

SUPREME COURT OF INDIA

State of Maharashtra

Vs.

Damu Gopinath Shinde

Crl.A.Nos.992-993 of 1999

(K. T. Thomas and D. P. Mohapatra, JJ.)

01.05.2000

JUDGEMENT

THOMAS, J.:-

1. Abduction and triple infanticide are the gravamen of this case. Kids, male and female, were abducted not for ransom but for their blood to propitiate gods to reveal the spot beneath which a treasure trove was believed to have been embedded. What finally disinterred were not the treasures - not even a tiny bit of it - but the putrefied corpses of three infants whose blood had copiously been collected in vain for searching out a non-existing cauldron of jewelleries. One of the abducted kids (Sagar) was not destined to die then as he escaped from the clutches of the kidnappers and his infantile recollections were utilised by the prosecution to tell the tale to the Court.

2. The Sessions Judge found all the four persons who were arraigned before him for such grisly perpetrated acts, guilty of the offences charged against them and they were all sentenced to death. But a Division Bench of the High Court of Bombay, Aurangabad Bench (V. K. Barde and J. A. Patil, JJ.) extended benefit of doubt which they entertained and set all the accused free. This is the

appeal which the State of Maharashtra has filed by Special Leave in challenge of the order of acquittal.

3. Sri Satish Chandra B. Subrik learned counsel who entered appearance for the accused reported to us that the first accused (Dami Gopi Nath) died during the pendency of this appeal and hence the appeal is against him can be, treated as abated. The remaining three respondents are A2-Gangadhar Gitaram Kotka alias Guruji, A3-Mukinda Anna Thorat and A4 Dhananjaya alias Balu Joshi. It is convenient for us to refer to them in the rank as they were arraigned as accused in the trial Court.

4. The events narrated in this case have the (attribute) of a crime thriller, mystery hounded around Chanda village in Newasa Taluk (Ahmednagar District in Maharashtra) over the sudden disappearance of children one after the other. Horror struck the minds of the villagers when cadavers of the children were recovered one after another from a canal which flowed through Newasa.

5. The episodes started on 4-3-1992 when a little girl by name Meera (one of the four children of Ramdas) was missing from her house. The elders of the family made hectic searches and then caused announcements to be broadcast through loudspeakers fitted at the Gram Panchayat's office regarding the disappearance of the child. Next day a complaint was lodged with the police. On the third day her dead body was recovered from the canal flowing through the locality. It was wrapped in a gunny bag made for urea storage. Among the injuries noted on the dead body two were so peculiar that the mystery deepened further. Dr. Ramprasad (PW 33) who conducted autopsy on the body has described one injury as anti-mortem and the other as postmortem. The former was multiple abrasions on the left labia majora on the lateral aspect. The latter was a "triangular wound on the perineal region just posterior to vaginal opening." PW 33 Doctor opined from the other injuries noted by him that death of Meera was caused by throttling.

6. On 9-2-1994 a five year old kid by name Devidas (one of the two children of P.W. 26 - Khandu) was found missing. A complaint was lodged with the police on the succeeding day and three days later the dead body of Devidas was found floating in the canal at Dedgaon in Newasa Taluk. He had an injury on the back of his head and his penis was seen chopped off. His father P.W. 26, a rustic villager, wished to avert a post-mortem examination on the remainings of his dear child and hence he did not choose to inform the police about recovery of the dead body.

7. On 13-2-1995 another little male child by name Deepak (who was then studying in the 2nd standard) was found missing from his house. His father P.W. 2 Suresh deputed his uncle to lodge the complaint with the police. Three days later the dead body of Deepak was found in the same canal and penis of that child was also seen chopped off, besides the lobes of his two ears were sliced off.

8. While the above events had rocked the locality, the particular village at Newasa Taluk was agog with different stories - In the meanwhile a seemingly event less incident took place. A five year old boy by name Sagar (P.W. 31) was endeared to A4 Balu Joshi whom the boy used to address "Balu Mama" (as the nephew of A4 Balu Joshi by name Krishna and Sagar were classmates and friends). On two occasions A4 (Balu Joshi) tried to allure Sagar by offering sweets to him and took him to some distance but on both occasions Sagar wriggled out from his grip and ran off. The first attempt took place in February, 1993 and second was in 1995. The boy told his father P.W. 30 Ramakant about it but the latter did not take it as a matter of serious implication to be reported to any authorities. But later when things crystallized into large dimensions P.W. 30 felt the need to bring it to the notice of the police.

9. A1 Damu Gopi Nath was arrested on 26-2-1995 and with his interrogation the police could make a break-through regarding the mysterious disappearances and death of the children. Arrests of the remaining three accused were followed swiftly and, thereafter, investigation progressed to a considerable extent. Certain articles were recovered consequent upon the information elicited from the accused and such recovery threw further light on the multiple infanticides. A confession was recorded by Ms. Anjali Apte, a Judicial Magistrate, First Class on 26-5-1995 and it became the sheet-anchor of the prosecution metrix. The confession is marked by the prosecution as Ex. 88.

10. Narration of the prosecution case should be incomplete without giving at least a summary of what has been recorded by P.W. 19 in Ex. 88. Hence the following extract is taken therefrom.

11. When Balu Joshi (A-4) talked to Kotkar alias Guruji (A-2) about his financial problems, the latter brought Mukinda Thorat (A-3) for suggesting some solution. Mukinda Thorat (A-3) mentioned about the hidden treasures in the property of Guruji (A-2) and wanted to seek the assistance of someone who practised occult things. The genesis of that thinking was the recovery of a gold ring from this land twenty five years ago when a manual labourer (P.W. 25) tilled the land for agricultural operation. Pursuant to it, Damu Gopinath (A-1) was brought and the latter told them that sacrificing five infant children would help to disinter the treasure trove. Damu Gopinath (A-1) then suggested the sequences to be adhered to as well as the suspicious days for performance of each such sacrifice. Guruji (A-2) would perform the necessary ceremonies or rituals for the same.

12. As suggested by Guruji (A-2), the first to be sacrificed was a female child by name 'Guddi.' The task was assigned to Balu Joshi (A-4) for procuring the girl. So Balu Joshi (A-4) managed to abduct Meera alias Guddi on 4-3-1992 from the place where she was playing with her friends and brought her to the house ("Wada") of Guruji (A-2). At 11.30 p.m., the girl was bathed and thereafter her legs were held by Guruji (A-2) and Mukinda Thorat (A-3). Damu Gopinath (A1) took out a knife and inflicted a cross shaped incised wound on her vagina and collected the blood in a brass pitcher (Kalash). After the blood collection was over, she was throattled to death and the dead body was covered in a gunny bag. Guruji (A-2) and Mukinda Thorat (A-3) carried the dead body to the canal on a motor cycle (Bajaj-M50) and threw it into the water.

13. As directed by Guruji (A-2), an endeavour was made by Balu Joshi (A-4) to abduct a boy by name "Sagar" (P.W. 30) in March, 1993. But the boy did not respond to the allurement offered by Balu Joshi (A-4). The accused persons became fearful lest Sagar might disclose it to other people about the abduction attempt but nothing happened for one year and hence they decided to revive their operation. Then Guruji (A-2) mentioned the name of Bhau Khandu Murge (alias Devidas) as a sacrificial kid. Balu Joshi (A-4) succeeded in abducting Devidas on 4-3-1994 and brought him to the Wada of Guruji (A-2). After performing the rituals in the night, Damu Gopinath (A-1) directed Mukinda Thorat (A-3) to take up the knife and inflict the cut. Strictly adhering to the said direction, Mukinda Throat (A-3) chopped the penis of the child off and collected the blood in a pitcher. Thereafter, a heavy blow was inflicted on the head of the boy with a club and Devidas died instantaneously. His body was also disposed of in the canal.

14. Almost one year elapsed thereafter and the treasure hunters wanted to try once again to get Sagar (P.W. 30). On 10-2-1995, Balu Joshi (A-4) went to the school where that boy was studying and he took the boy to some distance by offering sweets to be purchased. But somehow, Sagar did not bite the bait and hence the child ran away from Balu Joshi (A-4).

15. Three days after, Damu Gopinath (A-1) was directed to procure another boy by name Dipak Waware. Balu Joshi (A-4) went prowling for that boy and succeeded in abducting him on 15-2-1995. As it was a full moon night, A1 to A3 bathed him first and took him out of the room for exposing his penis to moonrays. Damu Gopinath (A-1) commanded Mukinda Thorat (A-3) to cut the earlobes of the boy first and then to chop down his penis and the commands were implicitly obeyed. After collecting his blood a heavy blow was given to his head and the boy died. The dead body was carried on a TVS Suzuki Motor Cycle and was consigned to the same canal.

16. The above narration is only a summary of the confession recorded by P.W. 19 Judicial Magistrate First Class. In fact, the confession contains much greater elaboration of each episode with minute details. We thought it not very necessary to reproduce the whole details.

17. The trial Court relied on the said confession as voluntary and true but the Division Bench of the High Court, after a detailed discussion, reached the following conclusion :-

"It will be, thus, seen that there is reasonable doubt to hold that Balu Joshi (A-4) made the confession voluntarily. On scrutinizing the details given in the confessional statement, it does not appear that whatever is stated would be possible or probable. The confessional statement does not appear to be true. Furthermore, it is retracted, may be at a late stage by the accused."

18. As we pointed out earlier, the confessional statement was recorded by P.W. 19 Mrs. Anjali Apte (Judicial Magistrate First Class), and when she was examined in Court, she pointed to the details of the various steps adopted by her for ensuring that the confession was voluntary. In fact, the Division Bench of the High Court discussed the procedure adopted by P.W. 19 elaborately and found that no fault could be discerned regarding the steps adopted for recording the confession. The finding made by the Division Bench in that regard is extracted below :-

"So, on going through the evidence of learned Judicial Magistrate (F.C.), Mrs. Apte (P.W. 19), and the statement of Balu Joshi (A-4) recorded by her on 25th and 26th May, 1995, it can very well be said that the learned Judicial Magistrate (F.C.) followed the provisions regarding recording confession properly and correctly. No defect can be found in recording of confession."

19. What persuaded the Division Bench to sideline the confession are the following reasons :-

1. The fourth accused-Balu Joshi remained in police custody for a considerably long period and that circumstance is sufficient to view his confession with suspicion.

2. The Sub-Jail, Newasa (in which the accused was interred) was located adjacent to the police station and hence the mere fact that he was locked up in the Sub-Jail is not enough to dispel the fear in the mind of the confession regarding police surveillance.

3. P.W. 19 (Mrs. Anjali Apte) was a Judicial Magistrate at Ahmednagar, whereas, there was a Judicial Magistrate First Class at Newasa itself. As the accused was locked up in the Sub-Jail at Newasa, there is no explanation why a Magistrate belonging to a distant place was asked to record the confession, in preference to a Magistrate at a near place.

4. The Investigating Officer (P.W. 42) has not explained how he knew that Balu Joshi (A-4) was willing to make a confession to him. Learned Judges draw an inference like the following :-

"If the circumstance, that the Police Station is adjacent to Sub-Jail, Newasa, is taken into consideration, then an inference can very well be drawn that nobody but police contacted Balu Joshi (A-4) and Police informed Mr. Suryawanshi (P.W. 44) that the accused was willing to make confessional statement."

20. We have considered the above reasons and the arguments addressed for and against them. We have realised that those reasons are *ex facie* fragile. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of police to have the confession in his own way by telling the Magistrate the true facts.

21. In fact, A-4 (Balu Joshi) remained in police custody only till 26-4-1995 and the confession was recorded only on 25-5-1995, which means, there was an interval of almost a full month after he was removed from police custody to judicial custody.

22. The geographical distance between the two buildings - sub-jail and the police station - should not have been a consideration to decide the possibility of police exerting control over a detenu. To keep a detenu in the police fear it is not necessary that the location of the police station should be proximal to the edifice in which the prisoner is detained in judicial custody. In many places judicial Courts are situated very near to police station houses, or the offices of higher police officers would be housed in the same complex. It is not a contention to be countenanced that such nearness would vitiate the independence of judicial function in any manner.

23. Newasa is a taluk located within the territorial limits of the district of Ahmednagar. The Chief Judicial Magistrate, Ahmednagar was approached for nominating a Magistrate within his jurisdiction for recording the confession. There could have been a variety of reasons for the Chief Judicial Magistrate for choosing a particular Magistrate to do the work. When not even a question was put to P.W. 19 or P.W. 44 (the Investigating Officer) as to why the CJM, Ahmednagar did not assign the work to a Magistrate at Newasa, it is not proper for the High Court to have used that as a ground for holding that voluntariness of the confession was vitiated. Similarly, it is a worthless exercise to ponder over how or from which source the Investigating Officer would have come to know that the accused was desiring to confess. Investigating Officer can have different sources to know that fact and he is not obliged to State in Court the same, particularly in view of the ban contained in S. 162 of the Code of Criminal Procedure.

24. Thus the reasons built up by the Division Bench of the High Court for carving out an area of doubt regarding the voluntariness of the confession made by A4 (Balu Joshi) cannot stand scrutiny. High Court should not have upset the finding of the trial Court regarding that aspect.

25. The Division Bench has erroneously understood the ratio laid down by this Court in *Kashmira Singh v. State of Madhya Pradesh*, AIR 1952 SC 159 : (1952 Cri LJ 839). The portion of the decision extracted by the Division Bench in the impugned judgment was the same as this Court has quoted in *Chandrakant Chimanlal Desai v. State of Gujarat* (1992) 1 SCC 473 : (1992 AIR SCW 2028 : 1992 Cri LJ 2757). The following is that portion (para 5 of AIR, Cri LJ) :

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in S. 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

26. We may make it clear that in *Kashmira Singh* (AIR 1952 SC 159 : 1952 Cri LJ 839) (supra) this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of S. 30 of the Evidence Act. Hence the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker. The legal position concerning confession vis-a-vis the confessor himself has been well neigh settled by this Court in *Sarwan Singh Ratan Singh v. State of Punjab*, AIR 1957 SC 637 : (1957 Cri LJ 1014) as under :

"In law it is always open to the Court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually Courts require some corroboration to the confessional statement before convicting an accused person on such statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case."

This has been followed by this Court in *Kehar Singh v. State (Delhi Administration)*, AIR 1988 SC 1883 : (1989 Cri LJ 1).

27. There are quite a large number of circumstances in this case which substantially support the truth of the version contained in the confessional statement given by A4 to P.W. 19. We may now refer to them one by one.

28. The foremost among such circumstances can be seen from the testimony of P.W. 31 (Sagar) the boy who escaped from the abduction attempt twice. His father P.W. 30 (Ramakant) also supported it. The boy was aged nine, when he was examined in Court, and he said that he knew A4 as "Balumama," he being the uncle of his classmate. He said in Court that once he was playing with his friends A4 Balu Joshi took him to a short distance by offering sweets but he did not like to go with him further and hence he ran away. He also said that while he was studying in the first standard A4 (Balu Joshi) went near him and caught hold of his hand by saying that he (A4 Balu Joshi) would escort him to his house but then also the boy ran away to the school. His father P.W. 30 said that

Sagar told him of both the above episodes but his initial reaction was not to treat them seriously. It was only when he heard later about the arrest of A4 in connection with abducting and killing of children, that he and the other elder members of his family realised how narrowly their child escaped.

29. The unrealistic approach made by the Division Bench of the High Court to the evidence of P.W. 30 and P.W. 31 can be seen even by a glance through the observation made by the learned Judges which is extracted below :

"Sagar is stating about the instances which took place, according to him, when he was of 5 or 6 years of age. The instances by themselves are so minor that anybody, in ordinary course, being of that age, would not remember the same even by the end of the day on which the incident took place. Trying to find corroboration to the deposition of Sagar (P.W. 31) from the deposition of Ramakant (P.W. 30) is a futile exercise."

30. For the boy the said instances might have been very minor not to keep them alive in memory even till evening of that day. But when he was told later of the danger he escaped from, that minor incident would winch to the surface of his mood. This is how human mind works and mind of a child is no exception to the process. For the parents of the boy the two episodes could not have created any impact at the time the incident happened. But when they knew later that A4 was kidnapping infants and killing them it would have created the most probable reaction of human mind in them also by realising how they escaped by the skin of their teeth from a perennial calamity. The Division Bench was, therefore, too unrealistic when it brushed aside the truthful evidence of P.W. 31 (Sagar) and his father P.W. 30 (Ramakant).

31. P.W. 41 Kum. Archana was 11 years old when she was examined as a witness. She said that Guddi was her neighbour and they were playmates. The last occasion she saw Guddi was when they played together with some other children. During then, A4 Balu Joshi reached there and after a few minutes, Guddi was found walking with A4 Balu Joshi. P.W. 41 Kum. Archana had not seen her thereafter. The said evidence of P.W. 41 Kum. Archana has been found reliable by the trial Court, but the High Court disbelieved her testimony on the sole ground that it is not possible for a child of that age to remember what happened three years ago.

32. It is rather unfortunate that the Division Bench of the High Court said so. As a matter of fact, P.W. 41 had seen Guddi last while they were playing together and later dead body of Guddi was recovered. If so, the one thing which a child of that age could have never forgotten would have been the last occasion they had played together. The reasoning of the High Court in rejecting her testimony was not only unreasonable, it reflected a poor understanding of how children would react and retain.

33. Recovery of dead body of the children from the canal the post-mortem findings of the Doctors (P.W. 22 Dr. Ashok who conducted the autopsy on the body of Dipak and P.W. 33 Dr. Ram Prasad who conducted the autopsy on the dead body of Mira); the condition of the dead body of Devidas as seen by his father (P.W. 26 Khandu) as the penis of the child was seen cut off are all circumstances which unmistakably corroborate the detailed confessional statement made by A4 Balu Joshi. The High Court did not even believe that death of Devidas was homicidal because no post-mortem examination was conducted on the dead body. The position would be different if the High Court had concluded that death of Devidas could not have been homicidal. The Court should be circumspective over the broader features in deciding whether death was homicidal or not. P.W. 26 Khandu had noted, besides the devastation caused on the penis of the child, an injury on the back of his head. If the latter alone was noticed by P.W. 26 perhaps one could have entertained the doubt that the death of the child could as well be accidental. But the presence of the other injuries on the dead body, would lead any sensible person to the conclusion that the child was done to death and it is no matter that a post-mortem examination was not conducted on the dead body.

34. When A2 Guruji was arrested and interrogated, he stated to P.W. 44-Investigating Officer regarding a "Kalash" (pitcher) which was recovered by P.W. 44-Investigating Officer from the house of A2-Guruji. What is significant about the recovery is that when chemical test was made on the pitcher, blood was found sticking on the outer side of the vessel. Of course, the chemical analyst could not determine the origin of the blood as it was disintegrated by that time. But the learned Judges of the High Court did not attach any value to the circumstances on that sole reason. At the first blush, the approach of the High Court may appear to be sound. But when we considered the answer which A-2 Guruji had given to the questions put on him under S. 313 of the Code regarding the said circumstance, he simply denied even the recovery of "Kalash" as stated by P.W. 44 Investigating Officer. When we know that there was blood on the pitcher it is for A-2 Guruji to explain how it was. But when he denied even the seizure of the pitcher, such a denial, in this context, is not inconsequential. In another case, a similar denial was treated by this Court as sufficient to provide a "missing link" to the chain of circumstances. (State of Maharashtra v. Suresh, 2000 (1) SCC 471).

35. After the arrest of A-3 Mukinda Thorat, he told the Investigating Officer that "Dipak's dead body was carried by me and Guruji (A-2) on his motor cycle and thrown in the canal." The said statement of A-3 Mukinda Thorat was not found admissible in evidence as the dead body was not recovered pursuant to the said statement. This aspect requires more consideration. It must be pointed out that pursuant to the said statement and the offer made by A-3 Mukinda Thorat that he would point out the spot, he was taken to the spot and there P.W. 44 (Investigating Officer) found a broken piece of glass lying on the ground. It was picked up by him. In this context, it is important to refer to another item of evidence. A motor cycle was recovered from the house of A-2 Guruji and its tail lamp was found broken and one piece of it was missing. But when the broken glass piece recovered from the spot pointed out by A-3 Mukinda Thorat was placed on the broken situs of the tail lamp of the motor cycle, it so fitted with the space that P.W. 44 Investigating Officer had no doubt whatsoever that the said glass piece was originally part of the tail lamp of that motor cycle.

36. The basic idea embedded in S. 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of Privy Council in Pulukuri Kottayya v. Emperor, AIR 1947 PC 67 : (1947 (48) Cri LJ 533) is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

37. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by P.W. 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motor cycle.

38. How the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which P.W. 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motor cycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact that A-2 Guruji had carried the dead body on that particular motor cycle up to the spot.

39. In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji that the dead body of Dipak was carried on the motor cycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent.

40. In Exh. 88 confession, A-4 Balu Joshi has stated that on 4-2-1995, A-3 Mukinda Thorat had handed over to him a list in which A-3 Mukinda Thorat had written down the articles to be purchased for performing the ceremony before Sagar and Dipak were killed. Later, A-4 Balu Joshi had purchased those herbals as per the said list. Now, it is important to note that when P.W. 44 Investigating Officer made a search in the house of A-4 Balu Joshi on 8-2-1995, a small book (an Almand) which contained a slip of paper inside. A few names of herbal articles were written on that slip (such as frankencese). That slip was forwarded to the handwriting expert along with the specimen handwritings collected from A-3 Mukinda Thorat for comparison. Ex. 64 is the opinion

forwarded by the said handwriting expert holding that the scribe who wrote the slip and the specimen manuscripts was the same.

41. Exh. 64 is only the opinion of the Asstt. State Examiner of Documents. From that description alone, it cannot be gathered whether his office would fall within the purview of S. 293 of the Code. Hence, without examining the expert as a witness in Court, no reliance can be placed on Exh. 64 alone.

42. But, excluding Ex. 64, we have come across a lot of other circumstances to corroborate the truth of the confessional statement contained in Exh. 88. As we have adverted to many such circumstances, we do not think it necessary to exhaust all of them for a detailed discussion here. All the circumstances discussed above would ensure confidence in our mind in believing that the confession was made voluntarily and it contained the true narration of what all transpired between the conspirators and how the children were abducted and killed. No doubt, it can be used against A-4 Balu Joshi without any difficulty whatsoever.

43. For using Exh. 88 as against A-2 Guruji and A-3 Mukinda Thorat, there is a constraint. S. 30 of the Indian Evidence Act permits only a limited use of the confession as against a co-accused to whom a major role is ascribed by the confessor. It is well settled that the confession made by one accused can be used against the co-accused even when the other conditions under S. 30 are satisfied only for the purpose of corroboration of other evidence. But this aspect is not sufficient to end the travails of A-2 Guruji and A-3 Mukinda Thorat in this case.

44. One of the offences alleged against all the accused is criminal conspiracy under S. 120(B) of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with "relevancy of facts." That section renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in S.10 is that there must be "reasonable ground to believe that two or more persons have conspired together to commit an offence." In this context, we may refer to *S. Nalini v. State by D.S.P., CBI, SIT, Chennai* (1999) 5 SCC 253 : (1999 AIR SCW 1889 : AIR 1999 SC 2640 : 1999 Cri LJ 3124). In paragraph 107 (of SCC) : (para 110 of AIR, Cri LJ), this Court has stated thus :-

"The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a

statement "in reference to their common intention." Under the corresponding provision in the English law the expression used is "in furtherance of the common object." No doubt, the words "in reference to their common intention" are wider than the words used in English law (vide *Sardar Sardul Singh Caveeshar v. State of Maharashtra* (AIR 1965 SC 682 : 1965 (1) Cri LJ 608)."

45. The basic principle which underlies in S. 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy (*State of Gujarat v. Mohd. Atik* (1998) 4 SCC 351 : (1998 AIR SCW 1453 : AIR 1998 SC 1686 : 1998 Cri LJ 2251). Section 10 permits "anything said, done or written by anyone of such persons in reference to their common intention" to be recorded as a relevant fact as against each of the persons believed to be so conspired.

46. In this case, there can be no doubt, relying on Exh. 88 that, there are reasonable grounds to believe that all the four accused have conspired together to commit the offences of abduction and murders of the children involved in this case. So what these accused have spoken to each other in reference to their common intention as could be gathered from Exh. 88 can be regarded as relevant facts falling within the purview of the S. 10 of the Evidence Act. It is not necessary that a witness should have deposed to the fact so transpired between the conspirators. A dialogue between them could be proved through any other legally permitted mode. When Exh. 88 is legally proved and found admissible in evidence, the same can be used to ascertain what was said, done or written between the conspirators. All the things reported in that confession referring to what A-1 Damu Gopinath and A-3 Mukinda Thorat have said and done in reference to the common intention of the conspirators are thus usable under S. 10 of the Evidence Act as against those two accused as well, in the same manner in which they are usable against A-4 Balu Joshi himself.

47. The net result is, the circumstances in this case are sufficient to establish that there was criminal conspiracy to abduct and slay five little children in which the four accused persons were the conspirators and further that abductions of four children and killing of three of them were carried out as sequel to the said conspiracy. There is no escape for them from conviction of the offences found against them by the Sessions Court. The Division Bench of the High Court has gone gravely erroneous in side-stepping everyone of the circumstances established by the prosecution. Criminal justice became the unfortunate casualty as a consequence of the unwarranted interference made by the High Court with a well considered conclusion arrived at by the trial Court. By acquitting the accused in a case of this nature, despite so much of sturdy and reliable circumstances, the judicial system became mauled and faith of the public in the efficacy of the judicial function would have considerably impaired.

48. Now, we have to make up our mind regarding the sentence to be imposed on the three accused. Learned counsel for the State pleaded for restoration of the same sentence which the trial Court has imposed, i.e., death penalty. The question is whether this case can be regarded as rarest of rare cases in which the lesser alternative is unquestionably foreclosed. Looking at the horrendous acts

committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremoniously performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Even so, we persuade ourselves to choose the normal punishment prescribed for murder as for these accused. Accordingly, while restoring the sentence passed by the trial Court in respect of other counts of offences, we order that the accused shall undergo imprisonment for life for the offence under S. 302 read with S. 34 of the I.P.C.

Order accordingly.