
(1998) 05 AHC CK 0141

Allahabad High Court

Case No: Capital Appeal No. 804 of 1997 (Reference No. 190 of 1997)

Phool Chand

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 20, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 281, 313, 463(1)
- Evidence Act, 1872 - Section 11
- Penal Code, 1860 (IPC) - Section 201, 302

Citation: (1998) 2 ACR 1479

Hon'ble Judges: Giridhar Malaviya, J; B.K. Sharma, J

Bench: Division Bench

Advocate: Vidya Vilas Mishra, for the Appellant; D.G.A., for the Respondent

Judgement

B.K. Sharma, J.

This capital appeal has been preferred by Phool Chand accused-Appellant from jail against the judgment and order dated 31st March, 1997 passed by Sri Y. R. Tripathi, Sessions Judge, Mau in S. T. No. 55 of 1991, State v. Phool Chand, Police Station Kotwali, District Mau, whereby he convicted Phool Chand, accused-Appellant u/s 302, I.P.C. and u/s 201, I.P.C. and sentenced him to capital sentence for the offence of murder. He did not, however, awarded a separate sentence for the offence u/s 201, I.P.C.

2. While sentencing the accused-Appellant to the capital sentence, the learned Sessions Judge made a reference to this Court for confirmation of the sentence of death, which has been registered as Reference No. 19 of 1997 and has been connected with this capital appeal for hearing.

3. It is a double murder case. There are two deceased Bindesh alias Pappoo, aged about 6 months and Ram Saran, aged about 8 years, both sons of Lal Chand. The informant in the present case is Shivraj alias Shiv Nath (P.W. 1). Lal Chand (P.W. 2) father of both the

deceased, and Phool Chand accused-Appellant are real brothers inter se and son of the informant. Smt. Surati (P.W. 3) is the wife of Lal Chand (P.W. 2). Smt. Radhika Devi (D.W. 1) is the wife of Phool Chand accused-Appellant. Ram Autar (D.W. 2) is the father-in-law of Phool Chand accused-Appellant.

4. The prosecution story was that in village Dasai Phokhra in one house, the informant's son Lal Chand (P.W. 2) lived in the northern Kotha, while the other son Phool Chand accused-Appellant lived separately in the southern Khotha ; that the informant himself lived in an Ahata, which was 4-5 bigha away from the said house ; that the accused-Appellant had a suspicion that Lal Chand (P.W. 2) had illicit relations with his wife: that on 3.6.91 Lal Chand (P.W. 2) and his wife Smt. Surati (P.W. 3) left their house in the early hours in the morning leaving the two victims asleep on a cot beneath the Mahuwa tree in the Sahan of the house and leaving accused-Appellant Phool Chand and his wife Radhika Devi (D.W. 1) at their own Kotha (i.e., the southern Kotha of the house), that Balmik (P.W. 5) while going from his house to Salahabad for his maternal uncle's house at about 6 to 7 a.m. saw the accused-Appellant picking one of the two deceased from the cot and taking him into his Kotha, that after some time Smt. Surati (P.W. 3) returned back home and found the two deceased missing, that she enquired the whereabouts of the two deceased from Radhika Devi (D.W. 1) who pointed out that the deceased had gone towards the Ahata (of the informant), whereupon Smt. Surati went to the Ahata and searched for the two deceased but did not find them there, that she (Smt. Surati) enquired from the informant (her father-in-law) at about 8 a.m. about the whereabouts of the two deceased but the informant expressed his ignorance, that on this Smt. Surati developed suspicion and made search of the two deceased here and there, that when she could not find their (deceased's) trace she, informed her husband Lal Chand (P.W. 2) at 11 a.m. and thereafter a search was made of the two deceased in the vicinity and announcements were also made on loudspeaker about the missing children (the two deceased) but all in vain, that thereupon Lal Chand (P.W. 2) gave a written report at the police station about the disappearance of the two deceased in respect of which an entry was made in the G.D. at Serial No. 32 at 5.45 p.m., that subsequently at about 8-9 p.m. Smt. Radhika Devi (D.W. 1) (wife of the accused-Appellant) while making search of a wrapper in her Kotha noticed a portion of the accused-Appellant's Lungi peeping from the chaff which was lying in the Kotha, that she tried to pull that Lungi out of chaff but found it weighty, whereupon she raised an alarm attracting thereby Lal Chand (P.W. 2), Smt. Surati (P.W. 3) and some others, who took out that Lungi from the chaff and found the dead bodies of the two infant deceased wrapped in Lungi and covered by Taat in the heap of chaff, that the accused-Appellant had fled away from the house when the search was made, that on coming to know about the recovery of the dead-bodies the informant also reached the spot and then went to the police station, got an F.I.R. scribed from one Rajendra Prasad and lodged the same there at 10.30 p.m., that on its basis a chick report was prepared and a case was registered nominating the accused-Appellant therein for the two murders.

5. The investigation of the case was entrusted to S.I. Kamta Prasad Shukla (P.W. 10). He visited the spot and found a blood-stained Gandasa, Lungi, torch and blood there. He took blood-stained and simple earth from the spot and also took blood-stained Gandasa, Lungi, Torch etc. from there and prepared memos of the same. The Panchayatnama proceedings were also taken and then the dead bodies of both the deceased were sent for post-mortem. During the investigation, the I.O. interrogated Rajendra Prasad P.W. 4 on 6.6.91 to whom the accused-Appellant had made his extra-judicial confession. The accused-Appellant Phool Chand was arrested on 7.6.1991 by the police. On his arrest, he offered to confess, he was produced before the C.J.M. along with a report for recording his confession. The C.J.M. fixed 10.6.91 for the recording of his statement before Sri Sukh Ram, Munsif Magistrate. On 10.6.91, the accused-Appellant was summoned from jail and produced before Sri Sukh Ram who recorded his confession.

6. The blood-stained articles were sent to the Forensic Laboratory, Lucknow for examination. The report of the forensic expert showed that these articles collected from the spot were stained with human blood.

7. The post-mortem on the dead body of Bindesh alias Pappoo deceased was performed by Dr. S. K. Gupta (P.W. 8) on 4.6.91 at 4 p.m. His material observations were as under :

Probable age: about 6 months.

Probable time since death: about one and half day.

(External Examination)

Muscularity : Body mixed with Bhoosa, clotted

Stoutness : blood over hand and face, average

Emaciation : built, mouth, eyes closed, foul

Rigor mortis : smell present, rigor mortis

Decomposition : absent, abdomen, scrotum and penis distended, P.M. staining

(Ante-mortem injuries)

(1) Incised wound 10 cms. ? 4 cms. ? neck content deep over middle and bony side neck 4 cms. above supra sternal notch, margin clean cut, tailing towards left, on opening all neck contents found clean cut.

(2) Incised wound 9 cms. ? 3 cms. ? neck content deep over middle and bony side neck 1 cm. above supra sternal notch, margin clean cut, tailing towards left, on opening all neck contents found clean cut.

(3) Incised wound 3 cms. ? 11 cms. ? muscle deep on anterior aspect of left forearm, 3 cms. below elbow. Margin clean cut.

Stomach and its contents: Empty.

Large intestine: Gas, Faecal and pasty material.

Bladder: Empty.

The death was caused due to shock and haemorrhage as a result of ante-mortem injuries.

8. The post-mortem on the dead body of Ram Saran deceased was also performed by the same doctor on the same day at 3 p.m. His material observations were as below :

Probable age: about 8 years.

Probable time since death: about one and half day.

(External Examination)

Muscularity : Body mixed with Bhoosa

Stoutness : Average built, mouth, eye closed.

Emaciation : Bleeding from left ear. Foul smell

Rigor mortis : present. P.M. staining present, Decomposition: Rigor Mortis

(Ante-mortem injuries)

(1) Incised wound 3 cms. x 2 cms. x bone deep over chin, margins clean cut, mandible clean cut, transverse placed, tailing towards left.

(2) Incised wound 3 cms. x 1 cm. x muscle deep left side face 3 cms. below ear, margin clean cut.

(3) Incised wound 7 cms. x 2 cms. x bone deep on left side skull upto left ear, margin, clean cut, tailing towards left.

(4) Incised wound 10 cms. x 3 cms. x bone deep over back of neck at the level of C2, margin clean cut, transversely placed, tailing towards left, cervical vertebra too clean cut through and through, spinal cord and its content clean cut.

(5) Incised wound 11 cms. x 2 cms. x bone deep on back of neck at the level of C3, margin clean cut, transversely placed, tailing towards left, cervical vertebra and spinal cord and content clean cut.

(6) Incised wound 6 cms. x 2 cms. x bone deep on the back of neck at the level of C5, margin clean cut, tailing towards left, vertebra, spinal cord and content clean cut.

(Internal Examination) Bones of (Head and Neck) Scalp, Skull, left side occipital bone and mastoid bone clean cut.

Membranes: Clean cut.

Brain: Congested, clotted blood present.

Stomach and its contents: Empty.

Large intestine and its contents: Gas faecal and pasty material.

Bladder: Empty.

The death was due to coma as a result of ante-mortem injuries.

9. The accused-Appellant was committed to the Court of Session and charged for murder. The accused-Appellant pleaded not guilty. During the trial, various pleas were taken by the defence. It was claimed that the motive had been fabricated, that he had not committed the occurrence and has been falsely implicated. The suggestion to Lal Chand (P.W. 2) was that he had falsely implicated the accused-Appellant to save himself from the charge of murder. It was also claimed that the accused-Appellant had himself made search for the deceased persons. It was also claimed that the occurrence took place at a different time and at a different place. The extra-judicial confession to Rajendra Prasad P.W. 4 was also denied. The taking of one of the two deceased from the cot to inside of his Kothar was also denied. About the judicial confession it was claimed that it was recorded under the police pressure.

10. In his statement u/s 313, Cr. P.C., the accused-Appellant claimed that he had given his statement before the Magistrate due to threats of beating by the police. He also claimed that the informant had lodged the F.I.R. under the threat of the police. He claimed ignorance about the information about the missing of the deceased children given at the police station. He also pleaded ignorance about the Panchayatnama proceedings. About the recovery of blood-stained Gandasa and Lungi, Taat and blood-stained earth from his residential Kotha he replied that he did not know. He denied the charge of murder but did not claim any alibi in his statement. However, he offered to lead defence and examined his wife Smt. Radhika Devi as D.W. 1, and father-in-law Ram Autar as D.W. 2. Both of them set up at alibi of the accused-Appellant. According to it the accused-Appellant and his wife Smt. Radhika Devi, both were at the house of Ram Autar (D.W. 2) at the time of the alleged occurrence. Smt. Radhika Devi claimed that the information was received on the second day after the occurrence, whereupon she, the accused-Appellant and also her father went to the village of occurrence. Ram Autar (D.W. 2) claimed that on receiving information about the murders after two days, on the second day he went to the aforesaid village of occurrence.

11. The learned Sessions Judge believed the entire prosecution story and the circumstances set out by the prosecution at the trial and held that all the circumstances taken up together had established the charge of the double murder. He also believed the extra-judicial confession and the judicial confession. Consequently, he convicted and sentenced the accused-Appellant as aforesaid.

12. After hearing the amicus curiae for the accused-Appellant and learned Additional Government Advocate and going through the record, it came out that some material

circumstances appearing in the prosecution evidence at the trial had not been put to the accused-Appellant in his statement recorded u/s 313, Cr. P.C. by the learned Sessions Judge. Though we were of the opinion that this failure had not materially prejudiced the accused-Appellant in his defence and the accused-Appellant had even led his defence evidence at the trial, by way of abundant precaution we put these circumstances to him and recorded his statement to give him further opportunity to offer explanation, if any, about these circumstances and then heard the learned amicus curiae for the accused-Appellant and learned Additional Government Advocate further.

13. In the additional statement u/s 313, Cr. P.C. recorded by us, Phool Chand accused-Appellant admitted that he and Lal Chand (P.W. 2) were sons of Shivraj alias Shiv Nath informant (P.W. 1) and that he and Lal Chand (P.W. 2) lived separately in the different parts of the same house and that he himself is living in the southern Kotha and Lal Chand (P.W. 2) is living in the northern Kotha and Shivraj alias Shiv Nath informant (P.W. 1) lived in an Ahata which was four bighas away from that house. About the aspect of illicit relations between his brother Lal Chand (P.W. 2) and his wife Smt. Radhika Devi (D.W. 1) and his feeling enmity with Lal Chand on that score, he stated in his additional statement recorded by this Court that the villagers had spread a rumour but there were no such illicit relations and no consequent enmity with Lal Chand (P.W. 2). He denied having picked up one of the two deceased children from his cot and his taking it to the inside of his (accused-Appellant's) Kotha. Regarding the leaving of the deceased children sleeping on the cot and leaving him and his wife present at the house, he stated that he had gone in the morning itself to market and (so) did not know about going of Smt. Surati. Asked about the return of Smt. Surati and her finding the two deceased children missing, the enquiry by her (Smt. Surati) from his (accused-Appellant's) wife Smt. Radhika Devi (D.W. 1) and the reply by Smt. Radhika Devi that the deceased had gone towards the Ahata, her going towards the Ahata and inquiring from the informant and the informant's telling her that the two deceased children were not there and the search for the two deceased children, he (the accused-Appellant) pleaded only ignorance. Regarding the raising of alarm by his (accused-Appellant's) wife on noticing his Lungi coming out from the heap of Bhoosa inside his (accused-Appellant's) Kotha and the rushing of Smt. Surati (P.W. 3) and Lal Chand (P.W. 2) and pulling of that Lungi from that heap and the finding of the dead bodies of the deceased children wrapped in his Lungi covered by a Taat, he stated that the Lungi was not his and about the rest of the circumstance he stated that he did not know anything. He also pleaded ignorance when asked about the arrival of the Investigating Officer at the spot and his finding the dead bodies of the two deceased children in his Kotha with ante-mortem injuries thereon. About the finding of blood on the recovered Gandasa and the clothes of the deceased children and the finding of stains of blood in the sample of earth, Tahmad and Taat by the chemical examiner also, he pleaded ignorance. Asked regarding the extra-judicial confession made by him (the accused-Appellant) to Rajendra Prasad (P.W. 4), he denied and claimed that he never met this witness. He claimed that this witness had falsely stated against him because there was a friction between the wife of this witness and his own wife. In regard to the

confession made by him before the Munsif Magistrate, he stated that he had given this statement at the instance of the Daroga at the assurance that on his giving this statement, he would be acquitted.

14. From the post-mortem evidence relating to both the deceased, it is established beyond every shadow of doubt that it was a case of double murder, whoever might have been the assailant or the assailants. Bindesh alias Pappoo deceased was inflicted ante-mortem incised wounds on the neck with a heavy cutting weapon. The wounds were neck content deep over middle and bony side neck with all neck contents cut. In the case of Ram Saran deceased, the injuries were ante-mortem incised wounds caused by a heavy cutting weapon on chin, face, skull and back of neck with mandible, occipital and mastoid bone, cervical vertebra and spinal cord cut. There is no doubt that the injuries of both deceased were sufficient to cause death in the ordinary course of nature.

The defence also does not dispute that it was a case of double murder.

15. It is a case of circumstantial evidence. In dealing with circumstantial evidence, the rules specially applicable to such evidence must be borne in mind. The law regarding such cases has been crystallized by a long series of judicial decisions given by the Apex Court and the High Courts. The circumstances from which the conclusion of guilt is to be drawn should be fully established by unimpeachable evidence beyond every shadow of doubt. The circumstances should be of a conclusive nature and tendency unerringly pointing towards the guilt of the accused. The facts so established taken collectively should be incapable of explanation on any hypothesis save that of the guilt of the accused. So, 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.

16. The circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt. Any circumstance that tends to destroy the presumption of innocence, if properly established, can be taken into account to find out if the circumstances lead to no other inference but guilt. The Supreme Court in [Dharm Das Wadhwani Vs. The State of Uttar Pradesh](#), has observed that every evidentiary circumstance is a probative link, strong or weak, and must be made out with certainty. Link after link forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taken separately may just suggest but when hooked on to the next and on again may manacle the accused inescapably. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the overall picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances established are considered together that it becomes possible to understand and appreciate their true

effect.

17. In the evidence led by the prosecution at the trial before the trial court, the following material circumstances had appeared :

(1) The separate living of the accused-Appellant Phool Chand in the southern Kotha of the house in village Sasai Pokhra, in the northern Kotha of which Lal Chand, his brother (P.W. 2) lived.

On this circumstance there is evidence of Shiv Raj alias Shiv Nath informant (P.W. 1), grandfather of the two deceased and father of the accused-Appellant and Lal Chand (P.W. 2).

(2) The accused-Appellant had a suspicion that Lal Chand (P.W. 2) had illicit relations with his wife Smt. Radhika Devi (D.W. 1), which constituted the motive for him to commit the double murder. About this circumstance, there is the evidence of Shiv Raj alias Shiv Nath informant (P.W. 1), Lal Chand (P.W. 2) and Smt. Surati (P.W. 3).

(3) The going of Smt. Surati (P.W. 3) from her husband's northern Kotha at about 6 a.m. in the morning on 3.6.1991 leaving the two deceased children asleep on a cot beneath the Mahuwa tree in the Sahan of the house and the presence of the accused-Appellant Phool Chand and his wife Smt. Radhika Devi in their own Kotha, i.e., the southern Kotha of the house at that time on the date of occurrence so that the accused-Appellant had ample opportunity to commit the murder of the two deceased. On this circumstance there is the evidence of Smt. Surati (P.W. 3).

(4) The accused-Appellant picking up one of the two deceased from the cot in the Aangan of the house and his taking that deceased into his own Kotha on the same day at 6 or 7 a.m. About this circumstance, there is the evidence of Balmik (P.W. 5).

(5) The returning of Smt. Surati (P.W. 3) on the same day, i.e., 3.6.91 to the house and finding the two deceased missing. On this point, there is the evidence of Smt. Surati (P.W. 3).

(6) The query by Smt. Surati (P.W. 3) from the accused-Appellant's wife about the two deceased children and its reply by her that the children had gone to Ahata. On this circumstance also, there is the evidence of Smt. Surati (P.W. 3).

(7) The going of Smt. Surati (P.W. 3) to the Ahata where the informant lived and the reply by the informant to her that the deceased children were not there. On this circumstance also, there is the evidence of Smt. Surati (P.W. 3).

(8) The search for the missing deceased children by Smt. Surati (P.W. 3), her informing her husband Lal Chand (P.W. 2) about their missing and the announcement by loudspeaker at the instance of Lal Chand (P.W. 2) when the deceased children could not

be traced. On this circumstance there is the evidence of Smt. Surati (P.W. 3) and Lal Chand (P.W. 2).

(9) The lodging of information by Lal Chand (P.W. 2) at the police station on 3.6.91 at 17.45 hours about the missing of both the deceased children. On this circumstance there is the evidence of Lal Chand (P.W. 2) and clerk constable Dubri Ram (P.W. 7).

(10) The raising of an alarm by Smt. Radhika Devi (D.W. 1) between 8 and 9 p.m. on the same day on noticing a portion of the Lungi of the accused-Appellant peeping out from the chaff which was lying in the southern Kotha and finding it weighty and the consequent rushing of Lal Chand (P.W. 2) and Smt. Surati (P.W. 3) there and their taking out that Lungi from the chaff in the southern Kotha of the house and finding the dead bodies of the two deceased children wrapped in that Lungi and covered by a Taat in the heap of chaff (Bhoosa). On this circumstance, there is evidence of Smt. Surati (P.W. 3) and Lal Chand (P.W. 2).

(11) The finding of the dead bodies of both deceased children with ante-mortem injuries, blood-stained Gandasa, blood-stained Lungi and blood stains inside the southern Kotha of the house aforesaid by Kamta Prasad Shukla, S.I. (P.W. 10) on 3.6.91 at about 11 p.m. after entrustment of the investigation to him on the F.I.R. being lodged at the police station on 3.6.91 at 10.30 p.m. by Shivraj alias Shiv Nath (P.W. 1), grandfather of both deceased children. On this circumstance, there is the evidence of Kamta Prasad Shukla, S.I. (P.W. 10).

(12) The presence of ante-mortem injuries on the bodies of the two deceased caused by sharp cutting weapon. On this circumstance there is the evidence of Shiv Raj alias Shiv Nath informant (P.W. 1) and the observations made in the Panchayatnama and the post-mortem reports. The evidence of Shiv Raj informant (P.W. 1) was that he found the dead bodies of the two deceased with throat cut, the evidence of the Investigating Officer Kamta Prasad Shukla, S.I. (P.W. 10) about the Panchayatnama and the evidence of the autopsy surgeon Dr. S. K. Gupta (P.W. 8).

(13) The report of the forensic expert of the forensic Laboratory U. P. Government showing that there was human blood on the Gandasa and Taat etc. and the presence of blood in the blood-stained earth taken from near the dead bodies of the two deceased. On this circumstance there is the report of the forensic expert, Ex. Ka. 29, supported by link evidence.

(14) The absconding of the accused-Appellant from his house since sometime after 7 in the morning of the said date upto the time of his arrest by the police on 7.6.91. On this circumstance there is the evidence of Lal Chand (P.W. 2), Smt. Surati (P.W. 3), Balmik (P.W. 5) and Kamta Prasad Shukla, S.I. (P.W. 10).

(15) The statement u/s 164, Cr. P.C. made by the accused-Appellant on 10.6.1991 at about 3 p.m. in which he confessed to the murders. About it there is the evidence of Sri

Sukh Ram, Munsif Magistrate who recorded it.

(16) The extra-judicial confession made by the accused-Appellant before Rajendra Prasad (P.W. 4) that he (the accused-Appellant) wanted to commit the murder of his brother, but he committed the murder of two deceased children. About this circumstance, there is the evidence of Rajendra Prasad (P.W. 4).

18. We have noted earlier that the two deceased children were sons of Lal Chand (P.W. 2) and Shiv Raj alias Shiv Nath informant (P.W. 1) was the father of Phool Chand accused-Appellant and also of Lal Chand (P.W. 2) and Smt. Surati was the wife of Lal Chand (P.W. 2) and Smt. Radhika Devi (D.W. 1) was the wife of the accused-Appellant Phool Chand. There was no controversy in it.

19. Then the oral evidence on record including the site plan prepared by the Investigating Officer indicates that Phool Chand accused-Appellant and Lal Chand (P.W. 2) lived separately in Kothas of the same house in the village, Smt. Radhika Devi (D.W. 1) admitted in her cross-examination (available at page 64 of the paper book) that she and Smt. Surati lived in separate rooms of the house. In fact, the accused-Appellant had himself admitted this fact in his statement recorded by this Court u/s 313, Cr. P.C. He admitted that Lal Chand (P.W. 2) lived separately in northern Kotha and he himself lived separately in the southern Kotha of the house.

20. These circumstances by themselves may not raise suspicion or inference of guilt against the accused-Appellant but taken together with the other circumstances, which we shall now deal with these circumstances would become part of a formidable chain of circumstances against the accused-Appellant.

21. Here it may be mentioned that one may say that the southern Kotha cannot be said to be in the exclusive possession of the accused-Appellant because the wife of accused-Appellant Smt. Radhika Devi (D.W. 1) also lived therein. But the accused-Appellant has nowhere suggested at any stage of the trial or even at the present stage that the double murder of the two deceased children was the handiwork of his wife or that his wife Smt. Radhika Devi (D.W. 1) might have committed the murder of the two deceased children. As noted earlier, he had volunteered to lead his defence at the trial and had himself examined her as a witness of his alibi. It may be mentioned here that Smt. Surati (P.W. 3) testified at the trial that the wife of Phool Chand accused-Appellant had gone early in the morning for the treatment of her child and that on coming back from there, she (Smt. Radhika Devi, wife of the accused-Appellant Phool Chand) also went in search of the deceased children. This statement of Smt. Surati had not been challenged in her cross-examination. So this testimony excludes the presence of Smt. Radhika Devi from the house during the time the accused-Appellant and the two deceased were alone at the house and which was also the time during which the murder of these two deceased children must have been done. Consequently, if the murders are found to have been committed inside the southern Kotha of the house which was in his (i.e., the

accused-Appellant's) possession, it will have to be inferred that the murders were committed by him and by no one else unless he could show at least his absence from the house, if not his alibi, his presence elsewhere at all material times so far away that it would rule out his presence at his house at the time when the murders would have been committed in his Kotha, i.e., the southern Kotha of his house.

22. There is the evidence of Smt. Surati (P.W. 3) that on the date of occurrence between 8 or 9 p.m. Smt. Radhika Devi (D.W. 1) raised an alarm noticing a portion of the Lungi of the accused-Appellant peeping out from the chaff which was lying in the southern Kotha and finding it weighty and on it, she and her husband Lal Chand (P.W. 2) rushed to the Kotha of the accused-Appellant and took out the Lungi from the chaff in the Kotha and found the dead bodies of the two deceased children wrapped in that Lungi and covered with a Taat in the heap of chaff. Lal Chand P.W. 2 also testified about it. There is no reason to doubt the testimony of any of them. In this regard, it may be mentioned here that Smt. Surati (P.W. 3) was nowhere suggested in her cross-examination that Smt. Radhika Devi did not raise an alarm or that she and her husband Lal Chand (P.W. 2) did not rush to the Kotha of the accused-Appellant and did not pull the Tahmad from the heap of the chaff (Bhoosa) and that body of the two deceased children did not come out from the same, nor was there any such suggestion made to Lal Chand (P.W. 2) in this regard.

23. Taking the evidence of the I.O. Kamta Prasad Shukla, S.I. (P.W. 10) about the finding of the dead bodies along with the Panchayatnamas got prepared by him in his supervision that established that the dead bodies of the two deceased children with ante-mortem sharp edged injuries on their person were found inside the Kotha in possession of the accused-Appellant, that blood stains were lying scattered near the dead bodies of the two deceased children inside the southern Kotha aforesaid and that the blood-stained Gandasa was also found lying there and the evidence of forensic expert on record with the necessary link evidence which showed that the blood-stained earth aforesaid was containing blood and the Gandasa and clothes of both the deceased were stained with human blood and the report of the post-mortem given by the autopsy surgeon Dr. S. K. Gupta (P.W. 8) that the injuries found on the dead bodies of the two deceased children were ante-mortem, it was established beyond doubt that both the deceased were done to death by the blood-stained Gandasa inside the southern Kotha which was in possession of the accused-Appellant on the date of occurrence.

24. As regards the evidence of the I.O. Kamta Prasad Shukla, S.I. (P.W. 10), it may be mentioned that not a single suggestion was made to him in his cross-examination that the blood stains were not found there or that the dead bodies of the two deceased children were not found there or that the blood-stained Gandasa was not found there or that the human blood was not found on the Gandasa. The report of the post-mortem has been duly proved by Dr. S. K. Gupta, (P.W. 8) showing sharp edged ante-mortem injuries and in his cross-examination his observations have not been challenged. He was, no doubt, suggested that ante-mortem injury Nos. 1, 2 and 3 found on the persons of the deceased children could be caused by more than two sharp-edged weapons of more than two

kinds. It was also suggested that these injuries could be caused by different weapons. Naturally, the doctor could not say whether all the injuries were caused by a single weapon or several sharp edged weapons. However, it was not suggested to the witness in his cross-examination that these injuries could not have been caused by the Gandasa recovered from the southern Kotha by the Investigating Officer or that the dead bodies of the two deceased children were not recovered from there. As noted earlier, the defence has not disputed the recovery of the dead bodies or of the blood stains lying scattered there, or the blood-stained earth and the recovery of blood-stained Gandasa from the southern Kotha of the house which was in possession of the accused-Appellant.

25. Some more circumstances which tend to fix the place of double murder may be enumerated here. One was that Smt. Surati, mother of the two deceased children (P.W. 3) fed milk to both the deceased children in the early morning and then left the house at about 6 a.m. leaving both the deceased children asleep on the cot in the Aangan of the house as testified by her. Another was that Balmik (P.W. 5) had seen the accused-Appellant Phool Chand picking one of the two deceased children from the cot and going from there into his Kotha, i.e., the southern Kotha where the dead bodies of the two deceased children were subsequently recovered, at about 6 or 7 a.m. There is no reason to doubt the testimony of these witnesses. The murders of the two deceased children having been committed inside the Kotha of the accused-Appellant, it is impossible to think that these murders could have been committed elsewhere, after the disappearance of the deceased children had been detected by Smt. Surati and communicated to the informant Shivraj alias Shiv Nath (P.W. 1) at about 8 a.m. It was also not suggested by the defence that the dead bodies had been brought after the murders to the Kotha of the accused-Appellant and placed there. There was also no evidence to show that the double murder took place elsewhere.

26. The learned Counsel for the accused-Appellant at the trial disputed the place and time of the occurrence in the cross-examination of Smt. Surati but it was nowhere suggested as to where the occurrence had actually taken place.

27. For fixing the time of death, we have to take into account the circumstantial evidence on record. As noted earlier, there is evidence of Smt. Surati (P.W. 3) that she fed milk to both deceased children and left the Ahata leaving the deceased children on the cot in the Aangan in the morning and when she came back, she found both the deceased children missing from the cot. Then there is evidence of Lal Chand (P.W. 2), father of the deceased children, that on the date of occurrence, he was working in Makka. He further testified that he was told by Smt. Surati (P.W. 3) that both the deceased children were not present at the house and that in the morning, she had gone for making sundry purchases leaving the deceased children sleeping at the house on the cot. His statement on this point has not been challenged in his cross-examination. Then there is the evidence of the informant Shivraj alias Shiv Nath (P.W. 1), grandfather of the deceased children and father of Lal Chand (P.W. 2) and of accused-Appellant Phool Chand, that he had been given information about the missing of the two deceased children by his elder

daughter-in-law Smt. Surati (P.W. 3) at 8 a.m. (available at page 21 of the paper book). There is no reason why the informant Shiv Raj alias Shiv Nath (P.W. 1) should implicate the accused-Appellant falsely. These circumstances show that the deceased children had been done to death sometime after Smt. Surati left the house leaving the two deceased children sleeping on a cot in the Aangan in the morning but before 8 a.m. when she informed her father-in-law about the missing of the deceased children. In fact, it must have been much before 8 a.m. because Smt. Surati (P.W. 3) had stated on oath that she had come back to the house and found the deceased children missing and then she had gone to the Ahata to enquire from her father-in-law if the deceased children were there as the wife of the accused-Appellant (Smt. Radhika Devi) had told her that the deceased children had gone to the Ahata. There is no substantial discrepancy between her testimony and the testimony of the informant. The central fact was the disappearance of the children from the house. What she told the father-in-law was a query giving information about the missing of the deceased children.

28. The autopsy surgeon Dr. S. K. Gupta (P.W. 8) had testified that the death of the deceased person could have taken place about one and half day earlier than 4 p.m. on 4.6.1991 (the time of post-mortem as noted). In his cross-examination by defence, he stated that the death of the two deceased children could have taken place at 3 a.m. in the night between 2/3.6.91. In reply to another defence question, whether the death could have taken place one hour before or after 3 a.m. he stated that there could be difference of one hour or even four hours either way. The doctor could not have given the actual time of death accurately. His testimony is fully consistent with the prosecution evidence fixing the time of death round about 6 a.m. or 7 a.m. On the other hand, the defence has not led any evidence whatsoever which may tend to show that the disappearance and the murder had taken place at 3 a.m. as claimed by it. If the murder of the deceased children had taken place at 3 a.m. as claimed by the defence, there was no reason why the time of occurrence should have been shifted by their father Lal Chand (P.W. 2) or mother Smt. Surati (P.W. 3) or grandfather Shiv Raj alias Shiv Nath (P.W. 1). Furthermore, so long as the place of the finding of the dead bodies of the two deceased children, the blood-stained Gandasa and the stains of blood from inside the Kotha in possession of the accused-Appellant remains intact, the inference that could be drawn will always be that in all probability, it was the accused-Appellant, who had committed the murder. In fact at 3 a.m., the presence of the accused-Appellant at his Kotha would be even more probable and particularly when he never claimed that he was away from his Kotha in the night between 2/3.6.1991 and his wife Smt. Radhika Devi also did not make any such claim. So the time of the occurrence as claimed by the prosecution round about 6 to 7 a.m. on the date of occurrence cannot be doubted.

29. It may be that Lal Chand P.W. 2 informant was suggested in his cross-examination that he had falsely implicated the accused-Appellant to escape himself in the murder case and that he was considering the deceased children to be illegitimate. However, this was only a vague suggestion without any head or tail. He was not directly suggested that it

was he who had committed the murder of the two deceased children. He was not even suggested that on the date of occurrence in the morning, he was not away at the field as claimed by him (the witness) but was present at the house. He was also not suggested as to why he considered his deceased children to be illegitimate. There was absolutely no defence suggestion made to Lal Chand (P.W. 2) in his cross-examination that his wife had illicit relations with some body and that the deceased children were the outcome of that illegitimate connection.

30. Smt. Surati (P.W. 3) was suggested in her cross-examination that the disappearance of the children had taken place in the night preceding the alleged date of occurrence in the small hours of the morning. She has refuted this suggestion. She has categorically stated that she had left her house at 6 a.m. and that at that time, both the deceased children were sleeping on the cot in the Aangan of the house. It appears from her reply to the defence suggestion and her reply in cross-examination that some Naanch (dance performance) had taken place somewhere in the village in the night preceding the date of occurrence. She had stated that her husband (Lal Chand) had come back with their elder son after seeing the dance performance. In reply to a Court question, she stated that her husband had gone to see the dance performance taking their elder son and that the rest of the children were with her (in the night). She also stated that in the night, she was at the house and had slept at the house and that from the place where she was sleeping, the dance performance was not visible. She was suggested that in the night preceding the date of occurrence, she had gone to see the dance performance and is concealing this fact. She refuted it.

31. Smt. Surati (P.W. 3) has testified that on the date of occurrence, her husband Lal Chand (P.W. 2) had gone to his field for working on Jonhari crop and she had gone behind him and that at that time, the deceased children were sleeping on the cot in the Aangan and that when she came back, both the deceased children were not on the cot and that the accused-Appellant was also not present at the house at that time. There is no reason to doubt her testimony.

32. At this stage, "motive" may be dealt with. Motive is that which moves a person to commit an act, say murder. Motive is often hidden in the heart of the assailants but some times it is evident and could be proved. The present is one of such cases. There is consistent evidence of Shiv Raj alias Shiv Nath informant (P.W. 1), Lal Chand (P.W. 2) and Smt. Surati (P.W. 3) on the point. There is absolutely no reason to doubt their evidence on the point. As noted earlier, the informant was own father of the accused-Appellant Phool Chand and also father of Lal Chand (P.W. 2). He has testified that the accused-Appellant had enmity with Lal Chand (P.W. 2) on the suspicion that he (Lal Chand) had illicit relation with his (accused-Appellant's) wife Smt. Radhika Devi (D.W. 1) and for this reason, he had committed the murder of the two deceased children. Being the father of the accused Appellant and of Lal Chand (P.W. 2), such a suspicion, if entertained by the accused-Appellant, could have been noticed by him. He stated in cross-examination that he did not know since how long the suspicion was present in the

mind of the accused-Appellant. But there was nothing strange about it. He has stated that he learnt about the factum of suspicion only on the date of occurrence. For this also, no exception can be taken because it was not necessary that this matter would come to his notice earlier. If it did not come to his notice earlier, there was nothing to doubt him. Being the head of the family, he could be the last man to concoct and justify to such a motive which brings bad name not only to Lal Chand (P.W. 2), Phool Chand accused-Appellant and Smt. Radhika Devi (D.W. 1) ; but also to the entire family of which he was the head. So, if he uttered at the trial on oath about the suspicion of such illicit relationship being entertained by the accused-Appellant, his words must be believed. It is not that he uttered it only at the trial. He had mentioned it at the earlier opportunity in the F.I.R. lodged by him at the police station on the date of occurrence itself.

33. Smt. Surati (P.W. 3) who was the wife of Lal Chand (P.W. 2) has also testified on the point. She stated that Phool Chand accused-Appellant makes a false charge on her husband that he has illicit relations with his (accused-Appellant's) wife. She has stated that actually there was no illicit relationship but it was a confusion of the brain of Phool Chand accused-Appellant and that on account of it, the accused-Appellant had committed the murder of the deceased children. She was cross-examined on the subject and she has stated therein that a quarrel had taken place between her and his (accused-Appellant's) wife about a year earlier than the date of occurrence taking the suspicion of illicit relations between her husband and her (the wife of the accused-Appellant). She further stated that her Dewar Phool Chand accused-Appellant had abused her and for this reason a Maarpeet had taken place between her husband and her Dewar accused-Appellant. She further stated that the said quarrel had taken place because the accused-Appellant had hurled abuses on her. She admitted that after the said quarrel, no further quarrel took place between her husband and the accused-Appellant. She also stated that there were no differences between her (the witness) and her husband (Lal Chand, P.W. 2) taking the matter of suspicion of the alleged illicit relationship. Her replies do not in the least tend to show that she had stated a concocted story. She also would not be opening her mouth and testify such a matter which would necessarily cast a suspicious eye of the villagers over her husband. It cannot be believed that a false motive was concocted to falsely implicate the accused-Appellant. Lal Chand (P.W. 2), no doubt, was suggested that he has falsely implicated the accused-Appellant to escape the murder charge. But then there was never any murder charge hanging on his head and there was no material to create even a suspicion that he (Lal Chand) committed the murder of his own children both of whom were male. We have already dealt with the allegation that both the deceased children were outcome of an illicit connection. Perhaps this suggestion has been made as a counter-blast to the allegation of the suspicion entertained by the accused-Appellant of the illicit relationship between this witness and the wife of the accused-Appellant as the motive of the murder. If the murder of the two deceased children would have been committed by Lal Chand (P.W. 2), then his wife Smt. Surati (P.W. 3) would be the last person to spare him and instead implicate the accused-Appellant falsely, not it was likely that Shiv Raj alias Shiv Nath

(P.W. 1), who was the father not only of Lal Chand (P.W. 2) but also of Phool Chand accused-Appellant would spare this son Lal Chand if he were the real culprit and would falsely implicate another person who also was no other than his own son.

34. Here it may be mentioned that the suggestion made to Shiv Raj alias Shiv Nath informant (P.W. 1) when he was in the witness box was that the motive of illicit relationship has been concocted for the purposes of this case but he has refuted the suggestion. He would be the last person to concoct this motive.

35. It has been elicited from the informant in his cross-examination that the wife of Phool Chand accused-Appellant was living in her Maika (her father's house). He denied that she has been turned out from the house by him. He admitted that he was now in possession of the house, i.e., Kotha of Phool Chand. He stated that he (the witness) still lived in the Ahata and kept the room of Phool Chand locked. In the circumstances of this case, there was nothing strange if he kept the Kotha in which the double murder had been committed by the accused-Appellant locked. He denied the suggestion that they had evicted the wife of the accused-Appellant from that Kotha and did not allow her to live in that Kotha. But even if it be so, it cannot be said that he had any animus against Phool Chand accused-Appellant prior to the occurrence and falsely implicated him for that reason. It has come in the evidence of the informant that he had made a partition of the house between his two sons and asked them to continue to live in the respective portions in which they were living before. It may also be stated that if he did not allow the wife of Phool Chand accused-Appellant to live in that Kotha even if she tried to do so, there was nothing unnatural about it having regard to the common course of human conduct. It cannot be doubted that the informant would not be having any soft corner for the accused-Appellant or his wife since the double murder.

36. In his statement u/s 313, Cr. P.C. before the learned Sessions Judge, the accused-Appellant had claimed that he had been falsely implicated on account of enmity but he did not disclose as to who had falsely implicated him and as to what was the enmity which led to his false implication. He was asked as to why the prosecution witnesses gave evidence against him and his reply was "Pata nahin" (He did not know). It may be mentioned that illicit relationship has been admitted by the accused-Appellant in his confessional statement recorded before the Munsif Magistrate also. In his statement u/s 313, Cr. P.C. recorded by this Court, he was put the question on the point of motive. He was asked if he had any suspicion that Lal Chand P.W. 2 had any illicit relation with his wife Smt. Radhika Devi and due to it, he felt enmity with Lal Chand and his reply was "Gaon Walon ne afwah Phailaya tha. Najayaj sambandh nahin they. ranjis nahin thi." It comes out from his statement that there was something in the air. There was some suspicion of illicit relationship. His reply, therefore, corroborated the prosecution evidence on the point of motive. Here it may be mentioned that in a case of circumstantial evidence, motive if proved serves as a link and as a strong link, in the chain of circumstances. In this case too, the motive has been established and it reinforces the chain of circumstances established by the prosecution at the trial against the

accused-Appellant. Often murders have been committed by persons on account of illicit relations whether suspected or actual between their wives and third persons.

37. Before we proceed further, we take up the evidence of last seen given by Balmik (P.W. 5). He testified that on the date of occurrence, he was going to Salahabad at about 6 or 7 a.m., that when he reached near the house of Dharmdeo, he saw Phool Chand accused-Appellant picking a boy, who was his nephew, and taking him on his lap to his house, i.e., Kotha. He further stated that he did not develop any suspicion at that time and went away where he was going. He further stated that when he came back, he learnt that the dead body of both the deceased children were found in the Kotha of Phool Chand accused-Appellant. He has been cross-examined at length but nothing material has come out. It has come in the evidence that he was not at his house in the night preceding the date of occurrence, that he was at Kooraghat at the place of Phenku, was his sister's husband and had started from Kooraghat at 4 a.m. by cycle and had not stopped in the way and it took him about half an hour in coming to his house. There is nothing suspicious if he left for Salahabad soon after his arrival at his house from Kooraghat. He had stated that he was going to Salahabad at the call of the family of his Nanihal. He claimed that Jamuna had called him to Salahabad. It was elicited from him that he did not ease himself after returning from Kooraghat and before going to Salahabad. Asked the reason for it, he replied "Jab Lagega Tabhi To Koi Jeyega". (i.e., one will go to ease himself when he develops an urge for it). In other words, he did not ease himself at that time because he did not feel an urge for it. It would not be correct to discard his testimony for this reason that he did not ease himself in that morning as he was expected to do.

38. It has come in his evidence that he has testified that he rode the cycle upto the door of Dharmdeo and that the house of Lal Chand was at the north west corner of the door of Dharmdeo aforesaid. He was not suggested any enmity with the accused-Appellant in his cross-examination. He denied the suggestion that he was giving false evidence under the pressure of the police. There is absolutely nothing to show that the police had gone out of its way to bring home charge to the accused-Appellant.

39. As noted earlier, it has come in the evidence of Smt. Surati P.W. 3, mother of both the deceased children that she went from her house on the date of occurrence at about 6 a.m. leaving both the deceased children asleep on a cot under the Mahuwa tree at the Sahan of the house and that at that time, the accused-Appellant was present in his Kotha along with his wife Smt. Radhika Devi and that when she (Smt. Surati) returned to the house, she found the children missing from the house and also found the accused-Appellant absent from the house and that on inquiry, Smt. Radhika Devi told her that the children had gone to the Ahata, whereupon, she went to the Ahata and inquired from her father-in-law (the informant) and learnt that the deceased children were not there. In her cross-examination, no suggestion was made that the accused-Appellant and his wife were all along absent from the house and were present in his Sasural.

40. Then one circumstance relied upon by the prosecution against the accused-Appellant was his abscondance from his Kotha since some times after 7.00 in the morning on the date of occurrence uptill his arrest by the police on 7.6.1991. About this circumstance, first of all there is evidence of Lal Chand P.W. 2. He has stated that since the time of the disappearance of the deceased children, the accused was also not traceable. There was no suggestion made to the witness by the learned Counsel for the defence in his cross-examination that he was telling falsely and actually accused-Appellant was present at his Kotha all along and that he himself also participated in the search for the missing deceased children. There was also no suggestion made by the learned defence counsel to this witness that actually the deceased-Appellant was present in the Sasural, i.e., at the house of his father-in-law, in village Basti (Bishmi Mathia), P. S. Haldharpur, District Mau. The place of the present occurrence was village Dasai Pokhra-ki-Mandi, District Mau.

41. The next witness about the abscondance was Smt. Surati P.W. 3. She had stated in her cross-examination by the defence that in the search for the missing the deceased-children, the informant Lal Chand P.W. 2 and several others had joined but not the accused-Appellant. The defence elicited from this witness in her cross-examination, that the wife of the accused-Appellant, Smt. Radhika Devi (D.W. 1) had participated in the search for the missing deceased children. She categorically stated in the cross-examination that the accused was absent from the time the search had begun for the missing of the deceased children.

42. The point of importance that at that time, the defence suggestion made to her was that the accused-Appellant was also present with her (Smt. Surati P.W. 3) and had himself participated in the search for the missing deceased children.

43. The next witness on the point of abscondance was Balmik P.W. 5. After giving his evidence of last seen of one of the deceased children with the accused-Appellant while he (the witness) was going to Salahabad, he stated that he remained at Salahabad in the night and returned from there to his own village in the next morning at about 6 a.m. and at that time, the accused-Appellant was not present but was absconding. It may be mentioned here that he was resident of the same village in which the accused-Appellant lived and the occurrence took place. In his cross-examination, no specific suggestion was made by the defence on the point of abscondance.

44. Then on the point of abscondance, there was the evidence of Kamta Prasad Shukla, Investigating Officer P.W. 10. He testified about his visit to the village of occurrence including the finding of blood, the blood-stained Gandasa and the dead bodies of the two deceased children in the Kotha in possession of the accused-Appellant. True that he did not specifically testify about the absence of the accused-Appellant from the Kotha but from this statement when taken along with his further statement that he arrested the accused-Appellant on 7.6.1991, it becomes clear, that prior to that arrest, the accused-Appellant was absent from his Kotha. He was cross-examined by the defence. Therein, he was suggested that Phool Chand accused-Appellant had been locked up by

him in the P. S. Kotwali on 3.6.1991, itself, i.e., on the date of occurrence. He refuted the suggestion. He was also suggested that it was Phool Chand accused-Appellant who had got the announcement of disappearance of the deceased children made on loudspeaker and further that he (accused-Appellant) was detained at the police station by way of suspicion. The I.O. refuted these suggestions also. The point of importance thus is that at this stage, the claim of the accused-Appellant was that he was himself present in the village and that he had taken an active role in search of the missing deceased children and that he had even got an announcement made about the missing of the children on loudspeaker so that anybody who may have seen the children may give clue that may lead to the recovery of the missing children and that at that stage, his stand also was that he was arrested by the police on the same day and detained at the police station by way of suspicion.

45. However, when it came to the stage of recording the statement of the accused-Appellant by the Sessions Judge u/s 313, Cr. P.C., the accused-Appellant took a different stand. In reply to question No. 3 about the moving of an application by Lal Chand P.W. 2 at the police station given information about the missing of the deceased children, his reply was "Nahin Pata". His reply to question No. 4 about the lodging of the F.I.R. also was, "Pata Nahin". His reply to question Nos. 6, 7 and 8 about Panchayatnama, preparation of chalan lash and photo lash of the dead children and the letter to C.M.O. for post-mortem also was "Pata Nahin". About the recovery of the blood-stained Gandasa, blood-stained Lungi and blood-stained earth from his Kotha put to him in question No. 10, his reply was the same "Pata Nahin". This showed that he was not present on his Kotha at all these times. However, even then he did not state in reply to any question u/s 313, Cr. P.C., by the Sessions Judge that at the time of occurrence and after it, he was living in his Sasural in another village.

46. He volunteered before the Sessions Judge that he would lead defence and he examined his wife Smt. Radhika Devi as D.W. 1 and father-in-law Ram Avtar as D.W. 2. Both of them claimed on oath that at the time of the occurrence, he and Smt. Radhika Devi both were living at the house of Ram Avtar D.W. 2 in village Basti (Bichni Mathia), P.S. Haldharpur. It is not surprising that Smt. Radhika Devi D. W. 1 and Ram Avtar D.W. 2 testified at the trial in the defence as they have done. One was the wife and the other was the father-in-law of the accused-Appellant and so it was natural for them to do all in their power to save the accused-Appellant from the gallows. However, it is impossible to place any reliance on their testimony which is inconsistent with the stands taken by the accused-Appellant from time to time. The accused-Appellant never claimed at any stage that he was in his Sasural along with his wife on the date of occurrence.

47. It will be seen that this alibi as given by D.W. 1 and D.W. 2 was not the original defence of the accused-Appellant. His original defence was that he was very much present in the village of occurrence and had even taken active part in the search for the missing children. In his statement u/s 313, Cr. P.C., his reply indicated that he was not present in the village but he did not claim to be living in the village where his Sasural was.

However, when this Court put additional questions to him u/s 313, Cr. P.C., he took an altogether different stand. In reply to question No. 4 about the going of Smt. Surati P.W. 3 from the house leaving the children asleep on cot and leaving him and his wife present in his Kotha, he replied that he had gone to the bazar in the morning itself and so he did not know about the going of Smt. Surati P.W. 3. In reply to question No. 6, also, he claimed that he was not present at his house, i.e., in his Kotha when Smt. Surati came to her husband's house and found both the deceased missing. In reply to question No. 7 about his abscondance, he stated that he did not come back to the house uptill 7.6.1991 because in the market R.C.C. roofing was being laid and he was working there (as a mason) and that he did not know about the murder of the deceased children. So it will be seen that at this stage, he resiled from the stand taken by the two defence witnesses about the living in Sasural and set up a third story that he was working as a mason in the market on the date of occurrence and laying R.C.C. roof. One who takes different discrepant stands one after the other cannot be believed on any of those stands. It may be mentioned here that it has come in the cross-examination of Ram Avtar D.W. 2, father-in-law of the accused-Appellant that the distance between the Dasai Pokhra village (where the occurrence took place) and his village Basti was about 10-20 kms. So the evidence of these two defence witnesses cannot be called an alibi in the eyes of law. The evidence of alibi is admissible u/s 11 of the Evidence Act. The facts not otherwise relevant are relevant :

(1) if they are inconsistent with any fact in issue or relevant fact ; (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue of relevant fact highly probable or improbable.

48. Therefore, the determining point is that there should be real inconsistency and improbability and that is not the case here. He could have committed the murder and reached at his Sasural which is 12 kms. away soon after and live there. If he was working as mason in laying R.C.C. roof of a shop in the village where on his own showing he could go in 15 minutes, he could have been seen working at the shop in laying the roof soon after committing the murder. In fact, neither the evidence of Smt. Radhika Devi D.W. 1 and Ram Avtar D.W. 2 was worthy of any credence nor was the claim of the accused-Appellant before this Court that he was busy with the laying of R.C.C. roof in the bazar of the village from 3.6.1991 (the date of occurrence) to 7.6.1991 (the date of his arrest) believable. Further the said evidence and the said claim cannot be said to be inconsistent with the committing of the double murder by him. It may also be added that this last claim was not at all consistent with the alibi as given by his wife Smt. Radhika Devi D.W. 1 and father-in-law, Ram Avtar D.W. 2.

49. In the background of the above discussion, it is obvious that the prosecution has succeeded in establishing the abscondance of the accused-Appellant from the scene of the occurrence since the time of the commission of the offence on 3.6.1991 uptill the time his arrest was made on 7.6.1991. This abscondance is yet another link which goes to strengthen the chain of circumstances established by the prosecution against the

accused-Appellant and all the circumstances established above when taken together lead to no other inference except that of guilt of the accused-Appellant, and so the conviction of the accused-Appellant could be safely sustained on the same.

50. However, in the present case, there are two more circumstances against the accused-Appellant. These also related to his conduct subsequent to the date of occurrence, one is the extra-judicial confession made by the accused-Appellant before Rajendra Prasad P.W. 4 had testified that about 2 years and few months before the date of his appearance in Court, the accused-Appellant Phool Chand met him at Paisa Bazar where he (the witness) had stayed for some time for taking tea while returning from Ratanpur, that the accused-Appellant Phool Chand all of a sudden came near him in a condition of fright whereupon he (the witness) offered him tea and asked him as to why he was so much frightened, whereupon, he replied "Main to apney bhai ko mar dalna chahta tha, lekin maar dala uskey bachchon ko. Mujhsey bari galti ho gayee. Yadi main bhayee ko maar dala hota to koyee afsos na Hota." This witness further stated on oath that it appeared from the attitude of the accused-Appellant that he would murder Lal Chand P.W. 2 also. He was a next door neighbour of the accused-Appellant. His cross-examination appears to have been made on the wrong assumption that he had testified that the extra-judicial confession had been made on the date of occurrence itself. Actually he had not said a word in his testimony to that effect or even to give such an impression. It is clear from his cross-examination that he kept on going to Ratanpura for working from time to time. Therefore, if the narration of his journey from place to place on the date of occurrence as given by him in his cross-examination was not consistent with the description of events of the date of making of the extra-judicial confession, there was nothing strange about it and so adverse inference could be drawn from it. It may be mentioned here that his statement was recorded by the I.O. on 6.6.1991. So the confession could have related to any date from the date of occurrence to the date of his interrogation by the I.O. It was the lapse of the prosecutor that he did not elicit from this witness as to how many days after the occurrence the confession had been made by the accused-Appellant to him. However, for this reason his evidence does not become open to doubt.

51. The defence claimed that this witness was testifying falsely because a quarrel had taken place between him and the accused-Appellant about the flow of water of his house. It has come in the evidence of this witness that the house of the accused-Appellant is situated to the south of his house and that to the south of the house of the accused-Appellant, there is a Kharanja, the level of which is higher and consequently, the water would flow from south to north and that taking the flow of water a quarrel had taken place between him and Lal Chand P.W. 2 accused-Appellant about it.

52. In reply to a Court question, the witness stated that no quarrel had taken place between him and the accused-Appellant about the flow of water. As noted earlier, Lal Chand P.W. 2 was living in the northern Kotha and Phool Chand accused-Appellant was living on the southern Kotha of the same house and so if there was any dispute about the

flow of water from the Kharanja which was on a higher level than the house, then it was a common matter relating to Lal Chand P.W. 2 and Phool Chand accused-Appellant and so it cannot be said that on account of such a dispute about the flow of water, this witness would go out of his way and depose falsely against the accused-Appellant about the murder of the deceased children of Lal Chand P.W. 2 which was a matter relating to the same family to which the house belonged. It may be mentioned here that in his additional statement u/s 313, Cr. P.C., recorded before this Court, he did not set up any such quarrel touching the flow of water from the Kharanja towards the house in which Lal Chand P.W. 2 and the accused-Appellant both lived in different parts but claimed that there was dispute between his wife (Smt. Radhika Devi D.W. 1) and the mother of Rajendra Prasad (P.W. 4) and for this reason Rajendra Prasad P.W. 4 falsely deposed against him. No such dispute between these two ladies was suggested to this witness when he was in the witness box. This shows that really there was no enmity between this witness and the accused-Appellant. So this witness was an independent witness. There was nothing improbable in the accused-Appellant unburdening his conscience before this witness who was his neighbour and had offered him a cup of tea on seeing him in a disturbed state of mind. There was no set code as to under what circumstances an accused may make an extra-judicial confession before a third person.

53. Before the learned Sessions Judge, some confusion arose from the fact that the name of this witness Rajendra Prasad was the same as the name of the person who scribed the F.I.R. of this case. The parentage of this witness P.W. 4 was Dinesh Prasad while the parentage of the scribe of the F.I.R. was Ganesh Prasad and the only factor that was common between the two was that both the persons were residents of the same village Dasia Pokhra. There is absolutely nothing in the evidence on record to show or even suggest that the scribe of the F.I.R. and this witness are one and the same person. It is also no one's case in the evidence that there is only one person bearing the name of Rajendra Prasad in the village. That being the position, there was no question of the prosecution examining this witness touching the scribing of the F.I.R. of this case. There is no reason to doubt about the testimony of this witness. His testimony goes to strengthen further the chain of circumstances against the accused-Appellant.

54. Last but not the least, there is the evidence of the confession made by the accused-Appellant before Sri Sukh Ram (P.W. 11), Munsif Magistrate, Mau at that time on 10.6.1991. The Magistrate has been examined by the prosecution as P.W. 11. The testimony of Kamta Prasad Shukla Investigating Officer P.W. 10 was that the accused-Appellant was arrested on 7.6.1991 and since he admitted his guilt, a report was given for recording his statement u/s 164, Cr. P.C. The record contained a report in this regard dated 7.6.1991 Exb. Ka. 13 on which the C.J.M. ordered,

put up for statement u/s 164, Cr. P.C. on 10.6.1991 remanding the accused-Appellant to judicial custody for a period uptill 21.6.1991. There is also testimony of the I.O. that on 10.6.1991 the accused-Appellant was summoned from jail and produced before the Munsif Magistrate Sri Sukhram for recording of his statement u/s 164, Cr. P.C. and that

his statement was recorded by the said Munsif Magistrate. The testimony of the Munsif Magistrate is that the C.J.M. had fixed 10.6.1991 for recording the statement of the accused-Appellant u/s 164, Cr. P.C. and that on 10.6.1991, the accused-Appellant was produced before him for that purpose because he was link officer of the C.J.M. and that on 10.6.1991, he recorded the statement of the accused-Appellant u/s 164, Cr. P.C. He has proved this statement which is in the following word ; "Mainey apney do sagey bhatijey ko gandasey sey kat diya hai. Mainey dinank 3.6.1991 ko subah karib 7 bajey karib apney bhatijon ko gandasey sey kat kar unki laas bhusa men chhipaya tha. Aik bhatijey ka nam Ram Saran tha. Jiski umar karib 5-6 varsh thi dusrey bhatijey ka nam abhi nahin rakha gaya tha uski umar karib 7 mah thi. Meray donon bhatijey jinhey mainey katkar lash bhusey men chhipaya tha vey donon merey sagey bhayee Lal Chand ke larkey they. Lal Chand merey barey bhayee hai. mere barey bhayee ka Najaij sambandh meri patni sey tha. Mai apney bhayee Lal Chand ko jaan sey marna chahta tha kintu mauka na milney sey mai apney barey bhayee ko nahin mar paya. Main Badley ki bhawna sey apney bhayee ke donon larkon ko maar dala. Main apney patni ko bhi marna chahta tha kintu agal bagal admi aa gaye is liyey usey nahin maar paya.

He has recorded on the bottom of the said statement Ext. Ka.-28, the usual certificate that he has explained to the accused-Appellant that he is not bound to make any statement and that if he gives a statement, it will be read against him and further that he is fully satisfied that the accused-Appellant is making his statement voluntarily. He has further recorded that he has himself written the statement given by the accused and has read it over to him and he has accepted it as correct. He has testified that this statement was given by the accused voluntarily and before it he had explained to the accused-Appellant that it is not necessary for him to give any statement and that the statement given would go against him. He has stated in his cross-examination that he had recorded the statement in open Court, that at that time, the Court work was finished and no litigants and lawyers were present at the time in the Court. He has also stated that the accused had been summoned from the jail from judicial custody having been brought by the police. He has also testified that after questioning the accused-Appellant, he has recorded the statement given by the accused-Appellant, He has further stated that there was no employee of P. S. Kotwali present in the Court at the time of recording the statement of the accused-Appellant u/s 164, Cr. P.C. He has refuted the suggestion made by the defence that he has recorded the statement under the pressure of the police. There was no question of the Munsif Magistrate having recorded the statement under any pressure from the side of the police or from any other quarter. It may be mentioned here that while a suggestion was made to the I.O. in his cross-examination (as noted earlier) that the accused was detained at the police station on 3.6.1991 itself, in the statement u/s 313, Cr. P.C., the accused-Appellant did not make any such imputation against the police. All that he has said is that he was assured by the police that if he will make the statement before the Magistrate, he would be acquitted. The I.O. has denied the allegation that he has pressurised or allured the accused-Appellant for making the statement before the Magistrate admitting the guilt.

55. I am satisfied from the testimony of the Munsif Magistrate that he had given the necessary warning to the accused-Appellant before recording his statement and that after this warning, the accused made the statement u/s 164, Cr. P.C. before the Magistrate voluntarily fully understanding its contents and impact. If he did not record the statement in the form of question answer, it does not in the circumstances of this case impair the worth of the statement recorded by him. This irregularity is curable u/s 463(1), Cr. P.C. The Munsif Magistrate has been examined in Court and we are fully satisfied that such non-compliance with the provisions of Section 281, Cr. P.C. has not injured the accused in his defence on the merits and that the Munsif Magistrate has duly recorded the statement of the accused-Appellant. We, therefore, admit in evidence the statement of the accused-Appellant recorded by the Magistrate u/s 164, Cr. P.C. There is no allegation at any stage that he made a statement different from the one as recorded by the Magistrate in the record. It is not a case where the accused has been produced before the Magistrate from police custody. As noted earlier, he had been consigned to jail custody on 8.6.1991 and that the date 10.6.1991 was fixed for the recording of his statement. It follows this time gap was given by the then C.J.M. in order to give the accused-Appellant an opportunity to reflect on the question whether to make any confessional statement or not. He was in judicial custody in jail from 8.6.1991 to 10.6.1991 when he was called from the jail custody to the Court of the Munsif Magistrate concerned for the recording of his statement and then he was given the requisite warning by the Magistrate and it was then that he proceeded to record his statement. In these circumstances, it cannot be said that the statement given by the accused-Appellant before the Magistrate was not a voluntary statement or that he has given the statement under any inducement, threat or promise from the side of the police. If there was any such inducement, threat or promise made to him, he had every opportunity to complain of the same to the Munsif Magistrate. Since he was coming from judicial custody, it cannot be said that due to fear of the police, he kept mum and gave the statement as called upon by the police to give. It cannot be believed that the accused-Appellant would be such a fool that he would believe a promise coming from the police of his acquittal on his admitting the entire guilt.

56. It is also to be noted that the confessional statement given by the accused is fully consistent with the chain of circumstances established by the prosecution in this case against the accused-Appellant and goes to corroborate the said prosecution evidence in full. The accused-Appellant stated in his confessional statement that he committed the murder by Gandasa. As noted earlier, the blood-stained Gandasa was recovered from the Kotha of the accused-Appellant and the dead bodies of both the deceased with sharp weapon injuries thereon were also recovered from the same Kotha and there were also recovered blood-stained earth from the same Kotha and there was also evidence of the concealing of dead bodies in the heap of Bhusa in the same Kotha. Then he has stated about the illicit relations of Lal Chand P.W. 2 with his wife and it is also stated by him that he wanted to commit the murder of Lal Chand P.W. 2 (his elder brother) but could not commit his murder for want of opportunity and that he committed the murder of both the

sons of his brother Lal Chand by way of revenge. This confessional statement is also quite consistent with the extra-judicial confession made earlier by him before Rajendra Prasad P.W. 4.

In view of the above discussion, the chain of circumstantial evidence established by the prosecution is complete, and is incapable of explanation on any other hypothesis than that of the guilt of the accused-Appellant. The prosecution evidence on record was not only consistent with the guilt of the accused-Appellant but was wholly inconsistent with his innocence. The circumstances are of determinative tendency unerringly pointing towards the guilt of the accused-Appellant and then as noted earlier, there is an extra-judicial confession of the accused-Appellant made before Rajendra Prasad P.W. 4 and the confessional statement made before the Munsif Magistrate u/s 164, Cr. P.C. which both go to further strengthen the chain of circumstantial evidence so successfully established by the prosecution against him.

57. In view of the above discussion, we find that there is no substance in the appeal on merits and that the conviction of the accused-Appellant from the offence u/s 302, I.P.C. as made by the trial court ought to be maintained.

58. Coming to the question of sentence, the learned Sessions Judge has imposed the penalty of capital punishment. The learned amicus curiae for the accused-Appellant has claimed that it was not such type of case in which the accused should be awarded death penalty. According to him, it was not the rarest of rare cases in which case alone the death penalty may be imposed. We have considered the pros and cons of the matter and are of the opinion that it is not a case in which the accused-Appellant should be visited with death penalty and that the accused-Appellant should be awarded the normal sentence of imprisonment for life. So the reference has to be answered accordingly.

59. For the reasons aforesaid, the appeal is partly allowed. The conviction of the accused-Appellant for the offence u/s 302, I.P.C. is maintained. However the reference of the learned Sessions Judge for confirmation of the death penalty is rejected and the death penalty is set aside. The accused-Appellant is sentenced to imprisonment for life for the offence u/s 302, I.P.C. He is in jail. He shall serve out his sentence of life imprisonment in accordance with law.

60. Sri Apul Misra, Advocate, who has argued this capital appeal on behalf of the accused-Appellant having been appointed amicus curiae for the accused-Appellant in this capital appeal by this Court shall be paid Rs. 2,500 as fee for arguing this capital appeal.

Let a copy of this judgment be sent to the learned Sessions Judge, Mau for information and compliance. The compliance report shall be submitted to this Court within a month from today.