8.2000 at 7.35 am. This is apparent from the fact that the FIR does not even nominate the other accused of this case Smt. Rajesh and simply mentions that it appeared that Jay Prakash with the help of some others had murdered the children and hidden them whilst the dead body of Guddi was lying in the village at the place of incident. Ramvir Singh, PW 1, has also deposed that the body of Guddi was lying in the kotha in the house when he arrived there at 6 a.m. Likewise, PW 2, Dharam Singh, has also mentioned in his examination-in-chief that the body of Guddi was lying in the room of the house when he visited the place along with Ramvir and that the children were missing. The two defence witnesses, Rajvir and Surajpal, have admitted that the body of Smt. Guddi was lying in the house of Jay Prakash and even they did not set up the story that she had died as a result of drowning. There is no suggestion to any of the witnesses that Smt. Guddi died as a result of drowning but the suggestion, if any, is to the effect that Guddi committed suicide by hanging herself. But apart from this bald suggestion there is no circumstance to corroborate the allegation of suicide by hanging by Guddi. Also, the reason for suicide set up by the defence is that Guddi's father Ramvir owed Jay Prakash Rs. 1/2 lakh in respect of a loan from Jay Prakash, hence Guddi had committed suicide. This motive for suicide suggested by the defence is too big a pill to be swallowed and has only to be stated to be rejected. Because a father-in-law has taken some loan from his son-in-law can never provide any reason to his daughter to commit suicide. There is no suggestion even that there was any bickering between Jay Prakash and his father-in-law over any such loan. This version was sought to be buttressed by the so-called suicide letter which was supposed to be lying near Guddi's dead body, which has been deposed to by the two defence witnesses, DW 1 Rajvir, uncle of Jay Prakash and DW 2 Suraj Pal. This suicide note containing this unlikely story is quite clearly a concoction and the Sessions Judge has rightly attached no value to this note or to the defence suggestion that Guddi committed suicide because her father had taken a loan of Rs. 1,50,000/- from Jay Prakash.

27. In view of the circumstances delineated above if the death of Smt. Guddi is homicidal, then apart from the appellant, who was Guddi's husband with whom she resided, none else would have any interest in murdering her. In any case as this was

a circumstance especially within Jay Prakash's own knowledge, if he wished to adopt any defence or to suggest that someone else had caused the death of his wife, the burden lay on him u/s 106 of the Evidence Act to explain how she had been murdered. Nothing has been done by the appellant to discharge this burden. Some vague suggestions to PW 1 Ramvir, the informant, that Smt. Guddi was a bad character who developed illicit relations with some villagers taking advantage of Jay Prakash's absence, who may have murdered Guddi, are absolutely vague and unsubstantiated and cut no ice. There was absolutely no reason for Ramvir, the father of Guddi, and the other witnesses to nominate the appellant if he had no hand in her murder. In our opinion therefore the charge against the appellant for having committed the murder of Guddi stands proved beyond reasonable doubt.

28. However, so far as the seven and nine year old Gaurav and Monika were concerned in our view their deaths could not be accidental. It is not likely that the two children would fall into the well and drown, at the same time when their mother is murdered. No outsider could also be assumed to be interested in causing the deaths of the two children and their mother and it has not been suggested anywhere by the defence that any outsider could have caused the deaths of the two children for reasons of his own.

29. The problem that remains is that apparently there would be little reason either for the father Jay Prakash or the mother Smt. Guddi causing the deaths of their children by throwing them in the well. It is hard to stomach the idea that Jay Prakash would want to remove the two children only because he considered them thorns in his affair with Smt. Rajesh. What objection could the two little children raise about his liaison, if any, with Smt. Rajesh. Likewise, why would Smt. Guddi throw her own children in the well in a fit of anger to teach her husband a lesson for his affair with Smt. Rajesh. Sri Chaturvedi has argued that the evidence of discovery of the two dead bodies from the well on the pointing out of the appellant must be excluded from consideration u/s 27 of the Evidence Act, as the discovery was the result of torture and third degree measures adopted by the police against him. The argument is based on an admission of PW 1 Ramvir in his cross-examination, that when the police administered a beating to Jay Prakash the children were recovered and that the appellant had not disclosed this fact to him.

30. However, subsequently in his further cross-examination Ramvir states that the police had taken Jay Prakash from village Burhsaini, PS Balaini and that he did not know whether the police personnel gave a beating to Jay Prakash or not. He did not even know how the police had taken Jay Prakash to the police station, whether by jeep or on foot, as he had not accompanied them. He reached the police station only at about 3.30 pm. He was also not present when the police took Jay Prakash and got the dead bodies of the children recovered and he was not there at the time of recovery. Likewise, PW 2, Dharam Singh, who accompanied Ramvir to Jay Prakash's house only refers to the extra-judicial confession, and disclosure to the police about

the well where the dead bodies were lying and their subsequent retrieval by a well mechanic. However PW 2 Dharam Singh does not depose to any beating to Jay Prakash by the police. In his further cross-examination he states that he was sitting outside the police station whereas Jay Prakash was in a room in the police station. However to a pointed question in the cross-examination, he specifically denies any beating to Jay Prakash by the police, in the room where he was interrogated. There is no suggestion even to the effect that Jay Prakash had got the bodies recovered as a result of any beatings which were administered to him.

31. No doubt, Jay Prakash was medically examined on 27.8.2000 at 11.50 am by Dr. P.K. Sharma, PW 3, when he was brought by constables Kamal Kumar and Satvir for medical examination. He found one abraded contusion on the left ankle of the size 8 cms x 5 cms on inner side around at the medial malleolus and one contusion of the size of 2 cms x 2 cms on back of left elbow in upper half. In cross-examination Dr. P.K. Sharma stated that he had not asked Jay Prakash about the cause of his injuries. The injuries could not be the result of assault by dandas. He also denied that Jay Prakash had told him that he had been beaten by the police.

32. PW 4, Ved Prakash, in whose presence Jay Prakash was apprehended from the ice factory near the Aminnagar Sarai bus stand, has mentioned that at the time of his arrest Jay Prakash had an injury on his leg. He does not depose to any confession by Jay Prakash at the ice factory but he mentions that Jay Prakash confessed to the police at the police station that he along with his aunt had throttled Guddi and that they had thrown the children in the well and that he could get the children recovered. He has also clarified in his cross-examination that he was only 10 yards from where Jay Prakash was detained but he admits that in his confinement Jay Prakash was only interrogated and not given any beating by the investigating officer. No suggestion was given to this witness that Jay Prakash had confessed as a result of beating. Subsequently, PW 5 Sher Singh who arrived at the time when the bodies of the two children had already been taken out in the presence of Jay Prakash, has also not deposed to any beating of Jay Prakash for effecting the recovery. The only suggestion that has been made to this witness is that he has deposed falsely, and that in fact Guddi had committed suicide along with the children. In his statement u/s 313 Cr.P.C. in response to question No. 5, which mentions that it was the prosecution case that on 25/26.8.2000 in the night Monika and Gaurav had been thrown into the well in village Burhsaini and murdered, except for a bald denial the appellant had not even suggested that the children had fallen accidentally in the well or that Smt. Guddi had thrown the children in the well. Likewise in response to question No. 7 that it was the prosecution case that on 26.8.2000 between 1.50 and 2.15 pm the dead bodies of Monika and Gaurav had been recovered from the well in village Burhsaini on the disclosure of Ramvir, his reply was only of denial, and there was no suggestion of any third degree methods having been used against him. The only point where he mentions that he was beaten and made to affix his signature was in his reply to question No. 8, which was

to the effect that on 26.8.2000 he signed the recovery memos of the bodies of Monika and Gaurav after he was beaten. The investigating officer SI Digambar Singh, PW 9, has stated that Jai Prakash had received an injury when he was trying to run away and an attempt was made to apprehend him at the ice factory. This explanation appears reasonable and plausible as there was a boundary wall in the factory which was at least 7 to 8 feet high and the injury on the left ankle of Jay Prakash could easily have resulted when he was trying to run away from the police who were attempting to arrest him. PW 6 Preetam Singh, SO of PS Aminnagar Sarai has stated that as soon as the accused jumped over the wall he was arrested. He has also mentioned that the factory had a boundary wall which was lying closed for several years and grasses etc. had grown there. He did not know whether there was any hand-pump or not. In such circumstances, Jay Prakash could easily have received his injuries when he was being arrested. Significantly, no suggestion has been made to PW 6, Preetam Singh, or to PW 9, SI Digambar Singh that any third degree measures were taken against Jay Prakash when he was apprehended resulting in the recovery of the two dead bodies. The decision cited by Sri Chaturvedi of Dhoom Singh (supra) in this connection, which states that recovery of the dead body at the instance of the accused, who was subjected to third degree measures making the recovery inadmissible u/s 27 of the Evidence Act has therefore to be confined to its own facts.

33. In the present case PW 6 SI Preetam Singh has stated that water level was 60 ft from the surface and in the well the water was 20 ft deep. The bodies were not visible from above and they were wholly concealed in water. The depth of the well was first measured with the aid of a rope and an anchor. The police then could not have received information about the presence of the children from any other source and in such circumstances without the pointing out by the appellant that the bodies were present in the well, the dead bodies could not have been discovered so soon after the disappearance of the two children. In such circumstances at least so much of the information which related distinctly to the fact discovered, was admissible u/s 27 of the Evidence Act, especially as there were no circumstance to establish that the said disclosure had been effected as a result of any third degree measures practiced by the police and the injury on the ankle of Jai Prakash could easily have caused when he was running away from the police at the ice factory where he was hiding. The statement of the appellant, which is mentioned in the recovery memo (Ext. Ka -4) of the two bodies, that on 26.8.2000 on the pointing out of the accused, Jay Prakash, who led the police to the well on his field in which he confessed to have pushed his daughter Monika and son Gaurav in the night and thereafter after arrangements for a rope and hook were made and the well mechanic entered the water and took out the dead bodies of Monika and thereafter of Gaurav is also a clear and explicit description of the statement of Jay Prakash in compliance with Section 27 of the Evidence Act. as it distinctly relates to the discoveries of the dead bodies.

34. In a certain sense some pressure can always be expected in any confession that is made before a police officer, and it is for this reason confessions to a police officer or when it is made when a person is in the custody of a police officer have been made inadmissible under Sections 25 and 26 of the Evidence Act, unless it is made in the immediate presence of a Magistrate . However, Section 27 has been drafted as an exception to Sections 25 and 26 of the Act, because it permits so much of the information which is distinctly related to the fact discovered, in consequence of that information to be admitted in evidence.

35. As pointed out in the land mark decision of the Privy Council, *Pulukuri Kottaya v. Kind Emperor*, 48 Cri.L.J. 1947, "that the section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly, can be safely allowed to be given in evidence ". But their Lordships of the Privy Council have clarified that only so much of the information as relates distinctly to the fact thereby discovered may be proved, this "embraces the place from which the object is produced and the knowledge of the accused as to this."

36. In the eleven Judges Constitutional Bench decision in the case of [The State of Bombay Vs. Kathi Kalu Oghad and Others](#), , it has been mentioned that a mere statement of an accused in police custody without anything more does not amount to testimonial compulsion so as to form foul of Article 20(3). In this connection, in paragraph 13 of the aforesaid law report, it has been observed as under:

"The question whether Section 27 of the Evidence Act was unconstitutional because it offended Article 14 of the Constitution was considered by this Court in the case of [State of U.P. Vs. Deoman Upadhyaya](#), . It was held by this Court that Section 27 of the Evidence Act did not offend Article 14 of the Constitution and was, therefore, "intra vires". But the question whether it was unconstitutional because it contravened the provisions of Clause (3) of Article 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been raised in one of the cases before us and has, therefore, to be decided. The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section . If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of Clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid unless compulsion had been used in obtaining the information. "

37. Again it is stated in paragraph 15 of the aforesaid law report, which is as follows:

Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the fact and circumstances disclosed in the evidence before it."

(Emphasis ours)

38. In the present case as we have pointed out above, there were no suggestions to the prosecution witnesses that third degree measures had been applied against the appellant for getting the two dead bodies recovered, nor was such a plea taken by the appellant in his examination u/s 313 Cr.P.C. Hence there is nothing on part of the appellant to suggest that the discoveries of the dead bodies were effected as a result of coercion or compulsion practiced against him.

39. Again in the case of *Sanjay alias Kaka v. The State (N.C.C.T of Delhi)*, 2001 (1) Crimes 268 (SC), it has been mentioned in paragraph 18 that although courts are required to be vigilant about the applicability of Section 27 because the provisions may be abused by the police, but the information should not be treated with suspicion in each case and discarded only on the ground that it was made to a police officer during investigation. The said paragraph reads as follows:

"As the Section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27."

40. Recently in the case of [State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate](#), it has been held by the Apex Court that even if it was assumed that an order granting police custody was illegal, the search and seizure under such an order does not become automatically vitiated. Paragraphs 14, 15, 15(1) and 15(2) of that case are very illuminating, and it would be useful to cite them in extenso:

"14. The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude

relevant evidence on the ground that it was obtained under an illegal search and seizure. Challenge to a search and seizure made under the Criminal Procedure Code on the ground of violation of fundamental rights under Article 20(3) of the Constitution was examined in [M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others](#), by a Bench of eight Judges of this Court. The challenge was repelled and it was held as under:

" A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions of searches. "

15. The law of evidence in our country is modeled on the rules of evidence which prevailed in English law. In *Kurma v. R* All ER 236, an accused was found in unlawful possession of some ammunition in a search conducted by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under:

The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

15.1 This question has been examined threadbare by a Constitution Bench in [Pooran Mal Vs. The Director of Inspection \(Investigation\), New Delhi and Others](#), and the principle enunciated therein is as under:

If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. So, neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

So far as India is concerned its law of evidence is modeled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by

illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.

15.2 This being the law, Direction given by the High Court that the confession and alleged recovery has no evidentiary value is clearly illegal and has to be set aside. The effect of the confession and also the recovery of the incriminating article at the pointing out of the accused has to be examined strictly in accordance with the provisions of the Evidence Act."

41. In any case much emphasis need not be given to the arguments in regard to the inadmissibility of the recovery of the dead bodies of the two children, u/s 27 of the Evidence "Act, by the appellant. This fact was clear that even if the confessional part of the statement of the appellant prior to the recovery u/s 27 of the Evidence Act is ignored, this much is clear that there is clear evidence to this effect that the appellant was able to get the concealed bodies of the two children recovered from under 20 feet of water from the well and the same would be admissible as subsequent conduct of the accused u/s 8 of the Evidence Act. The conduct of any person, who is an accused of an offence, and subject to any proceeding is relevant if such conduct influences or is influenced by any fact in continuation or relevant fact, whether it was previous or subsequent thereto.

42. In an old Full Bench decision in the case of Emperor v. Misri, 1909 ILR(XXXI) 592, the accused had got recovered certain ornaments of the deceased because she was given an inducement, while in police custody, that nothing would happen to her if she got the ornaments recovered. The court held that whatever limitation would be placed on the admissibility of the evidence in view of the fetter contained in Sections 24 to 27 of the Evidence Act, the evidence of that accused, that she went to a particular place and got the ornaments recovered, was relevant to the conduct of the accused and was admissible u/s 8 or other preceding sections of the Indian Evidence Act.

43. Therefore, from this conduct of the accused in getting the dead bodies recovered from the well, at least this could be inferred that the appellant had knowledge that the bodies were lying in the well But the question, as to whether the appellant had caused the deaths, or was the author of the concealment of the dead bodies in the well, or that he had learned that the bodies were lying in the well, may still remain open to question. Sri Chaturvedi has also argued in the alternative, that even if he failed to establish that Smt. Guddi had committed suicide, because of the injuries on her neck and other parts, and the doctor's observation that her death was due to throttling and because her body was found lying in the appellant's house, and there is not even a whisper of a suggestion that it was fished out of the well, it would still be open for him to contend that out of anger and sexual jealousy because Smt. Guddi was resentful of the appellant's liaison with Smt. Rajesh she



may in a fit of anger have decided to push the children in the well to teach her husband a lesson and the appellant husband in retaliation thereafter strangled her. It was argued that if there was even a faint possibility of the two children having been thrown into the well by an irate wife, and the husband strangulating the wife in anger thereafter, then even if the case could not be taken out of the purview of Section 302 IPC, at least in the circumstances of the case, death sentence would not be the appropriate punishment. Although we think that while there is no material for us to hold that Smt. Guddi caused the deaths of her two children, but still there may be some force in the submission of Sri Chaturvedi, that this is not a fit case for awarding the death sentence. We have noted above that the version of Smt. Guddi murdering her children by throwing them in the well is as likely or unlikely as the version of the husband murdering the children because of his resentment against his wife. At any rate this part of the case as to how the children died is shrouded in a little mystery. From the recovery of the children from the well on the pointing out of the appellant, as we have held above this could be inferred that the appellant had knowledge that the dead bodies were lying in the well. But no such inference could conclusively be reached that he had murdered the children and was the author of their concealment in the well. In the background of the allegations of constant bickering between the husband and wife over the husband's real or supposed affair with Smt. Rajesh if in a moment of anger, he strangled his wife, in our view this case would not come within the category of the rarest of rare cases where a sentence of death was the only appropriate penalty and the other option of awarding life sentence unquestionably foreclosed

44. Two mitigating circumstances for not awarding death sentence mentioned by the Constitutional bench of the apex Court in [Bachan Singh Vs. State of Punjab](#), were : (1) That the offence was committed under the influence of extreme mental or emotional disturbance, and (2) the probability that the accused would not commit criminal, acts of violence as would constitute a continuing threat to society. These two mitigating factors appear to be present in the instant case.

45. We have also pointed out that so far as the deaths of the two children are concerned, it cannot be stated with absolute certainty that the appellant alone had thrown them in the well causing their deaths. That part of the prosecution case is not as well established as the allegation of the appellant having murdered his wife.

46. In the case of [Dudh Nath Pandey Vs. State of Uttar Pradesh](#), where the part of the case was that as there was some unexplained circumstances in that case that the appellant in that case fired a shot at the deceased Pappoo, when he was driving his scooter and he would have received some injury and the scooter would have damaged slightly, but there was no injury on the person of Pappoo except an abrasion on the left side of the chest which was caused by gun shot and scooter was not damaged at all. The scooter was also not lying on the road, but was standing. In the circumstances the Court observed that "if the witness on whose evidence the life

of an accused hangs in the balance, do not choose to reveal the whole truth, the Court, while dealing with the question of sentence, has to step in interstitially and take into account all reasonable possibilities, having regard to the normal and natural course of human affairs. Since a part of the crucial event has been screened from the court's scrutiny and the possibility of an altercation between the appellant and the deceased cannot reasonably be excluded, we consider it unsafe to sentence the appellant to the extreme penalty." On this ground the Court substituted the sentence of death with a sentence of imprisonment for life.

47. In *Dudh Nath Pandey (Supra)* the appellant was a motorcar driver and he developed fancy for one of the sisters of the deceased and he murdered him because the deceased was trying to wean away his sister from the influence of the accused. The Court noted that on the previous evening the deceased retorted that "you are a man of two paise "s worth. How can you dare to marry my sister. I will break you hands and feet and the said dispute assumed the proportions of a feud over social status." The Court observed that mental turmoil and the sense of being socially wronged through which the accused was passing cannot be overlooked while awarding sentence.

48. In the case of [Suresh Vs. State of U.P.](#), the primary evidence of the five year old son of the deceased was recorded after 20 days after the incident. The Apex Court having noted the same as well as the fact that sudden impulse of sex or theft made the accused momentarily insensible, held that death sentence was not warranted, and such evidence "was not safe enough for putting out a life." In that connection the Apex Court has aptly observed in paragraph 11: "Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life. "

49. In view of the aforesaid mitigating circumstances and one part of the prosecution case about the appellant himself having murdered his two children not being as well established as the other part relating to the murder of his wife, we think that in the facts and circumstances of the case, while upholding the conviction of the appellant u/s 302 IPC, the sentence of death awarded to the appellant needs to be substituted with a sentence of imprisonment for life. The criminal reference made by the learned Sessions Judge u/s 366 Cr.P.C is accordingly rejected.

50. The appeal is partly allowed as above.