

officer of the Bank. The nature of evidence would also be similar in both the proceedings, though the standard of proof may indeed be different. In the criminal trial, standard of proof would be stricter. The matter involves the questions of facts as well as law. FIR was lodged on 31st October, 1995 whereas charge sheet in the disciplinary proceedings has been served on the petitioner on 18th December, 1997. In these circumstances, it is found appropriate that the disciplinary proceedings may await the outcome of the criminal case. The petitioner should not be asked to face two indetical proceedings involving same facts and allegations. The questions to be decided in both the proceedings appear to be almost similar. In these circumstances, it would be just and fair to stay the disciplinary proceedings till the conclusion of the criminal trial.

(12) In the result, the writ petition is allowed. The disciplinary proceedings against the petitioner shall remain stayed till the conclusion of the criminal trial. No costs.

S.C.K.

Before Jawahar Lal Gupta and V. M. Jain, JJ.

STATE OF HARYANA,—Petitioner

versus

RAM KISHAN,—Accused/Respondent

Murder Reference No. 2 of 1998

17th December, 1999

Indian Penal Code, 1860—S. 302—Arms Act, 1959—Ss. 25 and 27—Trial Court awarding death penalty to accused for killing five unarmed and innocent members of a family including a pregnant woman—Cruel and callous crime—No unreasonable or unexplained delay in lodging F.I.R.—Recovery of gun from the accused without licence which was used for crime—Case of prosecution duly established—Appeal dismissed—Death sentence confirmed—Conviction of co-accused also upheld.

Held, that motive is usually a double edged weapon. If a person has a motive to kill, the other side may have a motive to falsely implicate. However, in the present case, it is clear that Ram Kishan had a reason to be offended with the complainant side. He had taken the extreme step of virtually wiping out the entire family. We find nothing to suggest that the complainant side had any reason to leave out the culprit or to falsely implicate Ram Kishan.

(Para 25)

Further held, that it may be that each injury has not been graphically described. But we cannot forget that human memory has limitations. Equally, even the perception of events cannot be photographic. When an incident is described, some details may be forgotten and some may be ignored as being unnecessary. However, on a later date, one can recapitulate the sequence of events and narrate it. Minor variations may actually be indicative of truthfulness rather than falsehood.

(Para 41)

Further held, that Ram Kishan had taken the lives of five members of a family, parents, brother, Bhabhi and wife of the complainant, who was carrying a pregnancy of 6 to 7 months. There was no provocation. There was no justification. It was the act of a sick mind. Innocent lives were taken away in a cruel and callous manner. Even helpless, old persons as also the ladies were not spared. Accused showed no compassion. He deserves none.

(Para 43)

Further held, that award of death penalty is rare. However, it is equally important that men like Ram Kishan are not allowed to perpetrate callous crime on innocent and unarmed persons. Moreso, in case of the old and helpless ladies. We find no mitigating circumstances so as to justify any mercy. Thus, the death sentence awarded to Ram Kishan is confirmed.

(Para 44)

Amarjit Singh, Addl. A.G. Haryana with Vishal Sharma, Advocate,
for the petitioner.

R.N. Kush, Advocate, *for the respondent.*

JUDGEMENT

Jawahar Lal Gupta, J.

(1) Three persons viz. Ram Kishan, Moman and Munna were tried for having murdered Risal Singh, his wife—Jadao Devi, his son—Om Parkash and two daughters-in-law Smt. Darshana and Smt. Bala. The trial court has found Ram Kishan guilty under Section 302 IPC and Section 27 of the Arms Act, 1959. He has been sentenced to death under Section 302 IPC and for three years R.I. under section 27 of the Arms Act. Munna has been found guilty under section 302/34 IPC and has been awarded life imprisonment with a fine of Rs. 5000. Moman has been acquitted under Section 120 B IPC and Section 30 of the

Arms Act. Ram Kishan and Moman have, however been convicted under Section 25 and 29 of the Arms Act respectively.

(2) We have five cases before us. The Murder Reference No. 2 of 1998, Criminal Appeal No. 188-DB of 1998 and Criminal Revision No. 722 of 1998 arise out of the decision in the main Murder Case. The other two viz. Criminal Appeal Nos. 189-DB and 325-SB of 1998 arise out of the judgement under the Arms Act, 1959. Since the basic incident out of which all the five cases arise is one, these can be disposed of by a common order. The relevant facts may be briefly noticed.

(3) Risal Singh, one of the deceased and Chhaju Ram are brothers. Ram Murti—the complainant and Om Parkash, another one of the deceased are the sons of Risal Singh. Jadao Devi is his wife. Smt. Bala—the deceased who was carrying a foetus of 6/7 months is the wife of Ram Murti—the complainant. Smt. Darshana—the deceased was the wife of Om Parkash. Chhaju Ram has three sons—Ram Kishan (accused) Pardeep and Dalbir.

(4) The two brothers (Risal Singh and Chhaju Ram) had adjoining fields. Risal Singh owned about seven and a half acres of land. He was living with his sons. They had constructed their 'Dhani' (farm house) in the field. They had also installed a tube-well about one and a half years prior to the date of occurrence viz. 2nd March, 1995. The sons of Chhaju Ram had started installing a tube-well in their field. They had chosen a site which was close to the tube-well of the complainant. They were asked by the complainant to shift the site. Having failed to persuade, they had approached the civil court at Hisar and got a stay order on 1st March, 1995. Despite that, Pardeep and Dalbir had continued digging the tube-well. On 2nd March, 1995, Om Parkash lodged a report against Pardeep etc. with the police. The proceedings were initiated. The two brothers—Pardeep and Dalbir were arrested.

(5) The first version of the prosecution's case was given by Ram Murti. It was alleged that on the night of 2nd March, 1995, Risal Singh, his wife—Jadao Devi, Om Parkash and his wife—Smt. Darshana as also Smt. Bala wife of Ram Murti and her brother Shamsheer were present in the 'Dhani'. Three children below the age of two and a half years were also there. At about 10.30 PM, Ram Kishan armed with a .12 bore single barrel gun came to the 'Dhani'. He was accompanied by accused—Munna. Ram Kishan gave a *lalkara* and threatened to finish the whole family. Om Parkash who was in the *veranda* came out. Ram Kishan fired at him. He fell down. Ram Kishan then fired at Risal Singh. Munna ensured that the women did not come out of the room. Ram Kishan fired at Jadao Devi and the other two ladies. While Ram

Kishan was firing, the complainant—Ram Murti alongwith his brother-in-law—Shamsher were watching the events from behind the trees in the wheat field. They had not moved on account of fear. At dawn in the morning, Ram Murti left his brother-in-law—Shamsher with the dead bodies and went to the Police Station to lodge the report. At 8.30 A.M., Inspector—Rajinder Singh, SHO, Police Station, Sadar, Hisar, recorded the statement of Ram Murti—the complainant. On the basis of the statement, FIR Ex. PK was recorded. After registering the case, Inspector Rajinder Singh alongwith others had left the Police Station at about 9.30 AM. The police party reached the 'Dhani' of Ram Murti in two vehicles at about 10 AM. The crime van reached the site of the occurrence at 10.15 AM. Constable Mian Singh took photographs. These are Ex. P1 to P18. Head Constable—Karnail Singh took the bunch of hair from the left hand of Smt. Bala—deceased. These were sealed into a parcel,—*vide* recovery memo Ex. PT. The seal was given to Karnail Singh. Inspector Rajinder Singh prepared the rough side plan which is Ex. PV. He also lifted blood stained earth from places near the dead bodies. The memo is Ex. PL. Seven empties were also lifted and taken into possession,—*vide* recovery memo Ex. PL/1. Some wads and pellets were taken into possession,—*vide* recovery memo Ex. PL/2. A blood stained brick which was lying near the dead body of Om Parkas (Ex. P52) was taken into possession,—*vide* recovery memo Ex. PL/3. Broken bangles (Ex.P61) were taken into possession,—*vide* memo Ex. PL/4. A blood stained wrist watch removed from the hand of Om Parkash was taken into possession,—*vide* recovery memo Ex.PL/5. All the parcels were sealed. The memos were attested by Ram Murti and Telu Ram, Chowkidar.

(6) Inspector Rajinder Singh prepared the inquest reports. He also sent the dead bodies to the General Hospital, Hisar in a tractor. The complainant—Ram Murti, Telu Ram, Chowkidar and five constables had accompanied these bodies. Applications for post-mortem were submitted.

(7) On 8th March, 1995, all the three accused were arrested from Bir Babran near village Talwandi Rana. On disclosure statement Ex. PU having been made, the gun Ex. P82, the licence Ex. P83, Bandolier Ex.P84 and two light cartridges Ex.P85 and P86 were taken into possession,—*vide* memo Ex. PU/2.

(8) After investigation, the case was filed in court. As already noticed, the trial court found Ram Kishan and Munna guilty. Moman was acquitted.

(9) Mr. R.N. Kush, learned counsel for the appellants contended that there was delay in lodging the FIR. The story as given by the

prosecution was improbable. The alleged eye witness—Shamsher Singh was not present. The medical evidence does not support the ocular version. Appellant—Munna had no reason to be present. No role had been attributed to him. Section 34 was not attracted. Lastly, it was contended that no case for awarding the death sentence to Ram Kishan was made out.

(10) The claim made on behalf of the appellants was controverted by the counsel for the State of Haryana and the complainant. It was contended that the trial court had taken a rather lenient view.

(11) In Criminal Appeal No. 325-SB of 1998, it was submitted that the sentence already undergone would meet the ends of justice.

(12) The questions that arise for consideration are :—

- (i) Is there an undue delay in lodging the FIR ?
- (ii) Is the prosecution story improbable and, thus, unworthy of credence ?
- (iii) Does the medical evidence belie the story of the prosecution ?
- (iv) Are there any mitigating circumstances so as to warrant the award of a penalty less than death to Ram Kishan ?
- (v) Can the conviction of Munna be upheld ?

(13) Before proceeding to consider these questions, it may be briefly noticed that the prosecution has produced a total of 14 witnesses. The medical evidence consists of the testimony of PW5—Dr. J. S. Bhatia, PW9—Dr. KL Juggal and PW10—Dr. Surender Singh. The two eye witnesses are Ram Murti (PW7) and Shamsher Singh (PW8). Inspector Rajinder Singh is the Investigating Officer. Reference to the evidence of these and other witnesses shall be made at the appropriate stage. The documentary evidence shall also be considered wherever relevant.

(14) The questions as posed above may now be considered.

Reg. : (i) Is there an undue delay in lodging the FIR ?

(15) Mr. Kush contended that the occurrence had allegedly taken place at 10.30 PM on 2nd March, 1995. The FIR was lodged on the next day. There was an unexplained delay of about 9 hours. This time was utilised by the prosecution to cook up the story and to falsely implicate the accused persons. Is it so ?

(16) Ram Murti is the complainant. He had made statement before Inspector Rajinder Singh. It was on the basis of this statement that the case was registered. Ram Murti has given the sequence of events. There is a graphic description of the manner in which Ram Kishan had killed his parents, brother, Bhabi and his wife who was carrying a foetus of 6/7 months. He was honest enough to confess that he as well as his brother-in-law "took shelter behind the trees in the wheat field in order to save" themselves. It was only after Ram Kishan and Munna had left that he alongwith his brother-in-law—Shamsher Singh had "entered the Dhani" and found that his mother, father, brother, wife and brother's wife were lying dead. His statement does not end here. He has added that he "did not come to the police station during the night out of fear. Now at day dawn, I have come to the police station to lodge a report after leaving my brother-in-law (wife's brother) Shamsher at the spot for guarding dead bodies". Thus, the complainant has given an explanation at the threshold. He has pointed out that he did not leave his house at night "out of fear".

(17) Another fact which deserves mention is that even though the complainant and his family had a house in the village abadi, they were living in the farm house (Dhani). Ram Murti had clearly admitted that they had a house in the village abadi. It was suggested to him that his "wife mostly lived in the house in the abadi". The suggestion was denied. He also stated during cross examination that the "Dhani is about 2 kms. from the village abadi.....". He had boarded the Bus from his village and "got down at Bus Stand, Hisar after 10-15 minutes. Police Station Sadar is 5-6 kms. from the Bus Stand". In this situation, it is clear that the police station was not close to the place of occurrence. It was not even near the village. Even by bus, it had taken the complainant about 15-20 minutes to reach the Bus Stand, Hisar. The Police Station is at a distance of 5-6 kms. from the Bus Stand. In other words, it would be safe to presume that the Police Station was atleast about 15 to 20 kms. from the 'Dhani'.

(18) The death of virtually all the family members would have shocked any one. We cannot doubt the statement of the complainant that he had not left the house on account of fear. The death of so many persons would have instilled a genuine fear in the mind of even the strongest person.

(19) The complainant has categorically asserted that the day had dawned at about 6 AM. After that he had left for the Police Station. He had reached at 8.30 AM. His statement was recorded. The case was registered. In the circumstances of the case, we are satisfied that there was no unreasonable or unexplained delay.

(20) It also deserves notice that in our villages, the means of transport are not easy. Ram Murti had to walk from his farm house to the village to board the bus. On reaching the Bus Stand at Hisar, he had taken a three-wheeler to reach the Police station. His statement was recorded at 8.30 AM. The special report had been delivered to the Judicial Magistrate, Hisar at 10 AM.

(21) The sequence of events militates against any suggestion of undue delay. Resultantly, the claim of the counsel for the appellants that there was an unexplained delay, cannot be accepted. The first question is, accordingly, answered in the negative.

Reg. (ii) Is the prosecution story improbable and, thus, unworthy of credence ?

(22) Mr. Kush contended that the prosecution story was improbable. Is it so ?

(23) The sequence of events has been briefly noticed. It may bear repetition. In a nutshell, the prosecution has suggested that Risal Singh and Chhaju Ram owned adjoining pieces of land. The complainant party had installed a tube-well about one and a half years prior to the date of occurrence. The family of Chhaju Ram was in the process of installing a tube-well close to that of the complainant. If this were done, it was likely that the water available to both the tube-wells may have been inadequate. The complainant party had, thus, justifiably objected. However, they had not taken the law into their own hands. They had filed a civil suit. They were granted an injunction. The sons of Chhaju Ram *viz.* Ram Kishan, Pardeep and Dalbir had continued digging the tube-well. Thereupon, the police was informed, Pardeep and Dalbir were taken into custody. This had offended Ram Kishan. He had, thus, shot down every one from the complainant party that he could lay his eyes on. It appears that he had chosen to teach the complainant party a lesson for their having approached the civil court and the police. The arrest of his brothers was a strong reason for him to wipe out the complainant party.

(24) Admittedly, Ram Murti and Ram Kishan are cousins. Even if it is assumed that they were not affectionately disposed towards each other, there is no evidence of any old litigation or enmity. Still further, it is evident that when Ram Kishan etc. had not listened to the request of the complainant party, they had not taken the law into their own hands. they had approached the court and obtained an injunction. Even thereafter, they had approached the police. We do not find any aberration in the conduct of the complainant. Still further, it is unlikely

that Ram Murti shall not name the person/s who had killed his parents, brother, Bhabi and pregnant wife. It is equally unlikely that he would like his cousin to be sent to gallows if he were innocent.

(25) It is true that motive is usually a double edged weapon. If a person has a motive to kill, the other side may have a motive to falsely implicate. However, in the present case, it is clear that Ram Kishan had a reason to be offended with the complainant side. He had taken the extreme step of virtually wiping out the entire family. However, we find nothing to suggest that the complainant side had any reason to leave out the real culprit or to falsely implicate Ram Kishan.

(26) It was contended that the case of the prosecution is improbable for it cannot be accepted that Ram Murti and Shamsher would not have intervened if they were actually present. Their failure to act indicates that they were not present. Is it so ?

(27) Ram Murti's presence alongwith his family was natural. It is also the admitted position that Ram Murti while lodging the FIR had specifically stated that Shamsher Singh—his brother-in-law had come to see his sister. His presence at the place of occurrence has been specifically asserted in the earliest version given by the complainant. Secondly, Ram Murti had appeared as PW7. Even during the course of cross examination, he had asserted that Shamsher "had come to our Dhani at 5 PM. From 5 PM till the occurrence, we all remained in the Dhani". The suggestion that he and Shamsher were not present was categorically denied. Still further, Shamsher had appeared as PW8. He had categorically asserted his presence. It was not disputed that his two sisters were married to Ram Murti and Om Parkash. It would be natural for him to visit them in the house of their inlaws. The statements made by the two witnesses do not arouse any suspicion in our mind regarding their presence.

(28) Mr. Kush, however, contended that the inaction of Ram Murti and Shamsher militates against their presence.

(29) We are unable to accept this contention. Both the witnesses have asserted that they were lying on a cot. They were unarmed. Om Parkash had been shot in their presence. They had saved their own lives by going behind the trees in the field.

(30) It may be that a daring person would have taken the bull by the horn. He may have pounced upon the accused and tried to save the members of the family at all costs. Even at the risk to his own life. However, individual reactions can vary from time to time and place to

place. Basically, self-preservation is a natural instinct. If it predominates in a case, it cannot be said that the conduct is wholly unnatural and, thus, unworthy of credence. Still further, the evidence on the record shows that one of the ladies had shown courage. Smt. Darshana had pulled the hair of Ram Kishan. A bunch was found in her hand. Yet, she was also done to death. Clearly, Ram Kishan had an advantage. He was armed with a gun. The complainant was empty handed. They were taken unawares. In such a situation, the mere fact that Ram Murti and Shamsheer did not intervene but chose to save their own lives cannot mean that they were not present at the place and time of occurrence.

(31) Mr. Kush contended that Shamsheer Singh was not found to be present at the place of occurrence when the police reached on 3rd March, 1995.

(32) It is undoubtedly so. However, Shamsheer Singh has explained the position. When he appeared as PW8, he categorically stated that "after Telu Ram, Chowkidar reached the Dhani, I left at about 8 AM for my village to inform my family members. I returned from my village at 5 PM when the police met me at Talwandi Rana Bus Stand. I made my statement to the police there". The conduct of the witness was natural. His two sisters and brother-in-law had been killed. He had to inform his family. He had been left at the spot to take care of the dead bodies. He had gone only after Telu Ram, Chowkidar had reached. Still further, the inquest report shows that when the police reached at the spot, Telu Ram was present. This fact was reiterated by Inspector Rajinder Singh (PW14) during the course of his testimony. He had asserted that "Telu Ram, Chowkidar, Umed Singh, Sarpanch and Dharam Pal, Ex-Sarpanch were found present at the spot near the dead bodies.....". Thus, it is established on the record that Shamsheer Singh had left the dead bodies only after Telu Ram had arrived. His conduct in leaving the place of occurrence was natural. He had good reason to go and inform his family about the tragedy. There was nothing unnatural or improbable about the events.

(33) In view of the above, we answer even the second question against the accused and hold that the eye witnesses were present and that the prosecution story is neither unnatural nor unbelievable.

Reg: (iii) Does the medical evidence belie the story of the prosecution ?

(34) It was contended that the medical evidence with regard to the injuries received by Om Parkash belies the prosecution story. Is it so ?

(35) Dr. KL Juggal (PW9) had conducted the post-mortem examination on the body of Om Parkash. He had found the following injuries :—

- “1. Wound measuring 5x1 cm. was present on the left parietal region, 5 cm lateral to the occiput. It was bone deep. Holes in the bone were seen. Margins of the wound were inverted and ragged, Dark collar abrasion was present around the wound.
- 2.A Triangular wound 3 x 2 x 1 cm. bone deep, was present on the left parietal bone, 9 cm. above the ear. Margins of the wound were inverted and ragged. Dark collar of abrasion was present. Clotted blood was also present in the wound and tissues.
3. Wound 5 x .8 cm. bone deep was present on the right side of forehead, 3 cm above the medio and aspect of eye brow. Clotted blood was present. Margins of the wound were ragged and inverted and dark coloured abrasion was present.
- 4 Wound 3 x 1 cm. bone deep, was present to 4nt on the scalp 3 cm. posterior to injury No. 3 Margins of the wound were inverted and ragged. Dark colour abrasion was present around the wound.
5. Wound 5 x 2.5 cm. irregular in shape, was present on the right front parietal region 6 cm. above the lateral aspect of right eye brow. Margins of the wound inverted and ragged. Underlying bone was badly fractured and bore a big hole measuring 2 x 2 cm. Clotted blood was present in the tissue.
6. Wound 4 x 2 cm. was present on the right occiput, near the occipital prominence. Margins were ragged and everted.
- 7 Nasal bone was fractured.

On Dissection :

Dissection of skull : All the four bones were fractured and fragments of bones were found embedded in the brain matter. All the meninges were torn and caranial cavity contained blood. Three pellets were removed from the brain tissue. Cutter wound measuring 8x5 cm. was present on fronto-lateral aspect of left hand and wrist joint. Base of the thumb was disrupted. Metacarpal bone of the index

finger was ruptured. Clotted blood was present in the wound. All the tendons, muscles and other tissues were badly ruptured. On the palmer aspect of the wound, margins were inverted whereas the lateral aspect, the margins were everted.

9. Multiple punctured wound numbering 12 were present on the right flank of abdomen at the level of right illiac bone in an area of 14 x 9 cm. Two wounds measured 2 x 3 cm. and 2 x 1.2 cm. whereas 10 wounds measured 3 x .3 cm. each. Margins were everted and ragged. Dark colour abrasion was also present around the wound. Contusion was also present in the area. On exploration of the wound, the right illiac bone was found fractured. Right illiac artery was torn. Small and large intestines were punctured at many sites. Whole of the lower part of abdominal cavity was full of blood. 5 pelletes were found in the abdominal cavity. 5 pallets were removed from the muscles of the right gluteal region.

10. Abrasion 2.5 x 0.8 cm was present on the right shin bone in middle."

(36) He had also opined that injury Nos. 1 to 4 and 9 were wound of entrances caused by fire arm.

(37) Mr. Kush contended that according to the evidence, the number of shots fired at Om Parkash had varied from 1 to 5. The number of injuries was 10. The injuries were also alleged to have been given by the brick. The actual injuries as found on post-mortem examination do not corroborate the oral testimony. Is it so ?

(38) In the FIR, it has been mentioned that "Ram Kishan.....fired a shot with the gun at my brother, Om Parkash as a result of which he fell down". During the course of his statement before the court, Ram Murti added that "while leaving the place of occurrence, Ram Kishan—accused gave 5-6 blows with brick on the head of my brother—Om Parkash". During cross-examination, the witness stated that "the first shot fired by Ram Kishan hit my brother Om Parkash on the abdomen and he fell down.....Ram Kishan had fired three shots at Om Parkash....." The witness also stated that the "first shot was fired by Ram Kishan from a distance of two feet from Om Parkash".

(39) The medical evidence clearly indicates the use of a fire arm. Dr. Juggal has stated in his cross-examination that injury Nos. 1 to 4 and 9 were wound of entrances caused by fire arm. He also stated that

he is "not a ballistic expert." He admitted that he could not "give pin-pointed answer to the question that injuries No. 1 to 4 were the result of separate shot. These injuries could be possible by different shots".

(40) The evidence on the record is clearly indicative of the fact that Ram Kishan had fired at Om Parkash and others. His presence has been conclusively established by not only the oral testimony but even the report from the Forensic Science Laboratory, Ex. PR. The hair which were taken from the left hand of deceased Bala Devi were sent to the Forensic Science Laboratory. According to the report, Ex. PR/1, the hair were compared with the sample Ex. P25. These were found to be human and "showed similarities in most of their morphological and microscopical characteristics".

(41) It may be that each injury has not been graphically described. But we cannot forget that human memory has limitations. Equally, even the perception of events cannot be photographic. When an incident is described, some details may be forgotten and some may be ignored as being unnecessary. However, on a later date, one can recapitulate the sequence of events and narrate it. Minor variations may actually be indicative of truthfulness rather than falsehood. In the present case, Ram Murti had suffered a grave tragedy. All his near and dear ones had been done to death. It would have been humanly impossible for him to have recapitulated the events with microscopic precision. In fact, any attempt to do that may have aroused suspicion. In the circumstances of the case, it appears to us that all the five had suffered gun shot injuries. These injuries were fatal. The evidence on record viz. the oral testimony, the medical evidence and the report from the Forensic Science Laboratory clearly establish that the injuries had been caused by Ram Kishan. These injuries were caused by him with the gun recovered at his instance. The case as made out by the prosecution is duly established. Minor discrepancies are only symbolic of the truthfulness of the statement made by the witnesses.

Reg. (iv) Are there any mitigating circumstances so as to warrant the award of a penalty less than death to Ram Kishan ?

(42) It was contended that Ram Kishan had minor children and a young wife. The extreme penalty of death should not be awarded to him. Is it so ?

(43) The trial court has found that Ram Kishan had taken the lives of Risal Singh, Jadao Devi, Om Parkash, Smt. Darshna and Smt. Bala. It is further apparent that Smt. Bala was carrying a pregnancy of 6 to 7 months. There was no provocation. There was no justification. It was the act of a sick mind. Innocent lives were taken away in a cruel

and callous manner. Even helpless, old persons as also the ladies were not spared. Ram Kishan showed no compassion. He deserves none.

(44) It is true that award of death penalty is rare. However, it is equally important that men like Ram Kishan are not allowed to perpetrate callous crime on innocent and unarmed persons. *Moreso*, in case of the old and helpless ladies. We find no mitigating circumstances so as to justify any mercy.

Reg. (v) Can the conviction of Munna be upheld ?

(45) Mr. Kush contended that Munna had no relation with the principal accused. He was empty handed. No definite role had been attributed to him. Thus, Section 34 cannot be invoked and that his conviction cannot be sustained. Is it so that no role been attributed to Munna ?

(46) In the FIR, it has been recorded that "Munna detained the women in the room and asked him (Ram Kishan) to hurry up as Ram Murti and his relatives had fled away. Hearing so Ram Kishan entered the room and fired shots at my mother, wife and my brother's wife who on receipt of gun shots fell down on the floor then and there. After firing shots, Ram Kishan and Munna fled towards the fields with the gun". This position was reiterated by Ram Murti during the course of his statement before the court. Thus, it cannot be said that no role had been assigned to Munna. His active participation is clearly established. Thus, the view taken by the trial court calls for no interference.

(47) In view of the above, all the five questions are answered against the appellants.

(48) This leaves an ancillary matter for considerations. Criminal Appeal Nos. 189-DB and 325-SB of 1998 have been filed to challenge the order of conviction under the Arms Act, 1959. So far as Ram Kishan is concerned, it is established that he was in possession of a gun for which he had no licence. In fact, the gun belonged to Moman. He was, thus, in unauthorised possession of the weapon. This weapon, as has been found above, was used by him. Thus, the charge under Section 25 is also clearly established against him. So far as Moman is concerned, he was charged under Sections 29 and 30 of the Arms Act. He was acquitted of the charge under Section 30. Despite that, the evidence on record clearly shows that he had parted with his weapon and given it to Ram Kishan. he would, thus, clearly fall within the mischief of Section 29.

(49) Mr. Ajai Lamba who appeared for Moman in Criminal Appeal No. 325-SB of 1998 pointed out that he had remained in custody from

8th March, 1995 to 13th February, 1996 when he was released on bail. Thus, he had already undergone more than 11 months of substantive imprisonment. He prayed that he may be let off with the imprisonment already undergone by him under Section 29. In the circumstances of the case, his conviction is upheld. We are satisfied that ends of justice would be met if he is let off with the sentence already undergone by him. Ordered accordingly.

(50) In view of the above, Murder Reference No. 2 of 1998 is accepted and the death sentence awarded to Ram Kishan is confirmed. Criminal Appeal Nos. 188-DB, 189-DB of 1998 and Criminal Revision No. 722 of 1998 are dismissed. Criminal Appeal No. 325-SB of 1998 is partly allowed in respect of the sentence. Otherwise, the conviction is up-held.

S.C.K.

Before S.S. Sudhalkar, J.

SMT. RAMA ALIAS RAM KALA,—Appellant

versus

ANIL KUMAR JOSHI,—Respondent

F.A.O. No. 1142 of 1999

29th October, 1999

Hindu Marriage Act, 1955—Guardian and Wards Act, 1890—Ss. 10 and 25—Wife remarried after divorce—At the time of divorce, custody of children handed over to the husband—After one year, wife filed petition for custody of her minor child inter alia on the ground that the respondent does not have financial capacity to maintain the minor—Before trial Court children refused to go with the mother—Whether better economic position should be the paramount consideration in deciding the custody of the minor—Held, no—Trial Court's order upheld with liberty to mother to file petition in future if minor wishes to go with her.

Held, that remarriage does not disentitle from having custody of the children from the earlier marriage. However, it can be seen that in the case in hand, the appellant had given the custody of the minor to the respondent when she took the divorce. Now she wants the custody. She can be satisfied that she can bring up the minor in a better economic position than her prior husband. However, better economic position