

STATE OF ORISSA  
v.  
DIBAKAR NAIK AND ORS.

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APRIL 23, 2002

[R.P. SETHI AND DORAISWAMY RAJU, JJ.]

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*Penal Code, 1860—Sections 302, 304, 376 r/w 34 and Sections 323, 341, 342, 347, 448 and 506—Offences—Allegation— Trial Court convicted 8 accused u/ss.302 and 376 r/w 34 and for other minor offences—Other accused convicted for minor offences—Acquittal of the 8 accused by High Court—On appeal, acquittal of the accused u/ss 302 and 376 r/w s.34 challenged—The 8 accused specifically mentioned in FIR with allegation of murder and rape— Overt act attributed only to 4 of them—Held, the 4 accused rightly convicted u/s 376 r/w 34—Conviction u/s 302 r/w 34 not justified since the nature of injuries indicated that they had not intended to cause her death—In view of the manner of committing rape, they are assumed to be having knowledge that the action was likely to cause her death—Hence convicted u/s 304(II) r/w 34—Other accused acquitted for the offences of murder and rape—Conviction for minor offences upheld.*

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*Criminal Trial*

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*Post incident conduct—Evidentiary value—Appreciation of.*

*Benefit of doubt—Discrepancy in investigation—In such event benefit not given to the accused.*

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*Constitution of India, 1950—Article 136—Appeal—Finding of fact— Interference with—Held, generally not permissible—But where such finding perverse, based on inadmissible evidence and result of imaginative hypothesis and conjectures, interference is permissible.*

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**Appellant-accused were prosecuted for murder and rape of the deceased at riverbed and for having assaulted her and PW1 on two earlier occasions i.e. at bus stand and party office. Prosecution case was that accused who bore enmity towards the deceased and her husband (PW1) wanted them to leave the village. When the deceased, her husband and infant were fleeing to save**

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- A** their lives, accused gang raped and murdered her. PW1 had seen the assault on his wife with the help of torch light. He managed to save his and the life of the infant. After the incident he had met PW10 and PW13 to whom he had narrated the incident. He made repeated efforts to report the incident in the night of the incident, but was unsuccessful due to non co-operation of investigation officials, and he could manage to lodge FIR one day after the
- B** incident. On earlier occasions regarding assault on PW1 and modesty of the deceased as also commission of theft in their house, FIR was lodged. Accused 1, 4, 10 and 12 were alleged to be responsible for the incident at the bus stand and the office.
- C** Regarding incident at the river bed, names of Accused 2, 3, 5, 6, 7, 8, 9 and 11 were specifically mentioned, but no overt acts were attributed to Accused 2, 3, 8 and 9. Post Mortem Report showed signs of violent forced intercourse. During investigation of the case there was frequent changes of the investigating officers.
- D** Trial Court convicted Accused 2, 3, 5, 6, 7, 8, 9 and 11 for the offences punishable u/ss. 376 and 302 r/w Section 34 IPC. Accused 1, 4, 10 and 12 were convicted for minor offences punishable u/ss 448, 323, 342, 347 and 506. The Court found that the investigation was purfunctory.
- E** On appeal High Court acquitted the accused of the charges u/ss 376 and 302 r/w Section 34, holding that evidence of PW1 was not reliable as he had not disclosed the names of the accused to PWs 10 and 13 whom he had met immediately after the incident that since his evidence was contradicted by his own testimony as well as by medical evidence; that since the torch which he claimed to have carried on the night of the incident was not seized from him; and since PW1 was coward he did not come to rescue of his wife. The
- F** appeal of the accused convicted for minor offences was dismissed upholding their conviction. The appeal of the State against acquittal of some of the accused with regard to minor offences and offences of murder and rape, was also dismissed. Hence the present appeal. Accused 1, 4, 10 and 12 had already undergone their sentence. Accused 3 and 6 had died during pendency of the
- G** appeal. Hence the appeal abated against them.

Partly allowing the appeals, the Court

- H** HELD: 1.1. A-5, A-6, A-7, A-11 are held guilty for the commission of offences punishable under Section 304 (II) read with Section 34 of the Indian Penal Code besides the commission of offence punishable under Section 376

read with Section 34 of the Indian Penal Code. The conviction and sentence awarded by the trial court to A-5, A-6, A-7, A-11 under Section 376 of the Indian Penal Code is upheld. [324-H; 325-A, B] A

1.2. On re-appreciation of whole of the evidence, it is concluded that A-5, A-6, A-7 and A-11 were responsible for the occurrence which took place in the river bed wherein the deceased was subjected to gang-rape. But the nature of the injuries inflicted upon the person of the deceased indicate that the accused persons had not intended to cause her death. However, on proof of the commission of offence of gang-rape found to have been committed in a violent manner, they are assumed to be having the knowledge that by their action it was likely that the deceased would have died. [323-D, E, F; 324-G] B C

1.3. Instant case is a fit case requiring interference of this Court as the High Court has failed to discharge its statutory obligations. The accused have wrongly been acquitted on surmises and conjectures ignoring the trustworthy evidence of PW-1 by reaching perverse conclusions regarding the facts of the case. The view taken by the High Court, apparently appears to be perverse, not based upon evidence, completely in negation of the normal human behaviour of an individual caught in such a horrifying situation and forgetting that for the fault in the investigation no benefit can be given to the accused persons. To reject the testimony of PW-1, High Court appears to have adopted a technical approach. [319-E; 320-D] D E

*The State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh*, [1974] 3 SCC 277 and *State of H.P. v. Lekh Raj and Anr.*, [2000] 1 SCC 247, referred to.

1.4. The fact that PW1 could not save his wife, did warrant a finding that he was a coward and should not be believed. The circumstances narrated by PW1 show the presence of a number of accused persons, some of whom were even armed with knife. He had their infant child in his lap and heard the deceased crying and appealing to PW1 to save his life and the life of the infant. By no standards PW1 can be termed to be coward. Even if he was a coward, there is no ground not to rely upon his testimony on that ground alone. [320-B, C] F G

1.5. Non-mentioning of the names of the accused by PW1 to PWs 10 and 13 is factually not borne out and even if accepted would not render his testimony unacceptable. Post event conduct of a witness cannot be predicted on specified lines. It varies from person to person-so different people react H

A differently under different situations. PW1 had lost his wife in a most ghastly crime committed by the culprits. He apprehended danger to his life and was under shock. PWs 10 and 13 did not ask him about the names of the persons involved in the crime nor did he think it proper to disclose such names. Under such circumstances no adverse inference could be drawn against PW1 making his testimony doubt full or unbelievable. Under the facts and circumstances, the conduct of PW1 cannot be held to be abnormal. The efforts made by PW1 to reach the police station during the night speak of his sincere effort to ensure that the real culprits were brought to book.

[322-H; 323-A, B; 323-D; 319-G, H]

C *Rammi @ Rameshwar v. State of M.P.*, [1999] 8 SCC 649, relied on.

1.6. Even if there was failure on the part of the investigating agency to take steps for the seizure of torchlight, such an omission cannot be treated as a ground to reject the prosecution case. [322-F]

D *Balo Yadav and Ors. v. State of Bihar*, [1997] 5 SCC 360, relied on.

1.7. The finding of the Sessions Judge that the investigation was perfunctory is based upon almost admitted facts. The frequent change of the investigating officer proved, beyond doubt, that the initial investigation was tainted in favour of the accused apparently under their influence. It is only when PW41 took over the investigation that some evidence was collected to find out the truth regarding the allegations made by PW1. [319-F]

F 2.1. Appeals in regard to other accused persons are dismissed holding them not guilty for the commission of the offences punishable under Sections 376 and 304 read with Section 34 IPC. Their conviction and sentence for the minor offence, as awarded by the trial court is upheld. [325-D-E]

G 2.2. In the FIR PW1 had given the names of A-2, A-3, A-5, A-6, A-7, A-8, A-9 and A-11 only. In his deposition with respect to the occurrence which took place in the river bed where the deceased was raped and murdered, the said witness has not attributed any overt act to A-2, A-3, A-8 and A-9. It is in evidence that all the accused persons, named in the FIR, wanted the deceased and her husband to leave the village and probably to ensure it, they were following them. It cannot be ruled out that the accused persons, named in the FIR, excepting A-5, A-6, A-7 and A-11 wanted only to chase the deceased the PW1 and did not intend to commit the offence of either the rape or the murder. In the absence of any overt act attributed to them, there is nothing

to hold that A-2, A-3, A-8 and A-9 shared any common intention with A-5, A-6, A-7 and A-11, who had actually caught hold of the deceased and followed the witness (PW1) with the intention to apprehend him. [320-F, G, H; 321-A]

2.3. There is no evidence against A-1, A-4, A-10 and A-12 for holding them guilty regarding the commission of the offence of rape and murder. [317-F]

3. In an appeal filed under Article 136 of the constitution generally this Court does not interfere with the finding of fact arrived after proper appreciation of evidence by the Court below. If, however, such a finding is perverse, based upon no evidence or based upon such evidence which is inadmissible or is the result of imaginative hypothesis and conjectures, the Court is entitled to re-appreciate the evidence to ascertain the validity of the judgment impugned. [318-B, C]

*Mst. Dalbir Kaur and Ors. v. State of Punjab*, [1976] 4 SCC 158; *Duli Chand v. Delhi Administration*, [1975] 4 SCC 649 and *Ramanbhai Narapbhai Patel and Ors. v. State of Gujarat*, [2000] 1 SCC 358, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 534-535 of 1994.

From the Judgment and Order dated 1.7.1985 of the Orissa High Court in CrI. A. No. 133 of 1981 and G.A. Nos. 82 of 1981.

Raj Kumar Mehta for the Appellants.

Anukul Chandra Pradhan, Shiv Sagar Tiwari, Ms. Sasmita Tripathy for the Respondents Nos. 1, 3, 5-7, 9, 10-12.

P.N. Misra, Abhish Kumar, S. Misra and Ms. Mumud Lata Das for the Respondents Nos. 11.

The Judgment of the Court was delivered by

SETHI, J. Shrieks and wails of a blossoming young helpless woman pleading for mercy, praying for sparing her life and honour did not deter the vulture like culprits in committing the most ghastliest crime, known under the sky, of rape and culpable homicide for quenching their thrust for passion and revenge. Overawed by the might of the accused, the unfortunate husband, apparently concerned with the safety of his son and self, could not rescue his wife from the clutches of the accused. The alleged crime, committed by the couple, for which they were punished by the accused was the self-conceived

- A notions of the culprits regarding publication of some material against them by the deceased and her husband, both Press Reporters. The accused persons clothed themselves with the powers of both the police and the courts, presumably on account of the political influence they wielded in the area.
- B Inaction by the local police resulted in public agitation whereafter the investigation of the case was handed over to the Dy. S.P. of the Crime Branch. The trial court convicted Dibakar Naik (A-2), Raju Rao Dora (A-3), Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baba Tanti (A-7), Surendra Barik (A-8), Kelu Charan Das @ Tanti (A-9) and Madha Tanti @ Madhabananda Parmanik (A-11) under Sections 376 and 302 read with Section 34 of the Indian Penal Code. The other accused persons were convicted
- C and sentenced for minor offences punishable under Sections 448, 323, 341, 342, 347 and 506 and appropriately sentenced for the same. The appeals filed by the accused persons convicted under Sections 376, 302 read with Section 34 were allowed and their convictions and sentences set aside. Convictions and sentences of the other accused persons for offences other than murder and rape were upheld. The appeal filed by the State against the order of
- D acquittal of some of the accused with regard to minor and major charges of rape and murder was dismissed. Aggrieved by the judgment of the High Court, the State has filed the present appeals by special leave.

- E Horrific circumstances, as disclosed by the prosecution are that Chhabirani aged about 23 years was raped and murdered on 3.10.1980 in the river bed of River Biluakhai when she along with her husband was fleeing from the village to save their lives, as commanded by the accused persons. Nabhakishore (PW1) of about 30 years of age married the deceased, who was a Bengali lady, in the year 1973. PW1 was a matriculate and resident of Village Dhiasaibiri where his parents and three brothers were residing. About
- F 7 months prior to the occurrence, the couple was residing in Village Biridi which is about 10-11 kms. from PW1's native village Dhiasaibiri. The couple had a child of one and a half years of age. They were living in the rented house belonging to Raju Rao Dora (A-3). Before his marriage PW1 had served as a teacher. Seven months before settling in Village Biridi,
- G Nabhakishore (PW1) had become a Press Reporter of the daily Newspaper 'Pragatibadi', weekly Newspaper 'Nirvika' and monthly newspaper 'Niankhuntha'. The deceased was also a Press Reporter of monthly newspaper 'Durmukha'. Besides being a Press Reporter, PW1 was also an agent of some magazines. Prior to the date of occurrence on the reports of Nabhakishore (PW1), news item in 1980 July issue of 'Nirvika' were published. The said
- H news items were against Raju Rao Dora or Kalpana Mohanty whose brother

is a friend of accused Sudhir Parida (A-4) or against Block Development Officer and against the Management of the local hospital. After publication of the said news item the accused Raju Rao Dora demanded PW1 to vacate his house and even attempted to lock the same but failed in his attempt. A-2, A-4 and A-5 threatened PW1 for his publishing the news item pertaining to the said accused and the Block Development Officer. Prior to the date of occurrence, A-3 is alleged to have assaulted PW1 and outraged the modesty of the deceased with the help of his gang regarding which PW1 lodged FIR No. 230 of 1980 at Jagatsinghpur Police Station. Again a month prior to the occurrence the said accused, with the help of persons belonging to his group, allegedly committed theft in the house in occupation of PW1 for which another FIR was lodged as a consequence of which Shibaji Mania, the nephew of A-5 was arrested. A-5 thereafter threatened PW1 of being killed if he did not leave the village at the earliest.

On 2.10.1980 A-2 who was the Sarpanch of the village directed A-4 to keep watch over PW1. It was alleged that on that day at night A-4, A-5, A-6, and A-11 were playing cards with Hrudananda Patra (PW 32) and Kalandi Charan Das (PW22) in the vacant house of A-3 which adjoined the house under the occupation of the deceased and her husband. On the morning of 3.10.1980, A-2 inquired about the whereabouts of PW1 from PW32. According to the prosecution, when the deceased and her husband were waiting at the Biridi bus stand on 3.10.1980 to leave for Cuttack, some of the accused persons met PW1 at the bus-stand and directed him to go to the office of the Congress Party at Biridi which was at a distance of about 1 kilometer from the bus-stand because A-2 wanted him to be there. However, when PW1 intimated the accused persons that he would meet A-2 on that day about 4 p.m. after coming from Cuttack, the said accused persons compelled him to immediately meet A-2 otherwise he would be lifted and forcibly taken. He was rebuked in filthy language. Under the threat of the accused persons the couple returned from the bus-stand to reach the Congress Party office in the Weekly Market. They were followed by the accused persons who had threatened them. As their house fell on the way, the couple entered inside the house and the accused following them waited outside. The deceased requested her husband not to go to the Congress Party Office with the aforesaid accused persons, who thereafter attempted to enter inside the house. At this stage the deceased threatened the accused persons with a paper cutter looking like a knife which deterred them from entering the house. Subsequently A-2 and A-5 entered inside the house and dragged the couple from the house and brought them outside. A-10 and A-12 caught hold of PW1 and A-5 gave

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A him kicks. He was taken to the Congress Party office where A-3, A-4, A-6, A-9, A-11 and others were waiting. A-6 assaulted PW1 by giving him fists and kick blows. A-2 informed the other accused persons that PW1 was leaving the village without making payment of any person to whom he owed in all a sum of Rs. 100. As he expressed his inability to make the payment, A-9 and A-12 snatched away the gold ring which the deceased was wearing who had also come at that place. Thereafter one of the accused brought a piece of paper wherein it was written that the theft case reported by PW1 was false and that he was never assaulted by any of the accused persons. Outnumbered by accused persons and under their threat, the PW1 was compelled to sign the said writing. PW1 was locked in the office room of the Congress Party and released only in the evening. A-4 and A-5 threatened PW1 to leave the village that very night. When PW1 came to his house, A-2 came there and asked him to leave the house otherwise he would be killed by the accused persons. Left with no option, the couple decided to leave the place and to go to the house of Premoda Jena (PW13) who was a resident of village Manguli situated on the other side of the River Biluakhai.

D At about 7.30 p.m. on 3.10.1980 the deceased and PW1 stealthily left their house and avoiding the known path, took another route through Talabana for reaching the village Manguli. While they were proceeding in the river bed, the deceased informed PW1 that somebody was coming from behind. PW1 looked back and focussed his torch-light in that direction and found that A-5 and A-6 were following them from a short distance. PW1 asked the deceased to proceed hurriedly. PW1 took the child from the deceased and both of them started running. The deceased, though running, was left behind. While running PW1 heard the cries of his wife who was at a distance of about 20 yards from him. He again focussed the torch-light and saw that his wife was helplessly lying on the ground and A-5 and A-6 had caught hold of her. He also saw that A-2, A-3, A-7, A-8, A-9, A-11 were standing near his wife. A-5 directed the other accused persons to catch hold of PW1 whereupon A-7 and A-11 chased him. In the course of chasing the aforesaid persons went ahead of the place where PW1 was running as they could not notice him due to darkness. Thereafter PW1 did not take the route towards the village Manguli and proceeded towards Village Ukundara which was about 2 kms. from that place. He went to the house of Anama Padhi of Ukundara as he was known to him. He narrated the incident to him. His father Brajakishore Padhi (PW 10) advised him to report the incident to the Sarpanch Shamkanta Mohanty who advised him to go to the spot with four or five persons. Thereafter PW1 accompanied by PW10 and 2 to 4 persons

went to the river bed where he found naked dead body of his wife lying in the river bed. She was also bleeding from neck. Her blouse was torn, the saree and shaya had been removed. Though he wanted to remain at the river bed by the side of the dead body of his wife, but the persons accompanying him did not agree to remain there as they apprehended danger to their lives. Left with no option PW1 returned to the house of Premoda Jena (PW13) of Manguli. He informed the incident to him and requested him to accompany him to the police station. PW13, however, did not agree. The helpless husband, accompanied by PW13 went to Ankhia Sub Post Office in the night which was at a distance of about 4 kms. from Manguli. When he wanted to contact the police station over the telephone, he was initially intimidated by the Post Master that the phone line was out of order but upon his insistence, the call was made at the police station which was received by Constable Kashinath Naik (PW19). PW1 reported that his wife had been murdered and requested the constable to intimate the officer-incharge of the police station about the occurrence requesting him to come on spot immediately. Constable Kashinath Naik (PW19) told PW1 to wait as he was going to inform IOC to talk with him over the phone. PW1 waited till the morning but neither the Officer incharge of the police station nor the constable contacted him. It is alleged by the prosecution that immediately after the occurrence some of the accused persons accompanied by the Block Development Officer proceeded to Jagatsinghpur to exercise their influence upon the police for not registering the case at the instance of PW1. On 4.10.1980 PW1 came at the police station and met ASI (PW24) informing him about the incident. Instead of recording the FIR, the PW1 was taken to the officer-incharge of the police station. PW1 made over the written report to the said officer incharge who advised him to score that portion of the report which related to the phone message and also to delete the names of some of the accused persons. His signature were obtained on blank papers. He was directed to proceed to the spot where the police accompanied by Chokidar reached. Some of the accused persons were arrested and again as per direction of PW 36, PW1 wrote the FIR dictated to him because the earlier report had been destroyed by Prusty Babu.

Despite registration of the case, no effective investigation commenced, with the result that public of the area started agitation alleging inaction by the police under the influence of political leaders. The Superintendent of Police thereafter directed Padma Lochan Mohanty, CI of police to take up the investigation of the case and consequently PW 38 took charge of the investigation on 7.10.1980. Ultimately, the investigation was entrusted to Dhandeswar Pati (PW41) on 12.10.1980 who was then the D.S.P. of the

- A Crime Branch. In the course of investigation the inquest report Exh. 3/2 was prepared. Eight pieces of broken glass bangles and a key were seized from the spot. The dead body was sent for post mortem examination. PW21 conducted the post-mortem examination of the dead body of deceased Chhabirani on 5.10.1980 at 10 a.m. and as per post-mortem report Ext. 9
- B noted the injuries on her person. From the house of A-5 Lungi, full shirt, underwear, banian and handkerchief were seized. Lungis were also seized from the house of A-9. Wearing clothes of the deceased, the log book of the jeep, a torn shirt, some pieces of biris, etc. were seized vide various seizure memos. A test identification parade was conducted by the SDM, Jagatsinghpur in which PW-2 and PW-9 identified some of the accused persons. After
- C recording the statements of witnesses under Sections 161 and 164 of the Code of Criminal Procedure and obtaining the report of the Chemical Analyser and Serologist, the charge-sheet was submitted in the court. After the conclusion of the trial of the respondents-accused were convicted for various offences and sentenced accordingly. The appeals filed by the accused persons were allowed vide the judgment impugned in these appeals.
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We have heard the learned counsel appearing for the parties at length and critically examined the whole record.

- In order to prove its case the prosecution examined 41 witnesses and to prove their innocence, the accused persons produced two witnesses. PWs
- E 2, 3 and 9 are the witnesses to the occurrence which took place near Biridi Bus-stand in the morning on the date of occurrence. PWs 4, 5, 6, 16, 24 and 39 are the witnesses relating to the incident which took place in the office of the Congress Party. PW7 has deposed about the carrying of a letter to the father of PW1 Dukhishyam (PW8), on receipt of which he came towards
- F Biridi but was prevented from reaching his son as he was threatened by two of the accused persons. PW11 is the jeep driver of the Block Development Officer who has stated about some of the accused having gone to Jagatsinghpur on the night of the occurrence allegedly to influence the police. Damei Sahu (PW12) and Debendra Mohanty (PW33) have deposed that they had seen Chhabirani, the deceased in the river bed before rape and murder. PWs10 and
- G 13 are the witnesses to whom PW1 contacted in the night of occurrence after fleeing from the river bed where his wife was subjected to rape and murder. PWs22, 27 and 32 have stated that they had seen the accused persons playing cards in the vacant house adjacent to the house under occupation of PW1 and his deceased wife on the night of 2.10.1980. PW17 has prepared the spot site
- H plan. PW18 is the Police Constable who carried the dead body for post-

mortem examination which was performed by Dr. Indramani Jena (PW21). PW19 is the police constable of the Police Station Jagatsinghpur who received the phone message from PW1 regarding the incident during the night. PW20 is the Post Master Anakhia Post Office wherefrom PW19 was contacted by PW1 over phone. PW26 is the SDJM Jagatsinghpur who conducted the test identification parade. PWs14, 15, 28, 29 and 30 are formal witnesses to the inquest report and the seizure memos. PW31 has produced the log book of the jeep which was seized during investigation. PW34 is the Sub-Inspector of Police who had taken photographs on the spot. PW40 was cited as an eye-witness but he turned hostile and did not support the case of the prosecution. There are two groups of the investigating officers in the present case. The first group being of IOs Chakradhar Baral, ASI (PW25), Bhagaban Misra, SI (PW36) and Padamalochan Mohanty, CI (PW38) and the second group comprised of Nityananda Samantaray, SI Crime Branch (PW37) and Dhaneswar Pati, DSP, Crime Branch (PW41).

DW1 has spoken about the incident at Biridi Congress Party Office and DW2 has proved that some of the accused persons were married having children to suggest that they could not have committed the crime of rape.

Nanda Mohanty (A-1) and Nakula Behera (A-12) were not charged and Sudbir Parida (A-4) and Babaji Buna @ Das (A-10) were acquitted by the trial court.

The accused have been charged for commission of the offences on three different occasions, namely, at the Bridi Bus Stand, in the Biridi Congress Party Office and in the river bed. So far as the conviction and sentence of the accused-respondents being responsible for the occurrence at Biridi bus-stand and Congress Party office is concerned, it has been stated at the Bar that such accused persons have already suffered sentence and imprisonment awarded to them. Such accused persons are Nanda Mohanty (A-1), Sudbir Parida (A-4), Babaji Buna @ Das (A-10) and Nakula Behera (A-12). We do not find any evidence against the aforesaid accused persons for holding them guilty regarding the commission of the offence of rape and murder as it happened in the river bed.

It may also be noticed, at this stage, that Raju Rao Dora (A-3) and Babaji Mania (A-6) who are respondents 2 and 4 in these appeals have died during the pendency of the appeals and the appeal in so far as it relates against the aforesaid respondents 2 and 4 has become infructuous.

A In these appeals the culpability of Dibakar Naik (A-2), Raju Rao Dora (A-3), Birabar Mania (A-5), Bihra Behera @ Baga Tanti (A-7), Surendra Barik (A-8), Kelu Charan Das (A-9) and Madha Tanti @ Madhabananda Parmanik (A-11) has to be adjudicated so far as the commission of main offences are concerned. It may be noticed that these accused persons have also undergone the sentences awarded to them for the minor offences.

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C We are aware of the limitations of this Court in an appeal filed under Article 136 of the Constitution. Generally this Court does not interfere with the finding of fact arrived after proper appreciation of evidence by the Courts below. If, however, such a finding is perverse, based upon no evidence or based upon such evidence which is inadmissible or is the result of imaginative hypothesis and conjectures, the Court is entitled to re-appreciate the evidence to ascertain the validity of the judgment impugned. In *Mst. Dalbir Kaur and Ors. v. State of Punjab*, [1976] 4 SCC 158] the general principles governing interference by the Supreme Court in criminal appeal by special leave were summarised as follows:

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- (1) that the court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;
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- (2) that the court will not normally enter into a reappraisal or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;
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- (3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;
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- (4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;
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- (5) the Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence."

To the same effect are the judgments of this Court in *Duli Chand v. Delhi Administration*, [1975] 4 SCC 649 and *Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat*, [2000] 1 SCC 358. A

Mr. Mehta, learned counsel appearing for the appellant-State submitted that the findings of the High Court resulting in acquittal of the accused are perverse, based upon no evidence and the result of surmises and conjectures. On the other hand learned counsel appearing for the respondents have submitted that as the view taken by the High Court was a probable view, this Court should not interfere in appeal by special leave. B

For acquitting the accused, the High Court has held that PW1 cannot be relied upon as he had not disclosed the names of the accused persons to PWs10 and 13 whom he met immediately after the occurrence. Finding that PW1 was proved to be a coward who did not come to the rescue of his wife, the Appellate Court rejected his testimony. He was found contradicting his own testimony when he allegedly stated that A-5 had stabbed his wife which also stood contradicted by the medical evidence. The testimony of PW1 did not find favour with the High Court on account of non-seizure of the torch by the investigating agency. The High Court found that the view taken by the Sessions Judge regarding the perfunctory nature of the investigation was not acceptable which entitled the accused to be acquitted. C D

The views taken by the High Court apparently appears to be perverse, not based upon evidence, completely in negation of the normal human behaviour of an individual caught in such a horrifying situation and forgetting that for the fault in the investigation no benefit can be given to the accused persons. The finding of the Sessions Judge that the investigation was perfunctory is based upon almost admitted facts. The frequent change of the investigating officer proved, beyond doubt, that the initial investigation was tainted in favour of the accused apparently under their influence. It is only when Dhaneshwar Pati, DSP, Crime Branch (PW41) took over the investigation that some evidence was collected to find out the truth regarding the allegations made by PW1. Non disclosure of the names by PW1 to PWs10 and 13 could not be made a ground for rejecting his testimony as it was in evidence that the said witness was under a shock and the aforesaid two witnesses did not enquire from him names of the accused persons. The efforts made by PW1 to reach the police station during the night speak of his sincere effort to ensure that the real culprits were brought to book. The making of telephone call by PW1 has been admitted by PW19. However, the conduct of the E F G H

- A** officer-in-charge of the police station by not responding to the telephone call or to reach on spot is regrettable. Many questions arise regarding the conduct of the police particularly when the accused persons are shown to have reached at Jagatsinghpur to influence the police personnel. It is regrettable to note that the officer-in-charge of the police station directed PW1 to delete certain portions from the written report. There is no explanation as to why the signatures of PW1 were obtained on two blank papers. Only because PW1 could not save his wife, did not warrant a finding that he was a coward and should not be believed. The circumstances narrated by the aforesaid witness show the presence of a number of accused persons, some of whom were even armed with knife. He had their infant child in his lap and heard the deceased crying and appealing to PW1 to save his life and the life of the infant. By no standards PW1 can be termed to be coward under the circumstances. Even if he was a coward there is no ground to not rely upon his testimony on that ground alone. Failure of the police to search for the torch and seize it particularly when the investigating agency was found to be under the influence of the accused persons could not be made a ground to reject the otherwise self-inspiring testimony of PW1. We are satisfied that the present case is a fit case requiring our interference as the High Court has failed to discharge its statutory obligations. The accused have wrongly been acquitted on surmises and conjectures ignoring the trustworthy evidence of PW1 by reaching at perverse conclusions regarding the facts of the case.

**E** In view of the perversity in the judgment of the High Court we have opted to scrutinise and re-appreciate the evidence in the case to find about the guilt of the accused-respondents and the extent of their involvement in the case.

- F** It may be noticed, at this stage, that in the FIR recorded on 4.10.1980 at 8 a.m., PW1 had given the names of A-2, A-3, A-5, A-6, A-7, A-8, A-9 and A-11 only. In his deposition with respect to the occurrence which took place in the river bed when Chhabirani, his wife, was raped and murdered, the said witness has not attributed any overt act to A-2, A-3, A-8 and A-9.
- G** It is in evidence that all the accused persons, named in the FIR, wanted the deceased and her husband to leave the village and probably to ensure it they were following them. It cannot be ruled out that the accused persons, named in the FIR, excepting A-5, A-6, A-7 and A-11 wanted only to chase the deceased and PW1 and did not intend to commit the offence of either the rape or the murder. In the absence of any overt act attributed to them, there
- H** is nothing on record to hold that A-2, A-3, A-8 and A-9 shared any common

intention with A-5, A-6, A-7 and A-11 who had actually caught hold of Chhabirani and followed the witness (PW1) with the intention to apprehend him. In his statement PW1 has stated that at about 7.30 a.m. on 3.10.1990, he, along with his wife, left the house to abandon the village Biridi. His wife was carrying the baby. They did not go through the village road but proceeded through Talabana. Near the Block Office they entered inside the river Biluakhai. There was not much water in the river which, at that time, had two streams. After they crossed the first stream, he found three persons with a lantern light proceeding towards Village Manguli after crossing the river. He was ahead of his wife. His wife informed him that somebody was following them. He looked back and focussed torch light and found A-5 and A-6 were coming at a short distance. He asked his wife to proceed hurriedly. Thereafter both of them ran. At the request of his wife he carried infant baby and ran quickly. His wife, while running, was behind him. He heard the cries of his wife when she was at a distance of 20 yards from him. She fell down on the sand and when he focussed torch light he saw her lying on the ground and A-5 and A-6 had caught hold of her. He also found A-7 and A-11 and some others standing near his wife. Bira Mania (A-6) was holding a knife and he directed the other accused persons to catch hold of the witness. Only A-7 and A-11 chased the witness and the other accused persons remained standing near his wife. He left the route towards Village Manguli and to save his life proceeded to Ukundara which was about 2 kms. from that place. On the way he fell down and lost the torch. Thereafter he, as earlier noticed, made efforts to lodge the report but did not succeed. Ultimately the First Information Report was lodged by him early in the morning at 8 a.m. on 4.10.1980. The deposition of PW1 appears to be natural description of the occurrence. It is alleged that he has tried to improve by exaggerating and blowing up the occurrence with the intention of involving some of the accused persons who were merely by-standers but under the circumstances of the case that appears to be the natural reaction of a frustrated husband whose wife was raped almost in his presence and under his nose.

To reject the testimony of PW1, the High Court appears to have adopted a technical approach. This Court in *The State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh*, [1974] 3 SCC 277 has held that a criminal trial is not like a fairy tale where one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged

A with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. In *State of H.P. v. Lekh Raj and Anr.*, [2000] 1 SCC 247 this Court held:

B “The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the Courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a Utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind”.

F Regarding non-seizure of the torchlight, used by the witness to see the occurrence, it was held in *Balo Yadav and Ors. v. State of Bihar*, [1997] 5 SCC 360 that such an omission cannot be considered as a lapse on the part of any investigating officer and as such it was not a ground for impairing the testimony of the witness concerned. Even if there was failure on the part of the investigating agency to take steps for the seizure of torchlight, such an omission cannot be treated as a ground to reject the prosecution case.

H Much has been made out by the High Court for the alleged failure of PW1 to disclose the name of the accused persons to PWs10 and 13. Non mentioning of the names of the accused is factually not borne out and even if accepted would not render his testimony unacceptable. Post event conduct

of a witness cannot be predicted on specified lines. It varies from person to person as different people react differently under different situations. PW1 had lost his wife in a most ghastly crime committed by the culprits. He apprehended danger to his life and was under shock. PWs10 and 13 did not ask him about the names of the persons involved in the crime nor did he think it proper to disclose such names. Under such circumstances no adverse inference could be drawn against PW1 making his testimony doubtful or unbelievable. In *Rammi @ Rameshwar v. State of M.P.* [1999] 8 SCC 649 this Court held:

“This Court has said time and again that the post-event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different”

Under the facts and circumstances, the conduct of PW1 cannot be held to be abnormal.

On re-appreciation of whole of the evidence we have come to a conclusion that Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baga Tanti (A-7), and Madha Tanti @ Madhabananda Parmanik (A-11) were responsible for the occurrence which took place in the river bed wherein the deceased was subjected to gang-rape. The aforesaid accused persons, namely, Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baga Tanti (A-7), and Madha Tanti @ Madhabananda Parmanik (A-11) were, therefore, rightly convicted by the trial court for the commission of the offence punishable under Section 376 and sentenced accordingly.

However, the nature of the injuries inflicted upon the person of the deceased indicate that the accused persons had not intended to cause her death. Dr. Indermani Jena (PW21) who conducted the post-mortem over the dead body of Chhaborani had found the following injuries:

- “(1) One swelling 1” diameter irregularly circular over right mastoid process.
- (2) One swelling (which was black in colour) on the upper half of right breast 2” in diameter irregular circular.
- (3) On dissection I found the following:

The swelling in right mastoid area had under lying haemotome.

- A There was fracture of right fourth rib under injury No.2. Right side chest was filled with blood of about one litre. The right lungs was displaced and was inured in anterior surface by fractured rib. Heart chamber was empty, that is, there was no blood.
- (4) Stomach was empty.
- B (5) There were two echymosis of  $\frac{1}{4}$  " in diameter each on posterior vaginal wall. The injuries were 5 O' clock and 7 O' positions.
- (6) On examination of the vaginal smear I found dead spermatozoa and ophthelial cells.
- C (7) By the time of my examination, there was process of decomposition. Skin denudation had started. Tongue was protruded and bitten. There was bleeding from right angle of mouth and both ears. Abdomen was protruded due to foul gases. Death was within 48 hours of the P.M. Examination."
- D He has opined that all injuries were ante mortem. Death was due to injuries causing internal haemorrhage. There were signs of forcible sexual intercourse. It was a case of violent type of intercourse. The injuries found were not in normal course of sexual intercourse. Any violent assault even without rape could cause injuries 1 and 2 and the corresponding internal injuries. Injury No.2 with corresponding internal injury was sufficient to cause the death.
- E Whoever cause death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely, by such act, to cause death, is responsible for the commission of the offence of culpable homicide. Culpable homicide is murder if the act by which the death is caused is done with the intention of causing death and is not covered by any of the exceptions of Section 300 of the Indian Penal Code. As already noticed, in this case there is no evidence to show that the aforesaid accused persons proved to have been involved in the occurrence, had intended to cause the offence of murder within the meaning of Section 300 as punishable under Section 302 of the Indian Penal Code. However, on proof of the commission of offence of gang-rape found to have been committed in a violent manner, they are assumed to be having the knowledge that by their action it was likely that the deceased would have died. The aforesaid accused are, therefore, guilty of the offence, punishable under Part-II of Section 304 of the Indian Penal Code. While acquitting the other respondents we hold Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baga Tanti (A-7), and Madha Tanti @ Madhabananda
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Parmanik (A-11) guilty for the commission of offences punishable under Section 304 (II) read with Section 34 of the Indian Penal Code besides the commission of offence punishable under Section 376 read with Section 34 of the Indian Penal Code. The conviction and sentence awarded by the trial court to Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baga Tanti (A-7), and Madha Tanti @ Madhabananda Parmanik (A-11) under Section 376 of the Indian Penal Code is upheld. On proof of the offence punishable under Section 304(II) read with Section 34 IPC, the aforesaid accused persons are sentenced to undergo rigorous imprisonment for 10 years. Both the sentences shall run concurrently.

The appeals are partly allowed in so far as Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baga Tanti (A-7), and Madha Tanti @ Madhabananda Parmanik (A-11) who are respondent Nos. 3, 4, 5 and 8 in these appeals, are concerned. As respondent No.4 (A-6 in the trial court) is dead, the respondent Nos.3, 5 and 8 who were accused Nos. 5, 7 and 11 are directed to be taken into custody for undergoing the sentence awarded if they have not already suffered the imprisonment. Appeals in regard to other accused persons are dismissed holding them not guilty for the commission of the offences punishable under Sections 376 and 304 read with Section 34 IPC. Their conviction and sentence for the minor offence, as awarded by the trial court, is upheld. As they are stated to have undergone the sentence awarded, they need not be arrested.

K.K.T.

Appeals partly allowed.