

Patna High Court
Ram Chandra Mahto vs State Of Bihar on 7 April, 2010
Author: C.M.Prasad

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DEATH REFERANC No.16 OF 2008

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Reference made under Section 366 of the Code of Criminal Procedure by Additional Sessions Judge-cum-Presiding Officer, Fast Track Court No.V,Patna, by his letter No.427 of 2008 dated 20.9.2008 in connection with S. T. Case No. 188 of 2007.

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STATE OF BIHAR State
Versus
SHANKAR KANU @ SHANKAR SAO Condemned prisoner
With
CR. APP (DB) No.1224 of 2008
Against the judgment and order dated 18.9.2008
passed by the Additional Sessions Judge-cum-Presiding
Officer, Fast Track Court No.V, Patna in S.T. No.188
of 2007.

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RAM CHANDRA MAHTO Appellant
Versus
THE STATE OF BIHAR Respondent

With CR. APP (DB) No.1265 of 2008 SHANKER KANU @ SHANKER SAO Appellant Versus
THE STATE OF BIHAR Respondent With CR. APP (DB) No.1302 of 2008

1. ANIL URAON

2. Manohar Kumar

3. Ashish KLumar Rai Appellants Versus THE STATE OF BIHAR Respondent For the
Reference & the: Shri Ashwini Kumar Sinha,A.P.P. Respondent(in the three appeals) For the
appellants: Shri Kanhaiya Prasad Singh,Sr. Adv. (in three appeals) Shri Uday Kumar Singh,Adv.

P R E S E N T THE HON'BLE SHRI JUSTICE C.M.PRASAD THE HON'BLE SHRI JUSTICE
DHARNIDHAR JHA

Dharnidhar Jha, J.- The above noted Death Reference along with three appeals arise out of the
Judgment of conviction dated 18th of September, 2008, passed by the learned Additional Sessions
Judge-cum-Presiding Officer, Fast Track Court No.V, Patna, in Sessions Trial No.188 of 2007. They

have been heard together and are being disposed of by the present common judgment.

While holding the appellants guilty of committing offences under Sections 396 and 412 of the Indian Penal Code by the above order of conviction the learned trial Judge heard the appellants on sentence on 19.9.2008 and awarded sentence of death to appellant Shankar Kanu alias Shankar Sao. The sentence of rigorous imprisonment for life was awarded to appellants Anil Uraon, Manohar Kumar and Ashish Kumar Rai for their respective convictions under Section 396 of the Indian Penal Code. They were also directed to pay fine of Rs. 5,000/- each and in default in paying the fine were directed to suffer further R.I. for six months each. The learned Judge did not pass any separate sentence under Section 412 against any of the above noted appellants. As regards appellant Ram Chandra Mahto, he had been convicted for the charge under Section 414 of the Penal Code and he was directed to suffer rigorous imprisonment for two years for committing that particular offence. Awarding sentence of death to Shankar Kanu alias Shankar Sao necessitated submission of the records of the trial court to this Court under Section 366 Cr.P.C. and, as such, the above noted death reference. Besides, appellant Shankar Kanu alias Shnakar Sao also preferred his appeal with other appellants.

2. The facts of the case as per the F.I.R. and the evidence of witnesses are as follows:-

The deceased Papiya Ghosh was an academician, teaching History in one of the premier institutions of Patna, the capital city of Bihar, namely, Patna Women's College. She was a Bachelor, but was residing in a very big house. Her parents, it appears, had earned huge fortunes and different plots of land were acquired by them in the posh area of the city, known as Patliputra Colony. The house in which the deceased was living was house No.168 in the Colony. The other house bearing No.168A of the locality was situated just by the side of the house in which she was living. It appears from the evidence that a maid servant, namely, Malti Devi was accompanying Papiya Ghosh since her very childhood who was working in the household on account of being employed by her parents and she was residing in a separate room in the same house. Papiya Ghosh had authored many books and was living a comfortable life. Her household was fitted with many modern electronic gadgets.

3. It appears, things were normal in the night intervening 2nd/3rd December, 2006 and both Papiya Ghosh and her maid servant retired to their beds after meals. No one knew what happened in the dead of night. There was no movement of a soul till the morning of 3.12.2006 when another maid servant, namely, Geeta Devi, P.W.5) came there to perform her course around 7-7.15 A.M. She came shouting to P.W. 1 Neeta Aditya to tell her that in spite of having pushed the call bell, there was no response from inside.

4. P.W.1 Neeta Aditya could say that she and others of her family thought that Papiya Ghosh had taken ill and, as such, she accompanied Geeta devi(P.W.5) to the house of Papiya Ghosh and pressed the call bell but no one came to open the door. She found that the gate of the compound had no lock and, as such, she entered into the verandah of the house from that gate and pressed the call bell again. Getting no response from inside, she pulled the door which opened. Calling the deceased by her name, P.W.1 entered inside along with P.w.5 and found that articles in the first room were all scattered and the T.V. which used to be there was missing. The Almirah of the other room was open

and most of the articles were lying on the ground. P.Ws. 1 and 5 entered the 3rd room which was the bed room of Papiya Ghosh and found that her dead body was wrapped into a quilt and it had partially slipped towards the ground. There was blood on the quilt and one of her legs was outside it. She was dead. On touching the feet of Papiya Ghosh she felt it cold and when she turned out the quilt, she found that her omentum had come out.

5. Both P.Ws. 1 and 5 came out shouting and frightened. People started dropping in. When some of them had reached, they entered inside the other rooms and it was found that in another room, which was under occupation of the maid servant, she had also been killed by piercing another weapon into her belly. All the articles of the household were scattered or found missing. The computer, music system, T.V. and most of the household articles, it appeared, had been looted away.

6. As may appear from the evidence of P.W.1 and other witnesses, the police was informed telephonically. It reached there and Circle Inspector Nagendra Kumar Singh (P.W. 23) came there along with his patrolling party. He inspected the inner parts of the house and he found that in one of the rooms situated on ground floor towards south west of the house, the dead body of Papiya Ghosh was lying which was covered with a quilt. The quilt was soaked with blood and the face was uncovered. There was a deep cut injury on the belly. The deceased had bled and there were cut wounds also on her neck, cheeks, left eye and right forehead. The deceased had bled from her ears too. There was another wound also.

7. There was another room which was connected by a door with the room situated west of the above noted room of Papiya Ghosh and the maid servant of Papiya Ghosh, aged 60--65 years, was found lying dead by her belly. P.W. 23 found a deep cut mark on the belly of Malti and whole of the floor of the room splashed with copious blood. Almirah, attaché cases and boxes were found open and the articles scattered all over. The computer, its printer, monitor, C.D. player, cordless phone, Sony colour T.V. of 21 , washing machine, ornaments, cash and a Maruti 800 car bearing registration no. BR IV 5129 were found missing. The mobile phone of Papiya with Sim No.9334110212, was also found missing. P.W. 23 gave the above details which he could get at the spot, probably from persons assembled and noted that the full details of other articles could be provided by the family members of Sushri Papiya Ghosh.

8. P.W. 23, Circle Inspector Nagendra Kumar Singh who was the Officer-in-charge of Patliputra Police Station, drew up his own statement in the form of Ext.7 and entrusted the investigation to S.I. Kumar Abhinav (P.W. 28). On the basis of Ext.7, Ext.8 the F.I.R. of the case was drawn up at 9.15 A.M. on 3.12.2006 and P.W.28 S.I. Kumar Abhinav took up the investigation.

9. While investigating the case, P.W. 28 recorded the statement of the informant, inspected the place of occurrence, i.e., the house No.168 of late Papiya Ghosh which had on its south west the other house of the family bearing no. 168A. He inspected the place- of- occurrence-rooms and noted down their descriptions in the case diary. He found a blood stained knife on the bed over which late Ghosh was lying and the whole of the drawing room was found in a disorderly condition. It was not that things were scattered in the room and other places of the ground floor, rather, things were also found in disorganized and disorderly fashion on the upper floor also. The grill gate which was fixed

in the boundary wall of the house was also found unlocked though barbed wire had been fixed at the top of the boundary wall from all around. The suit cases, boxes, etc. kept on the floor were also found in a disarray. P.W. 28 found that there were marks left on account of removal of different articles from the household and further found that there was tyre mark left on account of movement of the vehicle and that the articles kept in the Almirah were all scattered.

10. The inquest reports, Exts. 3 and 3/1, were prepared by S.I. K.P.Singh by the orders of Circle Inspector Nagendra Kumar Singh. The statements of witnesses present at the place of occurrence were recorded. The photograph of the scene of the occurrence was also taken by hiring the services of the photographer.

11. The kitchen- knife which was found on the bed of Papiya Ghosh was seized by P.W.28 by preparing seizure report, Ext. 11, in presence of two witnesses Aisan Kumar (P.W. 15) and Jesan Kumar(P.W.

26) who were the grand sons of deceased Malti Devi. Some of the blood soaked clothes, like, the mattress, quilt, sleeping gown and underwear were also seized by preparing seizure memo Ext.11.

12. It came into light during course of investigation that Papiya Ghosh had a cellular phone with Sim No. 9334110212 and that had also been taken away by the criminals and, as such, a request was made to the service provider M/S Reliance India Ltd. for supplying the call details of the said cellular phone along with time of its activation and the location of tower details.

13. It appears that considering the nature of the offence and its impact on social order, Senior Superintendent of Police, Patna, formed an investigating team consisting of Circle Inspector Nagendra Kumar Singh (P.W.23) S.I. Abhaay Narayan Singh(P.W.25), the officer-in-charge of Gardanibagh Police Station and S.I. K.K.Singh(P.W. 27), the then officer-in-charge of Budha Colony Police Station, S.I. Ajay Kumar, the then officer-in-charge of Kotwali Police Station, who were to assist P.W. 28 in investigation.

14. Six steel knives were recovered from the room where Papiya Ghosh was murdered along with other articles which had blood stains over them the seizure of the knives was witnessed by the above noted witnesses, P.W. 15 and P.W. 26.

15. As may appear from the evidence of P.W.28, S.I. Kumar Abhinav and P.W. 25 S.I. Abhay Narayan Singh who were also the members of the investigating team formed by the Senior Superintendent of Police, Patna, that the Manager of Reliance India Ltd. informed P.W. 28 S.I. Kumar Abhinav that a call had been made at 12.30 P.M. from the cellular phone of the deceased which had been taken away by the criminals on to another cellular phone bearing Sim No. 9334134807 and that the tower location of the call was in between the clinic of Dr.Hai and Kurji. This information was passed on by P.W. 28 to the higher police Officers. P.W.25 was directed to investigate into the details of the call as to who had made the call from the cellular phone bearing Sim No. 9334110212 to another phone bearing no.9334134807. P.W. 25 investigated into it and found that the cellular phone which received the call was registered in the name of one Ashok

Kumar(p.W. 17). P.W. 28 questioned Ashok Kumar by calling him to his Police Station and he admitted that indeed he had received a call from the cellular phone of the deceased and was asked by the caller as to where he was and further that he should switch off his cellular phone(P.W. 25, paragraph 1). This information was given to the investigating Police Station Patliputra. P.W. 25 got further direction and accordingly he came to Patliputra Police Station and Ashok Kumar(P.W. 17) was questioned by all the Police Officers including the Investigating Officer(P.W. 28). He stated that he could take them to the person who had given the call to P.W. 17 from the area described by him as Kurji Balupur. Accordingly, a team of Police Officers consisting of Circle Inspector-cum-Officer-in-charge of Patliputra Police Station, K.N. Singh, Circle Inspector-cum-officer-in-charge of Kotwali Police Station, Ajay Kumar, Circle Inspector-cum- Officer- in-charge of Patliputra Police Station, Circle Inspector Nagendra Kumar Singh and the Investigating Officer of the case, (P.W. 28) set out with P.W. 17 at about 7 P.M. and reached a place described as house of one Jalandhar Rai situated in Kurji locality. P.W. 17 pointed to them a particular room and when it was got opened two persons, that's, appellants Manohar Kumar and Ashish Kumar Rai were found sleeping there. On search of that particular house Sony Colour T.V. of 21 , music system of Phillips, a L.P.G. cylinder, a pearl neckless and many other articles were recovered as per details contained in seizure memo Ext. 11/12 available at pages 525 to 527 of the Paper Book. The seizure memo was prepared in respect of the seized articles in presence of two witnesses and a copy of seizure memo Exts. 11/12 was also given to both the appellants Ashish Kumar Rai and Manohar Kumar.

16. The two appellants Manohar Kumar and Ashish Kumar Rai were questioned by the police after being arrested at the very place and they confessed to their guilt of committing the offence along with other accused persons, namely, Shankar Kanu alias Shankar Sao, Sanyog Rai, Ashish Kumar Rai and Md. Mustakim in the night intervening between 2nd/3rd of December, 2006 and pointed out that those were the articles which belonged to the deceased Papiya Ghosh and had been removed by them after committing their murders. On further questioning the two above named appellants Manohar Kumar and Ashish Kumar Rai pointed out the whereabouts of Shankar Kanu alias Shankar Sao.

17. The police, accordingly, came to Chauhan Apartment situated in New Patliputra Colony and found Shankar Kanu alias Shankar Sao sleeping in the servant room. Shankar Kanu alias Shankar Sao was arrested and searched and the cellular phone of the deceased Papiya Ghosh bearing Sim No.9334110212 was recovered from him. Shankar Kanu alias Shanker Sao was questioned there and he confessed to his guilt and pointed out that the articles which were looted from the house of Papiya Ghosh after committing her murder were, in some part, lying at his house and some were in possession of his companions and that he could get them recovered after going to those places. Accordingly, the Police brought Shankar Kanu alias Shankar Sao, firstly, to his house situated in the same locality Kurji, Balupur, and searched the room belonging to him. On opening a box, the police found the owner book in respect of the vehicle of Maruti Car of Papiya Ghosh as also the photo copy of the driving licence which had the photograph of Papiya Ghosh over it. Some bank cheques, already bearing signature of Papiya Ghosh, were also found there. Those articles were seized after preparing the seizure memo along with other articles, as may appear from the evidence of P.W. 28 in paragraph 38, which corresponds to the seizure memo Ext. 11/4, available to us at pages 530 and 531 of the Paper Book. A copy of the seizure memo was made over to appellant Shankar Sao also.

18. The three apprehended appellants were brought thereafter, with seizure witnesses on account of being led by appellant Shankar Kanu alias Shankar Sao to the garage of one Harinandan Singh which was a tin roofed structure, situated by the road side and the same was searched by the police officers. The Maruti Car 800 having no number plates either in front or back of it and which had chassis no.SB-308-IN- and 178912 and Engine No.F.8 PIN 2483877 was found kept there. Inside the vehicle was found a lock upon which a particular number was engraved. Other articles as per details available to us in paragraph 38 of the evidence of P.W. 28 (which correspond to the seizure memo Ext. 11/5.) were also found. On the back of the seat of the vehicle some clothes were found bundled up in a piece of cloth and those were saris and different wearing apparels of the deceased. Accordingly, those were also seized as per the above seizure memo.

19. The three accused who were in custody, namely, appellant Shankar Kanu alias Shankar Sao, Manohar Kumar and Ashish Kumar Rai promised the police to lead them to accused Sanyog Rai, Md. Mustakim and Anil Uraon who had also some parts of the theft properties in their respective possessions. Accordingly, the raiding party along with the accused persons in custody, came to the house of accused Sanyog Rai. Sanyog Rai was not found inside the house, but the house as per description in paragraph 43 of the evidence of P.W. 28 was searched. From inside a room situated in the southern part of the house, a Flatron computer monitor of L.G. make, Key board, Microsoft CPU, of L.G, two speakers, a printer of H.P., the cheque book in respect of S/B Accounts No. 106160 containing cheque numbers S/B 198571 to 198580 of which those bearing from serials no. 198571 to 198574 had been utilized and which account was held by the deceased in Allahabad Bank as also the Pass Book of S/B accounts of Punjab National Bank, bearing S.B.Account No.177440 were recovered. The seizure list was prepared in respect of the recoveries made from the house of accused Sanyog Rai, a copy of which was handed over to his father Nagina Rai. This seizure memo is Ext. 11/6 which is available to us at page 534 of the Paper Book.

20. The police party with three accused in custody started from the house of Ram Sanyog Rai to the house of appellant Anil Uraon, who as per information given by the arrested accused, was also in possession of certain properties belonging to the deceased. While proceeding towards the house of Anil Uraon, the police found a person moving on the road and that particular man was pointed by the three accused as appellant Anil Uraon. He was stopped and questioned and gave his name as Anil Uraon and readily confessed to his guilt finding the three other accused in custody. He was searched. His cloth had some blood mark on it and from the pocket of his pant Pound-currency-notes two in number, each of 20 denomination were recovered which had been issued by the Bank of England and which bore numbers as indicated in paragraph 44 of the evidence of P.W. 28. The other recovery was of an Allwyn lady watch of golden colour fitted with leather belt, an ornament, which articles were also seized vide seizure memo ext.11/7, a copy of which was handed over to appellant Anil Uraon.

21. On questioning Anil Uraon, it came into light that the front and rear plate numbers of the car of the deceased had been handed over to one M/s Munna Arts for repainting by the accused persons. Accordingly, all the accused persons in custody were taken by the police to the said M/s Munna Arts and during search the two number plates were found there which had new numbers written over them as BR-IR-1881 which inscription was fresh and new.

22. The owner of the said Munna Arts was questioned by the police and he has been examined as P.W. 11 in the case, who admitted that his profession was creating number plates of different vehicles. He stated that the three appellants brought by the police to his house on 16.12.2006 had handed over to him the two number plates for repainting on 11.12.2006. This witness P.W. 11 had identified the two accused as Shankar Kanu alias Shankar Sao and Anil Uraon in court during his evidence as may appear from his evidence in paragraph 11. P.W. 2 further stated that the number which was previously written on the two number plates and which had been defaced by rubbing could be read by him and that number was BR-IV- 5129. He had been told by the accused to write No.BR-1R-1881 and, accordingly, he had created the new number over the old number plates which had been seized by the police from his shop. The seizure memo in respect of two number plates has been marked Ext. 11/8. The two number plates have also been marked material exhibits as may appear from Paragraph 4 of the evidence of P.W.

11. It may appear further from the evidence of P.W. 11 that he had noted down the number desired to be painted by the accused persons on the reverse side of the two plates for memory purpose, so that the number was correctly written on the plates(P.W. 11, paragraph 8).

23. After having recovered the two number plates recreated on the number plates of the vehicle of the deceased, as indicated above, the raiding party moved further from that place to come to the tyre puncture repairing and air filling shop of accused Md. Mustakim Mian which was situated at Makhdumpur Digha, and which was found closed by putting a lock on a Chachari gate(manufactured from Bamboo) on it. A Micro Oven made by Nikai, Japan, was found concealed amidst the old tyres in the south-eastern corner of the shop. It was further found that the micro oven was bundled into an old window curtain. The police party found a Tata phone of white colour, another phone set of Beitel make, a cordless phone set of Sony carrying some descriptions over it along with a charger and an umbrella of blue colour over which Mist Harbour was written and an automatic umbrella of blue and white colour, brass plates and other utensils used in worship, rituals brass candle stand were also seized by preparing the seizure memo Ext. 11/3. The police returned back along with the seized articles and the arrested accused persons. Md. Mustakim was also not found and could not be arrested till date of judgment.

24. During questioning of the accused persons on 16.12.2006 at 5.30 P.M. it was learnt by the police that the washing machine which was removed from the house of the deceased was given to appellant Ram Chandra Mahto, a practicing Advocate who was residing in Ashiyana Nagar under Shastrinagar Police Station, Patna, and, accordingly, the house of appellant Ram Chandra Mahto was searched. It was a pucca house of appellant Ram Chandra Mahto and the police found there a fully automatic washing machine with black paint on its rear side. This machine was seized and seizure memo Ext. 11/10 was prepared. The washing machine was produced during course of hearing of the case and it was marked material Ext. 2/35 by the learned Judge. A copy of the seizure memo Ext. 11/10 was handed over to appellant Ram Chandra Mahto.

25. During the course of investigation P.W. 28 entered into correspondences with the District Transport Officer, Patna, and the Manager, Reliance India Ltd. for ascertaining the ownership respectively of the seized vehicle as also the registration of the Sim Card No. 9334110212 issued by

M/s Reliance India Ltd. P.W. 28 was informed by the District Transport Officer, Patna that the seized car which bore the chassis and vehicle number as indicated in some earlier part of the present judgment was registered in the name of the deceased Papiya Ghosh, daughter of Sri U.K.Ghosh, resident of 168 Patliputra Colony, Patna, and that the engine and chassis number tallied with those which were appearing on the recovered vehicle and which were noted down by the police during the course of its seizure. Likewise, the Manager of Reliance India Ltd. also furnished the details of the cellular phone. It was found that it bore no. RS No. RLGHS 1000309516, M.D. No. 6123110212 and was registered in the name of Papiya Ghosh of Indian nationality, resident of 168, Patliputra Colony, Patna, which tallied with the full details of RS No. of the phone which was recovered from the possession of appellant Shankar Kanu alias Shankar Sao. Not only that, P.W.28 represented to the Chief Judicial Magistrate, Patna of deputation of any Magistrate for overseeing the T.I.Parade of the seized articles and accordingly Shri Nirmal Kumar(P.W. 24), who was the Block Development-cum-Circle Officer, Patna, was ordered to be deputed for the purpose. Accordingly, the T.I. Parade of articles was held on 26.12.2006 by calling P.W.14 Kamla Ram who was the son of the deceased Malti Devi and his two sons P.W. 15 Aisan Kumar and P.W. 26 Jesan Kumar and, accordingly, the articles were identified by them in the T.I. Parade organized for identification of the seized properties. The T.I. Charts have been marked ext. 9 series and the objects have also been marked as various material exts. The blood stained articles were also sent to the Forensic Science Laboratory, Patna, and after completion of the investigation, the appellants were sent up for trial keeping the investigation pending against the absconding accused Md. Mustakim and Sanyog Rai. This is how the appellants were tried and convicted as indicated at the very out set of the present judgment.

26. In support of the prosecution charges, as many as 30 witnesses were examined. None of these witnesses are eye witnesses to the occurrence. In fact, no one had seen the occurrence being committed in his presence. The witnesses have been examined on one fact or the other or, in other words, on one circumstance or the other. The core evidence against the appellants, as may appear from the above narration, was the very information of the accused persons while in police custody which led to recoveries of different articles from different places and identification of those articles by P.Ws. 14,15 and 26 as belonging to the deceased. The legal inference of culpability and knowledge as also the inference of participation of the appellants in the commission of the twin murders or theft of the properties is based only on the above available on record.

27. The defence of the appellants was of innocence and also of being falsely implicated under some influence, as suggested by the appellants, so as to giving a clean chit, to P.Ws. 15 and 26 the two brothers Aisan Kumar and Jesan Kumar, who are the two grand sons of the other deceased Malti Devi. The other defence of the appellants, which was agitated before us was that some records were created in support of the prosecution even during the course of examination of the witnesses so as to lending credence to the evidence not only of recovery of different articles, but also of their ownership.

28. We have heard Shri Kanhaiya Prasad Singh, learned Senior Advocate appearing for appellant Ram Chandra Mahto and also Shri Uday Kumar Singh, learned counsel appearing on behalf of the remaining appellants.

29. Shri Uday Kumar Singh was highly critical of the prosecution approach in leading

evidence and was submitting before us that there being no eye witness to the occurrence or no evidence, in fact, connecting directly any of the appellants with the crime. The police has simply created unacceptable materials so as to getting a judgment of conviction against the appellants from the trial Judge who in spite of the materials on record, appears falling in error of acting on that fabricated evidence. Shri Singh took us through the evidence of each and every witness and contended that the interestedness of the Investigating Officer and whole of the police establishment was of such a class and degree that while P.W. 14 was amidst his cross examination, they created evidence by allegedly searching the house of the deceased on 8.5.2007 and showed recovery of certain packing materials in respect of different articles said to be recovered from the possession of different accused persons which were allegedly taken away by the accused persons by committing the twin murders on account of their seizure on 8.5.2007 and those cartons or packing materials were produced in court as evidence of the articles belonging to late Papiya Ghosh and accordingly the evidence was led through P.W. 14 in paragraph 66 that he was called by the police and the house was re-searched to recover those articles. It was further contended that it was not the end of the matter. The police prepared seizure memos of different vouchers/ receipts issued to the deceased late Papiya Ghosh for purchasing different articles which were the subject matters of theft from different retailers and the copies of the vouchers which were got generated electronically to be seized and produced in court by different seizure memos which were dated 12.5.2007. It was contended that P.W. 15(Aisan Kumar) was examined in court on 26.4.2007 and his cross examination was concluded on 21.5.2007 and it is unusual that further investigation was done amidst the evidence of that particular witness along with others. It was as such contended that the Court should reject whole of the above evidence on account of being fabricated so as to strengthening the prosecution evidence to obtain a conviction of the appellants of the charges.

30. It was contended that the seizure witnesses, like, P.Ws. 18, 19, and 20 did not support the seizure along with P.W.12 and as such the evidence of recovery of articles consequent upon the information received from the accused, appears of no consequence. It was contended further that the appellants appear being picked up by the police for creating some evidence so as to calm down the public outcry as also to satisfy some of the higher ups, like, one of the sisters of the deceased, namely, Smt. Tuktuk Ghosh being one of the high ranking officer in the services of the Indian Union. It was contended that the whole investigation, prosecution and conviction of the appellants is fit to be rejected.

31. Shri Uday Kumar Singh also contended that the F.I.R. is a doubtful document as it mentions some of the articles which were removed by the culprits from the house of the deceased. It was contended that there was no mention in the document, Ext.7, as to who had pointed out the removal of these articles from the house of the deceased. It was contended that there is completely no evidence about theft of the properties from the house of Sushri Papiya Ghosh against any of the accused persons. It was next contended that Papiya Ghosh's sister Smt. Tuktuk Ghosh was not examined and there was no reason as to why she was feeling shy in making any statement either on

facts of the case including the details of the articles. It was next contended by Shri Uday Kumar Singh that the articles had been shown to the P.Ws as has been testified by PW. 26 in paragraph 73 and thereafter the T.I. Parade was organized so that they did not have any difficulty in identifying them. It was contended as such that the T.I. parade Charts, Ext.9 series were table works having no sanction of law and procedure. Learned counsel appearing for the appellant Shankar Kanu alias Shankar Sao and others also made submission on sentence that all the appellants except Ram Chandra Mahto were young persons and it was their first offence. Their whole lives were ahead of them. They do not bear any previous history of conviction and it was a fit case in which a chance must be given to them for reforming themselves.

32. Shri Kanhaiya Prasad Singh, learned Senior counsel took us through the provision of the Indian Penal Code in respect of retaining or possessing properties obtained in theft and then submitted that the conviction of appellant Ram Chandra Mahto under Section 414 of the Penal Code was not justified as the offence Under Section 414 and the offence under Section 412 of the I.P.C. do not go hand in hand. Shri Singh submitted that the offences under Sections 411/412 of the Penal Code are different from the offence under Section 414 of the Penal Code. The charge was under Section 412 of the Penal Code and as such the conviction of appellant Ram Chandra Mahto under Section 414 of the Penal Code was not legally fit to be sustained. Shri Singh has referred to us some of paragraphs of the judgment impugned on discussions of the evidence and ultimate finding of guilt in respect of appellant Ram Chandra Mahto, like paragraph 64 and has referred also to some of the judgments, like, A.I.R. 1955 S.C. 274, Nanak Singh Vs. State of Punjab A.I.R. 1956, S.C.116 Willie(William) Slaney Vs. State of Madhya Pradesh and A.I.R. 1928 Bombay, 145 Emperor Vs. Hanma Timma Bhandiwaddar to submit that the offence under Section 411 of the Penal Code on receiving of stolen property and that under Section 414 of assisting to conceal stolen property being distinct from each other, the conviction of the appellant under Section 414 of the Penal Code without there being any charge under that section was not fit to be sustained. It was further contended that by virtue of his statement under Section 313 Cr. P.C. that he was handed over the washing machine by Shankar Kanu alias Shankar Sao, appellant Ram Chandra could not be assigned the knowledge that it was a stolen property and still he retained the property in his possession. Shri Singh also referred to the evidence of P.Ws. 18 and 19 and the provision of Section 104 of the Cr.P.C. to submit that they were not willing witnesses to associate themselves with the search and seizure rather they were forced to put their signatures over the document without being associated with that part of investigation. Shri Singh pointed out to us that the very manner of keeping the washing machine and also the very place where it was kept could give rise to an inference that it was not the possession knowingly obtained by appellant Ram Chandra Mahto and there was no evidence on record to show that the receipt of the property was dishonest.

33. As against the above, Shri Ashwini Kumar Sinha, learned Additional Public Prosecutor has submitted that the information given by the accused persons in custody of the police and consequent recoveries are the foundation of the prosecution evidence. The seizure witnesses have, of course, gone hostile but that may not be of any avail to the defence because they had admitted that they had signed the seizure memo and they had also admitted that the search and seizure were made in their presence and their writings to the above effect were there on it. Shri Sinha placed reliance upon (2006) 2 S.C.C.(Cri.) 444, Surendra Singh Vs.State of Haryana It was contended that once

recovery was consequent upon the information given by the accused persons, the burden to explain the possession of the articles obtained through theft by committing the twin murders and their participation in the offence rested upon them. It was submitted that even if there had not been any T.I. parade, it was of no consequence as the articles were all bearing manufacturing serials number, etc. and the documents regarding their purchase by or possession of the deceased, that's, the receipts were produced during the course of hearing.

34. As regards the conviction of appellant Ram Chandra Mahto, it was contended by Shri Sinha that he could not derive any benefit of being convicted of offence which was different from the one under which he had been charged in the light of the provision of Sections 221 and 464 Cr. P.C. It was contended that the trial court took a lenient view of sentencing while passing of sentence upon appellant Ram Chandra Mahto.

35. Shri Sinha contended that awarding death sentence to appellant Shankar Kanu alias Shankar Sao and awarding rigorous imprisonment for life to appellants who also appear convicted on same and similar nature of evidence does not conform to the principle of uniform sentence for equal offence and participation in it. Shri Sinha was fairly conceding that the appellants other than Shankar Kanu alias Shanker Sao were being awarded rigorous imprisonment for life and it was required of the learned trial Judge to be uniform in equally awarding the same sentence to appellant Shankar Kanu alias Shankar Sao. Though Shri Sinha was very strongly arguing that it could be a very fit case coming under the category of the rarest of rare cases, but one could not choose one accused out of many to hang him to death while the other equal participants could be directed to suffer rigorous imprisonment for life. It was contended by Shri Sinha that in absence of any appeal for enhancement of sentence in respect of appellants Anil Uraon, Manohar Kumar and Ashish Kumar the court is free to pass equal sentence upon them and while doing so the court must apply the principle of Shradanand Swami's case.

36. Before I grapple with the contentions of the sides to record my findings on facts of the case, I want to point out that the witnesses could be categorized in more than four classes. I have mainly categorised them in three categories. P.Ws. 1 and 5 are witnesses to speak of their being no response from inside the house when P.W. 5 Gita Devi, a maid servant of the deceased, reached early in the morning to do the household chores. She informed that P.W. 1 Neeta Aditya and this is how the two entered inside the house. P.W. 2 Ram Prasad was a labourer, who as per his evidence was doing maintenance works in the house of the deceased for about one month and on the eve of the occurrence he had been paid his labour charges by the deceased, late Papiya Ghosh. He stated that he came on picking up a rumour about his temporary employer being murdered with her maid servant and found the dead bodies in her house. The other class of witnesses is of those who witnessed seizure of different articles from different places on pointing of the accused persons or on searches made by the police.

37. The third class of witnesses are officials like the Police Officers associated with the investigation of the case and the circle officer, Patna, who supervised T.I. Parades. The category of seizure witnesses includes P.W. 3 Alok Ranjan who noticed that on 15.12.2006 a vehicle and some police personnel having come in the neighbourhood of his house at Mohalla Kurji Balupar came there with

P.W. 8 Om Prakash and both of them were requested by the police to accompany them in searching different houses and places and the first house searched was that belonging to appellant Shankar Kanu alias Shankar Sao who was the fourth son of one Yugeshwar Sao. He has testified the recoveries of different articles from the house of the above noted accused in respect of which Ext. 11/4 was prepared. He, (P.W. 3) further stated in paragraph 5 of his evidence that the two witnesses along with the police personnel were led to a garage which had a lock over it and which once used to be of one Harinandan Singh. The witness stated that the key of the lock was produced by accused Shankar Kanu alia Shankar Sao and the garage was unlocked and a Maruti 800 Car of white colour was found kept there. The doors of the car were pulled open and the properties were found kept there in a bundle of cloth and those were seized, as per his evidence in paragraph 5 and as per the descriptions of the properties in Exts. 11/4 and 11/5.

38. P.W. 8 Om Prakash Puri has not supported the above statement of P.W. 3 but both of them (P.Ws. 3 and 8) have admitted that the recoveries were made in their presence. Om Prakash Puri(P.W.8) was declared hostile. But, if he was admitting the searches being made and further if he was admitting his writing and signature on the seizure memos, then the Court has little to say on the veracity of the witness and his subsequent conduct of turning hostile. The witness had really witnessed the search and seizure of the articles as per Exts. 11/4 and 11/5. Thus, the evidence of those witnesses(P.Ws. 3 and 8) when read in the light of the evidence of police witnesses, like, P.W. 25 S.I.Abhay Narayan Singh and P.W. 28 S.I. Kumar Abhinav establishes the fact that accused Shankar Kanu alias Shankar Sao led the police to places where properties belonging to the deceased were concealed and those were the properties discovered consequent upon the information given by appellant Shankar Kanu alias Shankar Sao to the police while he was in custody.

39. The other witnesses in the above category are other seizure witnesses like P.Ws. 4 Kumar Ranjan Singh and P.W. 20 Pintu Kumar who had witnessed the search of the house of absconding accused Sanyog Rai by the police on account of being led to that place by appellants Shankar Kanu alias Shankar Sao, Ashish Kumar Rai and Manohar Kumar. The recoveries were, as per the seizure memo Ext. 11/6. Those witnesses too did not support the search and seizure being made in their presence. But, both of them(P.Ws. 4 and 20) have admitted by writing over Ext. 11/6 that the properties described in Ext. 11/6 were recovered in their presence. They have further admitted their respective signatures being genuine. Thus, the evidence of these witnesses, in spite of turning hostile, appears sufficient to establish that on searches, recoveries were made of the properties which were belonging to the deceased, as per their own evidence.

40. The above noted witnesses(P.W. 4 Kumar Ranjan Singh and P.W. 20 Pintu Kumar) were brought along with the accused persons who were in police custody to another place and while the police were moving on road they found appellant Anil Uraon going by the road and he was questioned and taken into custody. From his possession two notes of 20 pounds as also a lady watch of Allwyn make which were said to be belonging to the deceased which, as appears from the confessional statement of appellant Shankar Kanu alias Shankar Sao, was handed over to appellant Anil Uraon were also recovered from his pant- pocket as per evidence of P.W. 28 S.I. Kumar Abhinav and those were recovered in presence of P.Ws. 4 and 20, vide Exts. 11/7 and they again wrote over the seizure memo that the articles were recovered in their presence. They have admitted

the writings and their signatures.

41. P.W. 9 Harendra Ram is the son of Jalandhar Rai and his house is situated at Kurji Balupar. It may be recalled that after a call was received by P.W. 17 Ashok Kumar from the cellular phone of the deceased and details were supplied by the service provider, i.e., Reliance India Ltd., the police called P.W. 17 and questioned him who led them to the house of Jalandhar Rai situated at Kurji Balupar and, accordingly, a room was pointed out by P.W. 17 where the person making a call could be found. A knock was given at the door. The door was opened. Appellants Manohar Kumar and Ashish Kumar Rai were found inside and a search of the room was made in presence of P.W. 9 Harendra Rai and P.W. 10 Rikky Kumar. In fact, the evidence of P.W. 10 Rikky Kumar indicates that the police had made enquiries from him about the location of the house of Jalandhar Rai and it was P.W. 10 who had led the police to that particular house. On search of the house of Jalandhar Rai, articles, such as Sony Colour T.V., Phillips music system, L.P.G. cylinder, stabilizer, etc. which were said to be the properties of the deceased were recovered as per the evidence of P.W. 9 Harendra Rai and P.W. 10 Rikky Kumar and also in the light of the evidence of P.W. 28 Kumar Abhinav and P.W. 25 S.I. Aabhay Narayan Singh and, accordingly, seizure memo Ext. 11/2 was prepared by the police in presence of P.Ws. 9 and 10. Both the witnesses have testified to the recovery of the articles on the basis of their evidence which were also marked as material Exts.

42. During course of argument Shri Uday Kumar Singh learned counsel appearing for the appellant Shankar Kanu alias Shankar Sao and others was criticizing the evidence of P.Ws. 9 and 10 on the ground that the witness P.W. 9 has stated in paragraph 10 of his evidence that he was put in the police lock up for two days and was threatened to give evidence then only he would be released. The argument appears of no merit inasmuch as if there was threat that he would be released only when he had given evidence in the case, then it could be presumed that the witness was in confinement and produced before the court under arrest. The order of the court below dated 10.4.2007 on which date P.W. 9 Harendra Rai was produced by learned Additional Public Prosecutor for his evidence, does not indicate that he was produced under arrest. The other reason for rejecting the argument is that there was no hindrance for the witness when he appeared before the court below for giving evidence to file a petition to the above effect that he had been threatened or was confined by being put in police lock up for giving his evidence. The witness appears further stating in paragraph 10 that the police had put a lock in a room from which the recoveries were made, but again he appears not bringing into the notice of the court the above fact through a proper petition for delivery of possession of the said room after removal of the lock. On these grounds the contention appears hollow and fit to be rejected.

43. Other argument which was advanced by Shri Uday Kumar Singh was that the witness, P.W.9, had given his evidence on recovery of articles in the court not out of his own free will. The recoveries were made in presence of P.W. 9 Harendra Rai appears established by the fact that in paragraph 26 of his cross examination the witness has stated that he had seen the articles which were marked Exts. During course of his deposition he stated that the articles had been seen by him on the day of their recoveries also.

44. Shri Singh was contending that the recovery memo Ext. 11/2 indicates that the search was made in the house of Jalandhar Rai but the police Officers have stated that it was the house of Harendra Rai. As may appear from the parentage of P.W. 9 he is the son of Jalandhar Rai and if the witness is taking the name of his son instead of the real landlord it was not going to make any difference. Both P.Ws. 9 and 10 have stated that the articles were recovered in their presence and they, accordingly, signed the seizure memo.

45. The other witnesses belonging to the above category of seizure witnesses are P.W.12 Rabindra Kumar and P.W. 13 Shravan Kumar Gupta. It may be recalled that after the search of the house of Jalandhar Rai or of P.W. 9 Harendra Rai, the appellants Manohar Kumar and Ashish Kumar Rai were taken into custody and they pointed out to the police that Shankar Kanu alias Shankar Sao could be found in Chauhan Apartment in New Patliputra Colony, Patna. Accordingly, the police along with the two arrested accused Manohar Kumar and Ashish Kumar Rai came to New Patliputra Colony and on being led by the two appellants to the guard room of that apartment, accused Shankar Kanu alias Shankar Sao was found lying there who was identified by the above appellants. Shankar Kanu alias Shankar Sao was arrested and he was searched and from the right pocket of his full pant a cellular phone with Reliance Sim was recovered in his presence. P.W. 12 Rabindra Kumar turned hostile and did not support the search of person of accused Shankar Kanu alias Shankar Sao and recovery of the cellular phone, though he admitted that he had signed a piece of paper. He has further admitted in his evidence in paragraph 3 that he had written that the seizure was made in his presence and, accordingly, he had signed the document. As regards P.W. 13 Shravan Prasad Gupta, he has fully supported the fact of search of the person of present appellant Shankar Kanu alias Shankar Sao and the recovery of the cellular phone. In spite of P.W. 12 being hostile his very admission of the fact that he wrote about the search being made in his presence and further that he signed the seizure memo makes it utterly meaningless whether he was supporting the seizure or not through his evidence in court. The evidence of P.Ws. 12 and 13 proved quite satisfactorily that on search of the person of accused Shankar Kanu alias Shankar Sao the recovery of the cellular phone was made.

46. P.W. 18 Jitendra Kumar and P.W. 19 Pappu Singh are the witnesses in whose presence the house of appellant Ram Chandra Mahto was searched and a fully automatic washing machine was recovered. P.W. 18 Jitendra Kumar has testified to the above facts besides stating that copy of the seizure memo was also made over to appellant Ram Chandra Mahto. P.W. 19 Pappu Singh did not support this fact and as such he was declared hostile. But, Ext. 11/10 which is the seizure memo in respect of the recovery of washing machine from the house of appellant Ram Chandra Mahto indicated that both the witnesses had written in their own hands that the washing machine was recovered in their presence and they duly signed over it which fact was admitted even by P.W. 19 Pappu Singh. Thus, the search of the house of appellant Ram Chandra Mahto and recovery of the washing machine therefrom is fully established.

47. It is not that the recoveries of articles were made from different places in presence of the witnesses as pointed out in some earlier parts of the judgment, but those properties were also put on T.I. parade in presence of P.W. 24 who was the Block Development Officer-cum-Circle Officer, Patna, and who was deputed by the Chief Judicial Magistrate, Patna for conducting the T.I. Parade

of the recovered articles. If one considers the evidence of P.W. 24 Shri Nirmal Kumar, in the light of the evidence of P.Ws. 15 and 26, namely, Aisan Kumar and Jesan Kumar, one could very well find that there was clinching evidence indicating that the articles were the household articles of the deceased which were removed by the accused persons after committing the murder of the two deceased. Aisan Kumar and Jesan Kumar are the sons of P.W. 14 Kamla Ram. The evidence of P.W. 14 Kamla Ram may indicate that his mother, the other deceased Malti Devi, was working in the house of late Papiya Ghosh for last 40 years and used to reside in the same house. He has stated that after having received information about the murder of his mother and the land lady deceased Papiya Ghosh, he went there and found that the floor of the rooms where the dead bodies were found were splashed with blood. It appears from the evidence of P.W. 14 that after having committed the murders, the culprits had looted away or taken away the properties from the house. He gave the details of the properties in paragraph 3 of his evidence. He further stated that when the articles were recovered he went to identify them before a Magistrate and did identify them. The evidence of identification of articles comes in paragraphs 5 and 6 of his evidence. During his course of cross-examination, P.W. 14 has stated that there were eight other cars and he identified the car of the deceased. He further stated that there was no number plate over the car and this evidence gets support from the evidence of P.W. 11 and also from the of P.W. 28, the Investigating Officer and other witnesses on the point.

48. As regards the competence of other witness, like P.Ws. 15 and 26, the evidence of P.W. 14 could be relevant. He has stated that his son Jesan Kumar(P.W. 26) was a student in the NIIT and he used to live in the house of Papiya Ghosh. Prior to him, Aisan Kumar(P.W. 15) was living in the house of Papiya Ghosh. If one considers the evidence of P.Ws. 14, 15 and 26 one could come to a conclusion that the three witnesses were fully acquainted with every nook and corner of the house and each and every household article available in the house. They appear not only completely attached to the deceased Papiya Ghosh, but also to her belongings which fact appears remarkably coming out of the evidence when the two witnesses Aisan Kumar and Jesan Kumar(P.Ws. 15 and 26) gave specific reasons for identifying each and every article by them. P.W. 15 has given identifying marks by which he identified the T.V.(P.W. 15, paragraph

42), the computer monitor (P.W. 15, paragraph 45) and L.P.G. cylinder(P.W. 15, paragraph 49). The letter 'प' found by the witness written on the sound box which was the first letter of the first name of deceased Papiya Ghosh on some of her belongings was one such special mark for identification. Similar is the evidence of P.W. 26 who has given specific reasons for identifying the articles by pointing out those special marks of identification during his cross examination from paragraph 7 onwards. Thus, I find that the articles which were removed from the house of Sushri Papiya Ghosh were duly recovered and duly identified by the witnesses who were competent to identify them.

49. It was contended by Shri Uday Kumar Singh that no family member of Papiya Ghosh, specially Ms Tutuk Ghosh came forward to give her evidence and further came forward to identify the belongings of the deceased which, as per the prosecution, were recovered on pointing of the accused persons or from their possession. This may be evidently clear that the deceased late Papiya Ghosh was an unmarried lady(P.W.14 Paragraph 15) and she had three sisters(P.W. 14, Paragraph 19) and

they were all married and were residing with their husbands. Ms Tutuk Ghosh was Secretary to the Speaker of the Lok Sabha and it is admitted that in the night of occurrence the deceased and the maid servant were residing in the house. The fact of the case does not indicate that any of the sisters of Papiya Ghosh had come in the near future even to see her. The deceased's maid servant Malti, her son P.W. 14 and her two grand sons were companions of her or frequent visitors to the deceased Papiya Ghosh. It may be appreciated only after going through the evidence of P.W. 14 in paragraphs 29 and 30, as to how close the family members of Malti had been to the deceased Papiya Ghosh. As such, they could be competent persons to identify each and every article in the house and that appears the reason that they have very meticulously given special signs for identifying each and every article which were recovered from different places by the police on pointing of the accused persons. Even P.W. 14 Kamla Ram has given very sound and good reasons for identifying different articles as may appear from his cross examination in paragraph 48 and onwards. Hence, non-examination of Ms. Tutuk Ghosh or any other sister of Sushri Papiya Ghosh appears of no consequence.

50. From the narration which is based on the evidence of the prosecution, it is quite clear that the police had no clue for quite sometimes from 3.12.2006 up to 16.12.2006 when a call was made by the cellular phone of the deceased by one of the accused persons to P.W. 17 Ashok Kumar. He led the police to appellants Mahohar Kumar and Ashish Kumar Rai. The recoveries were made there and the two appellants having given information about the whereabouts of the appellant Shankar Kanu alias Shankar Sao, he was apprehended from the guard room of the Apartment and he led the police to the recoveries from different places even from the possession of absconding accused persons, namely, Sanyog Rai and Md. Mustakim Mian. The confessional statements of the accused persons appear recorded by the police. The confessional statement of appellant Manohar Kumar and Ashish Kumar Rai are Exts. 12 and 12/1, while that of Shankar Kanu alias Shankar Sao has been marked Ext.12/2. The confessional statement of appellant Anil Uraon is Exrt. 12/3. As regards the recoveries from the room in occupation of Manohar Kumar and Ashish Kumar Rai it was not made consequent upon any information about the place of concealment of the theft properties. It was simply by virtue of a call made by one of the accused persons on the cellular phone of P.W. 17 that the police was led to the room in occupation of the two appellants and recovered the theft properties. As such, those recoveries are not covered by Section 27 of the Evidence Act. Whereas the place of concealment of Shankar Kanu alias Shankar Sao was consequently discovered by the police on the information given to it by appellants Manohar Kumar and Ashish Kumar Rai to the police and thereafter appellant Shankar Kanu alias Shanar Sao was arrested and on search was found in possession of the cellular phone registered in the name of the deceased.

51. I have already discussed the evidence on the ownership of the cellular phone while discussing the facts of the case which is mainly based on the evidence on record that the Reliance India Ltd. informed that it was registered in the name of the deceased Papiya Ghosh. Shankar Kanu alias Shankar Sao stated in his confessional statement about the place of concealment of the properties which were removed from the house of the deceased after commission of the murder and, accordingly, the searches were made in his own house, in the garage of one Harinandan Singh and the house of Sanyog Rai and the garage of Md. Mustakim Mian. Those places were found concealing one or the other articles which were identified by P.Ws. 14,15 and 26 before P.W. 24 Shri Nirmal

Kumar. Thus, the recoveries from the house of Shankar Kanu alias Shankar Sao and, thereafter, from the places, like, garage of Harinandan Singh, the houses of Sanyog Rai and Md. Mustakim were duly admissible as facts discovered under Section 27 of the Evidence Act. It is needless to point out that the term "fact discovered" includes the places of concealment of the properties or objects. Accordingly, the whole statement as regards the discovery of the fact of concealment of different articles from a particular place or places appears clearly admissible which were consequent upon to the information received by the police from Shankar Kanu alias Shankar Sao after he had given the information on account of being questioned during police custody.

52. So far the recoveries of articles from the room in possession of appellant Manohar Kumar and Ashish Kumar Rai and Anil Uraon is concerned, it may be true that Shankar Kanu alias Shankar Sao had merely pointed out that two notes of 20 pounds each along with a lady watch of Allwyn make which belonged to the deceased and which was identified by P.Ws. 14, 15 and 26, were recovered from the pant pocket of appellant Anil Uraon but there was no exact information about the place from where those could be found. Hence, that recovery, to me, appears not covered by Section 27 of the Evidence Act. Likewise, the recoveries from the room in which appellant Manohar Kumar and Ashish Kumar Rai were found on search, were also not consequent upon any information received from the appellants. Hence, those recoveries may also not be admissible under Section 27 of the Evidence Act.

53. Now, the question is as to how evidence of recoveries as against appellants Manohar Kumar, Ashish Kumar Rai and Anil Uron could be admissible and may be sufficient for upholding their convictions. The recoveries are admissible on account of the conduct of the appellants of having participated and thereby being found in possession of the theft properties. Section 114(a) of the Evidence Act reads that if a person is found in possession of any theft property just after the theft has been committed, he is either a thief or is a receiver of the stolen property. It may be argued, though it has not been argued before us, that the recoveries were made after about 13 days of the occurrence from the possession of Manohar Kumar and Ashish Kumar from a room as also from the possession of Anil Uraon and as such the recoveries are not "just after" the removal of the properties from the house of the deceased to their respective possessions. It must be borne in mind that a stricter application of the provision by construing the term "just after the offence has been committed", may lead to disastrous results inasmuch as recoveries could be relatable to the commission of the offence under the special facts of a particular case.

54. Here the police was groping in dark after the twin murders had been committed and the whole of the properties of the household including a vehicle had been removed by the culprits. The police was not getting any opening. It was only sitting tight and watching out for any error to which the culprits may fall. Lastly, that plan occurred and a call from the cellular phone was made and that led to the complete cracking of the case. It may also be relevant to point out that there was no defence taken that the properties had been possessed by any of the appellants bona fide on account of being handed over to them by any other person. This at best could be said in respect of appellant Shankar Kanu alias Shankar Sao, Manohar Kumar and Ashish Kumar Rai. As soon as the police got an information from the arrested appellants Manohar Kumar and Ashish Kumar Rai the whole truth came out in the form of informations, firstly, about appellant Shankar Kanu alias Shankar Sao and,

thereafter, from him of other destinations and the persons who could be found in possession of different properties. Thus, to me, it appears a case where the gap of 12-13 days in making recoveries appears of no consequence. It could still be 'just after' the incident on the special facts of the present case. As such, in spite of there being no information leading to the recovery of the articles from the room in occupation of appellants Manohar Kumar and Ashish Kumar Rai the respective recoveries established their participation both as participants and retainers of the stolen properties.

55. On the same reasons the recoveries of the two notes of 20 pounds each and a lady watch belonging to the deceased could bring the charges home against Anil Uraon.

56. Thus, the contention that there was no evidence on the theft of properties from the house of Sushri Papiya Ghosh appears of no consequence inasmuch as the evidence is sufficient. Many witnesses including the police officers stated that the properties were found removed from the house and those were ultimately recovered from different places as already discussed. The evidence of the police officers that they found the marks of keeping of the properties at different places on account of dust having deposited, is not an untrustworthy circumstantial evidence. We put our household articles at many places and when that very thing is removed after some months, the mark of early presence of that thing is left behind after its removal.

57. Shri Uday Kumar Singh, learned counsel for the appellants Shankar Kanu alias Shankar Sao, Manohar Kumar, Ashish Kumar Rai and Anil Uraon has criticized the F.I.R. as a doubtful document. One must not lose sight of the fact that P.Ws. 1 and 5 were the first persons who entered the house. P.W. 1 is a neighbour of the deceased and she appears quite familiar with the deceased Papiya Ghosh and her family members. She has given the description of all the other three sisters of Papiya Ghosh in paragraphs 17 and 18 of her evidence and further the intellectual activity of the deceased Papiya Ghosh in paragraph 19. P.W. 5 Gita Devi was the maid servant. She was working in the household and she could be also knowing about the belongings of the deceased Papiya Ghosh. It may be true that the name of the person who could have given full account of the missing properties might not have been given in the F.I.R., but at the same time it may be remembered that such details were not required to be given and even if it was given, it was not required to give the name of the person who had furnished those details. The veracity of the document appears genuine inasmuch as it was merely a document which was drawn up for setting the investigation in motion of a criminal case and if at all it had been drawn up with a motive to falsely implicate someone, the police or any one who could have been influenced them, could have put any name with more specific details in it.

58. The criticism of Shri Uday Kumar Singh on Test Identification Parade that the witnesses had been shown the articles appears meritless inasmuch as the seizure was made on 16.12.2006 and the T.I. Parade was held on 26.12.2006 in which P.Ws. 14, 15 and 26 were asked to participate and accordingly the articles were identified. Even if they were shown the articles which were lying in the house of accused Shankar Kanu alias Shankar Sao each and every article was identified by some special mark or some special features appeared on each of them. While being cross examined the three witnesses pointed out the special marks and, thereafter, they were suggested that they had not made any such statement before P.W. 24 while identifying the articles.

59. The rule of T.I. Parade of the articles is contained in Rule 236(b) of the Bihar Police Manual which reads as follows:

236(b) Identification of suspected articles.- In this connection, the following instructions shall be followed word by word:-

(1) For identification of one article three or four articles of similar nature shall be mixed up.

(2) No mark shall be put on a suspected article. If it is essential to give a mark similar marks shall be placed on unsuspected articles.

(3) Care shall be taken to see that witnesses have not seen the suspected articles before the identification. Hence the witnesses shall not go with that officer who carries the articles before magistrate.

(4) Where any special mark has been given on articles from before and their

descriptions have been noted in first information report and in the statement of witnesses, the investigator shall fully scrutinize it after the article has been recovered and if from descriptions given, those articles are established, it shall not be necessary to get identification done. Only at the time of trial, the witnesses concerned shall identify these articles before courts.

(5) For the sake of identification it will be proper if articles, similar to suspected articles are made available. It may be found from the above provision of the Bihar Police Manual that for identifying a suspected article there is no necessity for any witness to say as to what was the special mark by which he picked up the articles as a property which was relatable to an offence. As in the case of suspected human being who bears any special marks of identification and who is put on T.I. Parade, there is no requirement to blur or conceal that special mark in a case of suspected article, rather the provision under Sub-Rule(4) of Rule 236(b) indicates that if the article bears any special marks of identification, as could be stated in the first information report or in the statement of any witness during investigation, on recovery of such articles the marks of identification have to be tallied with the marks given by the witness or by the informant in his information and on being satisfied that the two tallied, there is no need of holding the T.I. parade of articles. It may be pointed out that while P.W. 26 was being cross examined the police recovered certain packing materials from the place of occurrence and also obtained electronically generated receipts of different articles from different retailers and those bore special marks of identification which were also affixed on different articles which were recovered and identified by the witnesses. It appears that on account of ignorance of the rules, the articles were put on T.I. Parade by the police and they were duly identified by the witnesses by pointing special marks of identification. Hence, the T.I. Parade does not appear against the rules rather it appears as per rules and, as such, the suggestion to the witnesses by the defence that they had not pointed out those special marks of identification to P.W. 24 appears completely out of the purview of Rule 236(b) of the Bihar Police Manual.

60. The other argument of Shri Uday Kumar Singh was that the witnesses had been shown the articles. It is true that in paragraph 73 P.W. 26 has stated that he had seen the articles at the Police Station on the same day they were recovered. But, he has corrected himself in the next line that he had seen the articles one day after the occurrence. This witness appears confused if one considers his evidence in paragraph 73, probably, on account of being subjected to a very lengthy, grueling and searching cross examination. The evidence of the witness in paragraph 73 appears not affecting the merits of the proof of identification of articles inasmuch as there is no suggestion to any of the witnesses, be he a public witness or the police witness, that the articles were not belonging to the deceased which were not removed in the occurrence. It is also not denied that the police had seized those articles and those articles were put on T.I.Parade and the three witnesses participated. In such view of the evidence, and in absence of any suggestion the argument appears of no consequence.

61. One of the most important contentions of Shri Uday Kumar Singh was that while P.W. 15 was amidst his cross examination the police went to the place of occurrence house for searching it with P.Ws. 15 and 26 on 8.5.2007 and showed the recoveries of certain cartons and other packing materials said to be recovered from different accused persons which were allegedly taken away by the accused after committing the twin murders. It was contended that it was an unknown procedure of investigation and the evidence which was led through P.W. 14 on search and recovery of the above packing material and other materials as also of obtaining cash memo, etc. in respect of purchases of different articles were fit to be rejected.

62. While narrating the facts of the case, it has been pointed out that there were recoveries from the respective house and establishment of accused Sanyog Rai and Md. Mustakim Mian who could not be apprehended. The Police submitted charge sheet by sending up the present set of accused for trial keeping the investigation pending. Thus, the investigation was continuing and as such if the police was again going to the house of the deceased for collecting further evidence in the form of obtaining the cash receipts showing purchases and payment of price in respect of various articles by the deceased Papiya Ghosh which were the subject matters of the present offence, it does not appear to me anything unusual under the scheme of the Cr. P.C. Even if the investigation had completely been closed by submitting the report under Section 173 Cr. P.C. showing the other accused persons absconding, there was no hindrance in law by virtue of Section 173(8) Cr. P.C. that the police could have further investigated the case. There is no set stage under law for reopening the case for further investigating it. The police could reopen the investigation to carry out further investigation in a criminal case if it finds such fresh evidence. It is its statutory duty to collect all material evidence which may be required for doing complete justice and further to place it before the court for its consideration. The very language of Section 173(8) is explicit. The police was within its powers to collect additional evidence by taking up further investigation and to produce that fresh evidence in court any, which could be necessary for the proof of charges in a case even after the investigation was shut out and the case was amidst trial. As pointed out earlier, the investigation was kept pending which means that the investigation was very much continuing. If the police went again to the place of occurrence to collect further materials showing ownership of the properties and in that connection it obtained the receipts in token of purchases of those properties and produced them in court, I do not see anything unusual in it which could affect the very merits of the evidence.

63. Thus, on reading the evidence and considering the arguments in the light of the evidence, I find that the very recovery of articles either directly from the possession of the accused persons or on account of the information given by them to the police clearly proved the charges that the two deceased persons were killed in course of commission of the dacoity and the properties were taken away. I uphold the conviction recorded against accused Shankar Kanu alias Shankar Sao, Manohar Kumar, Ashish Kumar Rai and Anil Uraon.

64. As regards appellant Ram Chandra Mahto, his conviction has been questioned mainly on the ground that though he was charged under Section 412 of the I.P.C., was ultimately convicted under Section 414 of the Penal Code. The contention was further that the two offences being dissimilar the conviction of the appellant was bad in law. Shri Kanhaiya Prasad Singh, learned Senior counsel has placed reliance upon a few decisions which I have noted down while noticing his arguments in the present judgment. I do not want to discuss the ratio of those decisions. I want simply to note that it is true that the offences under Section 412 and 414 of the Penal Code are diametrically dissimilar as regards the ingredients of the two offences, but the truth of the matter is that there is sufficient evidence of the seizure witnesses, like P.Ws. 18 and 19 and that of P.W. 28 S.I. Kumar Abhinav that the washing machine which was identified by P.Ws. 14, 15 and 26 was recovered from a part of the house, that's from under the stair case, which was in possession of the present appellant Ram Chandra Mahto. During his statement under Section 313 Cr. P.C. in answer to question no. 16, which is available to us at page 390 of the Paper Book, this appellant has admitted that he was handed over the washing machine by appellant Shankar Kanu alias Shankar Sao. In fact, question No.16 put to appellant Ram Chandra Mahto, was to the following effect The evidence was that you in your bail petition dated 1.2.2007 had stated that you had got Manohar Kumar (appellant) and Sanyog Rai (absconding accused) released on bail and that the washing machine was given to you by appellant Shankar Kanu alias Shankar Sao. What have you to say?. It is true that the answer is that the above statement was made in his application for bail without his instructions. But, I am not inclined to accept this stand of the appellant inasmuch he is an Advocate who was practicing in the lower courts, Patna and no application could be said to be filed without his instructions. The replies of the appellant to various questions put under Section 313 Cr. P.C. are against the established facts but I am not going to take note of that because the statement of an accused under Section 313 Cr. P.C. could never be used against him. P.W.19 and the Investigating Police Officer have testified that the recovery of the washing machine was made from the house of appellant Ram Chandra Mahto. It is true that no one had participated in the T.I. parade but we must not lose sight of the provision of Section 221 Cr. P.C. which reads as under:-

□221. Where it is doubtful what offence has been committed.- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section(1), he may be convicted of the offence which he is shown to have committed, although

he was not charged with it. Besides the above, there is yet another provision under Section 464 Cr. P.C. according to which no finding, sentence or order by a court of competent jurisdiction could be deemed invalid merely on the ground that there was any error or omission in framing of charges. The evidence is clear that the washing machine was found in possession of the appellant Ram Chandra Mahto. The evidence further is that it was recovered from his possession. He is supposed to be versed in law. He was further supposed to apply good care and precaution before allowing anything to be kept in his house. No property which could be a theft property or about which there could not be any certainty of being a thing to be allowed to be kept in one's possession, could be allowed by a reasonable person to be kept in his house. Thus, I find that the appellant Ram Chandra Mahto was voluntarily assisting in concealment of the property on account of the fact that he was not putting any question to the person who had brought the machine to him as to what was the source of the property as regards the same being obtained. His act could be voluntary and it could be further said that he knew that it was not a fair property. The evidence shows that it was obtained in theft and the appellant Ram Chandra Mahto allowed it to be kept and, thus, he kept it at his house. The only purpose could be to intentionally allow its concealment by providing the proper place. May be, that he was very much sure that on account of being an Advocate no police Officer will be suspecting his indulgence and as such the property could very well be concealed.

65. Thus, I find that there is no error committed by the learned trial Judge in convicting the appellant Ram Chandra Mahto of the offence under Section 414 of the Penal Code in spite of there being no charge under that section.

66. Having upheld the findings of the trial court as regards the finding of guilt against the appellants, I want to scrutinize the contention of learned counsel for the appellants on sentence. It was contended by Shri Uday Kumar Singh learned counsel of appellants Shankar Kanu alias Shankar Sao, Manohar Kumar Ashish Kumar Rai and Anil Uraon that they are young persons and there is no record of conviction for committing any offence. It was contended that the sentence of death passed against appellant Shankar Kanu alias shankar Sao appears excessive and should be commuted to imprisonment for life. It was further contended that appellant Shankar Kanu alias Shankar Sao could be given an opportunity of reforming himself. As regards appellant Ram Chandra Mahto it was contended by Shri Kanhaiya Prasad Singh, learned Senior Advocate that he is an Advocate practicing in civil courts, Patna and it was an unintentional, ignorant act that the washing machine could be allowed to be kept at his residence. It was contended that his whole career is there and as such he may be released on admonition.

67. I first want to take up the contention on sentence passed against appellant Ram Chandra Mahto. He is a person who is lettered in law. He practices law in lower courts. He belongs to a profession which has its own history of upholding values in society. His profession and the professionals belonging to it, were high class persons, like the father of Nation, the first President and the first Prime Minister of our country. All the leaders who fought for our freedom and independence belonged to that profession. He appears a person who fell in greed forgetting his professional lineage and willfully concealed the theft property, the washing machine in his residence. It was falling quite short of the etiquette offence when it is considered in context to the professional etiquettes of an Advocate. Having considered sentence passed against him in the above background,

I find that the learned trial Judge has taken unduly a lenient view on it. The difficulty with this Court is that it had not issued notice of enhancement, else, it was a fit case for inflicting enhanced sentence to appellant Ram Chandra Mahto. I do not have any reason for reducing the sentence or letting him off on admonition.

68. The principle of sentencing envisages that equal sentence should be passed against all the accused who appear having participated in the same act or in similar acts in commission of an offence. The other aspect of sentencing is that the court inflicting sentence should ensure, as far as could be possible for it, that the sentence is neither excessive nor is disproportionately inadequate. It is evidently clear from the findings recorded by me while confirming the finding recorded by the learned trial Judge, that appellants Shankar Kanu alias Shankar Sao, Manohar Kumar, Ashish Kumar Rai and Anil Uraon definitely participated in the commission of murder of two defenceless women who had retired to the comforts and warmth of their respective beds in a cold December night. The injuries which were found by the Doctor, P.W. 21 could be sufficient indicators of the above fact that the murders were diabolically committed for no rhyme or reason only with a view to eliminating any resistance of any sort to it either by an act or by voice so that the culprits removed the properties unhindered. Their brutal act places the case amongst one of the rarest of rare cases.

69. But, the difficulty with this Court is that there is no evidence coming directly against any of the appellants as to who had indeed committed the twin murders. The manner of killing of the deceased indicates as if they were stabbed and attacked while they were fast asleep. This makes the act very disturbing and barbarous. The manner and the mode of liquidating the two innocent lives out of which one was an intellectual and the other always in service of such an intellectual, who was nursing the intellectual as if she were the mother of Sushri Papiya Ghosh. This brings the act in the class of the most brutal and diabolic of murders. In absence of any direct evidence, this Court finds it difficult to confirm the death sentence passed against appellant Shankar Kanu alias Shankar Sao and has no other option than to commute it, though the Court feels that it is a case in which the death-sentence could be the most appropriate sentence to be inflicted upon the appellants. But, in absence of the direct evidence on participation by all or any of the appellants, namely, Shankar Kanu alias Shankar Sao, Manohar Kumar, Ashish Kumar Rai and Anil Kumar Uraon the Court feels that the life imprisonment which means 20 years after insertion of Section 333A of the Cr.P.C. is also not an adequate sentence. Faced with the similar situation as we are faced in the present case, the Supreme Court in the case of Swamy Shraddananda(2) alias Murali Manohar Mishra Vs. State of Karnataka reported in (2008) 13 S.C.C. 767 justified taking a recourse which could be expanding the span of sentence in such situations. I am tempted to quote paragraph 92 of the said decision which is as under:-

□The matter may be looked at from slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years

would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact lawfully belongs to the Court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all. In the present case also, in my considered view, the period of 20 years which means life imprisonment as per the provision of Section 333A Cr. P.C. appears inadequate because after grant of remission, etc. which are without any legal basis as was noticed by the Supreme Court in the above noted case, it may come down to 14 years and that will be simply a mockery as regards passing of sentence on the convicts of twin murders of such magnitude. I, therefore, direct that no remission shall be granted to any of the four appellants, namely, Shankar Kanu alias Shankar Sao, Manohar Kumar, Ashish Kumar Rai and Anil Uraon and they shall serve out 20 complete years of sentence individually.

70. The reference is negated with the above modification in sentence. The three appeals also stand dismissed for the reasons indicated above.

(Dharnidhar Jha, J.)

C.M.Prasad, J.- I agree.

(C.M.Prsad, J.)

Patna High Court.
The 7th April, 2010
Kanth/A.F.R.