Ram Singh vs Sonia & Ors on 15 February, 2007

Equivalent citations: AIR 2007 SUPREME COURT 1218, 2007 AIR SCW 1278, (2007) 36 OCR 844, 2007 (2) SCC(CRI) 1, 2007 ALL MR(CRI) 1166, 2007 (3) SCC 1, 2007 (3) SCALE 106, (2007) 2 CRIMES 1, (2007) 2 MARRILJ 585, (2007) 1 JCC 46 (DEL), (2006) 134 DLT 703, (2007) 2 MAD LJ(CRI) 965, (2007) 1 CURCRIR 478, (2007) 2 ALLCRIR 1708, (2007) 2 SUPREME 86, (2007) 3 SCALE 106, (2007) 2 CHANDCRIC 118, (2007) 4 ALLCRILR 348, 2007 (2) ANDHLT(CRI) 203 SC

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Bench: B.N. Agrawal, P.P.Naolekar

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           CASE NO.:
Appeal (crl.)  895 of 2005

PETITIONER:
Ram Singh

RESPONDENT:
Sonia & Ors

DATE OF JUDGMENT: 15/02/2007

BENCH:
B.N. AGRAWAL & P.P.NAOLEKAR

JUDGMENT:
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JUDGMENT WITH CRIMINAL APPEAL NO. 894 OF 2005 & CRIMINAL APPEAL NO. 142 OF 2006 B.N. AGRAWAL, J.

Sonia [A-1] and Sanjiv [A-2], respondents in Criminal Appeal No. 895 of 2005, were tried and convicted by the trial court under Section 302 read with Section 34 and Section 120-B of the Indian Penal Code [`IPC' for short] and sentenced to death and to pay a fine of Rs. 2000/- each. A-1 and A-2 were further convicted under Sections 25(1-B)(b) and 25(1-B(a) of the Arms Act respectively and sentenced to undergo rigorous imprisonment for a period of one year. A-2 was further convicted under Section 201 IPC and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1000/- in default whereof to further undergo imprisonment for one month. The sentences were, however, ordered to run concurrently. Tried along with A-1 and A-2 were eight other accused persons but they were acquitted by the trial court for want of evidence. The order of convictions and sentences gave rise to a murder reference by the Sessions Judge, Hisar and appeals by both the accused before the Punjab & Haryana High Court. By the impugned judgment, while

upholding their convictions under Section 302 read with Section 34 and Section 120-B of the IPC and other provisions, the High Court has commuted the sentence of death into life imprisonment. Hence these appeals by special leave. While Criminal Appeal Nos. 895 of 2005 and 894 of 2005 have been preferred by Ram Singh, brother of deceased Relu Ram, and the State of Haryana respectively for enhancement of sentence from life imprisonment to death, Criminal Appeal No.142 of 2006 is by the accused assailing the impugned judgment of their convictions and sentences. The case of the prosecution is that on 23.8.2001 when Jeet Singh [PW 57], one of the employees of deceased - Relu Ram, and A-2 were sitting at the Saw Mill located by the side of Farm House of Relu Ram, a telephone call was received by A-2 from A-1 conveying her desire to celebrate Priyanka's [deceased sister of A-1] birthday at the Kothi at Litani Mor [place of occurrence] and that she would bring her from the hostel of Jindal School at Hisar the school she was studying in. At about 9.30 p.m. A-1 along with Priyanka reached home in a jeep. Thereafter, between 11 12 p.m., on hearing some noise of footsteps, PW 57, who was present at the Farm House, woke up and noticed that light in the room, where the spare parts of tractors etc. were kept, was on and upon inquiry found that A-1 was there in the room and he saw her taking a rod to the first floor which rod is used for raising/tilting the tractor from the ground. He again heard the noise of explosion of fire works, but, thinking that Priyanka's birthday was being celebrated, he went to sleep. PW 57 further stated that on 24.8.2001 at about 4.45 a.m. when he was sitting on his cot, he saw A-1 coming down and taking the Jeep at a very fast speed and returning after half an hour. Thereafter, at about 5.30 a.m. Ram Phal, the Milk Vendor, brought milk, but on seeing him coming upstairs, A-1 instructed him to leave the milk on the ground floor. At about 6.15 a.m. the School Van came to take Lokesh [deceased], son of Sunil [deceased], but it left after waiting for some time as Lokesh did not come down despite blowing of horn. PW 57 thereafter sent Rohtas, another servant of Relu Ram, to the first floor for bringing Lokesh down for being dropped in the School on motor-cycle. Upon being called by Rohtas, PW 57 went to the first floor and found that A-1 was lying in the porch with froth coming out of her mouth and was mumbling that she be saved and Sanjiv [A-2] be called. Reaching inside the house, PW 57 found that Relu Ram [father], Krishna [mother], Sunil [brother], Shakuntala [sister-in-law], Priyanka @ Pamma [sister], Lokesh [nephew] and Shivani and Preeti [nieces] of A-1 had been murdered in different rooms. He also found that Shakuntla's hands and feet were tied with cot. The tractor rod that PW 57 had seen A-1 removing from the room on the previous night was lying on the bed of A-1. Noticing a letter [Suicide Note Ext. 227] lying on the bed of A- 1 written in Hindi, PW 57 picked up the same and left for the Ulkana Police Station. While giving description of what had been seen by him at the place of occurrence and handing over the said Suicide Note to S.I. Vinod Kumar, PW 59, PW 57 also stated that it may be possible that A-1 under a conspiracy had either administered some poisonous substance or made them to inhale poisonous thing and upon becoming unconscious they had been murdered. It was further stated by him that about six months prior to this incident, A-1 with an intention to kill deceased Sunil had also fired a shot from the licensed gun of deceased Relu Ram over a dispute of property, but the matter was hushed up in the house. On the basis of sequence of events that had taken place at the place of occurrence from the evening of 23rd August until 24th morning, described by PW 57 to PW 59 and the Suicide Note alleged to have been written by A-1, FIR was registered in the Ulkana Police Station at 8.15 a.m. by PW 59 wherein contents of Suicide Note were also reproduced. On completion of the investigation, chargesheet was submitted against A-1, A-2 and eight other accused persons, cognizance taken and they were committed to the court of Sessions to face trial.

Defence of the accused persons was that they were innocent and falsely implicated. The stand taken by A-1 was that she was picked up by the police of CIA Staff on 24th August from Faridabad and was brought to Hisar, kept in illegal custody, tortured and threatened that in case she would not make the statement according to what they say, her only son would be killed and thereafter they forcibly obtained her signatures on blank papers. A-2 took the defence, inter alia, that he was falsely implicated at the instance of the employees of Relu Ram who had embezzled a lot of money of his father- in-law and by those people who had taken a loan from him and that it were they who had committed the murder of Relu Ram and his family members.

So far as A-1 is concerned, the prosecution case principally rests on (1) the Suicide Note [Ext. 227] alleged to have been written by her wherein she admitted having murdered eight persons, including three tiny tots, who were none other than her own immediate family members, (2) the judicial confession [Ext. 187] made by her to the Magistrate in the hospital where she was removed by the Police immediately after the occurrence and (3) bloodstained clothes of A-1, blood group of which tallied with the blood group of deceased Sunil and Lokesh.

So far as A-2 is concerned, the case of the prosecution revolves around circumstantial evidence, extra-judicial confessions made by him to Sunder Singh, PW.48, and Rajni Gandhi, Scientific Assistant, PW 17, the result of the polygraph test to which he was put by the prosecution and the recoveries made at his instance by the police. Mr. Sushil Kumar, learned senior counsel appearing on behalf of the respondents, has submitted that the suicide story is a total concoction by the prosecution as, even according to the medical evidence, A-1 did not show any symptom of having consumed poison, she was not administered any treatment as such, though prescribed and, therefore, her having not consumed any poison, there was no reason for her to write the alleged Suicide Note, as there was no risk to her life, which, he says, is a document that she was forced to write after having been tortured in police custody. So far as judicial confession [Ext. 187] made by A-1 to Pardeep Kumar, Judicial Magistrate, 1st Class [PW 62] is concerned, his submission is that it is a piece of evidence which needs to be eschewed from consideration by this Court on two counts i.e., admissibility and truthfulness as the approach of the recording magistrate was very casual and it has not been recorded according to the procedure prescribed by Section 164 of the Criminal Procedure Code [`Cr.PC' hereinafter]. According to the learned counsel, non-compliance of Section 164 by the recording magistrate cannot be cured by Section 463 Cr.P.C. as it cures only the defect of recording the statement and not its non-compliance. In support of this submission, reliance has been placed by the learned counsel upon the decisions in the cases of Nazir Ahmad v. King Emperor AIR 1936 PC 253, Preetam v. State of M.P. (1996) 10 SCC 432, and Tulsi Singh v. State of Punjab (1996) 6 SCC 63. Learned counsel further submits that since it is not and cannot be disputed that A-1 was removed from the place of occurrence to the hospital by Head Constable Ashok Kumar [PW.25], she came to be under police custody since the time of her such removal until her formal arrest by the police on 26th August, 2001 and her movements having been restricted and she having been kept under direct or indirect police vigil, as per the legal position, she was in police custody. In support of this submission, he has placed reliance upon Paramhansa Jadab & Anr. Vs. State, AIR 1964 Orissa 144. Learned senior counsel has also pointed out other infirmities in the prosecution case, such as tampering of hospital record [Exts. P-193 and P-192], non-lifting of fingerprints from the iron rod used to commit the crime and ante-timing of FIR.

On the other hand, Mr.K.T.S. Tulsi, learned senior counsel appearing on behalf of the appellant in Criminal Appeal No. 895 of 2005 has submitted that in view of admission by A-1 in the Suicide Note as well as in the judicial confession [Ext. 187] made to PW 62 of having committed the murder and handwriting on the Suicide Note having been proved to be that of A-1, there is no scope left for doubting the veracity of the prosecution case. It has been further submitted by Mr. Tulsi that insofar as judicial confession recorded by PW.62 is concerned, it was recorded according to the procedure set out in Section 164 Cr.P.C. and that the alleged breach of Section 164(2) i.e., failure of magistrate to record reasons to believe that her statement was voluntary is a defect curable by Section 463 of the Cr.P.C. and is covered by a decision of a 3-Judge Bench of this Court in the case of Babu Singh vs. State of Punjab, [1963] 3 SCR 749. Adopting the line of argument identical to that of Mr. Tulsi, Mr. U.U. Lalit, learned senior counsel appearing on behalf of the State, submitted that even if there is a violation of Section 164 Cr.P.C., the Court can admit such an evidence as the violation of that Section is cured by Section 463 Cr.P.C. if it had not injured the accused in his defence on the merits. We shall first deal with the Suicide Note allegedly written by A-1. PW 57 the informant while lodging the FIR and in his evidence stated that the Suicide Note was picked up by him from A-1's bed and thereafter he left for the Ulkana Police Station to lodge the FIR. It was handed over by him to PW.59 who, on the basis of sequence of events narrated by PW.57 that had taken place at the place of occurrence and on the basis of Suicide Note, registered the FIR, making the Suicide Note as part and parcel of the FIR by reproducing its contents therein.

So far as presence of A-1 at the place of occurrence is concerned, both PW.57 and PW 58 - Amar Singh, another employee of deceased Relu Ram who was working as Chowkidar and posted at the main gate of Kothi at Litani Mor [the place of occurrence], in their testimony have stated that they had seen A-1 coming to the Kothi at Litani Mor along with deceased Priyanka@Pamma in a Jeep between 9-10 p.m. on 23rd August, 2001, going out of the Kothi in the early hours of 24th August in a self-driven jeep at a very fast speed and returning after half an hour. This fact is corroborated by the evidence of Head Constable Dharambir Singh [PW.46] who, in his evidence, has stated that while he was on patrolling duty at Surewala Chowk from 2 a.m. to 6 a.m. on 24th August, 2001, he had seen A-1 at 5.30 a.m. coming from the side of Barwala in a Tata Sumo driving at a very fast speed. The evidence, which further lends support to this fact, is that of Constable Ashok Kumar [PW 25] and Chhabil Das, PW.64. PW.25, who was asked by PW.59 along with other police personnel to reach the place of occurrence, stated that on reaching the spot and seeing A-1 with froth coming out of her mouth, he removed and admitted her to the Janta Hospital at Barwala. PW.64, who happened to be present at the place of occurrence, has stated that on seeing PW.25 taking A-1 to the hospital, he accompanied him to the hospital. The application [Ext. P.152] moved by PW.25 to the doctor on duty with regard to the fitness of A-1 to make the statement and also the indoor chart [Ext. P.193] which bears the signature of PW. 64 depict that she was brought by PW.25. Mr. Sushil Kumar has drawn our attention to the omission made by PW.25 in his evidence that this witness has nowhere stated that he was accompanied by PW.64. This omission by PW.25, in our view, does not affect the case of the prosecution, especially in view of the fact that the indoor chart of the hospital bears the signature of PW.64. Therefore, there is overwhelming evidence to show the presence of A-1 at the place of occurrence on the intervening night of 23rd and 24th August and in the early hours of 24th August, 2001. The trial court and the High Court have relied on the evidence of PW 57, PW 58, PW 46, PW 25 and PW 64 after close and careful scrutiny of the same. We have on our own considered

the evidence on the point and we are satisfied that the view taken by the trial court and the High Court is correct one.

The factum of A-1's presence at the place of occurrence having been established, we now proceed to discern whether the Suicide Note was fabricated one. In order to verify the handwriting on the Suicide Note to be that of A-1, on 10.9.2001 SI Ajit Singh [PW 27] moved an application before Balraj Singh [PW.26], the then SDM, Hisar, for taking specimen signature and handwriting of A-1, which were taken and sent to FSL, Madhuban for analysis. According to the report submitted by FSL, Madhuban, in this regard, the handwriting on the Suicide Note tallied with the specimen handwriting.

A bare perusal of Suicide Note which was addressed by A-1 to none other than A-2 [her husband], would show that in the very first line she has confessed of having eliminated everybody and that she was ending her life as well. In this very letter of hers, A-1 has admitted having written it immediately after the occurrence. This fact stands proved by the evidence of PW.57 who in his evidence has stated that he picked up the said letter from A-1's bed and thereafter left for the police station. Therefore, there was no reason for any of the police officials to be present at the place of occurrence from the time the crime was committed until the arrival of the police officials after the lodgment of the FIR. Both the courts below have relied upon the evidence of PW.57 and PW.26 on this point and we see no reason to disbelieve their testimony. In this view of the matter, the submission of the learned counsel that the Suicide Note was fabricated has to be rejected.

This takes us to the next submission made by Mr. Sushil Kumar that movements of A-1 having been restricted since the time of her removal to the hospital until her formal arrest on 26th August, 2001, she was kept under direct or indirect police surveillance and, therefore, as per legal position, she was under police custody. In support of this submission, he has relied on Paramhansa Jadab & Anr. Vs. The State, AIR 1964 Orissa 144, a decision of a Division Bench of Orissa High Court. We have been taken through the evidence of PW 25, Dr. Jagdish Sethi [PW.52] and PW 62. PW.25 has stated in his evidence that on his arrival at the place of occurrence, he saw A-1 lying in front of the main door under the porch of the first floor of the house from where she was removed to the hospital. The factum of admission to the hospital stands proved from the evidence of PW.52, who was on duty as the Casuality Medical Officer at the Janta Hospital, Barwala. In his statement, PW.52 has stated that at the time of her admission to the hospital, A-1 was unfit to make any statement. PW.62 in his evidence has stated that at the time of recording of confessional statement of A-1, no police official was present either in the room in which the statement was recorded nor in the vicinity of the hospital which fact has been confirmed in his evidence by Dr. Anant Ram, PW 32, under whose care A-1 was at the time the judicial confession was being recorded and who was also present at the time of its recording. Undoubtedly, movements of A-1 were restricted, but it happened not because of any direct or indirect vigil kept by the police authorities, as is the contention of the learned counsel, but because of the treatment that was administered to her in the hospital. In her Suicide Note, A-1 towards the end has written that after finishing them all she was ending her life. PW.52 has also stated that at the time of her admission hers was a case of suspected poison and, therefore, she was declared to be unfit to make any statement. There is not an iota of evidence on record to show that in order to keep any direct or indirect vigil on the movements of A-1 the police personnel remained

present in or outside the room in which A- 1 was recuperating or in the hospital since the time of A-1's admission until her discharge therefrom or that the police personnel made frequent visits to the hospital, thereby restricting A-1's movement.

In Paramhansa [supra], reliance upon which has been placed by the learned counsel, the question that arose was whether the accused, who was formally arrested by the police on 19.2.1962, could be said to be in police custody from the moment when his movements were restricted and he was kept in some sort of direct or indirect police surveillance. In the said case, the accused was interrogated on 17.2.1962 and taken to the office of one Dr. Asthana on 18.2.1962. Accompanied along with the police personnel were some other persons and while police personnel left Dr. Asthana's office after a while, the accused and other persons who accompanied the police remained there. Setting aside the conviction of the accused under Section 302/34 and allowing the appeal, it was held at page 148 as under:

> " . in the circumstances of this case I would hold that Paramhansa was in police custody for the purpose of Section 26 of the Evidence Act from the date of his interrogation by the Inspector on 17.2.1962 and that he continued to be in police custody when he was brought and left in Dr. Asthana's residence on 18.2.1962 . It is true that when this appellant made the confession before Dr. Asthana no police officer was near him. But some persons who came with the police in the Police van were left there. Thus there was indirect control and surveillance over the movements of the appellant by the police ..."

Whether one is or is not in police custody could be discerned from the facts and circumstances obtaining in each case. Insofar as the case at hand is concerned, the police party reached the place of occurrence within 10 minutes of lodgment of the FIR and PW.25, being aware of the fact that A- 1 had consumed poison and under instructions, seeing A-1 lying in front of the porch, removed her to the hospital. PW.52 having opined that A-1 was unfit at the time of her admission in the hospital to give any statement, PW.62 and PW.32 also having stated in their evidence that none else, except them, was present in the room in which the statement of A-1 was recorded and in the absence of any evidence to show that from the moment of her admission to and discharge from the hospital the police personnel were either present in the room wherein A-1 was kept for treatment or even in the vicinity of the hospital or they made frequent visits to the hospital, it cannot be said that the A-1's movements were restricted or she was kept in some sort of direct or indirect police surveillance and that she was in police custody for the purpose of Section 26 of the Evidence Act. Therefore, in our view, Paramhansa [supra] is of no help insofar as A-1 is concerned.

Turning now to the next submission of learned counsel appearing on behalf of the accused as to the judicial confession [Ext.187] made by A-1 before PW.62, it would be useful to refer to relevant provisions in the Criminal Procedure Code that deal with the recording of a judicial confession by a judicial magistrate and see whether the judicial confession recorded by PW.62 of A-1 is according to the procedure prescribed by these provisions or whether any violation thereof has been made by the magistrate while recording it. The relevant Sections in the Cr.P.C. are Sections 164, 281 and

463. Sub-section (2) of Section 164 Cr.P.C. requires that the magistrate before recording confession shall explain to its maker that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the magistrate has reasons to believe that it is being made voluntarily then the confession shall be recorded by the magistrate. Sub-section (4) of Section 164 provides that the confession so recorded shall be in the manner provided in Section 281 and it shall be signed by its maker and the recording magistrate shall make a memorandum at the foot of such record to the following effect:

> "I have explained to [name] that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
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> [Signed] Magistrate"

Sub-section (1) of Section 463 provides that in case the Court before whom the confession so recorded is tendered in evidence finds that any of the provisions of either of such sections have not been complied with by the recording magistrate, it may, notwithstanding anything contained in section 91 of the Indian Evidence, Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

In the case on hand, the application that was made to PW.62 was for recording a dying declaration as A-1 was suspected to have consumed poison. Learned counsel appearing on behalf of the accused submits that as there was no danger to the life of A-1, there was no reason for the prosecution to call PW.62 for recording dying declaration of A-

1. We have perused the Indoor Charts of Janta Hospital, [Exts. 192 and 193] which clearly depict that hers was a case of suspected poison. We have also been taken through the evidence of Dr. Jagdish Sethi, PW.52, who, in his testimony, has also stated that A-1 was admitted to the Janta Hospital in the morning of 24th August as a suspected case of poison and, therefore, she was declared to be unfit to make any statement. In our view, the prosecution rightly sent for PW.62 for recording dying declaration of A-1.

Before adverting to the three decisions relied upon by the learned counsel for the accused, we shall first analyse the judicial confession (Ext.187) recorded by PW 62 and see whether it has been recorded according to the procedure prescribed by Section 164.

On 24th August, 2001, upon receipt of an application moved by Superintendent of Police for recording dying declaration of A-1 by a magistrate, DSP Man Singh, who partly investigated the case, approached the Chief Judicial Magistrate, Hisar, who, in turn, marked the said application to Pardeep Kumar, PW.62. On its presentation to PW.62 by DSP Man Singh at 10 p.m. the same day, both PW.62 and DSP Man Singh left for the Janta Hospital, Barwala. After reaching the hospital and

before recording the statement, PW.62 first sought opinion of Dr. Anant Ram (PW 32) as to the fitness of A-1 to make the statement. As in the opinion of PW 32, A-1 was fit to make the statement, PW.62 proceeded to record it, which is in question and answer form. It appears from Ext. 187 as well as from the questions and answers which were put to A-1 that PW.62 warned A-1 that she was not bound to make any confessional statement and in case she did so, it might be used against her as evidence. In spite of this warning, A-1 volunteered to make the statement and only thereafter the statement was recorded by PW.62. In the certificate that was appended to the said confessional statement PW.62 has very categorically stated that he had explained to A-1 that she was not bound to make a confession and that if she did so, any confession she would make might be used as evidence against her and that he believed that the confession was voluntarily made. He further stated that he read over the statement to the person making it and admitted by her to be correct and that it contained a full and true account of the statement made by her. It has been further stated by PW.62 in his evidence that at the time of recording of the confession it was he and PW 32, who were present in the room and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. It also appears from the evidence of PW.62 that it took about 2-1/2 hours for him to record the statement of A-1, which runs into 5 pages, which he started at 10.53 p.m. and ended at 1.28 a.m. which goes to show that A-1 took her time before replying to the questions put. PW.62 has also stated that she had given the statement after taking due time after understanding each aspect. It also appears that he was satisfied that she was not under any pressure from any corner. Therefore, it is evident from the certificate appended to the confessional statement by PW.62 that the confessional statement was made by the accused voluntarily. Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW.62 having stated in his evidence before the Court that he had asked the accused orally whether she was under any pressure, threat or fear and he was satisfied that A- 1 was not under any pressure from any corner, that in the room in which the said confessional statement was recorded it was only he and PW.32 who were present and none else and that no police officer was available even within the precincts of the hospital, the said defect, in our view, is cured by Section 463 as the mandatory requirement provided under Section 164(2), namely, explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him has been complied with and the same is established from the certificate appended to the statement and from the evidence of PW.62. Therefore, in the light of our discussion above, we have no hesitation in holding that the judicial confession [Ext. 187] having been recorded according to the procedure set out in Section 164 read with Section 281 and the defect made while recording the same being curable by Section 463, it is admissible in evidence. We now advert to the decisions relied upon by the learned counsel appearing on behalf of the accused. In the case of Nazir Ahmad [supra] the accused, who was charged with dacoity and murder, was convicted on the strength of a confession said to have been made by him to a Magistrate of the class entitled to proceed under the provisions of Section 164 relating to the recording of confession. The confession was not recorded according to the procedure and the record of the confession was not available as evidence either. The Magistrate, however, appeared as a witness and gave oral evidence about the making of the confession. He stated that he made rough notes of what he was told, got a memorandum typed from the typist on the basis of the rough notes and thereafter destroyed the rough notes. The said memorandum, signed by him contained only the substance but not all of the matter to which he spoke orally. The recording Magistrate in the said memorandum just above his signature appended

a certificate somewhat to the same effect as that prescribed in section 164 and, in particular, stating that the Magistrate believed that the statements were voluntarily made. As there was no record in existence at the material time, there was nothing to be shown or to be read to the accused and nothing he could sign or refused to sign. The Judicial Committee held that the oral evidence of the Magistrate of the alleged confession was inadmissible. The Magistrate offered no explanation as to why he acted as he did instead of following the procedure required by Section 164. When questioned by the Sessions Judge, the response of the accused was a direct and simple denial that he had ever made any confession. The Judicial Committee, considering the abject disregard by the Magistrate of the provisions contained in Section 164 of the Code, observed that "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all". Nazir [supra] is a case where recording Magistrate did not at all follow the procedure prescribed by Section 164 of the Code as a result of which, he violated the provisions thereof whereas in the case on hand the omission that has been made by the magistrate is his failure to record the question that he asked to the accused whether she was under

> any pressure, threat or fear to make a confession in the confessional statement and the answer given by A-1. In his evidence before the Court, PW.62 stated that he asked A-1 whether she was under any pressure, threat or fear and after he was satisfied that she was not under any pressure from any corner, he recorded in the memorandum that was appended to the confessional statement of A-1 that he believed that the confession was voluntarily made. In our view, Nazir [supra] has no application to the facts of the present case as the failure of PW.62 to record the question put and the answer given in the confessional statement has not caused prejudice to the accused in her defence and is a defect that is curable under Section 463.
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> In the case of Preetam [supra] the accused was arrested on 17.6.1973 and when produced before the Magistrate on the following day he was sent to police custody, where he remained until 22.6.1973 and, thereafter he was sent to judicial custody. Upon being produced before a Magistrate on 25.6.1973 for recording his confession, he was given two hours time to reflect. After cautioning the accused that he was not bound to make a confession and that if he did so, it might be used against him, the Magistrate went on to record his confession. Failure of the recording Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-section (4) was termed by this Court as flagrant violation of the provisions of Section 164(2) and in utter disregard of the mandatory requirements of the said section. Preetam (supra) is a case where the accused remained in police custody for six days immediately before the recording of his confession by the Magistrate and, therefore, could be said to have been pressurized, tortured and harassed by the police. In such a situation, omission on the part of the recording Magistrate to put a question to the accused to satisfy himself that the confession was being made voluntarily can be said to be flagrant violation of law. However, in the case on hand, A-1 was removed by the police from the place of occurrence to the hospital in the morning of 24th August, 2001 where she remained until her arrest by the police in the evening of 26th August, 2001. It was at

> 10.58 p.m. on 24th August, 2001, i.e., during her hospitalization, that PW 62 recorded her confessional statement after cautioning her that she was not bound to make any confession and that if she did so, it might be used as evidence against her. PW 62 in his evidence has stated that it was only after administering the above caution and satisfying himself that A-1 was making the statement voluntarily that he proceeded on to record her confession. It also appears from his evidence that no police official was present either in the room in which he recorded the confessional statement of A-1, or in the hospital.

Therefore, in the absence of any evidence to show that she was under direct or indirect vigil of the police authorities during her hospitalization and she having already confessed the crime in her Suicide Note, the omission on the part of the recording Magistrate to record the question and the answer given in the confessional statement cannot be said to be flagrant violation of law, especially in view of the fact that the recording Magistrate has stated in his evidence that he orally asked A-1 if she was under any pressure, threat or fear and it was only after satisfying himself that she was not under any pressure from any corner that he recorded her confessional statement. In the certificate that was appended to the confessional statement as well, PW 62 has stated that he believed that confession that A-1 made was voluntary. In our view, the defect committed being curable under Section 463 has not injured the accused in her defence on the merits and that she duly made the statement.

Similarly, in the case of Tulsi Singh [supra], also relied upon by the learned counsel for the accused, the recording Magistrate did not explain to the accused that he was not bound to make a confession and that if he did so, it might be used against him, nor did he put any question to him to satisfy that the confession was being voluntarily made although, an endorsement to this effect was made by him in the certificate that was appended to the confessional statement. This court, while setting aside the conviction and sentence recorded against the accused under Section 302 IPC, held that the special court was not at all justified in entertaining the confession as a voluntary one, observing that mere endorsement would not fulfill the requirements of sub- section (4) of Section 164. This case too has no application at all to the facts of the present case for two reasons firstly, in this case too the appellant remained in police custody for a week and secondly, it is a case in which the recording Magistrate neither explained to the accused that he was not bound to make a confession and if he did so, it might be used against him nor satisfied himself upon questioning the accused that the confession was being voluntarily made. In the case on hand, PW 62 in his evidence has stated that he did ask the accused the question whether she was under any pressure, threat or fear and only after satisfying himself that she was not under any, that he proceeded on to record her confessional statement.

Therefore, in view of our above discussion, the three decisions relied upon by the learned counsel for the accused in the cases of Nazir (supra), Preetam (supra) and Tulsi (supra) are of no help to the accused.

In the case of Babu Singh [supra], reliance on which has been placed by Mr. Tulsi, appearing on behalf of the appellant in Crl. Appeal No.895 of 2005, a 3-Judge Bench of this Court, while dealing

with the question whether non-compliance of the provisions of Section 164 or Section 364 [Section 281 of the new Code] is a defect which could be cured by Section 533 [Section 463 of the new Code] observed at page 759 thus:-

> " .Section 533(1) lays down that if any Court before which a confession recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied by the magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Mr. Khanna contends that the magistrate has in fact given evidence in the trial court and the evidence of the magistrate shows that the statement has been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the magistrate in not complying with Section 364(3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention ... But for the purpose of the present appeals we are prepared to assume in favour of the prosecution that the confessions have been proved and may, therefore, be considered on the merits if they are shown to be voluntary and that is the alternative argument which has been urged before us by Mr. Rana."

After observing that the confessions were duly recorded, the Bench proceeded to discern from the factual matrix of the case whether the confessions were voluntary or not and taking note of three unusual features qua the confession recorded, namely, (1) that the accused was kept in the police custody even after the substantial part of the investigation was over; (2) that the confession so recorded did not indicate as to how much time the accused was given by the magistrate before they made their confessions and (3) that the magistrate who recorded the confession had taken part in assisting the investigation by attesting recovery memos in two cases, the confessional statement of the accused was excluded from consideration. It was observed at page 764 thus:

> " ...Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore, excluded from consideration it is impossible to sustain the charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of the appellants for the offence under Section 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are left out of consideration, the charge of murder cannot be sustained .."

The three unusual features noticed by the Bench in Babu Singh [Supra] impelled the learned Judges to exclude from consideration the confessional statement made before the magistrate by the accused

after having observed that the confession was admissible in evidence. As the charge of murder was founded exclusively on the confession, both the accused persons were acquitted of the charge under Section 302/34 IPC.

In our view, the factual matrix in Babu Singh [supra] was distinct from the one with which we are dealing. In Babu Singh, both the accused remained in police custody for a long time and even after the substantial portion of the investigation was over. If one were or held to be in police custody, question of pressure, threat or fear would arise. We have already held that in the facts and circumstances of the present case, A-1 cannot be said to be in police custody during her hospitalization and, therefore, question of her being pressurized, threatened or put under any kind of fear does not arise.

In the case of State of U.P. v. Singhara Singh & Ors., AIR 1964 SC 358, a 3-Judge Bench of this Court observed that if the confession is not recorded in proper form as prescribed by Section 164 read with Section 281, it is a mere irregularity which is curable by Section 463 on taking evidence that the statement was recorded duly and has not injured the accused in defence on merits. It was observed at page 362 thus:-

> "What S.533 (Section 463 of the new Code), therefore, does is to permit oral evidence to be given to prove that the procedure laid down in S. 164 had in fact been followed when the court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in S. 164 is not intended to be obligatory, S.533 (Section 463 of the new Code) really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so."

In the light of the above discussion, we are of the view that Ext.187 is admissible, having been recorded according to the procedure prescribed under law and the same is voluntary and truthful.

Turning now to the medical evidence, Dr. Sanjay Sheoran [PW.1], Dr. R.S. Dalal, [PW.2], and Dr. Arun Gupta [PW.15], who conducted the autopsy on the dead bodies of the deceased, have opined that the injuries found on the persons of the deceased were ante mortem in nature, were sufficient to cause death in ordinary course of nature and that injuries could be caused with the iron rod. We have already referred to the testimony of PW 57 wherein he stated that he had seen A- 1 removing the iron rod from the store room at the place of occurrence on the night of 23rd August, 2001 which iron rod was recovered from the bed of A-1 at the place of occurrence by the prosecution. The medical evidence that injuries could be caused with the iron rod, the statement of PW.57 that he had seen A-1 removing the iron rod from the store room at the place of occurrence and its recovery from the bed of A-1 leave no scope for any doubt about the veracity of the prosecution case as against A-1. Finding of bloodstains on the salwar of A- 1 and its matching with the blood group of deceased Sunil and Lokesh further strengthens the case of the prosecution. Insofar as other submissions made by learned counsel appearing on behalf of the accused qua ante-timing of FIR, tampering of Exts. 193

and 194 and non-lifting of finger prints are concerned, we need hardly add anything to the exhaustive discussion in the elaborate judgments rendered by the trial court and the High Court while dealing with identical submissions.

As a result of our above discussion, we hold that the case against A-1 has been proved by the prosecution beyond reasonable doubt and, therefore, order of conviction of A-1 passed by the trial court and upheld by the High Court is unassailable.

We now proceed to consider the case of Sanjiv [A-2], husband of A-1, whose case revolves around the circumstantial evidence, apart from extra-judicial confessions made by him to Sunder Singh, PW 48 and Dr. Rajni Gandhi, PW.17, the result of the polygraph test and the recoveries made at his instance.

Insofar as circumstantial evidence as against A-2 is concerned, the courts below have very elaborately discussed the material produced by the prosecution while accepting each of the circumstances. In the normal course, there would have been no need for us to go into these circumstances as elaborately as was done by the two courts below in an appeal filed under Article 136 of the Constitution of India, especially when the finding qua conviction is concurrent. However, taking into consideration that the accused were awarded death sentence by the trial court, which has been converted into life imprisonment by the High Court, and that the case in hand is one of circumstantial evidence, we think it appropriate and in the interest of justice to reappreciate the evidence. The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof, for some times unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

In the light of the above principle, which principle has been reiterated in a series of pronouncements of this Court, we proceed to ascertain whether the prosecution has been able to establish a chain of circumstances so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused.

The first circumstance in the chain is the presence of A-2 at Hisar. A-1 in her judicial confession made to PW.62 has stated that she along with A-2 had gone to the Jindal Public School to pick deceased Priyanka @ Pamma for celebrating her birthday at the Kothi at Litani Mor, the place of occurrence. A-1 has further stated that while they were returning, due to some altercation between A-1 and A-2 which ensued after Priyanka @ Pamma informed A-2 of infidelity that A-1 was having with someone, A-2 got down of the vehicle at Hisar and went away and did not return. That getting down of A-2 on the way after the altercation was a part of the plan hatched by A-1 and A-2 to give a slip to the investigating agency to mislead it, is discernable from the evidence of Paramjeet Singh, PW.12, who owns a Fast Food and Bakery Shop at Camp Chowk, Hisar. In his evidence, he has stated that on 23.8.2001, A-1 accompanied by a man and a girl visited his shop and that the accompanying girl was calling the man as "Jijaji". That A-2 did not alight from the vehicle on the way and was with A-1 all the time could be elicited from the statement of A-1 made to PW.62, relevant portion of which is reproduced below:

> " At about 9 p.m. he [A-2] alighted from the vehicle at Hisar itself and started saying that he is having no need of her and I alone go to my home. I waited for 5/10 minutes that he would come back, but he did not turn up. After that I along with my sister came to our house at Punia Farm House Kothi at Litani Mor. We reached at about 10.00 p.m. in the Kothi. This is the talk of night of 23.8.2001. We purchased six pastries from the shop of Hisar for home. We, the three ate two pastries on the shop itself.
>
> This fact is further supported by the statement of Ishwar Singh, PW.30, who in his testimony has stated that on 23.8.2001 he had seen A-1 along with her sister and one another person between 9-9.30 p.m. purchasing fruits from a rehri at Barwala and that person was Sanjiv whom he has identified in Court. The trial court as well as the High Court have relied on the evidence of PW.12 and PW.30 after giving cogent reasons therefor. In view of the evidence of PW.12 and PW.30 and the confession of A-1 [Ext. 187], we are of the view that the prosecution has been able to establish that A-2 accompanied A-1 to the place of occurrence in the night of 23rd August, 2001.
>
> Insofar as participation of A-2 in the crime along with A-1 is concerned, our attention has been drawn to a photograph in which deceased Shakuntala is lying dead on the floor with her mouth, hands and feet tied which is indicative of the fact that before she was killed, she had shown resistance and in order to overpower her, her mouth, hands and feet were tied. By no stretch of imagination it could be perceived that tying of mouth, hands and feet of a person could be possible by one person. It would not have been possible for A-1 alone to tie mouth, hands and feet herself which further establishes the fact of presence of A-2 at the place of occurrence and his having participated in the crime along with A-1. This is the second circumstance in the chain which stands established and points a finger towards none other than A-2 of his having participated in the crime with A-1.

We now turn to the third circumstance and i.e., A-2's clandestine exit from the place of occurrence. We once again turn to the judicial confession made by A-1 to PW.62 wherein she has admitted having left the place of occurrence in the morning of 24th August and returning to it after half an hour, which fact stands proved from the statements of PWs.57 and 58 as well. Head Constable Dharam Singh, PW.46, who was on patrolling duty at Surewala Chowk, has also stated in his testimony that he saw A-1 driving Tata Sumo at a very fast speed and going towards Narwana Chowk. There was no reason for A-1 to leave the place of occurrence in the morning of 24th August after having taken a decision to end her life by consuming poison. Her leaving the place of occurrence and coming back after half an hour to that very place lends further support to the evidence of PWs. 57 and 58. That she initially thought of ending her life in accident and that is why she left the place of occurrence in the morning in Tata Sumo and having decided against it on the way and returned to the place of occurrence after half an hour does not inspire confidence at all. Therefore, in the absence of any infirmity in the evidence of PWs. 57, 58 and 46, which evidence is supported by none other than A-1 in her judicial confession made to PW.62, the third circumstance stands also proved by the prosecution. In order to establish that A-1 had left the place of occurrence in the morning to take A-2 out therefrom in a clandestine way and leave her at a sufficient distance so as to be not seen by anyone, we have also been taken through the evidence of Head Constable Dharambir Singh [PW 46], conductor Jai Singh [PW.39], Rajesh Kumar [PW.55], Jai Dev Hans, [PW 45], Rajinder Parshad [PW 43] and K.A. Khan [PW 3]. PW. 46 in his testimony has stated that while he was on patrolling duty at Surewala Chock, he saw A-1 driving a vehicle at a very fast speed coming from Barwala side and going towards Narwana Chowk. PW.39, who was the conductor of the bus that was plying on Hisar to Yamuna Nagar route, in his testimony, has stated that on 24th August, 2001 Bus No. HR 39/7090 started its journey from Hisar at 5 A.M. and that when it reached near Jajanwala, A-2, who was wearing pant and bushirt with a bag in his hand, boarded the bus and that he took the ticket from him for Kaithal. He has further stated that A-2 alighted from the bus at Kaithal. A-2 has been identified by this witness in Court. Rajesh Kumar, PW.55, a taxi driver, in his testimony has stated that on

24.8.2001 when he was at the taxi stand at Kaithal, A-2 hired his taxi at 7.30 a.m. for going to Panipat and that at that time he was carrying a bag on his shoulder. He has further stated that on the way A-2 got down from the Taxi at Jaidev STD Booth at Kaithal to make a call to Saharanpur and that after making the call he boarded the taxi again and was dropped by him at Panipat. PW.45, who owned STD Booth at Kaithal, in his deposition has confirmed the factum of A-2 having made a telephone call from his STD booth on the morning of 24th August at Saharanpur on telephone No. 729285. He has also identified A-2 in Court. That A-2 made a call at 7.20 a.m. on 24th August from the STD Booth of PW.45 on telephone No. 0132-729285 has been confirmed by PW.43 Rajinder Parshad, SDE of Telephone Exchange, Kaithal, on the basis of list of outgoing telephone calls made from the said STD Booth in his testimony. K.A. Khan, Divisional Engineer, Telephones, at Saharanpur, in his testimony has stated that telephone No. 729285 on which A-2 made call from Kaithal stands in the name of Sanjiv Kumar. Analysis of evidence of the aforesaid witnesses leads to

only one conclusion that A-1 had left the place of occurrence in the morning of 24th August along with A-2 so as to provide him a safe exit and to give a slip to the prosecution. This is the fourth circumstance that the prosecution has been able to establish.

The fifth and the last circumstance in the chain on which the prosecution has relied is the recovery of ash of the bloodstained clothes of A-1 and A-2 which were burnt by A-2 and chain and two buttons of the bag he was carrying to which we now advert. During interrogation, A-2 disclosed that after the occurrence his and A-1's bloodstained clothes were put by him in a plastic bag and those were burnt by him in the fields near village Bhainswal. The police party thereafter was taken to the place where A-2 had burnt his and A-1's bloodstained cloths and plastic bag from where the police team recovered the ash, chain and two buttons of the burnt plastic bag. The fact that A-2 was carrying a bag in his hand on 24th August, 2001 finds mention in the statements of PWs. 39 and 55. Therefore, in view of the recovery of ash of the bloodstained clothes and that of the bag at the instance of A-2, in our view, the prosecution has been able to establish this last link also in the chain of circumstances. We now turn to the extra-judicial confession made by A-2 to Sunder Singh, PW.48, which, in the submission of learned counsel appearing on behalf of the accused, having been made to a stranger, cannot be relied upon. PW.48 Sunder Singh, in his testimony, has stated that on receiving a message from Brahm Singh, cousin of A-1's mother, on 17.9.2001, he went to Shamli and met Brahm Singh, who told him that Relu Ram and his family have been killed by both A-1 and A-2. After some time, A-2 also reached there and told PW.48 that he and his wife have killed the entire Relu Ram family with iron rod and the reason given for committing the crime was that Relu Ram was not parting with the share of A-1 in the property. A- 2 also told PW.48 about his clandestine entry to and exit from the place of occurrence. On a suggestion made by PW.48 to A- 2 to surrender before the police, A-2 promised him that he would come on 19th September, 2001. PW.48 thereafter informed the police about the incident on 17th September itself. On 19th September, 2001 Brahm Singh and PW.48 produced A-2 at PWD Rest House, Panipat before DSP Mahender Singh and he was arrested. PW. 48, in his testimony, has stated that A-2 himself told him about his clandestine ingress to and egress from the Kothi at Litani Mor by hiding himself in the middle seat of the vehicle and that he was dropped by A-1 at Village Jajanwala on Narwana Road in the morning. The confession made to PW.48 is supported by the fact that the weapon used in the crime i.e., tractor rod, mention of which has been made by A-2 in his confession to PW.48, was found on the bed of A-1 and on the disclosure statement made by A-2 to the police, the ash of the bloodstained clothes of his and A-1 and that of the bag containing the said clothes was also recovered. Learned counsel appearing on behalf of the accused has submitted that PW.48 being a stranger to A-2 and Brahm Singh, who was not examined by the prosecution on the pretext of having been won over, having been remotely connected to PW.48 no reliance should be placed on the confession made by A-2 before PW.48. In our view, the submission has been made only to be rejected for the reason that in his testimony PW.48 has stated that he had attended the betrothal ceremony and marriage of A-2. Therefore, question of his being stranger to A-2 does not arise. However, it is well settled by a catena of decisions rendered by this Court that extra-judicial confession made even to a stranger cannot be eschewed from consideration if it is found to have been truthful and voluntarily made before a person who has no reason to state falsely. In the case of Gura Singh vs. State of Rajasthan, (2001) 2 SCC 205, the evidentiary value to be attached to the extra-judicial confession has been explained at page 212 thus:-

"It is settled position of law that extra-judicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Relying upon an earlier judgment in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322, this Court again in Maghar Singh v. State of Punjab, (1975) 4 SCC 234, held that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the confession was true and voluntarily made, then the conviction can be founded on such evidence alone. In Narayan Singh v. State of M.P., (1985) 4 SCC 26, this Court cautioned that it is not open to the court trying the criminal case to start with a presumption that extra-judicial confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extra-judicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession. In Kishore Chand v. State of H.P., (1991) 1 SCC 286, this Court held that an unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion, and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26. The Court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinized. To the same effect is the judgment in Baldev Raj v. State of Haryana, AIR 1991 SC 37. After referring to the judgment in Piara Singh v. State of Punjab, (1977) 4 SCC 452 this Court in Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204 held that the extra-judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."

Examined in the light of the enunciation of law as above, we are of the view that the testimony of PW.48 as regards the confession made by A-2 is such as to inspire confidence in our minds. Indisputably, extra-judicial confession was made by A- 2 to PW.48 prior to his arrest by the police and, therefore, question of it being made under any inducement, threat or promise does not arise. Moreover, there was absolutely no reason for PW 48 to unnecessarily implicate the accused, as he

had no animus against him.

In view of our above discussion, we see no reason to disbelieve the evidence of PW.48 and hold that A-2 made extra-judicial confession which is voluntary and truthful. Insofar as motive qua the crime committed is concerned, it is clearly borne out from the factual matrix of the case on hand that both the accused had an eye on the property of deceased, Relu Ram, which was in crores and in order to gain full control over the property and to deprive deceased Relu Ram from giving it to anybody else, both the accused persons have eliminated his whole family. We have been taken through the extra-judicial confession made by A-2 to PW. 48 wherein he has indicated that as deceased Relu Ram was not parting with the share of A-1 in the property, both A-1 and A-2 together have done to death his whole family. Therefore, the motive qua the crime committed stands proved in the present case.

We now turn to the extra-judicial confession made by A-2 before Rajni Gandhi, PW.17, wherein also A-2 stated that he and A-1 had murdered the deceased persons.

Indisputably, the extra-judicial confession that A-2 has made to PW.17 on 24th and 25th September, 2001 was made while he was in police custody, having been arrested on 19.9.2001. It is apt to reproduce the relevant portion of the statement made by PW.17 in her deposition which is to the following effect:

> " . On 24.9.2001 police brought Sanjeev Kumar . for lie detection test. After that myself and Sanjeev Kumar accused conversed with each other in a room/library of the FSL Madhuban. Police went away at that time. After completing the formalities that is of consent etc., I called for the police to take both the persons for lunch as by that time, lunch interval has started and it was necessary for a person not to be hungry while going through the lie detection test. . When Sanjeev Kumar was taken by the police for lunch on 24.9.2001, he was again brought after lunch interval. Then Sanjeev Kumar was put on polygraph machine. Lie Detection test continued for one and a half hour. During that process, Sanjeev Kumar used to stop his breathe voluntarily and on that account, Lie Detection Test could not be made on that day. I asked Sanjeev Kumar as to why he was doing, he told me that he was purposely doing it. Thereafter Sanjeev Kumar was brought before me on 25.9.2001 because on that day it was not possible to go through the lie detection test .. On 25.9.2001 Sanjeev Kumar was brought by the police at 9.30 a.m. in the office of FSL ".

The above statement of PW.17, therefore, clearly depicts that A-2 was brought by the police to Forensic Science Laboratory [FSL], Madhuban, for the lie detection test on 24.9.2001 and when she conversed with him the police party went away. On her saying, A-2 was taken by the police for lunch and thereafter brought back to the FSL. As Lie Detection Test [LDT] was not possible on 24th September, A-2 was again brought to FSL by the police on 25th September on which day the LDT was conducted.

Learned counsel appearing on behalf of the accused submits that temporary disappearance of the police from the scene leaving the accused in charge of a private individual does not terminate his custody and, therefore, the extra- judicial confession made by A-2 to PW.17 having been made in police custody is inadmissible as it is hit by Section 26 of the Evidence Act which provides that any confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall not be proved as against such person. In support of his submission, reliance has been placed on Kishore Chand vs. State of H.P [(1991) 1 SCC 286].

In Kishore Chand [supra], the question that arose before this Court was whether extra-judicial confession made by an accused to a Village Pradhan, in the company of whom the accused was left by the police officer after apprehending him, could be said to have been made while in police custody. While answering the question in the affirmative, a 2-Judge Bench of this Court at page 295 held as under:-

> "The question, therefore, is whether the appellant made the extra-judicial confession while he was in the police custody. It is incredible to believe that the police officer, PW.27, after having got identified the appellant by PW.7 and PW.8 as the one last seen in the company of the deceased would have left the appellant without taking him into custody .. Therefore, it would be legitimate to conclude that the appellant was taken into the police custody and while the accused was in the custody, the extra-judicial confession was obtained through PW.10....".

Indisputably, A-2 was arrested on 19th September, 2001 and on 24th and 25th September when he was taken for the LDT he was in police custody and it was at that point of time he made extra-judicial confession to PW.17 at which point of time police personnel went away from the scene temporarily. Therefore, in the light of the decision rendered in Kishore Chand [supra], we are of the opinion that extra-judicial confession made by A-2 to PW.17 is hit by Section 26 of the Evidence Act, it having been made by A-2 while in police custody and, consequently, cannot be admitted into evidence and, therefore, has to be eschewed from consideration. However, even the exclusion of extra-judicial confession made by A-2 before PW.17 would be of no help to this accused as we are of the view that the prosecution has succeeded in proving its case beyond reasonable doubts against A-2 on the basis of circumstantial evidence enumerated above as well as extra- judicial confession made by A-2 before PW.48. Insofar as the Polygraph [Lie Detection] Test which was conducted on A-2 is concerned, Mr. Sushil Kumar submits that since polygraph evidence is not subject of expert evidence as per Sec. 45 of Evidence Act being a science in mystique, it could at best be used as an aid to investigation and not as an evidence. In support of his submission, he has relied on Romeo Phillion and Her Majesty The Queen, (1978) 1 SCR 18 and R. v. Beland, (1987) 2 SCR 398, which are decisions rendered by the Canadian Supreme Court, and on Mallard v. Queen, 2003 WASCA 296, a decision of the Australian Supreme Court. Mr. Tulsi, on the other hand, submits that the result of Polygraph Test can be used against the accused. As there are other materials sufficient for upholding conviction of A-2, we refrain ourselves from going into the question of admissibility or otherwise of the result of Polygraph Test in the present case.

Having held that both A-1 and A-2 are guilty of murder of deceased Relu Ram and his family and that their conviction under Section 302 read with Section 34 and Section 120-B and other provisions inflicted upon them by both the courts below does not call for any interference by this Court, we now proceed to decide whether the instant case is one of rarest of rare cases warranting death sentence, as has been held by the trial court to be one, or the one in which sentence of life imprisonment would be appropriate, as has been held by the High Court while commuting the sentence of death to life imprisonment.

Learned counsel appearing on behalf of the accused submitted that the present case cannot be said to be rarest of the rare one so as to justify imposition of extreme penalty of death. This question has been examined by this Court times without number. In the case of Bachan Singh v. State of Punjab, [1980] 2 SCC 684, before a Constitution Bench of this Court validity of the provision for death penalty was challenged on the ground that the same was violative of Articles 19 and 21 of the Constitution and while repelling the contention, the Court laid down the scope of exercise of power to award death sentence and the meaning of the expression `rarest of the rare' so as to justify extreme penalty of death and considered that Clauses (1) and (2) of Article 6 of the International Covenant on Civil and Political Rights to which India has acceded in 1979 do not abolish or prohibit the imposition of death penalty in all circumstances. All that they required is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ex post facto legislation. The Penal Code prescribes death penalty as an alternative punishment only for heinous crimes, which are not more than seven in number. Section 354(3) of the Criminal Procedure Code, 1973 in keeping with the spirit of the International Covenant, has further restricted the area of death penalty. Now according to this changed legislative policy, which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist. Judges should never be bloodthirsty. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception.

In the case of Machhi Singh v. State of Punjab, (1983) 3 SCC 470, a 3-Judge Bench of this Court following the decision in Bachan Singh (supra), observed that in rarest of rare cases when 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. The community may entertain such a sentiment in the following

circumstances:

> I. 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. For instance,
>
> (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death; and (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) hired assassin commits murder for the sake of money or reward or (b) a cold-

blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murdered is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances etc., which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of 'bride burning' and what are known as '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.

IV. 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.

V. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In the said case, the Court further observed that in this background the guidelines indicated in the case of Bachan Singh (supra) will have to be culled out and applied to the facts of each individual case and where the question of imposing death sentence arises, the following proposition emerge from the case of Bachan Singh (supra):-

(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. In other words 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.

(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.

The Court thereafter observed that in order to apply these guidelines the following questions may be answered:-

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

Ultimately, in the said case of Machhi Singh (supra), the Court observed that if upon an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so.

In the light of the law already laid down by this Court referred to above, now this Court is called upon to consider whether the present case would come within the realm of the rarest of the rare or not.

The instant case is one wherein accused Sonia, along with accused Sanjiv [her husband] has not only put an end to the lives of her step brother and his whole family, which included three tiny tots of 45 days, 2-1/2 years and 4 years, but also her own father, mother and sister in a very diabolic manner so as to deprive her father from giving the property to her step brother and his family. The fact that murders in question were committed in such a diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims. The brutality of the act is

amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mind set which can be amenable for any reformation. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so. In view of these facts we are of the view that there would be failure of justice in case death sentence is not awarded in the present case as the same undoubtedly falls within the category of rarest of rare cases and the High Court was not justified in commuting death sentence into life imprisonment. In the result Criminal Appeal No. 142 of 2006 filed by the accused persons is dismissed whereas Criminal Appeal No. 895 of 2005 filed by private prosecutor and Criminal Appeal No. 894 of 2005 filed by the State of Haryana are allowed, order passed by the High Court commuting death sentence into life imprisonment is set aside and order of the trial court awarding death sentence is restored.