

CASE NO.:
Appeal (crl.) 867-868 of 2005

PETITIONER:
Aloke Nath Dutta & Ors

RESPONDENT:
State of West Bengal

DATE OF JUDGMENT: 12/12/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
JUDGMENT
W I T H

CRIMINAL APPEAL NO.875 OF 2005

S.B. SINHA, J :
INTRODUCTION :

Premise No.2C, a three storied building situate at Beadon Street situated in the town of Kolkata, belonged to one Jagannath Dutta. He transferred the said property in favour of his wife Arunamoyee Dutta on certain terms and conditions wherewith we are not concerned. She had four sons and one daughter. During her life time, two of the sons, namely, Biswanath Dutta (deceased) and Aloke Nath Dutta, (appellant), were residing with her. Biswanath used to stay at the second floor with some tenants occupying some portions thereof; whereas Aloke Nath Dutta used to reside on the first floor. Her daughter Anuradha Das was married and was residing at Jadavpore. Two other sons, namely, Amar Nath Dutta (PW-4) and Samar Nath Dutta (PW-3) were residing in the towns of Chandannagore and Bararast respectively.

Arunamoyee Dutta died intestate in April, 1993. Aloke Nath was working with Kolkata Police, whereas Biswanath was employed in the United Bank of India. Biswanath was a bachelor, whereas Aloke Nath is married. Mamata one of the appellants herein, is Aloke Nath's wife. Sister of Mamata and her husband Shib Sankar Roy @ Gobinda @ Babu Roy were also residing on the first floor.

Appellants herein are alleged to have entered into a conspiracy to commit the murder of Biswanath on 22.01.1994 at the first floor of the said premises, the details whereof, we would deal with hereinafter.

PROSECUTION CASE :

Aloke Nath had many vices. He was a spendthrift. He was a womanizer and spent a lot of money in gambling and horse racing etc. He intended to sell the said house property, wherefor he entered into agreements for sale with one Nandlal Singh as also with one Arunmoy Bose. Arunmoy Bose advanced a sum of Rs.65,000/- to him. Nandlal Singh (PW-15) also had advanced various sums of money to Aloke Nath from time to time. He on the advice of his advocate Bikash Pal (PW-14) refused to advance any further sum till the time he was put in possession of the room of the second floor and the Puja Room; which was promised to be delivered on 23.01.1994.

Prosecution story is that the deceased was not in favour of sale of the said property. The transactions with regard to the sale of the said property, in favour of the said Nandlal Singh and Arunmoy Bose, however, were being conducted, as if Biswanath was a party thereto. Appellant Mrinal

Dutta is said to have been impersonating Biswanath and singed several documents in his name.

Aloke Nath absented himself from duty from 7.00 p.m. on 22.01.1994 to 28.01.1994, as disclosed by his colleagues Sahadev Mondal (PW-33), Ananta Kumar Thanedar (PW-34), and Biman Ghosh Dastidar (PW-35).

Possession of Pooja Room and a room occupied by Biswanath was delivered to Nandlal Singh on 23.01.1994. Nandlal Singh noticed a newly constructed 'bedi' in the said room. He asked him the reasons therefor, and was informed that it was constructed for cooking purpose. He asked him to remove the same; whereunto Aloke Nath promised to do so after registration of the sale deed. Nandlal Singh, as advised by his advocate, Bikash Pal, issued an advertisement in the Newspaper 'Ananda Bazar Patrika', a Bengali Daily, on 31.01.1994. Bikash Pal suspected that Aloke Nath might have other brothers and sisters and therefore advised issuance of such advertisement. Amar Nath, Samar Nath and Anuradha Das (PWs. 4, 3 and 5 respectively) informed Bikash Pal that they were also co-owners of the said property and were not agreeable to sell the house.

In view of the aforementioned developments, Samar Nath (PW-3), Amar Nath (PW-4) and Avijit Dutta (PW-6) allegedly visited the Premises No. 2C, Beadon Street on 06.03.1994. They enquired about whereabouts of Biswanath and were informed that he had started living at Barasat. They visited the house the address whereof was furnished by Aloke Nath. They found out the same to be bogus as no person called Biswanath had been residing there. They came back to Premises No. 2C, Beadon Street. They insisted upon Aloke Nath to disclose the whereabouts of Biswanath, whereupon Aloke Nath allegedly broke down and made an extra judicial confession before them, as also Nandlal Singh and some tenants, that he had throttled Biswanath to death. While commotion was on, the officer in charge of the police station was informed by some neighbour of Aloke Nath. While police was coming to the said premises, they met Samar Nath on the way, who was going to inform them about the incident. The police officer came to the said house. Aloke Nath was arrested in the afternoon of 06.03.1994. He was interrogated in the Police Station and was brought back by the police personnel. The other accused were arrested on the next day.

Aloke Nath is said to have made a confession at the police station that he had concealed the dead body in a platform (a kind of cistern made of sand and bricks). He pointed towards the said platform, whereupon two labourers and one mason were sent for; forensic experts were summoned. The said cistern was broken and dismantled. Foul smell came out therefrom and a human skeleton lying beneath the same was seen. The skeleton was said to have been identified to be that of Biswanath by Aloke Nath himself, which was seized and sent to morgue. Cause of the death, according to the autopsy report was asphyxia. Aloke Nath also made a confession leading to recovery of certain articles belonging to the deceased Biswanath from the rented premises which he had been occupying, as also a confession leading to recovery of some of the household articles.

Appellant Mrinal Dutta is also said to have made a statement under Section 164 Cr. P.C. before T. Uddini, Metropolitan Magistrate, 3rd Court Kolkata on 21.03.1994. He, however, retracted therefrom on or about 16.06.1994.

Investigation was conducted by Sub Inspector Sukhendu Barick attached to Burtolla Police Station. However the case was transferred to the Detective Department of Kolkata Police and from 08.03.1994, Sub Inspector Atanu Banerjee (PW-48) took over the investigation of the case.

After having filed the charge-sheet, cognizance of the offence was taken and the case was committed to the Court of Sessions.

CHARGE :

All the accused were put to trial. Three different sets of charges were framed against them, under Sections 120B/302/34 and 201/34 IPC, in the following terms :

"First \026 That you, all in the month of January, 1994 at 2/C, Beadon Street, Calcutta, agreed to do and caused to be done an illegal act, to wit, to cause the death of Biswanath Dutta by murdering him to enable Alope Dutta to sell the premises no. 2/C, Beadon Street, Calcutta and that such illegal act of murder was committed in pursuance to the agreement and you all thereby committed an offence punishable under Section 120B/302 of the Indian Penal Code, and within the cognizance of this Court of Sessions.

Secondly \026 That you, all on about the night 22nd day of January 1994 at 2/C, Beadon Street, Calcutta, pursuant to the criminal conspiracy mentioned in Court No.1 above and with the common intention of you all, did commit murder by causing the death of Biswanath Dutta, and you are thereby committed an offence punishable under Section 302/34 of the Indian Penal Code, and within the cognizance of this Court of Sessions.

Thirdly \026 That you, all on or about the night of 22nd day of January 1994, at 2/C, Beadon Street, Calcutta, with the common intention of you all, to cause the evidence of murder to disappear and to screen the offenders, concealed the dead body of Biswanath Dutta after he was murdered, inside the cavity created on the wall shelf of the room of Alope Dutta and thereafter covered the same by bricks and cements and you all thereby committed an offence punishable under Section 201/34 Indian Penal Code and within the cognizance of this Court of Sessions.

And I hereby direct that you be tried by the said Court on the said charge."

NATURE OF EVIDENCE :

Before the learned Sessions Judge, as many as 48 witnesses were examined on behalf of the prosecution. The brothers of Appellant Alope Nath, viz. Amar Nath and Samar Nath, and Sister Anuradha examined themselves as PWs. 4, 3 and 5 respectively. Son of Amar Nath, Avijit, was examined as PW-6.

Witnesses examined on behalf of the prosecution can be sub-divided in three categories, namely, (i) Sale of house, (ii) Tenants at Premises No. 2C, Beadon Street, and (iii) Witnesses who testified about Alope's character and conduct as also others like Photographer, labourers, Mason etc.

We would deal with the depositions of the prosecution witnesses hereafter at an appropriate stage.

SESSIONS JUDGE :

The learned Sessions Judge by reason of the judgment of conviction and sentence dated 29.08.2003 convicted Alope Nath, Mrinal Dutta and Gobinda Roy under Sections 302/120B and 302/34 IPC and sentenced them to death. Mamata Dutta was, however, sentenced to suffer imprisonment for life under Section 302/34 IPC and to pay a fine of Rs.5,000/-, in default to suffer imprisonment of two more years. They were also convicted for

commission of offence under Section 201/34 IPC and to pay a fine of Rs.3,000/- each, in default to suffer imprisonment for one more year. No separate sentence was awarded under Section 402/120B IPC.

Appellants preferred appeals before the High Court.

HIGH COURT :

The High Court agreed with the findings of the learned Sessions Judge. It was opined that all Appellants had hatched a conspiracy and the deceased was killed when he was asleep. While considering the quantum of punishment, the High Court sought to draw a balance between aggravating and mitigating circumstances and observed that the case comes within the category of rarest of rare cases. It was observed that the learned Sessions Judge had rightly exercised the option in favour of the capital punishment to Alope Nath, Mrinal Dutta and Shib Sankar Roy @ Gobinda @ Babu. The High Court refused to differentiate the case of Alope Nath from that of Mrinal Dutta and Gobinda @ Babu, holding that all the three were part of the conspiracy to execute the pre-planned murder of Biswanath. Upon screening of evidence, the High Court dismissed the appeals preferred by them. The order of conviction and sentence of the learned Trial Judge passed against Mamata was also upheld by the High.

SUBMISSIONS :

Arguments on behalf of Appellants have been advanced principally by Mr. Pradip Ghosh, the learned Senior Counsel appearing on behalf of Mrinal Dutta.

Submissions of the learned Senior Counsel are :

- (i) The judgment of conviction being based on circumstantial evidence and there being no eye-witness; the prosecution cannot be said to have proved all the links in the chain so as to prove that Appellants were guilty of commission of the alleged offences.
- (ii) Circumstantial evidences brought on records by the prosecution were not sufficient to bring home the charge of conspiracy against Appellants to commit murder of Biswanath.
- (iii) The courts below committed a serious error insofar as they failed to distinguish between a larger conspiracy to commit a murder and a relatively smaller conspiracy for impersonation of Biswanath by Mrinal Dutta, committing the offence of forgery or cheating
- (iv) As the purported extra judicial confession made by Alope Nath was confined to acceptance of his own guilt, the courts below could not have convicted all Appellants under Section 302/34 IPC relying on or on the basis thereof.
- (v) The purported confession made by Alope Nath leading to recovery of the dead body and certain articles belonging to Biswanath which had been sold to Gobinda Sarkar (PW-26), did not conclusively lead to the prosecution's case of conspiracy; and no judgment of conviction could have been arrived at solely on the basis thereof, having not been corroborated in any manner whatsoever.
- (vi) Confession of an accused, even if accepted, must be considered in its entirety and not in pieces
- (vii) The judgment of conviction could not have been arrived at on the basis of judicial confession made by Mrinal Dutta which has since been retracted and was thus of weak evidentiary value, especially when there was no corroboration thereof
- (viii) Mrinal Dutta was not put to test identification parade, although Alope Nath was. His identification in court by the witnesses was of weak evidentiary value and no reliance could have been placed thereupon.
- (ix) Judicial confession purported to have been made by Mrinal Dutta disclosed that he had been forced to join Alope Nath and, thus, the courts below ought to have held that he made confession as a repentant and his being a party to the larger conspiracy was, thus, in serious doubt.

(x) In any view of the matter, extreme punishment of death could not have been awarded having regard to the nature of the evidences led by the prosecution.

Submissions of Mr. Altaf Ahmad, the learned Senior Counsel appearing on behalf of the State, on the other hand, were :

(i) That although there was no direct evidence as against Appellants, the sixteen circumstances enumerated by the learned Trial Judge and affirmed by the High Court, were based on positive evidences led on behalf of the prosecution.

(ii) Evidences, both oral and documentary, led by the prosecution were sufficient to arrive at the finding of guilt as against all the accused.

(iii) Extra judicial confession made by Appellant Alope Nath having not been retracted and the same having been proved by a large number of witnesses including independent witnesses and it being voluntary in nature was rightly relied upon by the courts below.

(iv) Extra judicial confession made by Alope Nath was made to his elder brothers Samar Nath (PW-3) and Amar Nath (PW-4) in the presence of his nephew Avijit Dutta (PW-6), the intending purchaser of the house Nandlal Singh (PW-15) as also two tenants of the premises, namely, Swapan Dutta (PW-18) and Bijoy Sharma (PW-19) and their testimonies having not been shaken in cross-examination, the learned Trial Judge as also the High Court committed no error in passing the judgment of conviction and sentence as against all of them.

(v) A free and voluntary confession deserves due credit as it is presumed to flow from the highest sense of guilt.

(vi) Judicial confession might have been retracted, but the learned Trial Judge and the High Court upon analysis of the material brought on records came to the conclusion that the same was true and had been voluntarily made, and there is no reason to interfere with the said findings. It is not a rule of law that a judicial confession must be corroborated in materials produced by independent witnesses.

(vii) Appellant Mrinal Dutta having retracted his confession only at a much later stage without specifying any reason therefor; no importance thereto should be attached.

(viii) In his examination under Section 313 of the Code of Criminal Procedure he alleged torture at the hands of PW-44, but PW-44 having not been cross-examined on the said point, the judicial confession was admissible in evidence not only against the maker thereof, but also against the co-accused in terms of Section 30 of the Indian Evidence Act.

(ix) Enough materials by way of documentary and oral evidences of the witnesses were brought on records to prove criminal conspiracy showing not only that Mrinal Dutta but also Babu Roy and Mamata Dutta signed various documents executed by Alope Nath.

(x) Judicial confession made by Mrinal Dutta contained vivid description of the manner in which the deceased Biswanath was done to death and his dead body was put in the bedi (platform) in the room occupied by Alope Nath, the same was sufficient to prove the charge of conspiracy. In any event, involvement of all the accused persons in committing murder of Biswanath and disposing of the dead body has amply been proved.

DISCUSSIONS :

The incident took place on the night of 22.01.1994. Biswanath was last seen alive by some of the tenants, who were examined viz. Swapan Dutta (PW-18), Bijoy Sharma (PW-19), Albela Sukla (PW-20), and Raj Kishore Singh (PW-23). According to PW-18, he had seen Biswanath alive on the said date. He had also allegedly seen Biswanath being called by Appellant Alope Nath to his own room. He was not heard and seen thereafter.

Analysis of the evidences is required to be done keeping in view the

factual matrix involved herein.

Criminal Conspiracy :

Criminal conspiracy, if any, arose out of the greed of Alope Nath. He needed money to satisfy his bad habits. A situation came to such a pass that he had to negotiate with two persons for sale of the house simultaneously. He had taken money from both the intending purchasers. Apparently, with a view to extract money from the said two purchasers, he pretended, that he and the deceased were the only owners of the house. The deceased might not have been willing to sell the house, but he might not have also been aware of the transactions. Alope Nath might have intended to keep him in dark and swallow the entire amount of consideration. His other brothers and sisters had also not been taken into confidence. Indisputably, they were on litigating terms with the deceased and Appellant Alope Nath. Assistance of Mrinal Dutta in impersonating Biswanath was obtained by Alope Nath. He was paid a sum of Rs.5,000/- for the same. He was impersonating Biswanath and had been signing, executing documents and posing himself as such at Alope Nath's instance.

When Nandlal Singh (PW-15) pressurized Alope Nath to hand over possession of a few rooms to him on the advice of his lawyer Bikash Pal, Alope Nath apparently became desperate. Whether he hatched a conspiracy with the other Appellants at that point of time to do away with his brother Biswanath and dispose of his dead body so as to get the entire amount of consideration of the sale of the house, is the core question. There is no direct evidence to show that other Appellants also were part of the said conspiracy. Their presence had not been noticed by any of the witnesses. Nobody saw them together in the house. Nobody saw Mrinal Dutta coming to the house even once. We are not oblivious of the fact that it is difficult to have direct evidence of conspiracy. But to prove conspiracy hatched to commit a heinous crime, circumstantial evidence brought on records must be such which would have no loose ends to tie.

Circumstances :

With the aforementioned principles in mind, we may now notice the various circumstances found to be existing against Appellants as enumerated by the learned Trial Judge and accepted by the High Court.

For the aforementioned purpose we may, at the outset notice, the statements of the witnesses whom we have categorized in Category (i).

PW-7, Shanker Dey is an attesting witness to the agreement for sale of the house in question with Arunmoy Bose (PW-8). He proved passing of an advance amounting to Rs.65,000/- to Alope Nath. Arunmoy Bose who was the intending purchaser and with whom Alope Nath had entered into an agreement also proved passing of the said consideration to Alope Nath. Both Shanker Dey (PW-7) and Arunmoy Bose (PW-8) also stated in details the negotiations leading to execution of the said agreement for sale.

Sudhakar Singh (PW-10) and Nawratan Singh (PW-16) were brokers. They were employed by Nandlal Singh (PW-15). They have also deposed as to how the transactions relating to sale of the house by Alope Nath in favour of Nandlal Singh proceeded. They have also proved passing of the amount of advance from time to time by Nandlal Singh in favour of Alope Nath. Bikash Pal, who examined himself as PW-14 is again a witness who was a witness to the said transaction. It was only at his instance Nandlal Singh refused to give further advance to Alope Nath unless he had been put in possession of a part of the said property. Bikash Pal advised Nandlal Singh to publish an advertisement in the Anand Bazar Patrika as he suspected that there might be other owners of the property. He identified the accused in court. Other witness also identified them. Their evidences taken in entirety however do not lead to the conclusion that they conspired to murder Biswanath. But it is sufficiently clear that they conspired to sell the property. We would deal with this question a little later at some depth.

We would hereinafter notice the alleged sixteen circumstances enumerated by the learned trial judge in his judgment and the evidences available in regard thereto :

1. Since the death of his mother, Alope Nath tried to sell the house surreptitiously without informing his other brothers and sister, and as he was not supported by Biswanath, he endeavored to sell the house secretly.
2. Prior to the said incident, Alope Nath entered into an agreement with Arunmoy Bose (PW-8) and received a sum of Rs.65,000/- where Alope Nath had put his signature and Mrinal Dutta had signed as Biswanath.
3. To earn more money and to grab the property of his brothers, Alope Nath entered into an agreement with one Nandlal Singh (PW-15). He introduced Mrinal Dutta as Biswanath and delivered possession of the two rooms on the 2nd floor. He was asked to dismantle the kaccha bedi to he replied that the same would be dismantled later on. Payment of advances was made from time to time.
4. Possession of the first floor was delivered in the month of February 1994, whereupon it was noticed that the 'bedi' had not been dismantled, instead it was made more stronger by fully plastering it with red colour cement.
5. As per advice of Bikash Pal (PW-14) an advertisement was published in Ananda Bazar Patrika for sale of the house.
6. Bikash Pal received three objections (Ex. 24 collectively). He in turn wrote two letters to PWs-3 and 4 (Ex. 25). When he informed thereabout Alope Nath told that he was trying for settlement with them.
7. Possession of the first floor was delivered to PW-15 on 14.02.1994 by Alope Nath and he told that Babu Roy would stay in the covered verandah for a couple of days.
8. In the morning of 06.03.1994, PWs-3, 4 and 6 reached the place of occurrence and found PW-15 in occupation. On being asked, Alope Nath replied that Biswanath had left for Barasat and was staying at 11/1, Jhawtola Lane, near Barasat Chowrasta, whereafter they left for the said place.
9. PWs-3, 4 and 6 returned to Premises 2C, Beadon Street and as they did not find existence of the address, they charged Alope Nath to speak the truth in presence of tenants, local people etc. Alope Nath then confessed that he had throttled Biswanath to death in the midnight of 22.01.1994 and kept the dead body concealed inside the hosue.
10. On 06.03.1994, O/c Burtolla Police Station received a telephonic message from an anonymous caller about the disturbance in front of the said premises. Police recorded the statement of PW-3, Samar Nath and arrested Alope Nath.
11. On the basis of the said confession, the bedi was dismantled by mason and labourers PWs-9, 30 and 31 and a human skeletonized body was found, which was identified by Alope Nath to be of the deceased Biswanath. This fact has been proved by the PWs-3, 4, 6, 9, 15, 18, 19, 23, 30, 46 and 47.
12. PWs-3, 4 and 6 also disclosed about the special identification mark(s) of Biswanath. The doctor on examination of the skeletonised body opined that the same was homicidal in nature and the death was due to throttling.
13. Skeletonised body had been subjected to the superimposition test conducted by expert PW-41, who opined the examined skeleton to be that of a human male, 5'-6" feet tall, aged 40-50 years.
14. Biswanath was seen alive on 22.01.1994 as he went to the office which has been proved by Ex.64 and 64/1. Accused Mrinal Dutta in his confessional statement which is believable, remarked that Alope Nath and Biswanath were seen together on 22.01.1994 between 10-10.30 p.m. at 2C, Beadon Street. Biswanath was goaded to sleep in the verandah on the 1st floor, near Alope Nath's bedroom on the plea

that Biswanath's room on 2nd floor was under repair.

15. Accused Mrinal Dutta came to the premises and found Aloke Nath, Babu Roy, Mamata Dutta and her two daughters present there.

Thereafter, in the midnight of 22.01.1994, Aloke Nath had first entered into the covered verandah where Biswanath was sleeping and having found Biswanath in sound sleep, called Babu Roy, Mrinal Dutta and Mamata Dutta. Mamata gave one blanket to Aloke Nath who then covered the head and face of Biswanath with the blanket, Mrinal Dutta caught hold of the hands of Biswanath and Babu Roy held his legs. The accused Aloke Nath then pressed the neck of Biswanath and killed him.

16. After delivery of the possession of the first floor of the premises to PW-15, Aloke Nath shifted his residence to the tenanted premises. On the basis of his confessional statement (Ex. 108) and on being identified and pointed out by him, the Investigating Officer on 10.03.1994 recovered and seized the personal belongings of Biswanath. On some articles the name of Biswanath appeared.

Evidences accepted by the Trial Judge :

Re: Circumstances Nos.1 & 2 :

PW-7 Shankar Dey, is the attesting witness to the agreement made by Aloke Nath with Arunmoy Bose to sell the house. He, as noticed hereinbefore, identified Mrinal Dutta as impersonating Biswanath. Arunmoy Bose (PW-8) has also proved the said fact.

Re: Circumstances Nos. 3 & 4 :

Sudhakar Singh (PW-10) and Nawratan Singh (PW-16) who worked as brokers on behalf of Nandlal Singh (PW-15). They were witnesses to the said transaction. Sudhakar Singh, Nawratan Singh and Nandlal Singh allegedly saw the kacha bedi, as also the objection on the part of Nandlal Singh in regard thereto, to which Aloke Nath responded by promising to dismantle the same, when the sale deed was registered.

Re: Circumstances Nos. 5 & 6 :

Publication of advertisement in Anand Bazar Patrika on 31.01.1994 in respect of the transfer of Premise No.2C, Beadon Street, Kolkata (Ex.61) has been proved by Bikash Pal (PW-14), Nandlal Singh (PW-15), intending purchaser; as also Bijit Kumar Basu, General Manager (Law), Anand Bazar Patrika (PW-28). Amar Nath (PW-4), brother of Appellant Aloke Nath, in his evidence stated that he with his brother and sister filed objections before Bikash Pal in respect of the proposed sale. From the evidence of Bikash Pal (PW-14), it further appears that he confronted Aloke Nath with objections of his brothers and sister. Aloke Nath allegedly assured that he would settle the matter with them. Bikash Pal in his deposition further stated that according to Aloke Nath, there was a deed of family dispute. He has also proved that on earlier occasion Aloke Nath had mentioned only about his one brother and sister but the sister was never brought in picture; and only having become suspicious as regards correction of the said statement he advised Nandlal Singh for publication of the notice in the said newspaper.

Re : Circumstance No.7 :

Sudhakar Singh (PW-10), Nandlal Singh (PW-15) and Nawratan Singh (PW-16) were witnesses to the delivery of possession of the room which had been occupied by Aloke Nath. They stated that Aloke Nath represented that his brother in law and family would stay in the covered verandah, for a couple of days. He further represented that the 'bedi' would be dismantled immediately after registration. The evidence of the said witnesses also show that apparently Aloke Nath had contacted his brothers and sister and only on that basis he had asked Nandlal Singh (PW-15) to be present in the premises at 2C Beadon Street on 10.03.1994, as his elder brothers and nephew PWs 3, 4 and 6 would visit.

Re: Circumstance No.8 :

The visit of PWs 3, 4 and 6 at the premises stood proved by their evidences. They further stated that when asked about the whereabouts of

Biswanath, they were told that he was staying at 11/1, Jhawtola Lane, near Barasat Chowrasta; whereupon they visited that place and came back after they failed to ascertain the said address.

Re: Circumstance No.9 :

Circumstance No.9 has been proved by PWs 3, 4 and 6 as also PWs 15, 18 and 19. The purported confession of Aloke Nath was made in presence of the said witnesses. The purported confession was made when PWs 3, 4 and 6 came back after search of the deceased at Barasat Chowrasta and accosted Aloke Nath with regard to the whereabouts of Biswanath. Evidently they suspected some foul play. It is at that point of time, Aloke Nath was said to have broken down and made the confession before the said witnesses.

Re: Circumstance No.10 :

It would appear from the evidences of Sukhendu Barick, Sub Inspector of Police (PW47) and Samar Nath (PW-3) that when the police, having received information that some untoward incident had happened at 2C, Beadon Street, was going to the said place, Samar Nath met them on the way who was going to the police station to lodge an F.I.R. The police came to the said premises and recorded his statement. Aloke Nath was arrested. The said circumstance has been proved by Samar Nath (PW-3) and Amar Nath (PW-4), brothers of Appellant Aloke Nath, Avijit Dutta son of Amar Nath (PW-6), Nandlal Singh (PW-15), Swapan Dutta (PW-18) and Bijoy Sharma (PW-19), tenants of the said house. Thereafter Aloke Nath made confession.

Aloke Nath made three confessions : (i) confession stating the manner in which the deceased was killed as also burial of his dead body; (ii) confession leading to the recovery of the dead body; and (iii) confession relating to the disposal of the belongings of Biswanath.

Relevant portions of the second confession are as under :

"On the night of 22.01.1994, after strangulating my elder brother Biswanath Dutta to death, I built up kind of a cistern with bricks, sand and cement underneath the cupboard on the southern side of a first floor room of our ancestral home, in which I used to live, and hid the dead body of my elder brother inside it and sealed the cistern, giving it the shape of a masonry platform. If I am taken along there I can show that room and the masonry platform built inside it.

After having buried the dead body of my elder brother Biswanath Dutta into the cistern. The excess brick, sand and cement had been kept under a cot in our house. If I am taken along, I can show them as well.

Recorded by me, read-over explained and admitted to be correct."

"After killing my elder brother Biswanath Dutta, I hid his valuable belongings like record player, tape, radio, wall clock, amplifier, suitcase, shirts, trousers, bag, three trunks etc. and many other articles in my bedroom at my present address at J/F/6/1, Ashwini Nagar, Bidhan Palli, Baguihati, Calcutta-59. If I am taken along there I can show that room and the belongings of my elder brother.

The police interrogated me and recorded my statement.

Recorded by me, read-over explained and admitted

to be correct."

Relevant portions of the third confession is as under :

"After killing my elder brother Biswanath Dutta, I sold the wooden almirah in his room, mirror and many other articles including our domestic pump set etc. to Gobind Sarkar a resident of Nimtala for seven thousand rupees. If I am taken along, I can identify Gobinda Sarkar, his residence and those articles.

Selling of those articles (partly torn) and I got the money from Gobind Sarkar and give him a receipt for the same.

The police interrogated me and recorded my statement.

Recorded by me, read over, explained and Bengali and admitted to be correct."

Re : Circumstance No. 11 :

His confession lead to the recovery of the dead body, PW-3, PW-4, PW-6, PW-9, PW-15, PW-18, PW-19, PW-23, PW-30, PW-46 and PW-47 were witnesses to the said recovery. Sukhendu Barick, Sub-Inspector (PW-47) allegedly sent for masons for demolishing the Bedi; whereupon Jatin Singh (PW-9) and Gopal Pramanik (PW-30) masons, came and demolished the Bedi. A human body in form of skeleton was noticed, which was taken out and identified to be that of Biswanath. Ashok Kumar Banerjee, Inspector of Kolkata Police (PW-47) is also a witness to the said occurrence.

Re: Circumstances Nos. 12 and 13 :

Circumstances Nos. 12 and 13 relate to the identification of the dead body and its autopsy. Biswanath was to have an extra tooth. It was proved by his brothers PW-3 and PW-4 as also his nephew PW-6. It was found to be an identification mark. The ante-mortem injuries on the dead body and the opinion of Dr. Nandy (PW-39), Autopsy Surgeon, are as under :

"\005There was 4" x 3" area of extravasation of blood on the surface of trachea and surrounding soft tissue along with hyoid and thyroid. There was fracture hyoid bone on the right cornue with evidence of extravasation on the margins. Evidence of extravasation on the posterior aspect of oesophageal 2" x <" size against 3rd, 4th and 5th cordial vert. Extravasation are more on the right side of midline for both trachea and oesophagus and also other tissue. The extravasation were blakish red in colour. No other injury could be detected ever after careful examination. The right femur was 17.8", the 12.3" and the right ulna 11.1". The changes in symphyseal surfact were at part with the mentioned age of 43 years. I preserved stomach with contents both kidneys and liver insaturated solution of common salt. Sample of preservative was preserved. Scalp hair heart were preserved without any preservative, nail cutting preserved tissue from extravagated area preserved. Both preserved. There was no blood of neck for example throttling ante-mortem and homicidal in nature. This is the report which bears my signature."

The dead body was also examined by Dr. V.K. Kashyap (PW-41). In his evidence, he opined that the dead body was of a human male, aged about 40-45 years and his height would be around 5' and 6".

Re: Circumstance No.14 :

Swapan Dutta (PW-18) was a tenant of the second floor of the premises (pages 109-113). He saw Biswanath at 10-10.30 p.m. on the night of 22.01.1994. According to the said witness, he was taken to the first floor of the house by Alok Nath on the pretext that his room was under repairs. He had testified that Biswanath was not seen thereafter. Kartick Chandra Sinha, (PW-29) who was the Chief Manager of the United Bank of India, also proved that from 23rd January, 1994 onwards Biswanath did not attend his office.

Re: Circumstance No.15 :

There is no independent witness to prove the said fact except the purported confessional statement of the accused Mrinal Dutta. His purported confession before the Magistrate is as under:

"My wife's brother Gobindo Roy used to stay on rent at the house of Alok Nath Dutta at (2/C) Beadon Street, I was introduced to Alok through Gobindo. Alok and me used to visit each other's house. Alok did not bear a good character. He used to have stakes in horses, Satta (a sort of numbers game played for gambling) and also used to go to at prostitutes. Alok's elder brother Biswanath Dutta also used to stay at the same house. They did not have good relation among them. Alok told me during the Puja of 1993 that he would sell his house and also tried hard for that. On the last November he told me that he wanted to sell the house but since his elder brother was not agree to sign, I had to sign in the name of Biswanath Dutta. At first I did not agree. Then he told that he would give me money. "You sign it". I was in need of money, so I agreed with that. Then he took my signature in the name of Biswanath Dutta in quite a few sheets of paper. He gave me Rs.5000/- (five thousand rupees only) in instalments. After that he told me to sign in a quite a few sheets of papers. In date 19/20 on the last January month of 1994 he came to my house and said, I think the house cannot be sold "Dada" (Elder brother) is not agreeing to put his signature. It is better to eliminate 'dada' (elder brother). He said, "I am thinking of murdering my 'Dada' (Elder brother)". I said him, "I cannot do this". He said, 'You had put fake signature. So, if we get caught, we will not spare you either.'" Mamata Dutta is the wife of Alok Dutta. Gobinda Roy signed some of the papers while Mamata signed some others. Gobindo is the brother of my wife. He is also the husband of my wife's sister. He left after we stopped and on the following I went to Alok's place. He told me further that he would pay me Rs.10,000/- more. I said, if I am spared for this, then I am agree to do this". I found Gobindo, Alok, Mamata \026 the three were sitting at his house. They closed the door after they took me to the room at first floor. Then he, Gobindo, Alok and Mamata said to me, on 22nd January, at night, you will come. Gobindo and Alok will make all the arrangements". While leaving they said, if you don't come, we shall harm you". As usual I came to Alok's house on 22nd January at 10.00 p.m. and saw that Alok, Gobindo, Mamata and two daughters of Alok talking. As I went they let me in and shut the door. As I entered in the room I saw that there was a little brick wall under the cupboard (wall Almirah). There were some cement, sand and bricks on the floor. Just at 10.30 p.m. Biswanath Dutta came to the house. Alok said to Biswanath, the work is going on at the room of second floor. "You lie down on the wooden cot at the veranda on the first floor". Biswanath lied down on the veranda.

We were sitting inside the room. At about 12/12.30 p.m. two daughters of Alope were slept. Then Alok came outside. After some time came inside the room and said, Dada (elder brother) had slept. Then Mamata gave Alok a rug. Gobindo, Alok and I came outside. At once Gobinda held two legs of Biswanath. I held two hands. Alok suffocated Biswanath on placing the rug on his face and neck, after 7/8 minutes Alok took the rug from the face of Biswanath. Then he pulled the hairs of Biswanath and on turning the eye lids he saw and said, "the work has been done. Immediately four of us took the dead body inside the room and laid the dead body inside the brick-structure after folding two legs. Then all of us filled up the rest of the sand and bricks which were kept aside over the dead body. Mamata handed down the water and the bricks. By the time we finished it had dawned. After that at about 5.30/6 Alok left for his own home, while going Alok said "you have to come again at noon-time." Again at noon time I came to his house. He then told me to sign in a paper. After signing that I went to my house. > days after that I met Alok at his place. He said, "I cannot give you any money now". I will see it after some time. I could not sleep well after returning home. I used to move in fear I stayed outside from my house for some days. On the last 07.03.1994 (Eng) police arrested me from my house."

T. Uddini (PW-43) was the Magistrate, before whom the purported confession was made by Mrinal Dutta. He had issued a certificate as is required under Section 164 of the Code of Criminal Procedure. He testified that he had satisfied himself that confession made by Mrinal Dutta was voluntary.

Re: Circumstance No. 16 :

Subhas Mazumdar (PW-11) and Nripen Chandra Das (PW-12) are witnesses to Alope Nath's entering into an agreement of tenancy and shifting to Premises at JF-6/1, Aswini Nagar, Bidhan Pally, Baguihati and recovery of goods. Atanu Banerjee, Sub Inspector of Police (PW-48), also testified as regards recovery of goods from the said premises.

FINDINGS :

We may now consider the evidences available on records for analyzing the reasonings of the courts below vis-'-vis involvement of each of Appellants before us.

Alope Nath :

Title in respect of the property in question is not in dispute. The fact that Alope Nath and his three brothers and one sister inherited the said property from their mother also stands admitted. A faint attempt has been made by the learned counsel appearing on behalf of Appellants to convey the possibility of the brothers of Alope Nath implicating him owing to the property, but we can safely ignore the same.

The events began from November 1993. It was only Alope Nath who had asked Mrinal Dutta to sign some blank papers impersonating Biswanath. He was paid a sum of Rs.5,000/- therefor. On the basis thereof, agreements for sale were executed by and between Alope Nath and Biswanath with Nandlal Singh. Out of the agreed amount of consideration of Rs.2,60,000/-, a sum of Rs.60,000/- was paid to him. A sum amounting to Rs.30,000/-, Rs.20,000/- and Rs.10,000/- were paid on 11.11.1993, 12.12.1993 and 25.12.1993 respectively by Nandlal Singh to him. Although Alope Nath received a substantial amount, his greed did not end there. He, as noticed hereinbefore, entered into another agreement for sale with Arunmoy Bose (PW-8) who had also paid a sum of Rs.65,000/- by cheque. He must have spent the entire amount or at least a substantial part of it.

Biswanath was allegedly killed on 22.01.1994. The second floor of the house which was in occupation of Biswanath was handed over to Nandlal Singh on 23.01.1994 upon receipt of further advance. The first floor was handed over on 14.02.1994, after Aloke Nath shifted to his new residence. So far as Aloke Nath is concerned, having regard to the charges framed, both the circumstantial evidence as also the extra judicial confession made by him are relevant. His further statements leading to the recovery of the dead body as also recovery of articles belonging to Biswanath are also relevant. It has also been proved that he sold some of the articles belonging to the deceased.

It is, however, disturbing to note that a confession has not been brought on records in a manner contemplated by law. Law does not envisage taking on record the entire confession by marking it an exhibit incorporating both the admissible and inadmissible part thereof together. We intend to point out that only that part of confession which is admissible would be leading to the recovery of dead body and/or recovery of articles of Biswanath, the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court.

[See State of Maharashtra v. Damu S/o Gopinath Shinde & Others \026 (2000) 6 SCC 269 at p. 282 \026 para 35]

In *Anter Singh v. State of Rajasthan* [(2004) 10 SCC 657], it was stated :

"11. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in *Pulukuri Kottaya v. Emperor* in the following words, which have become locus classicus: (AIR p. 70, para 10)

"It is fallacious to treat the fact discovered within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that I will produce a knife concealed in the roof of my house does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added with which I stabbed A these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

[But see *Dhananjoy Chatterjee @ Dhana v. State of West Bengal* [(1994) 2 SCC 220 at p.234-235]

Therefore, we would take note of only that portion of the confession which is admissible in evidence.

Apart from raising a contention that the extra judicial confession had not been recorded in the exact words of the maker thereof, no serious argument has been advanced with regard to its truthfulness or otherwise thereof. It was an oral confession. Evidently, the two brothers of Appellant Aloke Nath, namely, Samar Nath (PW-3) and Amar Nath (PW-4) as well as his nephew Avijit Dutta (PW-6) became highly agitated after being misled by Aloke Nath as he had made wrong statements as regards the whereabouts of Bishwanath. They were also perturbed as the house property was sought

to be sold without taking them into confidence.

In this context, it is important to revisit the events which took place on and after 31.01.94. Before meeting further demands of Alope Nath, Nandlal on advice of his advocate Bikash Pal published an advertisement in Anand Bazar Patrika on 31.01.94 inviting objections against the proposed registration of the property.

In response to said advertisement, Alope Nath's two elder brothers, Amar Nath and Samar Nath with sister Anuradha raised objections. Alope Nath wanted to settle the matter with his co-owners. Presumably with that end in view he thought to invite his brothers for discussion at the premises No. 2C, Beadon Street on 06.03.1994.

The incident which had taken place on that day may be divided in two parts: (i) the manner in which PWs 3, 4 and 6 visited the place whereabout they were wrongly informed as regards Biswanath's new address; and (ii) when they came back after a futile search and confronted Alope Nath as to why they were misled and again demanded information in regard thereto.

Identification of the dead body has not been seriously disputed before us. Although in a given situation, the court might have scrutinized the issue more closely, in view of the overwhelming evidence, it is not necessary for us to do so. Identification of the skeleton as that of Biswanath by Alope Nath has not been disputed. It is accepted that he had an extra tooth is also not in question. The height of the deceased and his age again has also not been disputed.

The fact that a platform was newly constructed is amply borne out from the materials on record. Nandlal Singh (PW-15), his brothers PW-3 and PW-4 and the brokers PW-17 and PW-18 stated, in no uncertain terms, that not only despite having been asked Alope Nath did not dismantle the same, but in fact the same was re-enforced and painted with red colour. Evidence as regards Alope Nath's reply to the query regarding the construction of 'bedi' that the same was meant for cooking purpose, is also not in much dispute.

The fact that Alope Nath had disposed of the belongings of the deceased and other household materials is also not in much dispute. It is not necessary for us to notice evidences of other witnesses who had testified about his character and misconduct, namely, Biswanth Basak (PW-21), Soumitra Nayak (PW-22), Subir Mullick (PW-25), Gobinda Sarkar (PW-26) and Bebashish Kar (PW-27). The circumstances enumerated by the learned Trial Judge in the light of the evidences brought on record and the extra judicial confession made by Alope Nath, in our opinion, lead to only one conclusion that the dead body recovered was that of Biswanath and it was Alope Nath who was responsible for his death.

He does not dispute that he was a party to the transactions with Nandlal Singh and Arunmoy Bose. His many vices are amply borne out from the materials. His absence from duty 11.01.1994 to 28.01.1994 has also been proved by his colleagues PW-33, PW-34 and PW-35.

EXTRA JUDICIAL CONFESSION :

If the prosecution witnesses are to be believed that Alope Nath made an extra judicial confession and furthermore in view of the evidences on record, it has to be held that the same was voluntary in nature. The same having been spontaneous in the form of natural response to a stressful stimulus made at the spur of the moment, we, for the reasons stated hereinafter, do not see as to why the same should be discarded. He was understandably reeling under a great mental strain. He might have killed his own brother, with a view to satisfy his greed of money, but the circumstances clearly demonstrate that he had been pushed to the wall. He knew that his brothers and sister would definitely ask for an explanation as to why without consulting them he tried to sell the house. A 'bedi' was

constructed in his own bedroom which one day or the other, was bound to be dismantled and the fact that a dead body buried therein would come out. He had delivered possession of bedroom which was occupied by his brother Biswanath, as also the premises which was in his occupation. He, therefore, was not in a position to dismantle the bed and remove the dead body clandestinely. It is not that he was under any threat even by his brothers. He was required to give a satisfactory explanation and he made a false statement on the morning of 06.03.1994 as regards the address of Biswanath. He was caught on the wrong foot. Events which took place immediately thereafter also assume great significance. His confession was made before a large number of persons. Each one of them would not have been able to remember the words used by him in his confession. But then there was absolutely no reason as to why the tenants of the premises would tell a lie. PW-18 and PW-19, were tenants of the premises. It had not been suggested, that they were in any way inimically disposed towards him.

Aloke Nath made extra judicial confession not only in presence of his own elder brothers PW-3 and PW-4 but also in the presence of his nephew (PW-6), the intending purchaser of the house (PW-15) as also the two tenants of the premises PW-18 and PW-19. The evidences of these witnesses are consistent and we do not see any reason as to why we should disagree with findings of the courts below in this behalf.

Our attention has been drawn to a decision of this Court in *Heramba Brahma and Another v. State of Assam* [AIR 1982 SC 1595], wherein this Court opined :

"18. We are at a loss to understand how the High Court accepted the evidence of this extra-judicial confession without examining the credentials of PW 2 Bistiram; without ascertaining the words used; without referring to the decision of this Court to be presently mentioned wherein it is succinctly stated that extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed\005"

The said decision was rendered on its own facts. A purported confession was made by the Appellant therein to another undertrial prisoner in jail. They were not known to each other. There had been no previous association between the witness and the other accused person. The court in the said factual backdrop, opined that it was highly improbable that such confession would be made. *Heramba Brahma* (supra) is not an authority for the proposition that extra judicial confession must pass the test of reproduction of the exact words. The tests laid therein are cumulative in nature. What is necessary for the court is to arrive at the conclusion as to whether such confession has been retracted or not. No suggestion had been given to the witnesses that confession had not been made. No circumstances had been brought out in cross-examination or by examination of independent witnesses that the statements of witnesses proving such confession are not correct.

In *State of Rajasthan v. Raja Ram* [(2003) 8 SCC 180], it was held :

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the

confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

It was further observed :

"20. If the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration as rightly submitted by the learned counsel for the respondent-accused, is a matter of prudence and not an invariable rule of law\005"

In the case of Gagan Kanojia and Anr. v. State of Punjab [Criminal Appeal Nos. 561-62 and 563 of 2005, decided on 24.11.2006, this Court opined :

"Extra-judicial confession, as is well-known, can form the basis of a conviction. By way of abundant caution, however, the court may look for some corroboration. Extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved can be relied upon by the courts."

In Nazir Khan & Others v. State of Delhi [(2003) 8 SCC 461], this Court held :

"\005A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilty\005"

[See also Ram Khilari v. State of Rajasthan (1999) 9 SCC 89; and Namala Subba Rao v. State of A.P. 2006 (10) SCALE 253].

It will also be relevant to consider State of Rajasthan v. Kashi Ram [2006 (11) SCALE 440], wherein this court observed :

"There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extra-judicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra-judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made."

Recently, this Court held in the case of Kulwinder Singh v. State of Punjab [Criminal Appeal No. 675 of 2006], decided on 05.12.2006, this Court held :

"the evidentiary value of an extra-judicial confession must be

judged in the fact situation obtaining in each case. It would depend not only on the nature of the circumstances but also the time when the confession had been made and the credibility of the witness who testifies thereto."

In his confession Alope Nath takes the entire blame on himself. We are not persuaded to hold that the courts below erred in opining that extra judicial confession of Alope Nath is in any way doubtful.

On the aforementioned evidence, the involvement of Alope Nath, in our opinion, is proved beyond any shadow of doubt.

We, therefore, hold that he has rightly been convicted of charges leveled against him.

OTHER APPELLANTS :
Circumstantial Evidence :

We have analyzed the evidences adduced by the prosecution to establish sixteen purported circumstances which had been relied upon by the prosecution in order to bring home the guilt of the other Appellants herein. Circumstances Nos. 14 and 15 enumerated by the learned Trial Judge directly relate to the manner in which Biswanath was allegedly murdered. We will hereafter proceed on the basis that Circumstance No. 1 to 13 had also been proved against them also. The question which would, however, arise is as to whether the circumstances leading to establishment of the guilt of the murder of Biswanath can be said to have been proved by reason of the purported circumstantial evidence as also the retracted confession of Mrinal Dutta and extra judicial confession of Alope Nath. So far as extra judicial confession of Alope Nath is concerned, he implicated only himself and did not implicate any other person in the conspiracy.

Circumstances nos. 1 to 13 are considered to be part of the same transactions but Circumstances nos. 14 to 16 relate to distinct and different charges. Appellants other than Alope Nath, had not been seen by anybody else immediately before or after the alleged occurrence. In fact there is no eye-witness to the alleged occurrence. The neighbours were also not examined to show that any untoward incident had taken place. There is furthermore no evidence on record to show that any of Appellants had even taken part in concealment of the dead body. The prosecution did not examine any witness to establish the case as to how the other Appellants had helped Alope Nath in procuring bricks and cement or whether any other person had helped him in concealment of the dead body. As Alope Nath had taken the entire blame on himself and did not speak anything in regard to involvement of the other appellants, there is no evidence in regard to the meeting of mind with reference to the plot of murder. Alope Nath evidently was in a desperate situation. He required money. Others did not. Motive on the part of other Appellants is not explicit. Therefore, others cannot be treated to be his accomplice. Even the statements made by him, leading to recovery of the dead body or other articles belonging to the deceased, do not implicate the other Appellants in any manner whatsoever.

We may assume that other Appellants conspired with Alope Nath for selling the house. Mrinal Dutta evidently had signed the blank papers. He purported to have executed some documents impersonating Biswanath. But the question which must be posed and answered would be as to whether they were parties to a bigger conspiracy of murder. Signing of certain documents, impersonation of Biswanath by Mrinal Dutta or the other Appellants' signing the said documents as witnesses, per se would not lead to the conclusion that at any point of time they had agreed with Alope Nath that Biswanath should be eliminated.

There is no eye-witness to the occurrence. Nobody has noticed any suspicious conduct on part of the Appellants indicating their role in

committing murder or disposing the dead body. While dealing with a case of grave nature like the present one, there is always a danger that conjectures and suspicion may take the place of legal truth. This court has laid down guidelines from time to time in regard to a finding of guilt solely on the basis of circumstantial evidence in a number of cases. The process started with Hanumant Govind Nargundkar and Another v. State of Madhya Pradesh [AIR 1952 SC 343] wherein the law was laid down in the following terms :

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Exhibit P-3-A or outside and we are constrained to observe that the courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case."

Yet again in Sharad Birdhichand Sarda v. State of Maharashtra [AIR 1984 SC 1622 = (1984) 4 SCC 116], this Court laid down the law in the following terms :

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

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

It was further observed :

"179. We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law. 180. It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."

The murder might have been committed in a very cruel and revolting manner but that may itself be a reason for scrutinizing the evidence a bit more closely.

In *Kashmira Singh v. State of M.P.* [AIR 1952 SC 159], it was observed :

"2. The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."

In *Swaran Singh Rattan Singh v. State of Punjab* [AIR 1957 SC 637], this Court observed :

"Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence before an accused can be convicted."

In *Mousam Singha Roy and Others v. State of West Bengal* [(2003) 12 SCC 377], this Court held :

"27. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence\005"

It was furthermore observed :

"28. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

CONFESSION GENERALLY:

Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

This Court in *Shankaria v. State of Rajasthan* [(1978) 3 SCC 435] stated the law thus :

"22. This confession was retracted by the appellant when he was examined at the trial Under Section 313 Cr. P.C. on June 14, 1975. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded Under Section 164 Cr. P.C, the Court must apply a double test:

(1) Whether the confession was perfectly voluntary?

(2) If so, whether it is true and trustworthy ?

Satisfaction of the first test is a sine quo non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test does not arise. If the first test is satisfied, the Court must before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession, may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test."

[Also see *Anil @ Raju Namdev Patil v. Administration of Daman and Diu, Daman and Anr.* - 2006 (12) SCALE5 16].

A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.

In *Muthuswami v. State of Madras* [AIR 1954 SC 4], this Court opined :

"8. The only reason the High Court give for accepting the confession is because the learned Judges considered there was intrinsic material to indicate its genuineness. But the only feature the learned Judges specify is that it contains

a wealth of detail which could not have been invented. But the point overlooked is that none of this detail has been tested. The confession is a long and rambling one which could have been invented by an agile mind or pieced together after tutoring. What would have been difficult is to have set out a true set of facts in that manner. But unless the main features of the story are shown to be true, it is, in our opinion, unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth."

RETRACTED JUDICIAL CONFESSION :

We may notice that till the purported judicial confession of Mrinal Dutta was recorded by PW-43, evidences collected during investigation were only suggestive of the fact that some person(s) had executed documents impersonating Biswanath. In fact the witnesses did not recognize Mrinal Dutta to be impersonating Biswanath. It was expected of the Investigating Authority to put Mrinal Dutta on test identification parade to prove the charge of impersonation of Biswanath. Mrinal Dutta was arrested along with other accused on 07.03.1994. An application for test identification parade for Aloke Nath was filed on 09.03.1994. No such prayer was made by the prosecution for Mrinal Dutta. On 16.03.1994 he had been remanded to police custody. A prayer was made by the Investigating Officer for further police custody before the ACM on 16.03.1994. Consequently he had been remanded till 19.03.1994. Before we examine the legal implications in regard to recording the judicial confession, we may notice the following facts. He had been produced before the Magistrate (PW-43) straightaway from police custody. He was asked to be sent to judicial custody for self introspection. He, however, was taken out from Presidency Jail at 10.30 A.M.. on 21.03.1994. Admittedly, he had been produced before the Magistrate at 1.00 p.m. Albeit a little later, a complaint was made by Mrinal Dutta, that before he had been produced before the Magistrate he was taken to the Alipore Police Station and tortured. It is true, as has been submitted by Mr. Ahmad, that although he had named the Police Inspector who allegedly tortured him, as would appear from his examination under Section 313 of the Code of Criminal Procedure, but the said Police Inspector has not been cross-examined on the said point, but the fact remains that the confession stood retracted and, thus, we have no option but to consider the legal aspect thereof having regard to the fact situation obtaining herein.

The court's scrutiny in regard to the acceptability of a judicial confession would not stop only because there was a failure on the part of the defence counsel to cross-examine the said witness, more so when the offence is said to be a grave one.

Constitutional Postulates and Retracted confession :

Article 20(3) of the Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself. The right to remain silent is an extension of the rule of civil liberty enjoined by our Constitution.

Considering the guarantee under Article 20 (3) and also humanizing standards under Article 21 we need to tread cautiously while construing retracted confession. Although such caution is subject to some exceptions such as per se evidence of the motivating factors of retraction or retraction based on extraneous circumstances.

In this regard it is important to address the scope and ambit of Article 20(3) i.e. at which stage of criminal process the safeguard becomes operative. In Smt. Nandini Satpathy v. P.L. Dani and Another [AIR 1978 SC 1025], this Court stated the law thus :

"57. We hold that Section 161 enables the police to

examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation \027 not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter."

In this context, it will be useful to refer to the following passage from the decision of this Court in *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru [(2005)11SCC 600]* :

"This Court rejected the contention advanced on behalf of the State that the two provisions, namely, Article 20(3) and Section 161, did not operate at the anterior stages before the case came to Court and the incriminating utterance of the accused, previously recorded, was attempted to be introduced. Noting that the landmark decision in *Miranda v. Arizona* [1966, 384 US 436] did extend the embargo to police investigation also, the Court observed that there was no warrant to truncate the constitutional protection underlying Article 20(3). It was held that even the investigation at the police level is embraced by Article 20(3) and this is what precisely Section 161 means."

[See also *Directorate of Enforcement v. Deepak Mahajan and Another*, (1994)3 SCC 440], and *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600].

To withdraw from what has been said previously needs to be interpreted in the vein of right to remain silent as an extension of this civil liberty. The quality or merit of confession, in no uncertain terms, is in voluntary narration by the accused. At the same time we are equally in know of the troubled times the judiciary is plagued with. The issue of evidentiary standards is a very delicate one and has a great bearing on the outcome of cases. But be it as it may, basic tenets of criminal law can not be lost sight of. In similar vein the law on retracted confession must be judged in the context of each case.

Legislative paradigm on retracted confession :

In this regard it is important to consider the retracted confession within the legislative paradigm laid down under Sections 24 to 26 of the Indian Evidence Act and Section 162(1) and Section 164 of the Code of Criminal Procedure, 1973.

Also it will be in the fitness of the case to appraise the value of retracted confession for the co-accused under section 30 of The Indian Evidence Act a little later.

Sections 24 to 30 deal with confession. Section 24 speaks of the effect of a confession made by an accused through inducement, threat or promise proceeding from a 'person in authority'. Whereas section 25 and section 26 deal with situations where such 'person in authority' is police. It is an institutionalized presumption against confession extracted by police or in police custody. In that frame of reference, Section 24 is the genus and sections 25 and 26 are its species. In other words, section 25 and section 26 are simple corollaries flowing out of the axiomatic and generalized proposition (confession caused by inducement where inducement proceeds from a person in authority, is bad in law) contained in section 24. They are directed towards assessing the value of a confession made to a police officer

or in police custody.

The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act.

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law. [See Babubhai Udesinh Parmar v. State of Gujarat \026 2006 (12) SCALE 385].

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

Judicial confession must be recorded in strict compliance of the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture.

The fact that the accused was produced from the police custody is accepted. But it was considered in a routine manner. The learned Magistrate in his evidence could not even state as to whether the appellants had any injury on his person or whether there had been any tainted marks therefor.

The courts while applying the law must give due regard to its past experience. The past experience of the courts as also the decisions rendered by the superior courts should be taken as a wholesome guide. We must remind ourselves that despite the fact that procedural safeguards contained in Section 164 of the Cr. P.C. may be satisfied, but the courts must look for truthfulness and voluntariness thereof. It must, however, be remembered that it may be retracted subsequently. The court must, thus, take adequate precaution. Affirmative indication of external pressure will render the retracted confession nugatory in effect. The court must play a proactive role in unearthing objective evidence forming the backdrop of retraction and later the examination of such evidence of retraction. However in cases where none exists, the court must give the benefit of doubt to the accused. Where there is no objective material available for verifying the conditions in which the confession was retracted, the spirit of section 24 of the Evidence Act (irrelevance of confession caused by inducement) may be extended to retracted confession. An inverse presumption must be drawn from absence of materials.

In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be

referable in nature. Such corroboration must be independent and conclusive in nature.

Evidentiary value of retracted confession :

A retracted confession of a co-accused cannot be relied upon for the purpose of finding corroboration for the retracted confession of an accused. It was so held in *Bhuboni Sahu v. R.* [AIR 1949 PC 257], stating :

"The court may take the confession into consideration and thereby no doubt, makes its evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

[See *Hari Charan Kurmi and Jogia Hajam v. State of Bihar* \026 (1964) 6 SCR 623]

However, we are not unmindful of the fact that in this country, retractions are as plentiful as confessions. In a case of retracted confession, the courts should evidently be a little slow in accepting the confession, although the accused may not be able to fully justify the reasons for his retraction.

It is interesting to note that in *R. v. Thompson*, [1893, 2 QB 12, 18], Cave, J. stated the law thus :

"I would add that for my part I always suspect these confessions which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear, and satisfactory, but when it is not clear and satisfactory, the prisoner is not frequently alleged to have been seized with a desire, born of penitence and remorse, to supplement it with a confession \026 a desire which vanishes as soon as he appears in a court of justice."

Straight J, observed in *R v. Babulal*, 6 A 509, 542, 543

"An endless source of anxiety and difficulty to those who have to see that justice is properly administered\005I have said, and repeat now, it is incredible that the extraordinarily large number of confessions, which come before us in the criminal cases disposed of by this court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented\005the retraction follows almost invariably as a matter of course"

[See *Sarkar on Evidence*, 15th Edn. \026 Volume 1 - page 466]

The value of a retracted confession is now well-known. The court must be satisfied that the confession at the first instance is true and voluntary. [See *Subramania Goundan v. The State of Madras* [AIR 1958 SC 66] and *Pyare Lal Bhargava v. State of Rajasthan*, [AIR 1963 SC 1094].

Caution and prudence in accepting a retracted confession is an ordinary rule. [See *Puran v. The State of Punjab* -AIR 1953 SC 459]. Although if a retracted confession is found to be corroborative in material particulars, it may be the basis of conviction. [Balbir Singh v. State of Punjab - AIR 1957 SC 216].

We may notice that in 1950's and 1960's corroborative evidence in "material particulars" was the rule. [See Puran (supra), Balbir Singh (supra), Nand Kumar and Others v. State of Rajasthan \026 1963 CrL LJ 702]. A distinctiveness was made in later years in favour of "general corroboration" or "broad corroboration". [See for General Corroboration - State of Maharashtra v. Bharat Chaganlal Raghani and Others [(2001) 9 SCC 1]; "General trend of Corroboration" - Jameel Ahmed and Another v. State of Rajasthan \026 [(2003) 9 SCC 673]; and "Broad Corroboration" - Parmananda Pegu v. State of Assam [AIR 2004 SC 4197]

Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it is found that retraction made by the accused was wholly on a false premise. [See Balbir Singh (supra)].

There cannot, however, be any doubt or dispute that although retracted confession is admissible, the same should be looked with some amount of suspicion - a stronger suspicion than that which is attached to the confession of an approver who leads evidence to the court.

Why we should not rely on the confession :

Coming to the facts of this case, on 04.10.2002, the lawyer appearing for Mrinal Dutta made a submission that an application had been filed praying for calling of some records from the Presidency Jail. No order had been passed thereupon. It was contended that he had been taken from Jail at 10.00 a.m.. The records were directed to be produced. However from the order sheet dated 14.11.2002 it appears that the said records had not been produced. On 17.01.2003 a prayer had again been made on behalf of Mrinal Dutta that steps would be taken for production of the documents in terms of order dated 04.10.2002. The learned Judge recorded :

"The order No.265 goes to show that the Court passed order regarding production of Jail Register of Presidency Jail dated 21.3.94. The report of the Superintendent, Presidency Correctional Home dated 14.11.02 shows that the same was not available. It was further stated in the said letter that if the said register is available, the same will be sent to this Court at once. As the said Register has not been produced, the Court is duty bound to take presumption that the said Register could not be traced out. It should be stated here that the cease work was withdrawn long ago and during this period, the defence lawyer for accused Minal Dutta did not take any step to compel the superintendent Presidency Correctional Home to appear in person and to produce the document. As today is fixed for D.W. and as no petition has been filed the case is closed, considering the fact that the case is pending for trial since 1994."

The court, with respect, misdirected itself. It had no such duty. It was in fact the other way found .

It is not in dispute that Mrinal Dutta had retracted from his confession. The value of the retracted confession was required to be considered on the accusation of the accused that the confession was not voluntary. In his application retracting from his confession, it was alleged :

"Respected Sir, my humble submission is that I am

informing true facts of my case. I have been implicated in the murder of Biswanath Dutta and the fraud committed. I am not connected with these incidents and I know nothing about these acts. Police came to my house on 7.3.94 to apprehend my brother-in-law Gobinda Roy. Gobinda was at my house on the said date. Police apprehended and brought me and Gobinda Roy from my house. Thereafter implicated me in that murder and fraud. Then beat me up severely and told me to state whatever they dictate and thereafter to accept the same. Otherwise they would torture me and members of my family continuously in various manners and would implicate in other cases also. They told me if you follow our dictates we would save you. They made me make a confession as per their false statements before a Respected Magistrate of Jorabagan Bankshall Court.

Out of the fear of Police torture I and members of my family are on the brink of destruction. My humble appeal to you to kindly take necessary action to save me and members of my family from destruction."

It is expected in a situation of this nature that the court will issue a suo motu direction to the authority to produce the records. There was absolutely no reason as to why the records would not be produced by the Presidency Jail's authorities for a period of two months. If the said records had not been produced, in our opinion, it was obligatory on the part of the court to issue a suo motu notice. The court was dealing with a serious matter. More than one life hinged on that valuable material. If a public authority does not produce a document despite being called upon to do so; an adverse inference is to be drawn. Converse is not the law.

It is true that sufficient time was given (two days) to Mrinal Dutta to confirm his willingness to confess and finalize the contents of the confession. The reasons for which the confession had been retracted and the subsequent events wherein the appellants intended to prove a certain state of affairs, namely, although he was supposed to have been produced directly from the jail to the concerned Magistrate but in fact he was taken out of jail 2 = hours before the time fixed therefor, could be a pointer to the fact as to whether the confession was a voluntary one.

It may be true that an application for adducing evidence had been filed by the Appellants in terms of Section 311 of the Code of Criminal Procedure, but the said evidence, if adduced would have tilted the balance one way or the other so as to enable the court to come to the conclusion as to whether the purported judicial confession made by Mrinal Dutta satisfies the tests laid down by this Court in a large number of decisions. There was no reason for the court to draw an adverse inference that the records had been destroyed. No such inference could be drawn in law either in terms of Section 114 of the Indian Evidence Act or any other law. The period during which such documents are preserved under the provisions of the jail manual have not been referred to. No evidence had been brought on record to show that the documents had in fact been destroyed. The least the jail authorities could do was to produce the destruction register.

In the aforementioned backdrop, the court should give the benefit of doubt to the accused instead of the prosecution. The learned Trial Judge, in our opinion, should not have closed the case. He should have invoked his jurisdiction under Section 311 of the Code of Criminal Procedure in the interest of justice and instead of blaming the defence for non-examination of the Superintendent of Presidency Jail, the court itself should have called upon authorities to produce the document. The presumption raised by the court in this behalf is wholly misconceived.

Effect of a retracted confession :

We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a

well-settled principle of law that a retracted confession is a weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. [See Paramananda Pegu (supra)]

In Navjot Sandhu @ Afsan Guru (supra), this Court observed :

"32. As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in Bharat v. State of U.P. Hidayatullah, C.J., speaking for a three-Judge Bench observed thus: (SCC p. 953, para 7)

"Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its use. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true"

[See also Puran (supra), Bharat v. State of UP (1971) 3 SCC 950, Kora Ghasi v. State (1983) 2 SCC 251, Preetam v. State of MP (1996) 10 SCC 432, Bhagwan Singh v. State of MP (2003) 3 SCC 21].

Mr. Altaf Ahmad, relied upon a decision of this Court in Sidharth and Others v. State of Bihar [(2005) 12 SCC 545] wherein having regard to the extensive evidences produced by the prosecution, it was held that the same lent corroboration to the confession made by the accused. In that case the circumstances had been independent de'hors the confession. It was opined :

"16. The confession made by the appellant Arnit Das is voluntary and is fully corroborated by the above items of evidence. The Sessions Judge was perfectly justified in relying on the confession made by the

appellant Arnit Das."

Reliance has also been placed by Mr. Ahmad on State of Tamil Nadu v. Kutty @ Lakshmi Narsimhan [(2001) 6 SCC 550]. Therein materials were brought on records to lend assurance to the court about the truthfulness of the confession made. There had been several independent circumstances which had lent assurance thereto, although the same had been retracted.

APPRECIATION OF EVIDENCE :

In the instant case, it is an admitted position that on 19th March, 1994, Mrinal Dutta was taken to the Magistrate (PW-43) straight from the Police custody.

Even though the Magistrate had sent the accused to jail custody on 19th March so that he could further reflect on the matter, when he was brought to the Magistrate again on 21.03.1994 he was, as subsequently asserted by Mrinal Dutta, first taken to Alipore Police Station and was threatened and tortured and was also tutored as to what he should tell the Magistrate in his confession. PW-48 the I.O. was cross examined on this point and suggestions were also given to him which he denied.

Mrinal Dutta in his retraction made from jail on 16.06.1994 emphatically stated that he was taken to Alipore police station before being brought to the Magistrate on 21.03.1994. He maintained that stand in his examination under Section 313 Cr.P.C. Strangely enough prosecution did not make any attempt to disprove this allegation.

In this case, as we have noticed hereinbefore, there is no independent evidence adduced on behalf of the prosecution to prove conspiracy with regard to cheating and forgery of documents and impersonation. They had been sought to be proved by the supplementary circumstantial evidences.

In this case, the courts below have failed to notice the legality of the judicial confession. There did not exist any evidence against Mrinal Dutta. The courts apparently considered the said confessions of Aloke Nath and then started connecting links therefrom and again came back to the confession for completing the chain. Confession must be considered so as to buttress other evidence and not the vice-versa. In other words, in the instant case, the courts started to consider the matter from the angle of confession then picked up facts from the deposition of the witnesses and again came back to the confession.

The evidences merely established to defraud the intending purchasers. At that point of time, Aloke Nath thought it fit to do away with Biswanath, as he was proved to be an obstruction in his attempt to dispose of the property. The Appellants might or might not have joined hands with him, but unless there exist sufficient and cogent reasons to link them with the alleged crime committed by Aloke Nath, it may not be said that they are also guilty thereof.

Effect of retracted confession of Mrinal Dutta on Appellants other than Aloke Nath :

Furthermore, so far as the accusation against Babu Roy and Mamata Dutta are concerned, the only evidence against them was the judicial confession of Mrinal Dutta. The same was admissible against them only under Section 30 of the Indian Evidence Act.

Section 30:

It is not in dispute that apart from general evidence in regard to commission of forgery etc., only evidence of involvement of Mamata and Babu Roy is the judicial confession made by Mrinal Dutta. The extra judicial confession made by Aloke Nath before the prosecution witnesses, as noticed hereinbefore, does not implicate these Appellants. Only in his judicial confession, Mrinal Dutta has assigned roles to these accused persons as having common intention to commit the offence of murder of Biswanath with Aloke Nath.

Judicial confession is admissible in evidence against the maker thereof under Section 26 of the Indian Evidence Act; but against the co-accused, Section 30 will be applicable.

Section 30 of the Indian Evidence Act reads thus :

"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. \026 When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The expression 'the court may take into consideration such confession' is significant. It signifies that such confession by the maker as against the co-accused himself should be treated as a piece of corroborative evidence. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a co-accused, be it extra judicial confession or a judicial confession and least of all on the basis of retracted confession.

What is furthermore required to be considered is that if a retracted confession itself is weak evidence, the question of conviction of a co-accused on the basis thereof would not arise.

The question has been considered in State of M.P. through CBI and Others v. Paltan Mallah and Others [(2005) 3 SCC 169], Navjot Sandhu (supra) and Sidhartha (supra).

In Sidhartha (supra), this Court held :

"19. It is true that the confession made by a co-accused shall not be the sole basis for a conviction. This Court in Kashmira Singh v. State of M.P. held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

In Ram Parkash v. The State of Punjab [1959 SCR 1219], it was held :

"That a voluntary and true confession made by an accused though it was subsequently retracted by him, can be taken into consideration against a co-accused by virtue of s. 30 of the Indian Evidence Act, but as a matter of prudence and practice the court should not act upon it to sustain a conviction of the co-accused without full and

strong corroboration in material particulars both as to the crime and as to his connection with that crime.

The amount of credibility to be attached to a retracted confession would depend upon the circumstances of each particular case."

It was further opined :

"On the evidence in the case the confession of P was voluntary and true and was strongly corroborated in material particulars both concerning the general story told in the confession concerning the crime and the appellant's connection with crime."

[See Navjot Sandhu alias Afsan Guru (supra) and Jaswant Gir v. State of Punjab (2005) 12 SCC 438].

We, therefore, express our inability, with respect, to agree with this part of the judgment of the learned judge.

DEATH SENTENCE :

Is this case an instance of 'rarest of rare cases' meriting imposition of capital sentence is now the question? What are the parameters, are there any? Several factors are relevant. One of them being a long lapse of time [See Paltan Mallah (supra)]

In Bachan Singh v. State of Punjab [(1980 2 SCC 684 = (AIR 1980 SCC 898)], a Constitution Bench dealt with the validity of death sentence and while doing so the rule of rarest of rare cases was laid down. It was reiterated in Machhi Singh and Others v. State of Punjab [(1983) 3 SCC 470]. The illustrative circumstances which were laid down in the aforementioned cases are :

1. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
2. When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.
3. When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride-burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
4. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
5. When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

We are, however, not oblivious of the fact that the court also should not remain unmindful to protect the injured and with that view of the matter recommend award of proper sentence having regard to the nature of offence. [See Sevaka Perumal v. State of Tamil Nadu - AIR 1991 SC 1463]

In Devender Pal Singh v. State of NCT of Delhi [AIR 2002 SC 1661] the death sentence was upheld by a majority of 2:1 notwithstanding the dissenting view holding the accused to be innocent.

[See also Dhananjay Chatterjee @ Dhana v. State of West Bengal & Others (2004) 9 SCC 759].

We may notice that in Saibanna v. State of Karnataka [JT 2005 (5) SC 564 = (2005) 4 SCC 165], this Court imposed death punishment in a case where the accused committed a murder while undergoing life imprisonment.

Although we are not concerned with such a case, the view taken therein is doubtful.

We may also notice that in Ram Anup Singh and Others v. State of Bihar [(2002) 6 SCC 686] and Bachittar Singh and Another v. State of Punjab [(2002) 8 SCC 125], this Court did not impose a death penalty although the case involved murder of a brother by another brother.

It is not necessary for us to notice a large number of decisions which are available in the reports, except a few recent decisions.

In Surendra Pal Shivbalakpal v. State of Gujarat [(2005) 3 SCC 127], death sentence was not imposed in a case where the offence involved was rape with murder of a girl, stating :

"13. The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment."

Therein it was also noticed that the accused was prone to do such crime.

In State of Maharashtra v. Man Singh [(2005) 3 SCC 131], the court refrained itself from awarding the capital punishment, although the offence involved was rape with murder.

In Rama Subramanian v. State of Kerala [AIR 2006 SC 639], this Court did not award a death penalty where a lady, together with her three children, was killed, despite arriving at a finding that the evidence adduced by the prosecution is very clear and convincing to prove the guilt of the Appellant, stating :

"\005It is true that the crime committed by the appellant is cruel and dastardly in nature and the appellant deserves no mercy. However, it may be noted that it is not known how and under what circumstances the incident had taken place on 9.8.1999. the appellant was annoyed by the fact that his services were terminated without being paid any compensation despite serving his employer for quite a long period. Taking the overall facts into consideration, we do not find that this is one of the rarest of the rare

cases where death sentence could be the only punishment\005."

Apart from Sidharth (supra), our attention has also been drawn to a judgment of this Court in State of Rajasthan v. Kheraj Ram (2003) 8 SCC 224] by Mr. Ahmad, wherein this Court, while awarding death punishment, held :

"35. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the courtroom after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberation and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

36. The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment need not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

37. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably, to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the terrific results of his crime. Inevitably, these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread."

In that case, death penalty was imposed but our endeavour here is to see that courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar.

We would, however, notice that in State of U.P. v. Satish [(2005) 3 SCC 114], the same learned Judge took a similar view in a case where the High Court reversed the judgment of conviction and imposition of death sentence by the Trial Judge for commission of an offence of rape and murder of a girl aged 6 years, saying the earlier view once again.

In Navjot Sandhu @ Afsan Guru (supra), nine persons including eight security personnel and one gardener succumbed to the bullets of the

terrorists and 16 persons including 13 security men received injuries as a result of storming of the Parliament by 5 terrorists. This Court upholding the decision of the High Court to award death penalty, observed :

"The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity. It is a classic example of rarest of rare case."

In Holiram Bordoloi v. State of Assam, [(2005) 3 SCC 793] appellant along with 17 others was convicted for murdering 4 persons by burning them alive in a hut. Death penalty was imposed on the appellant. This Court embarked on a discussion as to the aggravating circumstances and mitigating circumstances, observing:

"Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind." A "murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why; it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments."

This Court also affirming the death penalty, held :

"Even when questioned under Section 235 (2) of Criminal Procedure Code, the accused stated that he had nothing to say on the point of sentence. The fact that the appellant remained silent would show that he has no repentance for the ghastly act he committed."

In Pratap Singh v. State of Jharkhand and Anr. [(2005) 3 SCC 551], a Trade Union leader was shot dead by the appellant as a result of a labour dispute. This Court observed that the incident leading to these appeals had taken place as early as 1991. As there is a long lapse of time, the court did not think that the sentence of death imposed by the Sessions Court is justified in the circumstances.

In Amrit Singh v. State of Punjab [2006 (11) SCALE 309], this Court while taking account of the available evidence observed that it was possible for the death to have occurred because of excessive bleeding and not by strangulation as the Trial Court and High Court held. This Court also noted that there were no eye-witnesses that actually saw the commission of the offence and it was only on the basis of circumstantial evidence, that he was convicted. This Court noted that although the crime was brutal, it could not be said it was the rarest of the rare case. This Court observed :

"He had no pre-meditation for commission of the offence. The offence may look heinous, but under no circumstances, it can be said to be a rarest of rare cases."

Hence the sentence was commuted to one for life.

In Major Singh and Anr. v. State of Punjab (2006 (10) SCALE 354] death Sentence was awarded to the appellant by the High Court. Appellant

therein murdered the deceased on the suspicion that the deceased had murdered his wife who happened to be the sister of the appellant. It was observed :

"\005considering the fact that there was probably some enmity due to suspicion about Sukhwinder Kaur's death two years after her marriage to Kashmir Singh [deceased] which could have a motive for the crime, we reduce the sentence awarded to both the accused from death sentence to life sentence."

However, we may also notice that recently two ladies have been awarded death penalty where the accused were systematically killing children in Renuka Bai @ Rinku @ Ratan & Anr. v. State of Maharashtra [(2006) 7 SCC 442 : 2006 (8) SCALE 604], stating :

"24. The appellants have been awarded capital punishment for committing these murders and their sentence was confirmed by the High Court. Going by the details of the case, we find no mitigating circumstances in favour of the appellant, except for the fact that they are women. Further, the nature of the crime and the systematic way in which each child was kidnapped and killed amply demonstrates the depravity of the mind of the appellants. These appellants indulged in criminal activities for a very long period and continued it till they were caught by the police. They very cleverly executed their plans of kidnapping the children and the moment they were no longer useful, they killed them and threw the dead body at some deserted place. The appellants had been a menace to the society and the people in the locality were completely horrified and they could not send their children even to schools. The appellants had not been committing these crimes under any compulsion but they took it very casually and killed all these children, least bothering about their lives or agony of their parents.

25. We have carefully considered the whole aspects of the case and are also alive to the new trends in the sentencing system in criminology. We do not think that these appellants are likely to be reformed\005"

[Emphasis supplied]

In Gurmeet Singh v. State of Uttar Pradesh [(2005) 12 SCC 107] appellant and his companion Lakha Singh (who died during the course of trial proceedings) committed the murder of thirteen members of his own family. This Court observed :

"All the victims were closely related to the appellant and they were killed in the most dastardly manner. Most of the victims were sleeping when they were attacked. The appellant did not spare even the small kids with whom he had apparently no enmity. The appellant did not have even a grain of mercy or human kindness in his heart. Considering all these aspects, we do not think that this is a fit case where the death penalty is to be commuted to life imprisonment."

It is evident that different Benches had taken different views in the matter.

We must remind ourselves that there has been a growing demand in the international fora that death penalty should be abolished. [See Second Optional Protocol to the International Covenants on Civil and Political Rights and the Protocol to the American Constitution on Human Rights to

abolish death penalty]. Pursuant to or in furtherance of the pressure exhorted by various international NGOs, several countries have abolished death penalty. The superior courts of several countries have been considering the said demand keeping in view the international covenants, conventions and protocol.

In 2002, the United States Supreme Court held in *Atkins v. Virginia*, [536 U.S. 304 (2002)] that it is unconstitutional to execute defendants with mental retardation. The U.S. Supreme Court ruled 6-3 that executions of mentally retarded criminals are "cruel and unusual punishment," violating the Eighth Amendment to the Constitution. The court held :

"We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty."

We may furthermore notice that the Privy Council recently in *Reyes v. R* [(2002) UKPC 11 : 12 BHRC 219], upon noticing the decision of the Supreme Court in *Mithu v. State of Punjab*, [1983] 2 SCR 690, observed :

"In *Mithu v State of Punjab* [(1983) 2 SCR 690] the Supreme Court of India considered a provision of the Indian Criminal Code which required sentence of death to be passed on a defendant convicted of a murder committed while the offender was under sentence of imprisonment for life. The court addressed its attention to article 21 of the Indian constitution, which protects the right to life. Certain observations made by Chandrachud CJ, at pp. 704, 707 and 713 are relevant to the present discussion:

"But, apart from that, a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair ... Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, of that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case."

[See also *Hughes, R v (Saint Lucia)* [2002] UKPC 12]

In the case of *Roper v. Simmons*, [543 U.S. 551 (2005)], at age 17, respondent planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. The court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

The court observed that:

"The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of

certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."

There are some precedents of this Court e.g. Sahdeo and Others etc. v. State of U.P. [(2004) 10 SCC 682- Para 9] and Sheikh Ishaq and Others v. State of Bihar \026 (1995) 3 SCC 392], which are authorities for the proposition that if the offence is proved by circumstantial evidence ordinarily death penalty should not be awarded. We think, we should follow the said precedents instead and, thus, in place of awarding the death penalty, impose the sentence of rigorous imprisonment for life as against Aloke Nath. Furthermore we do not find any special reason for awarding death penalty which is imperative.

In Kishori v. State of Delhi [(1999) 1 SCC 148], this Court observed :

"12. It is no doubt true that the high ideals of the Constitution have to be borne in mind, but when normal life breaks down and groups of people go berserk losing balance of mind, the rationale that the ideals of the Constitution should be upheld or followed, may not appeal to them in such circumstances, nor can we expect such loose heterogeneous group of persons like a mob to be alive to such high ideals. Therefore, to import the ideas of idealism to a mob in such a situation may not be realistic. It is no doubt true that courts must be alive and in tune with the notions prevalent in the society and punishment imposed upon an accused must be commensurate with the heinousness of the crime. We have elaborated earlier in the course of our judgment as to how mob psychology works and it is very difficult to gauge or assess what the notions of society are in a given situation. There may be one section of society which may cry for a very deterrent sentence while another section of society may exhort upon the court to be lenient in the matter. To gauge such notions is to rely upon highly slippery imponderables and, in this case, we cannot be definite about the views of society."

[See also Balraj v. State of U.P. \026 (1994) 4 SCC 29; and Jashubha Bharatsing Gohil and Others - (1994) 4 SCC 353]

Sentencing indisputably is a part of criminal jurisprudence. More importantly, in death penalty references sentencing issues requires serious deliberation. Cases of this nature warrant objective evaluation of indicia and legal thresholds.

In Union of India (UOI) and Ors. v. Devendra Rai [(2006) 2 SCC 243] accused was awarded death sentence for having caused homicidal death of two army personnel and for having caused grievous injuries with the intent of causing murder of two others, in a court martial. The High Court upheld death penalty awarded. This Court, however, noticed :

"8. What is culled put from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up.

9. In the instant case, the High Court has not attempted to do that exercise and has come to an abrupt conclusion about the case being not covered by the rarest of rare category. That is clearly contrary to the principles set out by this Court in the decisions noted above. We deem it appropriate to remit the matter to the High Court

to consider the matter afresh and take the decision as to the appropriate sentence. The exercise has only to be limited to that aspect alone as the High Court itself has in the impugned judgment found that the conviction was well merited."

When a statute provides for death penalty, so long as the same is not ultra vires, application thereof cannot be altogether eliminated. But keeping in view the decision of the Constitution Bench of this Court, the jurisdiction of this Court in this behalf is limited. Death penalty can be awarded only if in the opinion of the court, the case answers the description of rarest of rare cases. What would constitute a rarest of rare cases must be determined in the fact situation obtaining in each case. We have also noticed hereinbefore that different criteria have been adopted by different benches of this Court, although the offences are similar in nature. Because the case involved offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding death penalty or a lesser penalty as several factors therefor are required to be taken into consideration. No sentencing policy in clear cut terms has been evolved by the Supreme Court. What should we do ?

Does fact of this case make out the case to be one of rarest of rare cases? We are of the opinion that it does not. The manner of commission of offence may be gruesome. Biswanath was killed while he was in deep slumber, but the method applied cannot be said to be cruel. The reason for commission of the murder is greed of money on the part of Alope Nath which evidently arose out the result of his bad habits. We have no doubt in our mind that he was pushed back to such a situation where he thought that he had no other option but to kill his brother. The prosecution has not brought out any material to show that Alope Nath had not been maintaining good relation with Biswanath. There might have difference of opinion between the brothers in regard to the question of sale of house, but we have nothing before us to say one way or the other in this behalf. Alope Nath was in need of money; Biswanath, an employee of a bank and being a bachelor probably did not require the same. He might have other idea e.g. he did not want to loose his place of abode. Alope Nath had many vices, whereas Biswanath did not have any. But they had been living in the same premises for a long time. Both of them have been looking after their parents. In fact, only it was the other brothers, namely, Amar Nath and Samar Nath had filed a suit against their mother as well as Alope Nath and Biswanath, apprehending that their mother would bequeath the property in their favour, and, thus, excluding them from inheriting the same.

We in the facts and circumstances of this case are also of the opinion that the prosecution having been failed to prove the case of conspiracy against Appellant herein, the case cannot be said to be one constituting rarest of rare cases.

CONCLUSION :

For the reasons aforementioned, Criminal Appeal No. 867-868 of 2005, as far as Shib Shankar Roy @ Babu Roy and Mamta Dutta are concerned, and Crl. Appeal No. 875 of 2005 preferred by Mrinal Dutta, are allowed, and the judgment of conviction and sentence passed against them is set aside. They may forthwith be released unless wanted in connection with any other case. Criminal Appeal No.867-68 of 2005, as far as Alope Nath is concerned, is allowed in part and to the extent that the death penalty imposed upon him is commuted to imprisonment for life. Other part of the sentences is also upheld.