

(2014) 01 AHC CK 0079

Allahabad High Court

Case No: Capital Cases No. 378 of 2013

Dharmendra

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 9, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 302, 304, 308

Citation: (2014) 1 ACR 633 : (2014) 2 ALJ 231**Hon'ble Judges:** Sunita Agarwal, J; Amar Saran, J**Bench:** Division Bench**Advocate:** Rahul Mishra, Advocate for the Appellant**Final Decision:** Dismissed

Judgement

Amar Saran, J.

The appellant Dharmendra has been awarded a death sentence u/s 302 I.P.C. for the murders of his wife Smt. Kavita and two year old son Sunny by the judgment and order of the Additional Sessions Judge, Court No. 3, Azamgarh, dated 19.2.2012. We have heard Sri. Rahul Mishra, learned counsel for the appellant and Sri. Akhilesh Singh, learned Government Advocate assisted by Sri. Anand Tiwari, learned A.G.A. for the State.

2. The F.I.R. of this incident was lodged by Pintoo, brother of the deceased alleging that a quarrel had taken place between the appellant and the deceased Kavita in the previous night, and in a fit of anger, after losing control over his senses, the appellant appeared to have attacked his wife Kavita and their son Sunny with a gandasa at 5 a.m. on 26.10.2009. Kavita had died on the spot and Sunny was lying in an injured condition and had been rushed to the hospital by the persons present.

3. Pinto reported this incident at P.S. Bilariyaganj, on 26.10.2009 at 7.30 a.m., where a First information Report was registered by the S.O., P.W. 6 Santosh Kumar Sharma at Crime No. 789 of 2009 u/s 308/304 I.P.C. The S.O. Santosh Kumar Sharma after getting the check report and other papers prepared and carrying out other necessary formalities proceeded to the spot, i.e. the house of the appellant in village Karmaini, where he also recorded the statement of the informant and inspected the spot and collected the plain and blood stained mud. The accused was arrested on the same day from a room in the same house, and from his possession a blood stained gandasa was recovered. The signatures of the witnesses Naseem and Gayasuddin and the appellant Dharmendra were taken on the recovery memo, which was marked as Ext. Ka-7. The I.O. got the inquest on the dead body conducted by S.I. Kamla Yadav and thereafter got the body sent for postmortem.

4. Dr. Vimlesh Kumar, P.W. 5 conducted the post-mortem on the body of Kavita aged about 26 years on 26.10.2009 at 2.50 p.m. The deceased was of average built. Rigor mortis was present on both the extremities. She had the following ante mortem Injuries:-

1. Incised wound 7 c.m. x 2 c.m. x bone deep on left side chin 3 c.m. below mouth
2. Incised wound 10 c.m. x 3 c.m. x muscle deep 1 c.m. below injury No. 1.
3. Incised wound 7 c.m. x 1 c.m. x neck cavity deep, 3 c.m. below injury No. 2.
4. Linear incised wound 9 c.m. x $1\frac{1}{2}$ c.m. x muscle deep on top of left shoulder.
5. Incised wound 4 c.m. x 1 c.m. x muscle deep 10 c.m. below top of left shoulder on post aspect of left arm.
6. Incised wound 1 c.m. x $1\frac{1}{2}$ c.m. x muscle deep 12 c.m. upper to left wrist joint.
7. Incised wound 1 c.m. x $2\frac{1}{2}$ c.m. x muscle deep, 6 c.m. upper to left wrist joint.
8. Incised wound 3 c.m. x 1 c.m. x muscle deep just proximate to little finger.
9. Incised wound 4 c.m. x 2 c.m. x bone deep below right index finger.
10. Incised wound 6 c.m. x 0.5 c.m. x muscle deep on right palm.
11. Incised wound 10 c.m. x 10 c.m. x bone deep and muscle deep behind the neck in 7 numbers. The size of the smallest injury was 07 c.m. x 1 c.m. and the size of the biggest injury was 1.0 c.m. x 02 c.m.

5. After Sunny aged about two years died on 26.10.2009 at 5 p.m. at the District Hospital, Azamgarh, his post-mortem was conducted on 27.10.2009 at 3.30 p.m. by P.W. 9 Dr. Rajesh Sinha. Rigor mortis was present on both the extremities. The following ante mortem injuries were found:-

1. One stitched wound about 6 c.m. long on left side of face, right end of wound is 1 c.m. away from left mouth, left end of the wound is about 2 c.m. below ear. On cutting stitches wound is bone deep, underlying mandible fractured.
2. One stitched wound about 1 c.m. long left side face, 2 c.m. in front of left ear, on cutting stitches wound is muscle deep.
3. One stitched wound about 1.5 c.m. long on left side chin 2 c.m. below left angle of mouth, on cutting stitches wound is muscle deep.
4. One stitched wound about 5 c.m. long on dorsum of left hand just below left wrist joint, on cutting stitches wound is bone deep and metacarpal bones of little ring and middle finger fractured.
5. One linear incised wound 3 c.m. x .5 c.m. front of left side of neck, skin deep 3.5 c.m. below injury No. one.
6. One incised wound, linear 3 c.m. x 0.5 c.m. muscle deep on left and front of neck, 3 c.m. below injury No. (5).
7. Multiple linear abrasions in an area of 7.5 c.m. x 4 c.m. varying in size from 1 c.m. to 3 c.m. on bone of back side chest and left side of neck just below injury No. six.
6. Both the deceased died due to shock and haemorrhage due to ante mortem injuries. The earth was completely soaked in blood. Blood was seen on large portions of the sari, petticoat, blouse, kathari and on the gandasa. Human blood could be detected on the blouse, kathari and blood stained earth. The gandasa was sent to the Forensic Science Laboratory at Agra along with the clothes, sari, petticoat, blouse, ring and kathari of the deceased along with plain and blood stained earth. So far as the sari, petticoat and the gandasa were concerned, as the blood had disintegrated their origin could not be determined.
7. The appellant was charged u/s 302 I.P.C. for having murdered the informant's sister Kavita and her son Sunny on 26.10.2009 at 5 a.m., to which charge, he pleaded not guilty and claimed trial.
8. The prosecution examined P.W. 1 Pintoo, brother of the deceased, P.W. 2 Sharda Devi, mother of the deceased, P.W. 3 Prabhawati and P.W. 4 Bhikhari, neighbours of the appellant as witnesses of fact.
9. P.W. 5 Dr. Vimlesh Kumar, and P.W. 9 Dr. Rajesh Sinha who conducted autopsies on the corpses of Smt. Kavita and Sunny respectively as described above, P.W. 7 S.I. Mohammad Israil, who conducted inquest on the dead body of Sunny at the mortuary in the District Hospital, Azamgarh on 27.10.2009. P.W. 6 S.O. Santosh Kumar Sharma who registered the case u/s 308/304 I.P.C. and commenced the investigation as above, P.W.

8 S.I. Ram Singh, the second I.O., who took over the investigation from 1.12.09 and sent the blood stained mud to the Forensic Science Laboratory, Lucknow, recorded the statements of the remaining inquest and other witnesses, and submitted the charge sheet u/s 302 I.P.C. against the appellant on 10.12.2009 are the formal witnesses.

10. P.W. 1 Pintoo deposed that a quarrel took place between his brother-in-law, the appellant Dharmendra and his wife Kavita, the sister of this witness on 26.10.2009. As a result in a fit of anger, the appellant after losing control of his senses assaulted his sister Kavita and her son Sunny with a gandasa. On receiving this information, he had gone to the sasural of his sister. He found her lying dead. His nephew Sunny had been taken to hospital by the villagers. Many persons had gathered. He got the report (Ext. Ka-1) scribed by Raj Kumar, which he handed over at P.S. Bilariyaganj, after appending his signature on the same on the same day at 7.35 a.m. His nephew also died as a result of the assault by the appellant. In his cross-examination, he admitted not seeing the incident, but learning about it from Ravindra, the devar of Kavita. He further stated that Kavita had married the appellant Dharmendra about 10 years earlier.

11. P.W. 2 Smt. Sharda Devi, mother of the deceased deposed that Pintoo had come to her and revealed that his brother-in-law Dharmendra had assaulted her daughter Kavita and Kavita and Dharmendra's son Sunny with a gandasa. After that Pintoo had gone to the village Karmaini. Later Smt. Sharda Devi along with some other co-villagers also proceeded to Karmaini. When they reached the village, she found Kavita had died and Sunny had been taken to the hospital by Kavita's father-in-law and Dharmendra's aunt. Deepak and Sooraj, who were the sons of Dharmendra's aunt told her that Dharmendra had assaulted Kavita and Sunny. Kavita's father-in-law Bahadur used to ply a "thela." Dharmendra did not do any work and he would roam about the whole day. Her daughter Kavita used to wash clothes and work in some houses for earning money. Dharmendra used to repeatedly asked her to bring money from her house and had been troubling her right after her marriage. Whenever, her daughter used to go to her sasural, Smt. Sharda would give her Rs. 1000-1500/- or Rs. 2000/- as per her capacity at that time. One month prior to the incident, when Kavita had come to her maika, she had told her mother, that when Kavita would go to wash clothes or to do kitchen work (chulha bartan) at different houses, Dharmendra would express suspicion about her character and threaten to kill her. Dharmendra also used to beat her. Two months earlier Dharmendra had met P.W. 2, Smt. Sharda Devi, who had questioned him as to why he would beat her daughter, but Dharmendra denied this fact. Dharmendra had married Kavita 10 years back. Dharmendra's uncle Kanhai and Sooraj had revealed that Dharmendra had assaulted the deceased, but they had made this disclosure on the basis of hearsay. She further admitted in cross examination that she had no knowledge as to whether her daughter had ever lodged a report against the appellant in the past for having beaten her.

12. P.W. 3 Prabhawati a neighbour of Dharmendra denied having seen the incident and claimed that she had gone out side for the purpose of toilet. She was declared hostile by the prosecution, and in her cross-examination by the D.G.C., she denied having given

any 161 Cr.P.C. statement to the I.O. She also denied having colluded with Dharmendra because he belonged to her caste.

13. Likewise P.W. 4 Bhikhari claims that he had only over heard that Dharmendra had killed his wife and son. When he reached the spot, the police had taken away the dead body and Dharmendra was also not present. The next day, he had gone to see Dharmendra's son Sunny in the hospital. By then Sunny had died. Sunny's inquest was conducted by the police in his presence and he appended his signature to the inquest papers. In his cross-examination, he admitted that his house was 1½ miles away from the house of Dharmendra. He had reached the house of Dharmendra at 8 a.m. He admitted to being questioned by the police, but he claims to have told them that he had seen nothing. He was declared hostile and it was suggested to him by the D.G.C. (Criminal) that he had good terms with Dharmendra's family. But he denied changing his version because of the good terms.

14. The circumstances of the case were put to the appellant u/s 313 Cr.P.C., which he denied. He claimed that he was innocent and he was sleeping in his other house and that he had been falsely implicated. To most specific queries his answer was "nahin maloom," (he did not know the answer).

15. Bahadur, father of the appellant has been examined as D.W. 1. He deposed that Dharmendra used to sleep with him at his house, which was 70-75 paces from the house, where the deceased, his daughter-in-law, used to sleep. His daughter-in-law was fair and many persons used to come to visit her. He had dissuaded his daughter-in-law from entertaining visitors, otherwise some incident could happen, but she never listened to him. Any of these visitors may have committed the murder of Kavita and her son Sunny may have also received injuries in the incident which caused his death. To a Court question, he admitted that there was no quarrel between his daughter-in-law and his son. The appellant who was his son used to sleep at his place every night. Even in his cross-examination by the A.D.G.C. D.W. 1 Bahadur admitted that there was no quarrel between the appellant Dharmendra and his daughter-in-law.

16. D.W. 2 Phool Chandra, who was a neighbour and also gave the same evidence as D.W. 1 that the appellant's father Bahadur had two houses. The murder had taken place in the old house, where the appellant's wife used to reside with her two years old son. She was of fair complexion and attractive and she was visiting other houses in the village for domestic work. Villagers used to visit her. On the date of incident, Dharmendra was staying at his father's house. D.W. 2, Phool Chandra had no idea how the incident had taken place. There was no dispute between Dharmendra and his wife and he did not know whether Dharmendra's wife had been killed because of her bad character, but he claimed that Dharmendra had not murdered her. In his cross-examination, he further admitted that he had only seen Dharmendra one week prior to the incident and his house was at least 200 feet from the two houses of Dharmendra.

17. Learned counsel for the appellant submitted that this is a case of circumstantial evidence and the circumstances are not sufficient to connect the appellant with this offence. As Bahadur, D.W. 1, father of the appellant and D.W. 2 Phool Chandra had given evidence that Dharmendra used to spend the night with his father in his second house and had not murdered his wife, hence no onus could be cast on the appellant u/s 106 of the Evidence Act to explain how the two deceased had died in his house. He drew our attention to the evidence of P.W. 6 S.O. Santosh Kumar Sharma, the first Investigating Officer who admitted in his cross-examination that the entries in the case diary were not properly made. The Investigating Officer claims to have started the investigation on 26.10.2009 when he had written out the first case diary parcha, but he had not noted the time, when he closed it. He had also not noted the time, when he had arrested the accused. Absence of mention of time casts some suspicion on the quality of his investigation. It was further submitted that the recovery of the gandasa from the appellant is doubtful as none of the witnesses of recovery mentioned in the recovery memo. viz. Naseem and Gayasuddin have been examined. There was no reason for the appellant to have remained in the old house, where he had been apprehended on the date of incident, 26.10.09. It was more surprising how the appellant would be holding the blood stained gandasa at that time. He further submitted that actually outsiders used to visit the house of the deceased Kavita because she had a loose character who had murdered her and the appellant had been falsely implicated. Two, neighbourhood witnesses P.W. 3, Smt. Prabhawati and P.W. 4 Bhikhari have turned hostile and have not supported the prosecution case. P.W. 9 Dr. Rakesh Sinha has admitted in his cross examination at one stage that the injuries could have been caused by any sharp edged weapon and that the injuries had not necessarily been caused by a gandasa.

He also submitted that this was not a case, in which the death sentence was appropriate, as the appellant appears to have acted as a result of some mental disturbance perhaps because he was suspicious about the character of his wife. He placed reliance on the decisions of [Dharmendrasinh @ Mansing Ratansinh Vs. State of Gujarat](#), and [Rajesh Kumar Vs. State through Govt. of NCT of Delhi](#),.

18. Learned Government Advocate, on the other hand, argued that the circumstances of this case are sufficient for connecting the appellant with this crime. No reliance could be placed on the defence witnesses. D.W. 1 Bahadur and D.W. 2 Phool Chandra, who only appeared to have deposed in favour of the appellant because Bahadur was his father and Phool Chandra was a close family friend. As the defence witnesses admitted that there was no dispute between the husband and wife, in the normal circumstances it would be expected that the appellant would be staying with the deceased and his two year old son and the onus lays on the appellant to explain as to how the deceased Kavita and her son Sunny had been murdered. The Investigating Officer had proved the recovery of a blood stained gandasa from the appellant and it was not very material that the other witnesses had not come forward to prove the recovery of the weapon from the appellant. The appellant had even signed the recovery memo. which he has not denied in his

cross-examination. It was not necessary for all the witnesses to have supported the prosecution cases. Two witnesses, P.W. 3 Smt. Prabhawati and P.W. 4 Bhikhari may have turned hostile. But there was sufficient other evidence, such as the testimonies of P.W. 1 Pintoo and P.W. 2 Sharda Devi which was corroborated by the other circumstances such as the recovery of the blood stained gandasa from the appellant at the time of his arrest, motive with the appellant for the crime, false alibi regarding absence of the appellant from the house and having stayed at his father's house on the night in question. How an accused reacts after the crime is an idiosyncratic reaction, and the appellant may have remained rooted to the spot after the incident, where he was arrested by the police along with the gandasa. In any case the failure of the appellant to explain how the deceased had died in the house, which burden fell upon the appellant u/s 106 of the Evidence Act was touted as an important circumstance for connecting the appellant with this offence. There was no reason for the false implication of the appellant, if any other persons had committed this crime.

19. Considering the brutality of the assaults, it would be appropriate in this case, where the wife and two year old son had been murdered by the appellant that the death penalty awarded by the trial Judge be not disturbed, and the sentence of life imprisonment would be inadequate.

Analysis of the evidence and contentions

20. The basic contention of the learned counsel for the appellant was that no onus could be cast on the appellant u/s 106 of the Evidence Act to explain how the two deceased had died in his house, because D.W. 1 Bahadur, father of the appellant, and D.W. 2 Phool Chandra have stated that the appellant used to sleep in the other house along with his father Bahadur whilst the deceased Kavita would sleep in another house with her deceased child Sunny. The appellant would be relieved of the burden, only if we find that the version set up by the defence witnesses appears to be probable and acceptable.

21. However on a careful analysis of the evidence and the circumstances we are of the view that the testimony of these two defence witnesses does not appear to be at all plausible. D.W. 1 Bahadur being the father of the appellant would naturally be interested in trying to save his son from the gallows. We also find some inherent improbabilities in this version. Normally the 28 year old appellant would be expected to sleep in the same house as his wife Kavita, who was of his own age, and who was supposed to be attractive and of fair complexion. They also had a two year old child, who would also need to be protected. It was also not the prosecution or defence case that the relations of the couple had completely broken down. D.W. 1 Bahadur himself admits that food would be cooked in their old house, where the deceased, his daughter-in-law and his grandson resided and the entire family would eat there. However according to Bahadur, after consuming his food, Bahadur and his son Dharmendra used to go to his new house for sleeping, which was 75 paces from the old house. In his cross-examination in Court, D.W. 1 Bahadur also admits that prior to this incident, there was no quarrel between his

daughter-in-law and the appellant and their relations were congenial. It was also admitted that the appellant used to bear the expenses of his wife, and their son, the two deceased in this case, by performing the work of a labourer. In these circumstances the claim that the appellant was not sleeping in his own house, along with his wife and little child, and sleeping in his father's house, is hard to digest. Also, if the allegation of D.W. 1 Bahadur that visitors would come to the house of his daughter-in-law was correct, that would provide greater reason for the appellant to sleep in the old house to prevent his wife from having illicit relations with any visitors. In further cross-examination to a question by the A.D.G.C., D.W. 1 could give no explanation why the appellant would not be sleeping in the said house in which his wife and son resided. This witness has simply made an unsubstantiated suggestion that Smt. Kavita was killed on account of her illicit relations, but he had no idea with whom she had illicit relations. Although, he suggested that there were 2-4 boys of the village, who were having illicit relations with her, but their names were never specified. D.W. 1 was never able to find out as to who had killed his daughter-in-law and grandson Sunny. He had not even given any S. 161 Cr.P.C. statement to the Investigating Officer.

22. Similarly Phool Chandra, D.W. 2 has supported the statement of D.W. 1 and deposed that the murder had taken place at the old house, where the deceased Kavita resided with her son, without the appellant. Dharmendra's wife was fair and relatively attractive, and visitors would come to meet her, but on the night of incident, Dharmendra was sleeping in his father's new house. He however admits in his cross-examination that he had no idea how the deceased was murdered, but admitted that there was no dispute between the appellant and his wife, the deceased. He was not even able to state whether the deceased was killed because of illicit relations, but he simply stated that Dharmendra did not murder her. He further stated that the houses of Dharmendra were 100 feet apart, but his own house was 200 feet from Dharmendra's house and Dharmendra had not even informed him that he would be sleeping with his father. He did not meet Dharmendra after the incident. He denies that being a relation of Dharmendra, he was falsely trying to save him. On a close scrutiny, for the reasons above mentioned, we are of the view that the appellant's father Bahadur and relation Phool Chandra have appeared as defence witnesses only for the purpose of shielding the appellant. They have given no good reasons to suggest why the appellant would sleep in the new house along with his father and not in the house, where his wife and two years old child used to reside, where they were murdered. In view of the above evidence, we are left with no option except to infer that the appellant was in fact residing with his wife and child, who were murdered in the same house.

23. Another circumstance damaging to the appellant is that if his wife was killed by any outsiders, the appellant Dharmendra would have lodged a report or at least he would have gone to the hospital along with his father for the purpose of saving the life of his 2 years old child, who had been seriously injured in the incident and was fighting for his life. Even D.W. 1 Bahadur, could have gone to the police and lodged an F.I.R., if someone

else had committed the crime, but he failed to do so, which circumstances only go to suggest that it was the appellant and none other who had committed the two murders.

24. We also think that although it was a little unusual as to how the appellant was arrested from his house, along with the gandasa and did not abscond immediately after the incident. But as it has been stated in some decisions that there is no standard or normal manner in which a human being (whether the accused or a witness) may act after a crime. It is indeed possible that in a fit of irrational jealous anger the appellant, who may have been suspicious of the chastity of his wife Kavita, who needed to go to different people's houses to work there, as has been deposed to by Kavita's mother, P.W. 2, Sharda Devi, committed the murders of his wife and son. But later overwhelmed by pangs of conscience he became contrite and remained rooted to the spot where he was arrested by the police along with the gandasa on their arrival to his house on the same day, as deposed to by the I.O., P.W. 6 Santosh Kumar Sharma. Thus in [Bachhitar Singh and Another Vs. State of Punjab](#), the Supreme Court has noted (SCC p. 135, para 12)

12. Human behavior may vary from man to man. Different people behave and react differently in different situations. Human behavior depends upon the facts and circumstances of each given case. How a man would behave in a particular situation, can never be predicted.....

Again in [Dinesh Borthakur Vs. State of Assam](#), , the Apex Court has observed at page 707 :

47. No hard-and-fast rule having any universal application with regard to the reaction of a person in a given circumstance can, thus, be laid down. One person may lose equilibrium and balance of mind, but, another may remain a silent spectator till he is able to reconcile himself and then react in his own way. Thus, merely because the appellant did not cry or weep on witnessing the dead bodies of his wife and daughter, cannot be made the basis for informing (sic inferring) his guilt.

In the instant case it is also true that Gyasuddin and Naseem the public witnesses of the recovery of the "gandasa" and arrest of the appellant on 26.10.09 and signatories of the recovery memo. (Ext. Ka 7) have not been examined. But it is not unusual that outsider witnesses are reluctant to come forward to give evidence as they avoid getting mixed up with the police. But that in itself can provide no reason for doubting the credibility of the recovery or arrest by the police. In [State, Govt. of NCT of Delhi Vs. Sunil and Another](#), , it is observed that it is not an essential legal requirement that independent witnesses of recovery sign the recovery memo. or are produced in each case, and there is no reason to presume that the police has not performed its official acts in a regular manner. In paragraph 20 of the aforementioned law report it is specifically observed:

20.But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so

prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

The aforesaid decision has been approved inter alia in [Kashmiri Lal Vs. State of Haryana](#), and [Munish Mubar Vs. State of Haryana](#), .

25. To a specific question put to the appellant u/s 313 Cr.P.C. as to how the blood stained gandasa was recovered on his pointing out, he has simply stated that he does not know how, "nahin maloom." There was even no suggestion that the blood stained gandasa was not recovered from him, or that it was planted on him. In somewhat similar circumstances. It has been held in [John Pandian Vs. State Rep. by Inspector of Police, T. Nadu](#), as follows: (SCC p. 153, para 57)

57. ... The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case.

26. In [State of Maharashtra Vs. Suresh](#), it has been held that when the attention of the accused is drawn to such circumstances that inculcate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said failure may be considered a missing link for completing the chain of circumstances.

27. No doubt, the neighbourhood witnesses P.W. 3 Prabhawati and P.W. Bhikhari have not supported the prosecution case. The former has repudiated her S. 161, Cr.P.C. statement to the Investigating Officer. She has been declared hostile and has disclaimed any knowledge of the incident. This witness has also denied that she was trying to save the appellant because she belonged to the same caste and was his neighbour. P.W. 4 Bhikhari has stated in his examination-in-chief that he had over heard that the appellant had murdered his wife and two years old son Sunny, but in cross-examination, he states that the A.D.G.C. had dictated his statement. He was also declared hostile. He denied that he had turned hostile because of his good relations with Dharmendra and his family. It has been observed that too often now independent witnesses are extremely reluctant to give evidence in cases, as they consider every crime to be private matter of two contesting sides. For this reason Courts do not insist on production of independent witnesses to the same extent as before, and pass sentences on the basis of the available witnesses and other reliable evidence on record. In this context it has aptly been observed in [Mehmood Alam Tariq and Others Vs. State of Rajasthan and Others](#), :

11. In the light of these principles, we may now consider the first contention urged by the learned counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused, now that none except the family members come forward to give evidence in a case, as usually independent witnesses think that the matter does not concern them. But ordinarily there is no reason for the related members to depose against the accused if he was not involved in the offence, sparing the real offenders.....

28. We therefore see no problem if P.W. 3, Smt. Prabhawati and P.W. 4 Smt. Sharda Devi, who were neighbours, caste mates or acquaintances of the appellant fail to support the prosecution case by turning hostile. The evidence of P.W. 1, Dharmendra, P.W. 2 Sharda Devi, who were the brother and mother of the deceased Kavita is intact for establishing motive for the crime, which together with other circumstances of this case could prove sufficient for connecting the appellant with this offence.

29. Some faults in the investigation process have been pointed out by the learned counsel for the appellant. So far as the claim that the S.O. S.K. Sharma, the first I.O. admits in his cross-examination that in the entries in the case diary, he did not note the time when he wrote out the first parcha on 26.10.2009 and he also did not note the time when he arrested the accused. We think that merely on account of such minor irregularities in the investigation process, the entire evidence and the substratum of the prosecution case cannot be discarded. Thus, after review the conspectus of the law on the aspect of impact of irregularities and lapses in investigation on the assessment of evidence, the Apex Court in a recent decision, [Hema Vs. State, thr. Inspector of Police, Madras](#), has laid down as follows:

18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses

affect the object of finding out the truth.

30. But the main circumstance against the appellant was that if this version set up subsequently by the appellant and the defence witnesses that the appellant used to sleep in the house of his father was incorrect, and that he had belatedly set up a false alibi and was actually sleeping in his house, on the night in question along with this wife and son (the two deceased), then the onus squarely lay on the appellant u/s 106 of the Evidence Act to explain how the two had been murdered in the house, which was a fact within his exclusive knowledge and regarding which it was very difficult for the prosecution to produce evidence. But the appellant in his statement u/s 313 Cr.P.C. has denied the specific allegation against him and has simply said that he was innocent and was sleeping in his other house. This false defence and absence of any explanation about the said murders were important circumstances for filling up the missing link and for inferring that the appellant and none other was responsible for the two murders.

31. Nothing significant turns on the admission by P.W. 9, Dr. Rakesh Sinha that the injuries could have been caused by any sharp edged weapon and not only by a gandas. This was only the opinion of the doctor. Certainly an incised injury could be caused by a gandas or by another sharp edged weapon. That is all what the doctor admitted. The important aspect was the gandas which was recovered from the appellant did have blood on it, which therefore lends assurance to the prosecution version that the appellant appears to have murdered his wife and child with this gandas. As held in [Dr. Sunil Clifford Daniel Vs. State of Punjab](#), , merely because the Forensic Science Laboratory"s report mentions that as the blood on the gandas had disintegrated, hence its origin could not be determined, in the background that the appellant could not offer no explanation in his S. 313 Cr.P.C. statement as to how this blood stained gandas was recovered from the appellant, ".....no advantage can be conferred upon the accused, to enable him to claim any benefit, and the report of disintegration of blood, etc. cannot be termed as a missing link, on the basis of which, the chain of circumstances may be presumed to be broken" (Sunil Clifford, para 46).

In [Trimukh Maroti Kirkan Vs. State of Maharashtra](#), in paragraphs the Apex Court has observed thus:

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in [State of Punjab Vs. Karnail Singh](#), . The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely

difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

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

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

In [Ravirala Laxmaiah Vs. State of A.P.](#), which was another case where a husband suspicious of the chastity of his wife had murdered her, and then tried to show that she had committed herself by committing suicide by hanging which defence was found to be untrue. In that case the Apex Court observed as follows:

15. It is a settled legal proposition that in a case based on circumstantial evidence, where no eye-witness's account is available, the principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. (Vide: [State U.P. Vs. Dr. Ravindra Prakash Mittal](#),; [Gulab Chand Vs. State of Madhya Pradesh](#),; State of Tamil Nadu v. Rajendran AIR 1999 SC 3535; [State of Maharashtra Vs. Suresh](#),; and [Ganesh Lal Vs. State of Rajasthan](#),). These decisions apply squarely to the facts of this case. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonise a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the houses should go unpunished.

32. As in this case, the appellant did not explain or falsely explained as to how the bloodstained gandasa was recovered from him and also how his wife and 2 years old child had been murdered in his house, and has adopted a false defence that he was not present in the house on the night of incident with his wife and child, he has failed to discharge the burden cast upon him u/s 106 of the Evidence Act, as these facts were within the exclusive knowledge of the appellant, and it was extremely difficult for the prosecution to produce evidence regarding these facts. This was an important additional circumstance to connect the appellant with this crime.

33. Summarizing, we find that the following circumstances are available for connecting the appellant with this offence:

1. The defence version given by the appellant's father D.W. 1 Bahadur and neighbour D.W. 2 Phool Chandra that the appellant used to sleep in his father's new house, whereas his wife, the deceased Kavita and their two years old son Sunny would stay in the other house in the village cannot be accepted for reasons stated above.

2. A gandasa was recovered from the appellant on his arrest, which according to the FSL report contained blood. Although as the blood had disintegrated its origin could not be determined. But for the reasons spelt out above, nothing turns on the latter aspect.

3. To the query u/s 313 Cr.P.C. regarding recovery of the blood stained gandasa at the instance of the appellant, the appellant had given no explanation for the same, but has simply stated that he did not know how the gandasa was recovered from him. He has however not denied the recovery or called it a plant on him.

4. Similarly there was no explanation as to how the two deceased (i.e. the wife and 2 years old son had died in his house, as the explanation of the accused that he was away from his house at that time has already been rejected above. In this backdrop the failure of the appellant to discharge the burden u/s 106 of the Evidence Act, as to how the deceased and their two years old son had been murdered in the house where they resided along with the appellant, which was a fact within his special knowledge, was an important additional circumstance for connecting the appellant with this offence

5. There was no merit in the defence suggestion that some unknown visitors may have committed the murders as the deceased had a bad character. No names of any such visitor has surfaced in the evidence at any stage. These allegations have also not been substantiated by the appellant. Also how would the blood stained gandasa have been recovered from the appellant, if an outsider had committed the crime.

6. The lack of any attempt to file an F.I.R. by the appellant or his father D.W. 1 Bahadur if the appellant's wife and 2 years old son had been murdered by some other person also goes to suggest that this defence case was without any basis, and in fact the appellant alone had murdered these two persons.

7. Some evidence of motive has also been led by the police that the appellant was a no-gooder, who used to ask his wife to get money for him from her maternal family and he also used to express suspicion against the character of his wife, because she used to visit others houses for doing domestic chores for them.

8. It was of no importance that the I.O. had failed to note the time of cutting the 1st parcha or the time of the appellants arrest in his case diary.

9. Nothing turns on the fact that at one point the doctor conducting the post mortem had admitted in his cross-examination that the injury to the deceased could have been by a gandasa or some other sharp-edged weapon.

10. It is also not very material that two neighbourhood witnesses, P.W. 3 Prabhawati and P.W. 4 Bhikhari have turned hostile and not supported the prosecution case, because of their closeness to the appellant or his father. The evidence of P.W. 1 Pintoo, and P.W. 2 Smt. Sharda Devi, the brother and mother of the deceased regarding motive, and the quarrels between the appellant and his deceased wife, and the other circumstances enumerated above suffice for showing the complicity of the appellant in this crime.

11. There was no reason for the appellant to have been falsely implicated, if some other persons had committed the crime.

34. In view of the above, we are satisfied that the trial Court has committed no error in coming to a conclusion that the appellant has committed the offence for which he was charged.

35. However one final question remains to be examined as to what would be the appropriate sentence in this case, and whether affirming the death penalty would be appropriate, or whether the lesser option of awarding imprisonment for life be adopted.

36. Learned G.A. filed written arguments and contended that the appellant had acted in a cruel and diabolic manner in killing his wife and small child. He had thereby damaged the sacred relationship of a husband with his wife, and a father with his son, hence according to the learned G.A. this was the rarest of rare case, where the death sentence was appropriate. He placed reliance on [Umashankar Panda Vs. State of Madhya Pradesh](#), , [Ravji alias Ram Chandra Vs. State of Rajasthan](#), and [Amruta Vs. State of Maharashtra](#), . The learned counsel for the appellant on the other hand contended that if the prosecution allegations are accepted this appears to be a case where the appellant may have become extremely suspicious about his wife's chastity, and in a fit of anger after losing control of his senses, he may have belabored his wife and two years old son which resulted in their deaths. No evidence has been led by the prosecution for showing that the appellant was incapable of reform. These are mitigating circumstances for awarding the lesser penalty. He has cited some case law on the point, as mentioned above.

37. On a thoughtful consideration of the matter, we are of the view that the present is not the rarest of rare case, where only a death penalty was apposite, and the option of awarding the lesser penalty of life imprisonment was not foreclosed in this case. The reasons for our view are that the appellant does appear to have been nursing an irrational grouse against his wife as he seemed to be suspecting (although without any reasonable basis) that his wife was unchaste, only because she used to go out to work in different houses. In a case cited by the learned [Amruta Vs. State of Maharashtra](#), and the cases cited by the appellant's counsel, [Dharmendrasinh @ Mansing Ratansinh Vs. State of Gujarat](#), and [Rajesh Kumar Vs. State through Govt. of NCT of Delhi](#), the Apex Court has chosen to award life imprisonment as opposed to the death penalty for such crimes where the accused is mentally disturbed on account of his grave (though basically irrational) suspicion regarding the chastity and character of his wife. Significantly in the present case, in the F.I.R. itself it is mentioned that there was a quarrel between the appellant and the deceased, and in a fit of anger after the appellant lost control over his senses and appears to have committed the murder of his wife, and to have caused injuries to his child, (who succumbed to his injuries later). Even the F.I.R. in this case was initially registered only under sections 308/304 I.P.C. We also feel that the appellant did not abscond and was apprehended from his houses on the same day along with the blood stained gandasa may suggest that the appellant was suffering from pangs of guilt after his impulsive crime, which are all mitigating circumstances and militate against award of the death penalty in this case. No evidence has been led by the prosecution for showing that the appellant was involved in any earlier crime, or that he was incapable of reform, regarding which evidence is required to be produced by the prosecution for deeming a case to be the rarest of rare case fit for award of the death penalty. So far as the decisions in [Umashankar Panda Vs. State of Madhya Pradesh](#), and [Ravji alias Ram Chandra Vs. State of Rajasthan](#), cited by the defence are concerned these cases gave more importance to the nature of the crime rather than the criminal. Recently in two decisions, [Sangeet and Another Vs. State of Haryana](#), and in [Shankar Kisanrao Khade Vs. State of Maharashtra](#), relying on the Constitutional bench decision in [Bachan Singh Vs. State of Punjab](#), this approach of giving undue importance only to the crime, and neglecting any special circumstances favourable to the criminal for awarding the lesser penalty have come in for criticism.

38. In view of the aforesaid facts and circumstances, we are of the opinion that the judgment of the trial Court convicting the appellant u/s 302 I.P.C. suffers from no illegality and is upheld. We are however of the view that the death sentence awarded to the appellant be commuted to a sentence of imprisonment for life. The reference for confirming the sentence of death is rejected. With the above modification the appeal is dismissed.