PETITIONER:
SURESH

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT17/03/1981

BENCH:
CHANDRACHUD, Y.V. ((CJ)
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CHANDRACHUD, Y.V. ((CJ)
SEN, A.P. (J)

CITATION:
1981 AIR 1122 1981 SCR (3) 259
1981 SCC (2) 569 1981 SCALE (1)543

ACT:
Sentence of death-Whether death sentence is called for has to be examined in each case with dispassionate care-Penal Code, section 302.
Evidence-Trustworthiness of a witness, a child of five years, examined without administering oath by reason of his lack of understanding the sanctity of oath.
Conviction rested not on the evidence of sole eye-witness, a child of five years of age but other corroborative evidence.

HEADNOTE:
The appellant, a starving youth was given shelter by a kindly couple by engaging him as a domestic servant. The reward of that kindness was the murder of the lady of the house and her three year old son and causing serious injury to her five year old son. The appellant was, therefore, charged and convicted under sections 302 and 307 of the Penal Code and sentenced under section 307 to imprisonment and to death under section 302. The High Court confirmed the death sentence and hence the appeal after obtaining special leave of the Court.
Maintaining the conviction under sections 302 and 307 I.P.C. and the sentence under the latter section, but modifying the death sentence under section 302 to one of life imprisonment, the Court
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HELD: 1. Altering the sentence of the appellant to imprisonment for life for the offence under section 302 of the Penal Code, while maintaining the sentence under section 307 Penal Code-the two sentences to run concurrently- will meet the ends of justice, in the instant case, under the following circumstances: [267A-B]
(a) He was just about 21 years of age on the date of the offence and, very probably, a sudden impulse of sex or theft made him momentarily insensible. (b) The evidence of Sunil shows that immediately after the crime, he was found sitting in the chowk of the house crying bitterly.(c) Having achieved his purpose, he did not even try to run away, which he could easily have done since his injuries were not of such a nature as to incapacitate him from fleeing from an inevitable arrest. (d) Though he was not insane at the time

of the offence in the sense that he did not know the nature and consequences of what he was doing, still he was somewhat unhinged. He was kept in a mental hospital from July 19, 1973 to February 2, 1975 where he had shown aggressive symptoms and once even attacked another patient. (e) The basic evidence in this case is of a child of five who answered many vital questions with a nod of the head, one way
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or the other. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life. (f) Non-availability of the useful data on the question of sentence which the trial court proposed to pass due to the trial Judge's failure to ask the appellant what he had to say on the question of sentence and (g) the appellant has been in jail for ten long years and probably would have earned by now the right to be released, after taking into account the remissions admissible to him, were he sentenced to life imprisonment. [265 E-H, 266A, C-D, G]

2. The Trial Judge had a safe expedient in section 235(2) of the Code of Criminal Procedure, 1973, which he needlessly denied to himself on technical consideration that by reason of section 484(2) (a) of the Code section 235 (2) did not apply to trials which were pending on the date when the new Code came into force. The Trial Judge ought to have questioned the appellant on the sentence, whether the letter of section 235(2) governed the matter or not. That would have furnished to the court useful data on the question of sentence which it proposed to pass. In any case, the trial would not have been invalidated if the court were to apply the provisions of section 235 which were introduced into the Code, ex debito justiciae. [266 D-F]

3. A witness who, by reason of his immature understanding was not administered oath and who was privileged, by reason of his years, not to make his answers in an intelligible and coherent manner is unsafe to be trusted whole sale. Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disputed thoughts which tend to stray. [266 A-B, C]

But, in the instant case, there are unimpeachable and the most eloquent matters on the record which lend an unfailing assurance that Sunil is a witness of truth, not a witness of imagination as most children of that age are. [263H,264A]

4. An assessment of the following corroborative evidence, in the instant case, clearly indicate that it was the appellant who committed the murder of Geeta and her son Anil and caused injuries to Sunil: (a) the presence of the appellant proved by quite a large number of injuries during the incident; (b) his conduct in not raising hue and cry at least after the robbers had made good their escape, if any at the time of the killing of the mistress of the house, but little while later, he quietly walked to a neighbour and trotted out the story that a few Badmashes intruded into the house and killed Geeta and her son; (c) the pattern of the crime, that is, Anil was sleeping alongside his mother receiving an injury and getting killed while the mother was assaulted and Sunil being assaulted in order that he should not be left alive to identify the culprit, whom Sunil could easily identify as he was a household servant engaged mainly to look after the two boys: (d) the nature of injuries which were found on the person of the appellant are typically of

the kind which a woman in distress would cause while defending herself, and cannot be by a Badmash but would otherwise deal with him if indeed the Badmash wanted to put the appellant out of harm's way; (e) the weapons with which Geeta was defending herself at different stages of her life saving fight with the appellant were snatched by the appellant and he hit her with those weapons, that is how similar injuries were found on the person of the deceased and the appellant by the same two weapons. [264 A-H, 265 B-C]
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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 281 of 1978.

Appeal by Special Leave from the Judgment and Order dated 4.11.77 of the Allahabad High Court at Allahabad in Criminal Appeal No. 1495 of 1977.

L. N. Gupta for the Appellants.

H. R. Bhardwaj and R. K. Bhatt for the Respondent.

O. P. Rana for the Complainant.

The Judgment of the Court was delivered by

CHANDRACHUD, C. J. This is yet another case in which a young housewife has been done to death by a trusted servant of the family. Her three-year old son was murdered along with her and her five-year old son was seriously injured. The incident occurred on May 6, 1971 at about 2.00 p.m. in House No. F-4/3, Kanoria Colony Quarters, Renukoot, where one Mohan Lal Khetan used to live with his wife Geeta and two sons Anil and Sunil aged three and five years respectively. Mohan Lal left for Allahabad for some work on the morning of the 6th. His wife and children took their food at about 1.00 p.m. and while they were resting, with a cooler on, they were assaulted as a result of which Geeta and Anil died and Sunil received serious injuries. The only other person who was then present in the house was the appellant, who was working as a household servant for a few years before the incident. His presence in the house at the material time is beyond the pale of controversy and indeed his very defence is that some intruders entered the house and caused injuries to Geeta, her two sons and to he himself. The appellant received quite some injuries in the incident which led to the death of Geeta and Anil.

Sunil, the five-year old son of Geeta, was examined by the prosecution as the sole eye witness in the case and his evidence has been accepted by the Sessions Court and the High Court. Shri L. N. Gupta, who has argued the case on behalf of the appellant with admirable precision and brevity, contends that no reliance should be placed on Sunil's evidence because he is a young child of immature understanding, that no oath was administered to him by reason of his lack of understanding of the sanctity of oath, that he did not implicate the appellant for two days or so at least and that his
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statement was recorded by the police about 20 days after the incident. Counsel further argues that in the very nature of things, it would be impossible for a young lad of 13 like the appellant to overpower, gag, assault and slay a well-built woman of 30 that Geeta was. The motive of the offence, according the Courts below, was to outrage the modesty of Geeta. It is urged that a boy of 13 could not possibly have entertained any such lewd thoughts. According to medical

evidence, the injuries on the person of Geeta and the appellant were partly caused by a blunt weapon and partly by a sharp-edged weapon. That means that two different kinds of weapons were used against both of them and, what is more important, the same two weapons. According to counsel, that is more consistent with a stranger or strangers attacking Geeta and the appellant than with the appellant attacking Geeta. The appellant could not have attacked Geeta with two different weapons and even if Geeta were to retaliate, she could not have caused injuries to the appellant with the same two weapons. The final submission is that the prosecution case is rendered suspicious because the evidence of discovery of the iron rod, the knife, two gold bangles and the cash at the instance of the appellant has been disbelieved by the Sessions Court and the High Court.

We have given our anxious consideration to these weighty considerations but on a close scrutiny of the evidence and the circumstances of the case we find ourselves unable to differ from the Courts below in regard to the assessment of the evidence in the case. Counsel is not right in saying that the appellant was only thirteen years of age in May 1971. It appears that the appellant gave his age as 13 during the committal proceedings but the age so given cannot be accepted as correct merely because, as counsel contends, the prosecution did not dispute the correctness of the assertion made by the appellant. There was no assertion in regard to the appellant's age and indeed it was not put in issue at any stage of the proceedings. The point regarding the appellant's age is being raised for the first time in this Court in the form and context in which it is raised by Shri Gupta. The reference to the "tender age" of the appellant was made in the Sessions Court on the question of sentence and not that of guilt, nor indeed in the context that the nature of the offence is such that the appellant could not have committed it, being just a boy of 13 or so. It is not a matter of uncommon experience that the age of an accused is mentioned in the committal proceedings without proper inquiry or scrutiny since, in most cases, nothing turns on it. In fact if the appellant
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was only 13 years of age at the time of the offence, the Sessions Court would not have failed to notice that fact and it would be amazing that the appellant's advocates in the Courts below should not advert to it, though the minutest contentions were raised in arguments and subtle suggestions were made to prosecution witnesses in their cross-examination.

During the trial, the appellant was suspected to be of a deranged mind and was for that reason sent to the mental hospital at Varanasi. Exhibit K-20, which is the abstract of medical history maintained in that hospital, shows that at the time of the appellant's admission to the hospital on July 19, 1973 he was 23 years of age. The occurrence having taken place in May 1971, the appellant would be about 21 years of age at the relevant time. That is what the High Court has found while dealing with the question of sentence when it was urged before it that the death sentence should not be confirmed since the appellant was just 14 or 15 years of age on the date of offence. We concur in view of the High Court on the question of the appellant's age and agree with it that the age given by the appellant in the committal Court and the Sessions Court was a random statement not based on any reliable data.

We cannot accept that an able-bodied boy of eighteen or nineteen could not have committed an assault of the present

nature for the motive alleged. But we might mention that we are not in entire agreement with the Sessions Court and the High Court that the motive of the offender was necessarily to outrage the modesty of Geeta. It is not possible to record a positive finding that the motive necessarily was to commit theft or robbery, but the nature of injuries on the person of Geeta does not fully bear out the inference that the motive of the outrage was concerned with sex. There was no injury at all on Geeta's private parts or anywhere nearabout, not even a scratch or an abrasion. Most of the injuries were caused to her on the face and head. It seems to us more probable that Geeta woke up while the almirah was being ransacked and she paid the price of her courage. She resisted the robbery and was therefore done to death.

Shri Gupta made a very plausible case against the acceptance of the evidence of Sunil, the child witness. We must confess that if the case were to rest solely on Sunil's uncorroborated testimony, we might have found it difficult to sustain the appellant's conviction. But there are unimpeachable and the most eloquent matters on the
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record which lend an unfailing assurance that Sunil is a witness of truth, not a witness of imagination as most children of that age generally are. As we have stated earlier, the presence of the appellant is undisputed and is indeed indisputable. The appellant himself received quite a large number of injuries during the incident, which proves his presence in the house at the relevant time beyond the shadow of a doubt. If the appellant was present in the house at the time when Geeta was assaulted, it becomes necessary to examine his conduct without shifting the burden of proof on to him. If the mistress of the house was killed by robbers, we should have thought that the appellant would raise a hue and cry at least after the robbers had made good their escape. He did nothing of the kind and a little while later, he quitely walked to a neighbour and trotted out the story that a few "Badmashes" intruded into the house and killed Geeta and her son.

Not only does the conduct of the appellant corroborate the evidence of Sunil, but the very pattern of the crime corroborates that it is the appellant who committed it. Anil was sleeping alongside his mother and he seems to have received an injury while the mother was assaulted. But Sunil was assaulted obviously in order that he should not be left alive to identify the culprit. The culprit whom Sunil could easily identify was the appellant who was a household servant engaged mainly to look after the two boys. Total strangers, whom even the appellant could not identify except as "Badmashes", would have no reason whatever to assault Sunil.

The most important of the circumstances which corroborates the evidence of Sunil is the nature of injuries which were found on the person of the appellant. Those injuries are typically of the kind which a woman in distress would cause while defending herself. There is a trail of scratches and abrasions on the front portion of the appellant's body and it is not without significance, as contended by Shri Bhardwaj who appears on behalf of the State of U.P., that the injuries on Geeta are also all on the front portion of her body. A 'Badmash' would not deal with the appellant with his nails, if indeed he wanted to put the appellant out of harm's way.

There is one more argument which requires to be dealt with, namely, that two different weapons and the same two weapons were used against both Geeta and the appellant. We

are not quite sure whether Geeta had received an incised injury because, the injuries which were found on her forehead can give the appearance
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of incised injuries, if caused by an iron rod. The skin just above a hard surface can break by a severe blow and give the appearance of an incised injury. But even assuming that the same two weapons were used on Geeta as also the appellant, it does not militate against the commission of the crime by the appellant himself. It is clear from the evidence of Dr. Guha and Dr. Sharma that all the injuries on the person of both Geeta and the appellant were on the front portions of their respective bodies. It is also clear that the injury which resulted in the death of Geeta as also her son Anil was caused by the iron rod. We are inclined to the view that the weapons with which Geeta was defending herself at different stages of her life-saving fight with the appellant were snatched by the appellant and he hit her with those weapons. That is how similar injuries were found on the person of both.

We, therefore, agree with the Sessions Court and the High Court that it is the appellant who committed the murder of Geeta and her son Anil and caused injuries to Sunil.

Crimes like the one before us cannot be looked upon with equanimity because they tend to destroy one's faith in all that is good in life. A starving youth was given shelter by a kindly couple. The reward of that kindness is the murder of the woman and her child. We cannot condemn adequately the utterly disgraceful and dastardly conduct of the appellant. But all the same, the question as to whether the death sentence is called for has to be examined in each case with dispassionate care. The appellant was just about 21 years of age on the date of the offence and, very probably, a sudden impulse of sex or theft made him momentarily insensible. The evidence of Sunil shows that immediately after the crime, the appellant was found sitting in the chowk of the house crying bitterly. Having achieved his purpose he did not even try to run away, which he could easily have done since, his injuries were not of such a nature as to incapacitate him from fleeing from an inevitable arrest. It would also appear that though he was not insane at the time of the offence in he sense that he did not know the nature and consequences of what he was doing, still he was somewhat unhinged. He was suspected to be insane during the trial and was kept in a mental hospital from July 19, 1973 to February 2, 1975. He was eventually declared fit to stand his trial but the evidence of Dr. R. N. Srivastava (P.W. 13), who was in charge of the hospital and the notes (Exhibit Ka-20) of the hospital show that the appellant had
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shown aggressive symptoms and once, he had attacked another patient. Coupled with these considerations is the fact that the basic evidence in the case is of a child of five who answered many vital questions with a nod of the head, one way or the other. A witness who, by reason of his immature understanding, was not administered oath and who was privileged, by reason of his years, not to make his answers in an intelligible and coherent manner is unsafe to be trusted wholesale. We cannot also overlook, what Shri L. N. Gupta highlighted, that Sunil's statement was recorded about 20 days later. There is valid reason for the delay, namely, his state of mind (he was a witness to the murder of his mother and an infant brother) and the state of his body (he was gagged as a result of which his clavicle was fractured).

Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life.

The learned Sessions Judge did not ask the appellant what he had to say on the question of sentence, holding that section 235 (2) of the Code of Criminal Procedure, 1973 did not, by reason of its section 484 (2) (a), apply to trials which were pending on the date when the new Code came into force. We wish that the Sessions Court had questioned the appellant on the sentence, whether the letter of section 235(2) governed the matter or not. That would have furnished to the Court useful data on the question of sentence which it proposed to pass. In any case, the trial would not have been invalidated if the Court were to apply the provisions of that section which were introduced into the Code ex debito justiciae. The learned Judge had before him a safe expedient, the benefit of which he needlessly denied to himself on technical considerations.

Finally, the appellant has been in jail for ten long years. He has probably earned by now the right to be released, after taking into account the remissions admissible to him, were he sentenced to life imprisonment. We suppose, though we are not confident, that some celebrity or the other must have visited the jail and large, wholesale remissions from sentence must have been doled out to the prisoners in order to commemorate the great and unusual event.

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In the result, we confirm the order of conviction but set aside the sentence of death imposed upon the appellant and sentence him to imprisonment for life for the offence under section 302 of the Penal Code. The sentence under section 307 will stand but the two sentences will run concurrently.

S.R. Appeal partly allowed.

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