ISHWARI LAL YADAV

v.

STATE OF CHHATTISGARH

(Criminal Appeal Nos.1416-1417 of 2017)

OCTOBER 03, 2019

[R. F. NARIMAN, R. SUBHASH REDDY AND SURYA KANT, JJ.]

Penal Code, 1860: ss.364/34 r/w. s.120B, ss.302/34 r/w. s.120B and s.201 – Gruesome murder of small boy as a human sacrifice – Prosecution case was that a child (boy) was found missing from his house – When his parents were searching for him, they noticed loud music being played in the house of appellants – They entered the house along with other village people and found freshly dug mound of earth – Appellants-main accused who claimed to be "tantriks" admitted that they killed the boy with the help of other co-accused and buried him to attain "siddhi" and begged for mercy – On the basis of disclosure statements of accused, recoveries of certain incriminating articles were made – Trial court convicted all the accused under ss.364/34 r/w. s.120B, ss.302/34 and s.201 and awarded death sentence – High Court confirmed the death sentence of the two main accused and modified the sentence of other accused to life imprisonment – On appeal, held: It was consistently, deposed by the independent witnesses that when they entered the house of the main accused, they had confessed that they had committed murder of the missing child for the purpose of sacrifice – There was nothing on record to show that such confessions were caused by inducement, threat or promise – When such confessions were corroborated by other evidence on record, the trial court as well as the High Court, rightly relied on such confessions – As regards the charge of kidnapping and conspiracy, there was no acceptable evidence on record – As far as co-accused were concerned other than the main accused, there was no consistency of the persons named by the witnesses in the house of main accused, when they all entered their house – In absence of any consistent definite evidence regarding presence of all other accused, along with the main accused and further when the prosecution failed to prove either the common intention or the conspiracy on their part along with the main

A *accused, the case of the prosecution cannot be accepted and as such co-accused are entitled for the benefit of doubt – Prosecution proved the guilt of the main accused for offence under s.302 r/w s.34, however, their conviction under ss.364/34 r/w. s.120B is set aside.*

B *Evidence Act, 1872: s.106 – Applicability of – Held: As regards the applicability of s.106 of the Evidence Act, it was proved by cogent evidence that the body of the missing boy was found in the house of the main accused – By applying the provision under s.106, burden was on the accused to explain the fact within the knowledge of them how the body of the boy came to be buried in their house –*
C *Penal Code, 1860.*

Sentence/Sentencing: Death sentence – Punishment for murder – It is clearly well settled that normal punishment for the offence under s.302 IPC is life imprisonment but in a case where incident is of "rarest of rare cases" death sentence is to be imposed
D *– It is equally well settled that only special facts and circumstances will warrant passing of death sentence and a just balance has to be struck between aggravating and mitigating circumstances, before the option is exercised – To come to conclusion in each case aggravating and mitigating circumstances are to be considered –*
E *Further factors like, age of the accused, possibility of reformation, gravity of the offence etc. are also to be kept in mind – In this case, evidence on record showed that the two main accused, committed the murder of the two year old child as a sacrifice to the God – They had three minor children at that time – Inspite of the same, they committed the murder of two year old child brutally – The head*
F *of the helpless child was severed, his tongue and cheeks were also cut – Having regard to age of the accused, they were not possessed of the basic humanness, they completely lacked the psyche or mindset which can be amenable for any reformation – It was a planned murder committed by the two appellants – Appellants who were the main accused were also convicted on an earlier occasion for similar*
G *murder of a 6 year old girl – Such conviction for similar offence can be considered as aggravating factor – This is a case of "rarest of rare cases" where death sentence imposed by the trial court was rightly confirmed by the High Court – Penal Code, 1860 – Crime against children.*

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Disposing of the appeals, the Court

HELD: 1. All the persons who joined PW-3 and PW-5, the parents of the deceased child stated in one voice, that when they entered the house of the main accused, they found some wet area and some *puja* articles. They noticed fresh mounds of earth. When they removed the same, they found the body of the deceased child in two parts. All the witnesses consistently stated that the body was in two parts, its cheeks were cut and tongue was missing. It was consistently, deposed by the independent witnesses that when they entered the house of the main accused, they had confessed that they had committed murder of the deceased child for the purpose of sacrifice. There was nothing on record to show that such confessions were caused by inducement, threat or promise. When such confessions were corroborated by other evidence on record, the trial court as well as the High Court, rightly relied on such confessions. From the evidence, it was proved that the place where the body of deceased boy was traced belonged to the two main accused and in absence of any explanation from their side, there was no error committed by the trial court in accepting such evidence. [Paras 14, 16][905-H; 906-A-B]

2. To prove the charge of kidnapping and conspiracy, there was no acceptable evidence on record. In absence of any corroborative evidence for kidnapping of the deceased boy by the co-accused, the evidence on record cannot be accepted. Even to prove the common intention to attract the provision under Section 34, IPC, it requires a pre-arranged plan and prior concert. Therefore, there must be prior meeting of minds. The common intention must exist prior to the commission of the act in a point of time. The burden lies on the prosecution to prove that participation of more than one person for commission of criminal act was done in furtherance of common intention. The common intention stood proved between the two main accused but at the same time there was no acceptable evidence against all others to prove their guilt that they have committed the offence with the common intention. Prosecution failed to prove the common intention of all other appellants than the main accused, either to kidnap or to murder the deceased child on the day of occurrence.

A **The evidence on record showed that all other accused were disciples of self-claimed *gurumata*, main accused no.2 and they were regularly visiting her house for offering fruits and flowers. There was no consistency of the persons named by the witnesses in the house of main accused, when they all entered their house.**
B **In absence of any consistent definite evidence regarding presence of all other accused, along with the main accused and further when the prosecution failed to prove either the common intention or the conspiracy on their part along with the main accused, the case of the prosecution cannot be accepted as such they are entitled for the benefit of doubt. In view of the evidence on record**
C **the prosecution proved the guilt of the main accused for the offence under Section 302 read with Section 34 of the IPC. [Para 17][906-C-G; 907-B-C]**

3. It is proved by cogent evidence that the body of the missing boy was found in the house of the main accused. By
D **applying the provision under Section 106 of the Indian Evidence Act definitely, it is the burden of the accused to explain the fact within the knowledge of them how the body of the boy came to be buried in their house. [Para 19][908-B-C]**

4. It is clearly well settled that normal punishment for the
E **offence under Section 302 IPC is life imprisonment but in a case where incident is of "rarest of rare cases" death sentence is to be imposed. Only special facts and circumstances will warrant passing of death sentence and a just balance has to be struck between aggravating and mitigating circumstances, before the option is exercised. In a "rarest of rare case" capital punishment**
F **is to be imposed. To come to conclusion in each case aggravating and mitigating circumstances are to be considered. Further factors like, age of the accused, possibility of reformation, gravity of the offence etc. are also to be kept in mind. In this case, the main accused, committed the murder of the two year old child boy as a**
G **sacrifice to the God. They had three minor children at that time. Inspite of the same, they committed the murder of the deceased, a child of two years of age brutally. The head of the helpless child was severed, his tongue and cheeks were also cut. Having regard to age of the accused, they were not possessed of the basic humanness, they completely lacked the psyche or mindset which**
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can be amenable for any reformation. It is a planned murder committed by the two appellants. The appellants who are the main accused were also convicted on an earlier occasion for the offence under Section 302/34 and Section 201 of IPC for similar murder of a 6 year old girl for which they were convicted. Such conviction for similar offence can be considered as aggravating factor. [Paras 22, 23][910-F-H; 911-A-D]

Sushil Murmu v. State of Jharkhand **(2004) 2 SCC 338: [2003] 6 Suppl. SCR 702;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684;** *Machhi Singh v. State of Punjab* **(1983) 3 SCC 470 : [1983] 3 SCR 413 – relied on.**

Aghnoo Nagesia v. State of Bihar **[1966] 1 SCR 134;** *Sahadevan & Anr. v. State of Tamil Nadu* **(2012) 6 SCC 403 : [2012] 4 SCR 366;** *Shambu Nath Mehra v. The State of Ajmer* **[1956] SCR 199;** *Ronny v. State of Maharashtra* **(1998) 3 SCC 625 : [1998] 2 SCR 162 – held inapplicable.**

Firozuddin Basheeruddin & Ors. v. State of Kerala **(2001) 7 SCC 596 – referred to**

Case Law Reference

(2001) 7 SCC 596	**referred to**	**Para 19**
[1966] 1 SCR 134	**held inapplicable**	**Para 18**
[2012] 4 SCR 366	**held inapplicable**	**Para 18**
[1956] SCR 199	**held inapplicable**	**Para 19**
[2003] 6 Suppl. SCR 702	**relied on**	**Para 21**
(1980) 2 SCC 684	**relied on**	**Para 21**
[1983] 3 SCR 413	**relied on**	**Para 21**
[1998] 2 SCR 162	**held inapplicable**	**Para 22**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1416-1417 of 2017.

From the Judgment and Order dated 01.12.2016 of the High Court of Chattisgarh at Bilaspur in Criminal Reference No. 1 of 2014 and Criminal Appeal No. 511 of 2014.

A With

Criminal Appeal Nos. 300-301/2018, 1418-1419/2017, 298-299/2018.

Birendra Kumar Mishra, Adv. (A.C.)

B Siddhartha Dave, Sr. Adv., Ms. Liz Mathew, Ms. Ninni Susan Thomas, Yash S. Vijay, Ms. Jemtiben AO., Ms. Saumya Gupta, Siddhant Krishna Dave, Kabir Dixit, Rajeev Kumar Bansal, M. P. Singh, Akshay K. Ghai, Sumeer Sodhi, Ashish Tiwari, Ms. Ridhima Juneja, Ms. Suditi Batra, Advs. for the appearing parties.

C The Judgment of the Court was delivered by

R. SUBHASH REDDY, J.

1. All these appeals are directed against the common judgment of the High Court of Chhattisgarh at Bilaspur dated 01.12.2016 passed in D Criminal Reference No.1 of 2014 and Criminal Appeal No.511 of 2014, as such they are disposed of by this common judgment and order.

2. All the appellants were charged for offence under Sections 364/34 read with 120B; 302/34 read with 120B and 201, Indian Penal Code (IPC). Vide judgment dated 27.03.2014 passed in Sessions Trial E No.61 of 2011, the learned Sessions Judge, Durg, has convicted and sentenced the appellants. For the offence under Sections 364/34 read with 120B, IPC they were convicted and sentenced for imprisonment for life and fine of Rs.5000/- each, in default of payment of fine, to undergo further rigorous imprisonment for four months. For the offence F under Sections 302/34 read with 120B, IPC death penalty was imposed with a fine of Rs.5000/- each, in default of which, they were sentenced to undergo further rigorous imprisonment for four months. For the offence under Section 201, IPC, rigorous imprisonment for five years and a fine of Rs.2000/- each was imposed, in default of payment of fine, they were sentenced to undergo further rigorous imprisonment for two months.

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3. In view of death penalty imposed on the appellants, a reference was made to the High Court, as required under Section 366 of Cr.P.C. and further appellants-accused have filed Criminal Appeal No.511 of 2014 before the High Court. By a common judgment dated 01.12.2016, the High Court has confirmed death sentence on the two main accused,

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namely, Ishwari Lal Yadav and Smt. Kiran Bai and modified the sentence of other appellants to one of imprisonment for life without any entitlement of remission or parole.

4. The deceased, a small two year old boy, by name, Chirag Rajput was the son of Poshan Singh (PW-3) and Savitri Bai (PW-5). PW-5 works as a domestic help whereas Poshan Singh (PW-3) was working in Bhilai. Smt. Vandana Rajput (PW-21) is the sister of Savitri Bai (PW-5) and was at home along with the minor child – Chirag – on fateful day, i.e., 23.11.2010. When Vandana Rajput (PW-21) and deceased boy Chirag Rajput were at home on 23.11.2010, Chirag went outside the house to play while she was inside. After sometime when she went out, she could not find Chirag and Chirag was missing. She immediately rang her sister and brother-in-law, i.e., PW-5 and 3 respectively who came back to their house.

5. It is the case of the prosecution that the two main accused, Smt. Kiran Bai and her husband Ishwari Lal Yadav believed in *tantrism*. Smt. Kiran Bai wanted to attain *siddhi*. She was also proclaimed as *'gurumata'*. To propitiate the God, she asked her husband and disciples who are the other co-accused along with them, to get a small child for human sacrifice. The main accused were neighbours to PW-3 and 5. It is alleged that for the purpose of sacrifice to God, the child Chirag was kidnapped and murdered in a gruesome manner, inside the house of main accused Kiran Bai and Ishwari Lal Yadav. Thereafter he was buried in the precincts of the house. To avoid sound of cries, music system was played loudly.

6. After the information from Vandana Rajput (PW-21) to her sister Savitri Bai (PW-5) and brother-in-law Poshan Singh (PW-3), all started searching for Chirag. When the parents of the child, family members and other people of the neighbourhood were searching for missing boy, they became suspicious from the loud music, emanating from the house of two main accused. Thereupon, some people have entered the house of Kiran Bai and Ishwari Lal Yadav and found five mounds of freshly dug earth. It is alleged that there was also a leaf bowl (*Dona*), one small bowl (*Katori*), one small round metal pot (*Lota*), a trident (*Trishul*), idols and pictures of Gods and other items of *puja* were lying there. There was blood on some of these items. It is alleged that when the crowd asked the accused what had happened, Smt. Kiran Bai and Ishwari Lal Yadav confessed that they had sacrificed Chirag

A with the help of other co-accused and begged for mercy. Immediately thereafter, the crowd started digging the freshly dug earth and body of Chirag was taken out. Thereafter police came to the site and report was lodged. The body of Chirag was sent for post-mortem. All the accused were questioned on which they made some disclosure statements. On the basis of such disclosure statements, recoveries of certain incriminating B articles were made. After completing the investigation, the police filed final report under Section 173 Cr.P.C. against all the appellants and one other accused by name Krishna Tambi. However, as he was absconding, his trial was separated. All the accused have denied the guilt and claimed trial. They were tried for the offences as referred above before the C learned Sessions Judge, Durg and they were convicted and sentenced vide judgment dated 27.03.2014. All the appellants were imposed with the penalty of death. Reference was made to the High Court under Section 366 of the Cr.P.C.

7. Appellants have also challenged their conviction and sentence D imposed, by way of criminal appeal. Both were considered by a common judgment. While confirming the conviction under Section 302/34 read with Section 120B, IPC and sentence of death penalty on the main accused, namely, Ishwari Lal Yadav and Kiran Bai, the High Court has modified the punishment of other accused to that of imprisonment for life.

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8. We have heard Sri Siddhartha Dave, learned senior counsel appearing for the appellants in Crl. Appeal Nos.1416-1417 of 2017 and 1418-1419 of 2017; Sri Birendra Kumar Mishra, learned counsel for the appellants in Crl. Appeal Nos.300-301 of 2018; Sri Rajeev Kumar Bansal, learned counsel appearing for the appellants in Crl. Appeal Nos.298-299 F of 2018 and Sri Sumeer Sodhi, learned counsel appearing for the respondent-State of Chhattisgarh.

9. In these appeals, mainly it is pleaded by the learned senior counsel Sri Siddhartha Dave appearing for the appellants that except the alleged confessional statement, there is no other evidence to prove G the guilt of accused for kidnapping and murder of deceased boy – Chirag. It is further submitted that all the findings recorded by the trial court, as confirmed by the High Court, for conviction of the appellants rest upon confessional statement of the appellants which is barred under Sections 24, 25 and 26 of the Indian Evidence Act, 1872. It is submitted that there are material contradictions in the depositions of witnesses about the arrival H of police to the place of occurrence of the offence and on the alleged

extra-judicial confessions, inspite of the same, courts below have accepted such evidence on record and passed the impugned judgments. It is submitted that, as the body of the deceased was not found in exclusive possession of the main accused, courts below have committed an error in taking assistance of Section 106 of the Indian Evidence Act. It is submitted that body was discovered only after large crowd had gathered. Further, it is submitted that the discovery of skeleton of other person and also the theory of bad character, that is, appellants were black magic practitioners, is barred under Sections 14, 15 and 54 of the Indian Evidence Act. It is further submitted that the prosecution has not proved any ingredient under Section 120B, IPC to prove conspiracy among the appellants for committing the alleged offence.

10. It is the contention of the learned counsel appearing for the appellants that there is absolutely no evidence on record to prove that there was a common intention on the part of such appellants to commit the offence of kidnapping and murder of the deceased child. So far as the appellants other than the main accused, it is submitted that the findings of the courts below are based on the alleged confessional statements and in the absence of any corroboration, the courts below have committed an error in convicting the appellants with the aid of Sections 34 and 120B, IPC. It is also the contention, of the learned counsel for the appellants that there is no reason or justification for imposing the death penalty on Ishwari Lal Yadav and Kiran Bai, while modifying the punishment to that of life imprisonment to all other accused. It is also submitted that the incident in question cannot be considered as the "rarest of rare cases" so as to impose the capital punishment. The learned counsel appearing for the appellants, in support of his arguments, has relied on the following cases :

1. Aghnoo Nagesia v. State of Bihar[1]
2. Sahadevan & Anr. v. State of Tamil Nadu[2]
3. Shambu Nath Mehra v. The State of Ajmer[3]
4. Firozuddin Basheeruddin & Ors. v. State of Kerala[4]
5. Ronny v. State of Maharashtra[5]

[1] 1966 (1) SCR 134 = AIR 1966 SC 119
[2] (2012) 6 SCC 403
[3] 1956 SCR 199
[4] (2001) 7 SCC 596
[5] (1998) 3 SCC 625

A 11. On the other hand, Sri Sumeer Sodhi, learned counsel appearing for the State of Chhattisgarh, has submitted that the case relates to a gruesome murder of small two year old boy as a human sacrifice and from the oral evidence on record, the prosecution has proved the guilt of the accused beyond reasonable doubt, as such there are no grounds to interfere with the impugned judgment. It is submitted that, all the appellants B were present in the house of the main accused and the fact that the body of the deceased was also recovered from the house of the main accused, is proved from the oral evidence of PWs-2, 3, 5, 6, 9, 10, 12, 13 and 16. It is further submitted that the contradictions referred to by the counsel for the appellants are minor and they may not affect well reasoned C findings and conclusions arrived by the trial court, as confirmed by the High Court. The learned State Counsel has relied on the judgment of this Court in the case of *Sushil Murmu v. State of Jharkhand*[6] to substantiate his arguments.

12. Having heard the learned counsels we have carefully perused D the impugned judgments and also the material on record.

13. To prove the guilt of the accused, prosecution has examined PW 1 to PW 22. When it was reported by Vandana Rajput (PW-21), who is the sister of Savitri Bai (PW-5), Savitri Bai and Poshan Singh (PW-3) came back to their house. In the evidence of Poshan Singh E (PW-3) who is the father of the deceased child, he has stated that the main accused Ishwari Lal Yadav and Smt. Kiran Bai are his neighbours and he knows them. He also knows all other accused because they regularly visit but he could not tell their names. He further stated that during their search for the missing Chirag along with his wife Smt. Kiran Bai and others, they heard loud music emanating from the house of the F main accused, which gave suspicion in the minds of the people in the locality, therefore, they entered the house of Ishwari Lal and Kiran Bai and noticed that the ground around the place of worship was wet and a knife was also lying at that place. On digging up the wet place, body of Chirag was found. The body was in two parts and head had been severed G from the neck. Both the cheeks had been cut. At the place of worship, pictures of Gods have been placed. At the same time, he stated, he has come to know the names of other accused after occurrence of the incident. In similar lines is also the oral evidence of PW-5 who is the mother of the deceased child. In her deposition she has stated that she

H [6] (2004) 2 SCC 338

works as a domestic help. On the day of occurrence, when Vandana Rajput (PW-21) has informed the mother of the deceased child, PW-5 Savitri Bai has come back to the house and it is stated that she along with her husband and others, were searching for the missing boy, and on hearing the loud music emanating from the house of Ishwari Lal Yadav they entered the house. She has further stated that she knows accused Kiran Bai and Ishwari Lal Yadav, Nihaluddin @ Khanbaba, Hemant Sahu and Sukhdev. She has also stated that all other accused were regularly going to the house of Ishwari Lal Yadav and Kiran Bai. She too in clear terms has stated that when they entered the house of Ishwari Lal Yadav and Kiran Bai, they admitted the guilt of committing murder of Chirag in the form of human sacrifice and begged for mercy. On suspicion from the members of the group, the place of worship was dug and on digging, the body of Chirag was found. His head was separated from the body, both the cheeks had deep cuts and tongue was cut off. On seeing her child with such condition, she became unconscious. In her deposition she has specifically stated that police had not come with them inside the house of Ishwari Lal Yadav, they came later. The brother of Poshan Singh, Sri Suraj Singh Rajput (PW-2) was also examined. In his deposition he has stated that he knows all the accused because earlier he was residing in Ruabandha area where all accused used to reside. In his deposition he has stated that on call from his brother Poshan Singh (PW-3) stating that Chirag was missing, he went to the house of his brother and along with him the sister-in-law and other persons of the locality searched for Chirag. Thereafter they went to police station, lodged a report and returned to their locality and on hearing loud music in the house of the *tantriks* – Ishwari Lal Yadav and Smt. Kiran Bai – and on getting suspicion, they went inside the house along with others. He has also stated in his deposition that on questioning, Ishwari Lal Yadav confessed that he has asked Hemant Sahu to kidnap Chirag for the purpose of human sacrifice. Thereafter *puja* was done at the spot and Chirag was sacrificed and buried there. He has further stated that at the time of human sacrifice, wife of Ishwari Lal Yadav, i.e., Smt. Kiran Bai, their three children and all other accused were present. Sri Ram Avtar Gada is also a neighbour of accused Ishwari Lal Yadav and Kiran Bai and Savitri Bai and Poshan Singh, he was examined as PW-6. In his deposition, he has stated that the accused Ishwari Lal Yadav and Smt. Kiran Bai were known *tantriks* and other accused were their followers. On hearing the loud music, he went to the house of the main accused,

A along with others and on digging the *puja* area the body of Chirag was found which was in two parts – severed at the neck and both cheeks were cut. Sri Parasnath Bhuarya who was examined as PW-9 has stated that on the day of occurrence having come to know that Chirag was missing, they all were searching for Chirag and on hearing the loud music coming from the house of accused Ishwari Lal Yadav and Kiran Bai, they entered their house and he could recognise accused Ishwari Lal Yadav and since it was dark he could not recognise other accused. He too stated that when they questioned the accused, the accused Ishwari Lal Yadav and Kiran Bai confessed that they had sacrificed Chirag and begged for mercy. Corporator of the area – Rajendra Rajak was examined as PW-10. In his deposition, he has stated that Chirag's grandmother has come to his house and informed about the missing of her grandson Chirag. Thereafter he has given a suggestion that an announcement be got made from loudspeaker of the mosque. Thereafter the announcement was made. All the people of the locality were searching for Chirag. He too stated that the house of Poshan Singh (PW-3) adjoins the house of accused Ishwari Lal Yadav. In his deposition he has also stated that when the whereabouts of the child were not known even after the announcement was made and the main accused were continuously playing music, he along with other persons went inside the house of accused Ishwari Lal Yadav and Kiran Bai. In his deposition he has also stated that the main accused have stated that Chirag had been sacrificed in pursuance of their *tantrik* activities and had been buried inside the house. At the same time he stated, he cannot identify the other accused but stated that some people were present there. The evidence of PW-12 – Dilip Thakur is also on similar lines stating that after hearing the announcement about the missing of Chirag he started searching for Chirag along with others. The evidence of PW-13 – Arvind Singh is also to the same effect. One Sri Shiv Kumar Rajak was examined as PW-16. In his deposition he has stated that after hearing the announcement made about the missing of Chirag, son of Poshan Singh, he joined others. After hearing loud music from the house of Ishwari Lal Yadav and Kiran Bai he also entered along with others. He has further stated that after digging the *puja* area, body of Chirag was found which was in two parts. Some ash has been smeared on the head of Chirag and both the cheeks had been cut and tongue was missing. Only thereafter police was informed. He further stated that when accused Ishwari Lal Yadav was questioned, he confessed that he has asked Hemant Sahu to kidnap

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the child and thereafter they had worshipped the child, put *tilak*, touched the feet then sacrificed the child. He has also stated that on questioning, the accused confessed that about six months earlier they had sacrificed one girl child also.

14. From the oral evidence on record of all the persons who have joined the parents of the deceased child, i.e., Poshan Singh (PW-3) and Savitri Bai (PW-5), it is clear that they have stated in one voice, that when they entered the house of the main accused, they have found some area which was wet and some *puja* articles were there. When they have noticed fresh mounds of earth, they have removed the same and found the body of the deceased child in two parts. All the witnesses have consistently stated that the body was in two parts, its cheeks were cut and tongue was missing.

15. The first information with the police was recorded by PW-19 – Domar Singh Thakur. The constable who took the application for post mortem was examined as PW-1. The doctor who conducted the post mortem on the body of Chirag was Dr. Lal Mohammad was examined as PW-14. One Patiram Bareth was examined as PW-11. He was the Patwari of the area and in his statement he has clearly stated that the house from which the body of the child was recovered belongs to Ishwari Lal Yadav. PW-18 is the Assistant Sub Inspector who took accused Ishwari Lal Yadav into custody and recorded his statement under Ex.P21. The recovery of incriminating articles was disbelieved by the High Court. From the evidence on record it is also clear that several independent witnesses who were examined on behalf of the prosecution were in the group of search along with parents of the deceased and they have entered the house of the main accused on hearing the loud music. It is also equally clear from the evidence that police have come to the scene of occurrence only afterwards, when PW-10 – Corporator has informed the police.

16. From the above evidence on record, it is clear that the parents of the deceased boy along with others were searching for the boy, on hearing the loud music from the house of Ishwari Lal Yadav and Kiran Bai, they got suspicious and entered the house. It is consistently, deposed by the independent witnesses mentioned above, that when they entered the house of the main accused, namely, Ishwari Lal Yadav and Kiran Bai, they have confessed that they have committed murder of the deceased child for the purpose of sacrifice. There is nothing on record

A to show that such confessions are caused by inducement, threat or promise. When such confessions are corroborated by other evidence on record, the trial court as well as the High Court, rightly relied on such confessions. From the evidence, it is proved that the place where the body of deceased Chirag was traced belongs to Ishwari Lal Yadav and Kiran Bai and in absence of any explanation from their side, there is no
B error committed by the trial court in accepting such evidence on record. It is true that the extra judicial confession is a weak piece of evidence, but at the same time if the same is corroborated by other evidence on record, same can be accepted.

C 17. To prove the charge of kidnapping and conspiracy, there is no acceptable evidence on record. In absence of any corroborative evidence for kidnapping of the deceased boy by Hemant Sahu and another, the evidence on record cannot be accepted. Even to prove the common intention to attract the provision under Section 34, IPC, it requires a pre-arranged plan and prior concert. Therefore, there must be prior meeting
D of minds. The common intention must exist prior to the commission of the act in a point of time. The burden lies on the prosecution to prove that participation of more than one person for commission of criminal act was done in furtherance of common intention. If we closely analyse the evidence on record the common intention stands proved between
E Ishwari Lal Yadav and Kiran Bai who are main accused but at the same time there is no acceptable evidence against all others to prove their guilt that they have committed the offence with the common intention. Prosecution has failed to prove the common intention of all other appellants than the main accused, namely, Ishwari Lal Yadav and Kiran Bai, either to kidnap or to murder the deceased child on the day of
F occurrence. It is borne out from the evidence on record that all other accused were disciples of self-claimed *gurumata*, namely, Kiran Bai and they were regularly visiting the house of the main accused offering fruits and flowers. There is no consistency of the persons named by the witnesses in the house of Ishwari Lal Yadav and Kiran Bai, when they
G all entered their house. Even PW-5 Savitri Bai, in her deposition has clearly stated that all other accused used to come regularly to the house of Ishwari Lal Yadav and Kiran Bai, along with the fruits and flowers. The father of the child PW-3 Poshan Singh, in cross-examination has stated that he knew the names of Ishwari Lal Yadav and Kiran Bai earlier and he has come to know the names of all other accused, after

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the occurrence of the incident. PW-6 Ram Avtar Gada, also stated in her deposition that the accused Ishwari Lal Yadav and Kiran Bai were known *tantriks* and other accused were their followers. Further PW-9 Parasnath Bhuarya, in his deposition has stated that he entered the house along with the others and he could only recognise Ishwari Lal Yadav and as it was dark he could not recognise all others. In absence of any consistent definite evidence regarding presence of all other accused, along with the main accused, namely, Ishwari Lal Yadav and Kiran Bai and further when the prosecution has failed to prove either the common intention or the conspiracy on their part along with the main accused, it is difficult to accept the case of the prosecution as such they are entitled for the benefit of doubt. In view of the evidence on record the prosecution has proved the guilt of the main accused, namely, Ishwari Lal Yadav and Kiran Bai for the offence under Section 302 read with Section 34 of the IPC. The common intention is to be restricted only to the main accused Ishwari Lal Yadav and Kiran Bai but same cannot be applied to others.

18. Learned counsel for the appellants has relied on a judgment of this Court in the case of *Aghnoo Nagesia*[1] to buttress his contention that the courts below have committed error in recording a finding of guilt of the appellants based on confession. But same is a case where the appellant therein was charged under Section 302 IPC for murdering his aunt and others and there were no eye witnesses to the murder. The principal evidence against the appellant was First Information Report which contains a full confession of guilt by the appellant himself. The said confession was made to a police officer and the same is not provable having regard to Section 25 of the Indian Evidence Act. Further reliance is also placed on a judgment of this Court in the case of *Sahadevan*[2]. In the aforesaid judgment of two-Judge Bench of this Court it is held that the extra judicial confession is a weak piece of evidence and court must ensure that same inspires confidence and is corroborated by other prosecution evidence. If the totality of oral evidence on record is considered in the case on hand, it is consistent and inspires confidence of the case of the prosecution to prove the guilt of the main accused. We are of the view that the aforesaid judgments would not render any assistance to support the case of the appellants.

19. Learned counsel also relied on the judgment of this Court in the case of *Shambu Nath Mehra*[3]. In the aforesaid judgment this Court has held that in a criminal case burden of proof is on the prosecution and

A Section 106 is certainly not intended to relieve it of that duty. It is held that on the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. In this case on hand it is proved by cogent evidence
B that the body of Chirag was found in the house of Ishwari Lal Yadav. By applying the provision under Section 106 of the Indian Evidence Act definitely it is the burden of the accused to explain the fact within the knowledge of them how the body of Chirag came to be buried in their house. The judgment relied on in the case of *Shambu Nath Mehra*[3]
C also would not be helpful for the appellants. In the case of *Firozuddin Basheeruddin*[4] this Court has discussed the ingredients which constitute criminal conspiracy within the meaning of Section 120B of the IPC. As we are of the view that the evidence on record is not sufficient to prove the guilt of the appellants under Section 120B of IPC, as such it is not necessary to elaborate any further.
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20. Vide impugned judgment, the High Court has confirmed the death sentence imposed on appellants Ishwari Lal Yadav and Kiran Bai. Learned counsel for the appellants relied on the judgment in the case of *Ronny*[5] wherein this Court has held, in a case of multiple accused, where
E the culpability of each accused is not clear to examine whose case falls within the "rarest of rare cases", it would serve the ends of justice, if the capital punishment is commuted into life imprisonment. On the other hand, learned counsel appearing for the State of Chhattisgarh has submitted that the High Court has considered the aggravating and mitigating circumstances and confirmed the death sentence so far as
F main accused, namely, Ishwari Lal Yadav and Kiran Bai are concerned and there are no grounds to modify the same. Learned counsel for the State also relied on judgment of this Court in the case of *Sushil Murmu*[6]. In the above said case in similar set of facts where killing of a nine year old boy as a sacrifice to the deity was dealt with, this Court has upheld the death sentence imposed on the appellant therein.
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21. It is clearly well settled that normal punishment for the offence under Section 302 IPC is life imprisonment but in a case where incident is of "rarest of rare cases" death sentence is to be imposed. It is equally well settled that only special facts and circumstances will warrant passing of death sentence and a just balance has to be struck between aggravating
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and mitigating circumstances, before the option is exercised. While referring to the earlier cases in the case of *Bachan Singh v. State of Punjab*[7] and *Machhi Singh v. State of Punjab*[8] further guidelines are summarised in the judgment in the case of *Sushil Murmu*[6]. Paragraphs 15 and 16 of the judgment read as under :

> "15. The following guidelines which emerge from *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (*Machhi Singh case* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] SCC p. 489, para 38)
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> (*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
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> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.
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> 16. In rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

[7] (1980) 2 SCC 684
[8] (1983) 3 SCC 470

A (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 a hired assassin for
B money or reward or a 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
C 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.

D (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 the murder is an innocent child, or a helpless
E woman or an 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."

22. It is clear from the above judgment that this Court has laid down the guidelines, which are to be considered, in a given case whether
F capital punishment should be imposed or not. There cannot be any hard and fast rule for balancing the aggravating and mitigating circumstances. Each case has to be decided on its own merits. In a "rarest of rare case" capital punishment is to be imposed. To come to conclusion in each case aggravating and mitigating circumstances are to be considered. Further factors like, age of the accused, possibility of reformation, gravity
G of the offence etc. are also to be kept in mind.

23. In this case it clear from the evidence on record, the main accused, namely, Ishwari Lal Yadav and Kiran Bai have committed the murder of the two year old child Chirag as a sacrifice to the God. It is to be noticed, they were having three minor children at that time. Inspite of
H the same, they committed the murder of the deceased, a child of two

years of age brutally. The head of the helpless child was severed, his tongue and cheeks were also cut. Having regard to age of the accused, they were not possessed of the basic humanness, they completely lacked the psyche or mindset which can be amenable for any reformation. It is a planned murder committed by the aforesaid two appellants. The appellants herein who are the main accused, namely, Ishwari Lal Yadav and Kiran Bai were also convicted on an earlier occasion for the offence under Section 302/34 and Section 201 of IPC in Sessions Trial No. 98/2011 by the learned Sessions Judge, Durg, for similar murder of a 6 year old girl for which they were convicted and sentenced to death, but such sentence was modified on appeal in Criminal Appeal No.1068 of 2014 by the High Court of Chhattisgarh at Bilaspur and they were sentenced to undergo life imprisonment without any remission or parole. On appeal to this Court, the order of the High Court is. Such conviction for similar offence can be considered as aggravating factor. By following the guidelines as mentioned in the case of *Sushil Murmu*[6] we are of the view that this is a case of "rarest of rare cases" where death sentence imposed by the trial court is rightly confirmed by the High Court. As the case is proved beyond any reasonable doubt so far as the main accused are concerned, the judgment relied on by the learned counsel for the appellants in the case of *Ronny*[5] also is not helpful to them.

24. For the aforesaid reasons the appeals filed in Criminal Appeal Nos.300-301 of 2018 and Criminal Appeal Nos.298-299 of 2018 are allowed and conviction recorded and sentence imposed upon the appellants therein is set aside. They shall be released forthwith if their custody is not required for any other case. Criminal Appeal Nos. 1416-1417 of 2017 and Criminal Appeal Nos.1418-1419 of 2017 filed by Ishwari Lal Yadav and Kiran Bai respectively are partly allowed, setting aside the conviction recorded and sentence imposed for the offence under Section 364/34 and 120B of the IPC. However, their conviction under Section 302/34 and 201, IPC is confirmed, confirming the death sentence imposed on them for the offence under Section 302/34 IPC. The sentence imposed on them under Section 201 IPC is also confirmed.

Devika Gujral Appeals disposed of.