

(1989) 02 BOM CK 0004

In the Bombay High Court

Case No : Criminal Appeals No's. 244 and 245 of 1988 and Confirmation Case No. 2 of 1988

Kaliram and etc.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-02-1989

Acts Referred:

Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 162, 313, 367
Evidence Act, 1872 — Section 8
Penal Code, 1860 (IPC) — Section 34

Citation : (1989) 2 BomCR 475

Hon'ble Judges : W.M. Sambre, J;Deshpande, J

Bench : Division Bench

Judgement

Deshpande, J.—Accused 1 Kaliram and accused 2 Bansilal were convicted by the 3rd Additional Sessions Judge, Amravati under Ss. 302 and 376 read with S. 34 of the Indian Penal Code and sentenced to death. Confirmation Case No. 2 of 1988 arises out of the reference made by the 3rd Additional Sessions Judge in respect of the sentence of death while Criminal Appeals Nos. 244 and 245 of 1988 have been filed by the accused 1 and 2 respectively questioning their conviction and sentence.

2. The incident out of which the prosecution arose, occurred in the night between February 15 and 16, 1988 in the village Surali jungle in the field belonging to one Vishnupant Bhujade. The accused No. 1 Kaliram was employed as Vishnupant Bhujade's agricultural servant. Accused 1 Kaliram and his wife used to reside in Vishnupant's house in a separate room. Vishnupant had a hut in his agricultural land in the outskirts of the village. The accused 1 met Ramu Mawasi about 5 days before the incident and introduced him to Vishnupant Bhujade. Vishnupant employed Ramu and his wife Munnibai and gave them the hut in his land for their residence. The hut was a small structure 10" X 7" in area with an electric light. On the day of the incident Ramu and his wife had their evening meals at about 7

p.m. and went to sleep. At about midnight Munnibai was awakened because of the beating which was being given to Ramu. On waking she noticed the accused 1 and 2 beating her husband. She screamed, but they silenced her by threatening her. After killing Ramu by means of sticks, the accused 1 and 2 wrapped his body in a quilt and carried it to a dry well 411 feet away and dropped it there. They made Munnibai remove all the bloodstained articles which were inside the hut and dumped those articles also in the well. She was then taken by force to an orange garden where accused 1 Kaliram forcibly ravished her and after he finished, the accused 2 Bansilal also ravished her. The accused No. 1 Kaliram left the place. Munnibai was then taken by accused 2 to a nearby field where he had sexual intercourse with her four times. At sun rise he left her upto the door of Vishnupant's house. Munnibai narrated the incident to the accused 1's wife Bindiya and took her to the well. Vishnupant also followed them and saw the place of the incident. Munnibai accompanied Vishnupant to Warud police station and lodged the first information report. P.S.I. Wagh sent Munnibai for medical examination to the Primary Health Centre and got her examined by Dr. (Miss) Dhote who found seminal stains on her sari, but no marks of violence or injury. She collected vaginal swab and sent it to the Chemical Analyser for examination.

3. P.S.I. Wagh seized Munnibai's sari (Art. 1) under the panchanama Ex. 46 and saw the place of the incident, but as it was dark, without recording the panchanama of the scene of offence, he recorded the statements of Munnibai, Vishnupant and Vishnupant's wife Kamlabai and arrested accused 1 at 21 hours after drawing up the panchanama Ex. 13. He seized the blue pant, Jangiya and Manila which were on accused 1's person under the seizure memo Ex. 14. The panchanama of the scene of offence Ex. 15 was drawn up. The dead body which lay concealed in the well under sheaves of fodder was taken out and an inquest was held. The hand and legs of the dead body were found tied with a rope string. The clothes and the articles which were in the well were seized under a panchanama and the dead body was sent for post mortem. The post mortem examination in respect of the dead body was performed by Dr. Sadapure (P.W. 3). He noticed 3 incised wounds respectively on the left ear, forehead and right ear and contusions on the forehead, right eye-brow, left ring finger, chin, left parietal region, left scapular region and lacerated wounds on the left eyebrow, right parietal region and abrasion on left elbow joint. The internal examination showed that the left kidney was ruptured, the skull was fractured, brain material had come out of the skull and the spleen was also ruptured. In the opinion of Dr. Sadapure, the death was due to shock on account of the extensive hemorrhage resulting from the injuries, the injuries on the right and left parietal region being grievous resulting in damage to the brain. The accused No. 2 was arrested at 3 p.m. on 17-2-1988 and the clothes which he was wearing viz full-plant, Bengali shirt and pants, Arts. 18, 19 and 20 were seized under seizure memo Ex. 23. In consequence of the information given by accused 1 and 2, two Babhul sticks Arts. 22 and 23 were seized under two separate seizure memos. After the

Chemical Analyser's report was received, the accused 1 and 2 were put on trial.

4. The accused pleaded not guilty to the charge and their defence being mainly of denial. The learned Additional Sessions Judge found that Ramu Mawasi met with a homicidal death and his death was caused by accused Nos. 1 and 2. He also found that accused 1 and 2 had gang raped Munnibai (P.W. 1). The additional Sessions Judge held accused 1 and 2 to be guilty under sections 302 and 376 read with S. 34 of the Penal Code and without passing any sentence in respect of rape, imposed the sentence of death on accused 1 and 2.

5. The fact that Ramu Mawasi met with a homicidal death is established by medical evidence as well as the evidence of Munnibai (P.W. 1), Vishnupant (P.W. 5) and the other circumstances bearing upon the condition in which the dead body came to be found discarded in the dry well. The position that Ramu Mawasi met with a homicidal death is not questioned before us and indeed no other conclusion than the one that he met with a homicidal death is possible under the circumstances.

6. With regard to the occurrence, the evidence purporting to implicate accused 1 and 2 comes mainly from Munnibai (P.W. 1). It is apparent from her account which is supported by that of Vishnupant Bhujade (P.W. 5) that about 5 days before the gruesome incident Munnibai and her husband Ramu had come to the village in search of an employment and on meeting the accused 1 Kaliram they went to Vishnupant Bhujade and Vishnupant employed them and asked them to reside in the hut in his agricultural land. Kaliram used to reside with his wife Bindiya in a separate room in Vishnupant Bhujade's house. In the fateful night Munnibai and Ramu slept in the hut by spreading a Bondri (quilt) on a platform about 3" in height inside the hut. Munnibai's evidence shows that there was an electric light burning inside the hut when they went to bed and at about midnight the accused 1 Kaliram suddenly entered the hut along with a person wearing a Bengali shirt and they both started beating Munnibai and her husband with Babhul sticks. When Munnibai started screaming the accused 1 Kaliram threatened her that she will be stabbed with a knife and killed. This worked and she stopped crying. After Ramu was battered to death, accused 1 and 2 wrapped him in the quilt and carried him by hanging the bundle to a Babhul branch to a well in the adjoining field. Munnibai's evidence shows that accused 1 Kaliram pulled her by hand and took her also to the well. After throwing the bundle into the well the accused 1 and 2 dropped some sheaves of fodder inside the well and dragged her to an orchard about 200 to 300 paces away from the well. Munnibai's account shows that accused 1 Kaliram put her on her back, lifted her sari and had a sexual intercourse with her. After he finished, the accused 2 Bansilal also had a sexual intercourse with her. According to her the accused 1 Kaliram had intercourse with her twice and left in the direction of the village. Thereafter accused 2 Bansilal took her to another field where there was a heap of fodder and had sexual intercourse with her thrice. At sun rise she collected her sari and went in the direction of the village. According to Munnibai, accused 2

followed her until she reached the door of Vishnupant Bhujade's house.

7. When she reached Vishnupant's house, she narrated the incident to Bindiya the wife of accused 1 Kaliram and took her to the well near Vishnupant's field as she wanted to verify Munnibai's version. Munnibai's evidence shows that when she reached the well, Vishnupant also followed there and she also narrated the incident to Vishnupant. Vishnupant then went to Warud police station while she and Bindiya stayed in the field and Vishnupant returned with a police party. She narrated the incident to the police and pointed out the well. According to her, her statement was recorded by the police while she was in the field and the account she gave to the police Ex. 11 substantially supported her version given in the evidence. The learned counsel for the accused persons urged that the statement Ex. 11 which was treated as the F.I.R. by A.S.I. Wagh (P.W. 10) and included in the printed F.I.R., was not in fact the first information report because on Munnibai's own showing it would be clear that her statement was recorded by the police in Vishnupant's field and that she had not gone to the police station until after the police arrived at the scene of offence. A.S.I. Wagh, however, asserted that Vishnupant Bhujade had not given the first information report to him and the incident came to be narrated to him by Munnibai when she came to the police station along with Vishnupant. Vishnupant's account shows that when he went to his field at about 10-30 a.m. he met accused 1 Kaliram while the latter was returning to the village but he came back and told him that his wife Bindiya had been blurting anything by saying that he had committed Ramu's murder in the previous night. It is noteworthy that the statement which was attributed to the accused 1 had not been made before the Police when Vishnupant's statement was recorded in the night of 16-2-1988. Vishnupant's evidence purports to show that the accused 1 told him that whatever Bindiya was saying, was false and that at that time Munnibai and Bindiya were sitting in his land and when they heard what accused 1 was saying. Bindiya said that her husband should not be trusted because he was not in their house in the previous night and she also stated that Ramu was killed by the accused and was dumped in the well. These statements regarding the conduct of accused 1 Kaliram and Bindiya came to be made for the first time in Vishnupant's evidence in the Court and he had made no such statement before the Police. Vishnupant's evidence further purports to show that he then went to the field and made fresh enquiry from accused 1 Kaliram, but he did not admit his complicity and so he took Munnibai aside and enquired from her and she informed that accused 1 and one more person committed the murder of her husband in the previous night and that they had discarded Ramu's body in the well and that thereafter they both had ravished her. Vishnupant claimed to have made fresh enquiry from Kaliram, but he stated that he had neither beaten nor murdered Ramu and it was Bansilal accused 2 who was responsible for the murder. It is evident that this statement about the conduct attributed to accused 1, was not made before the police when Vishnupant's statement was recorded. Considering the belated references which came to be made for the first time when Vishnupant's evidence was recorded on

25-8-1988, it is difficult to accept his version regarding the statements attributed to accused No. 1 Kaliram. Shorn of these embellishments, what remained of Vishnupant's evidence was that he had seen Munnibai and Bindiya together in his field and that Munnibai had made statements implicating accused 1 Kaliram and one other person of her husband's murder and rape on her.

8. It was strenuously urged on behalf of accused 1 and 2 that Munnibai's version regarding her informing Vishnupant, cannot be trusted because she was out to implicate accused 1 and 2 falsely and that the omission to examine Bindiya in the course of investigation and to examine Kamlabai the wife of Vishnupant whose statement had been recorded by the Police, in Court, would give a lie to Munnibai's version. It appears to us that Bindiya's examination would not have served any purpose because even assuming that she had momentarily felt annoyed with the conduct of the accused 1 Kaliram, she was not an eye-witness to the incident and except for saying what was the immediate conduct of Munnibai, her evidence would not have unfolded the narrative of the prosecution case any further. With regard to mentioning of the gruesome incident immediately after the occurrence, Vishnupant (P.W. 5) had testified to it and he was also the person who was instrumental in getting Munnibai's first information report recorded in the police station. But for saying that Munnibai had made identical statement to her also, Kamlabai's evidence would not have gone further. She was not an eye-witness and if the purpose of examining Bindiya and Kamlabai were to offer corroboration to Munnibai's version, the prosecution had examined Vishnupant for that purpose and had also paced on record the first information report which was attributed to Munnibai. We are not, therefore, impressed by the contention raised on behalf of accused 1 and 2. The law laid down in *Rameshwar Dayal v. State of U.P.* AIR 1978 SC 1558 is clear and it is that it is manifest that what is important is not as to who were not examined but as to whether the witness, who had actually been examined should be believed. As we have pointed out the witnesses who were not examined in this case were not eye-witnesses and nothing would have turned upon their examination and no adverse inference can, therefore, be drawn against the prosecution for not examining these two prosecution witnesses.

9. With regard to Munnibai's version that her statement came to be recorded in the field after the police arrived and in the meanwhile Vishnupant had been to the police station, as we have already stated A.S.I. Wagh and Vishnupant (P.W. 5) stated that the F.I.R. was given by Munnibai and that it was not Vishnupant who had given that information. It is evident that according to them the information relating to the offence was given by Munnibai first. The learned trial Judge who had the advantage of seeing the witness has observed that one cannot be oblivious of the fact that Munnibai a young Adiwasi woman was a stranger to the village and whatever discrepancies were pointed out in her evidence are accountable to the limited faculty to reproduce what she had observed and that it was always natural that due to mental disposition, such as shock and horror at the time of the occurrence, some discrepancies are likely to

occur in the evidence of such a witness. There is no doubt that Munnibai had been to Warud police station and had been sent to Dr. (Miss) Dhote (P.W. 4) who examined her at 5-45 p.m. on 16-2-1988. The printed first information report shows that the first information report regarding the incident had been given at 16 hours on that day. A.S.I. Wagh was categorical in stating that apart from her F.I.R. her detailed statement also came to be recorded. It is obvious that it was she who had shown the place of occurrence to the police and that was late at night and so a panchanama of the scene of offence could not be drawn up. We have no reason in these circumstances to doubt the version of A.S.I. Wagh and Vishnupant (P.W. 5) that the FIR was given by Munnibai. Vishnupant's evidence shows that he had taken Munnibai in a rickshaw to the police station at Warud. It was urged on behalf of accused 1 and 2 that with regard to taking her in a rickshaw to the police station there was omission in the statement before the police. We do not think that this omission to mention the vehicle was a material omission and we do not think that merely because of that omission Vishnupant's version regarding his taking her to the police station should be disbelieved. On the other hand it appears to us that Vishnupant (P.W. 5) who was employed as a Head Clerk in the Irrigation Department at Warud and had agricultural land at Surali would have no reason to give false evidence against his own servant the accused 1 Kaliram. Munnibai's account regarding the manner in which Ramu came to be beaten by two persons including accused No. 1 Kaliram and those two persons having ravished her finds corroboration in the first information report as well as the account given by Vishnupant (P.W. 5).

10. There are two parts of the incident. The one which has earlier in point of time is the assault by accused 1 and 2 on Ramu inside the hut. Munnibai stated that the two persons started battering her husband by means of sticks inside the hut. The learned counsel for the accused 1 and 2 laid great stress on the circumstance that the height of the hut according to Munnibai was such that if one were to stand inside the hut, his hands would touch the basa (bamboos) and therefore, it was unlikely that an assault by means of sticks might have taken place inside the hut. Vishnupant's evidence however, shows that his hut is about 7 1/2 feet high from the ground level. There was a platform about 3 feet high inside the hut on which the couple was sleeping and if the height were about 7 to 7 1/2 feet, we see no difficulty for anyone who was bent upon hitting the sleeping couple from being prevented from doing so. The panchanama of the scene of offence Ex. 15 shows that the hut was slanting on both the sides. The reference to the bamboos which is to be found in Munnibai's evidence would not have reference to the roof but the bamboos which supported the structure and merely because one could touch the bamboos while standing, it would not follow that an assault by means of a stick on the sleeping couple would not be possible. Munnibai also mentioned that an electric bulb was burning inside the hut at the time of the incident though she stated that at the time of the panchanama the bulb was found broken. This subsequent event, however, would not give a lie to her version that there was a light in the hut when the incident occurred and it

may be that while the incident was in progress, the bulb might have been broken. We see no substance in the plea taken on behalf of the accused 1 and 2 that on account of the finding of the bulb broken at the time of the panchanama, it would follow that there was no electric light in the hut to facilitate the identification.

11. Kaliram accused 1 was known to Munnibai because 5 days earlier it was he who had introduced Ramu and Munnibai to Vishnupant and the accused 1 and his wife had been residing in Vishnupant's house and also working on his land. There could, therefore, be no question of a mistaken identity of accused No. 1 Kaliram in that night in the light that was available. Another circumstance which makes her account credible is that the accused 1 threatened her when she started crying, with harm to her and she stopped crying and that she followed the accused 1 and the other person to the well when they wrapped Ramu's body in the quilt and discarded it in the well.

12. It was emphasised on behalf of accused 1 and 2 on the basis of the recital in the panchanama of the scene of offence (Ex. 16), that the spot where the dead body was dropped was in the well in the field of one Bakaram Pawar and it was apparent from the evidence of Vishnupant (P.W. 5) that there was another well 200 feet away from the hut which was nearer than the well in Bakaram's field, and so the watchman who was in the nearby field could have become aware of the incident. Vishnupant's evidence shows that if a person were to stand near Bakaram's well. Mahadeo's field would be about 700 feet away. From the field of Mahadeo the orchard of Yashwantrao Agarkar is about two fields away and in Yashwantrao's field there is a hut and the watchman lives in it. Considering the distance, the threat of the accused 1 which had silenced Munnibai and the hour at which the ghastly incident occurred, it is difficult to accept that Munnibai would give a cry and invite trouble or that the watchman who was in Yashwantrao's field would be so alert as to notice the incident so far away in that dark night. It appears to us that none besides Munnibai could have watched this incident and there was no question of the prosecution not examining some other who might have seen the incident.

13. We see nothing unusual in the miscreants compelling Munnibai to accompany them because otherwise she would have been left free to raise a cry and get the villagers who could have caught the accused 1 and 2 red-handed. It was only after the body was dumped into the dry well and Munnibai made to collect all the blood stained articles from the hut and discard them into the well, that she would be allowed to be free. The finding of the body in the well in the circumstances which we have narrated gives a ring of truth to Munnibai's version. It was urged on behalf of the accused that there was no mention in the first information report about the dead body being tied and then discarded and this would show that Munnibai's account did not present the full picture and since the tying of the body had not been mentioned, her account would become suspect. When she has graphically described that her husband was wrapped in the quilt and the

bundle was tied to a pole and carried away like a dead animal, we do not think that any further particulars regarding anything that was done by the miscreants could be expected. So far as this part of the narrative given by the Munnibai is concerned, we see no reason to suspect her account. She would naturally be in the hut with her husband and if the assault were to be made on him in the dead of the night, she would be the only witness to such an occurrence. Her presence was natural and her account was also consistent with the probabilities.

14. It was urged on behalf of the accused that Munnibai's statement that accused 2 was standing outside the hut when the assault was going on, would show that he had not participated in the assault. In fact she had stated in her examination-in-chief that both had participated in the assault and hit with Babhul sticks. She immediately corrected the statement regarding accused 2 standing outside by saying that both of them had assaulted her husband. In fact she has attributed all the acts to two persons from the beginning to the end and it is obvious that the statement that the accused 2 was outside must have been inadvertently made. We are satisfied that because of that statement alone it cannot be inferred that the other person had not participated in the assault. Considering that the two persons including the accused 1 came together, took part in the assault, together wrapped the dead body and carried it to the well and dumped it there and thereafter made an attempt to conceal the dead body by throwing sheaves of fodder on the body, the only inference that is deducible is that the two persons acted in concert and participated in action. The prosecution version, therefore, appears to us to be natural and acceptable.

15. That takes us to the other part of the incident regarding rape. The second part of the incident began after Ramu's dead body was thrown into the well. Munnibai (P.W. 1) spoke about the accused having ravished her in the orchard about 200 to 300 paces away from the well, the accused 1 having had sexual intercourse with her first followed by the accused 2, and the accused 1 again ravished her twice. Her evidence shows that thereafter the accused 1 left the place, but the accused 2 took her to another field at a considerable distance and ravished her thrice on a heap of fodder sheaves. The panchanama of the scene of offence Ex. 15 shows that the earth of both the places where the sexual assault was carried was dislevelled. The learned Additional Session Judge relied on the presence of semen stains on the Jangiya and underwear of accused 2 (Arts. 3 and 7) and the sari (Art. 1) which belonged to Munnibai. Mere presence of semen stains on the underwears of the adult males cannot be regarded as an incriminating circumstance in the absence of evidence to show that the semen of the same blood group as that of the accused 1 and 2 was found on the sari (Art. 1). The report of the Chemical Analyser Ex. 52 shows that the origin of the semen stains found on these clothes could not be determined. Munnibai was a married woman and as the evidence of Dr. (Miss) Dhote (P.W. 4) shows, was accustomed to sexual intercourse and since she had been sleeping with her husband in the hut in Vishnupant's field, there is nothing unusual in the presence of semen stains on her sari and those semen stains are not referable

only to the accused 1 and 2. Dr. (Miss) Dhote's evidence shows that there were no marks of violence on Munnibai's body, no matting of the pubic hair and no injury to the external genitals. She collected vaginal swab on two slides. The report of the Chemical Analyser shows that no semen was found on the vaginal swab. Dr. (Miss) Dhote's evidence makes it clear that if traces of semen or spermatozoa are not noticed in the vaginal swab, it would definitely indicate absence of sexual intercourse or rape on the victim. The learned Additional Sessions Judge has observed in para 52 of his judgment that the articles were sent to the Chemical Analyser on 25-2-1988 and were examined on or about 17-6-1988 and it was therefore, possible that in the meanwhile the sperms may not be available on the cotton swab. In Modi's Medical Jurisprudence and Toxicology, 15th edition, at page 117, it has been observed as follows :

"Spermatozoa lose their activity in the mediums of acids, strong alkalies, metallic salts, alcohol, glycerin and urine or when heated about 50 degree C, but they retain their characteristic form for a long time if not disintegrated by decomposition. In properly preserved garments they have been identified in stains of from five to eighteen years standing."

It is, therefore, difficult to agree with the view of the learned Additional Sessions Judge that the spermatozoa and semen may have been destroyed on account of the delay of only four months in examining the sample. Munnibai clearly stated that both the accused 1 and 2 while having sexual intercourse with her more than once ejaculated. If this version were true, then certainly presence of semen and spermatozoa would have been seen in the vaginal swab. Her version, therefore that she had been subjected to sexual intercourse by accused 1 and 2, cannot be accepted. We are unable to agree with the finding of the learned Additional Sessions Judge that the accused 1 and 2 committed rape on Munnibai and the conviction u/s 376 read with S. 34 of the Indian Penal Code, would have to be set aside.

16. The submission on behalf of accused 1 and 2 was that if Munnibai was not telling the truth in respect of a substantial part of the story, her evidence should be rejected in its entirety. It is not possible to accept this submission because of the telltale circumstances to which we have referred while considering Munnibai's evidence in respect of the assault on her husband. Her version is corroborated by the finding of human blood on the full-pant and Manila of accused 1 Kaliram (Arts. 24 and 25) and on the full-pant (Art. 26) and Bengali shirt (Art. 27) of the accused No. 2 Bansilal. The report of the Chemical Analyser showed that the blood on the full-pant (Art. 26) was of "O" group. Though the learned Additional Sessions Judge has put questions regarding the seizure of these clothes to the accused 1 and 2 in their examination u/s 313 of the Criminal Procedure Code, no specific question was put to either of them regarding the presence of human blood of blood group "O". Question No. 26 to the accused 1 Kaliram was that it had come in the evidence of Suryabhan (P.W. 2) and A.S.I. Wagh that he was arrested on 16-2-1988 and the blue pant, Jangya and the

Manila (Arts. 2, 3 and 4) were seized from him under the seizure memo (Ex. 14) and the answer he gave was that this was false. The question regarding Chemical Analyser's report was couched in the following words :

Q. 39. - It has come in the evidence of A.S.I. Wagh and P.C.B. No. 748 Ambadas that the seized articles along with samples collected by M.Os. were sent to office of Chemical Analyser, Nagpur along with forwarding letters (Exs. 50 and 51) which were reached by P.C. Ambadas who received acknowledgment (Ex. 39) from said office. What have you to say about it ?

Answer. - I do not know.

Q. 40. - It has come in the evidence that on examination of the articles referred to him, the Assistant C.A., Nagpur gave report (Ex. 52). What have you to say about it ?

Answer. - I do not know.

The corresponding questions put to accused No. 2 Bansilal were as follows :-

Q. 30. - It has come in the evidence of Suryabhan (P.W. 2) and A.S.I. Wagh that you were arrested on 17-2-1988 and the Bengali shirt, pant along with V.I.P. Chaddi (Arts. Nos. 20, 18 and 19 respectively) now shown to you, were seized from you under the seizure memo (Ex. 23). What have you to say about it ?

Answer. - It is false.

Q. 44. - It has come in the evidence of A.S.I. Wagh and P.C.B. No. 748 Ambadas that the seized articles along with samples collected by M.Os. were sent to office of Chemical Analyser, Nagpur along with forwarding letters (Ex. 50 and 51) which were reached by P.C. Ambadas who received acknowledgment (Ex. 39) from said office. What have you to say about it ?

Answer. - I do not know.

Q. 45. - It has come in the evidence that on examination of the articles referred to him the Assistant C.A., Nagpur gave report (Ex. 52). What have you to say about it ?

Answer. - I do not know.

The submission of the learned counsel for the accused 1 and 2 was that as it was not specifically put to the accused Nos. 1 and 2 that there were stains of human blood on their clothes and as it was not put to accused No. 2 that blood of blood group "O" which was the same as the blood group of the deceased Ramu had not been put to the accused persons, the circumstance of finding human blood which would be an incriminating circumstance in the absence of an opportunity to the accused Nos. 1 and 2 to explain how that blood came upon their clothes, cannot be used against them. The learned Assistant Government Pleader invited us to exercise our powers u/s 367 of the Criminal Procedure Code and put the questions on this point to the accused Nos. 1 and 2, if we were to take the view

that the questions as put by the learned Additional Sessions Judge were vague and did not bring to the notice of the accused 1 and 2 that human blood was found on their clothes. This request was opposed on behalf of the accused Nos. 1 and 2, the learned counsel contending that the High Court would not have the powers to put such questions by recourse to Section 367, S. 367 reads as follows :-

"367. Power to direct further inquiry to be made or additional evidence to be taken. - (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken, upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court."

The position with regard to the powers of the High Court in this regard has been clarified by the Supreme Court while considering the identical provisions of the Code of Criminal Procedure, 1898, in *Jumman and Others Vs. The State of Punjab*, as follows (Para 12) :-

"On a reference to the High Court under S. 374, the entire case is before the High Court. In fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence under S. 375 if it so desires. There is a difference when a reference is made u/s 374 and when disposing of an appeal u/s. 423 and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law it is for High Court to come to an independent conclusion of its own."

Once it is clear that the confirmation proceedings are a continuation of the trial, we see no impediment in invoking S. 313 which runs as follows :-

"313. Power to examine the accused. - (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary,

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case."

We are not impressed by the submission of the learned counsel for the accused Nos. 1 and 2 that the term "inquiry" contemplated by sub-section (1) of S. 367 would not take in the examination of the accused u/s 313(1)(a). To accede to this proposition would be unreasonably narrowing the wide powers conferred on the Court by the use of the expression "may at any stage". Putting such a limitation on the powers of the High Court u/s 367 may in proper cases deprive the accused persons of an opportunity to offer explanation in respect of the incriminating circumstances which have been brought in the evidence and exposing him to the risk of a conviction even if he were to have a proper and plausible explanation to offer in respect of that circumstance and put him in the peril of suffering a conviction for no fault of his. This obviously cannot have been within the contemplation of the Legislature while investing the High Court in the confirmation proceedings with the wide powers under S. 367 of the Criminal Procedure Code. Shri Daga for the accused Nos. 1 and 2 very fairly stated before us that he has not been able to find out any case which would support the proposition which he is canvassing and relied on the observations in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, where the Supreme Court had not adopted this course while exercising its powers under Article 136 of the Constitution. There the Supreme Court observed that there was a vital defect in some of the circumstances mentioned and relied upon by the High Court and as those circumstances were not put to the appellant in his statement u/s 313 of the Criminal Procedure Code, they must be completely excluded from consideration because the appellant did not have any chance to explain them. The question as to the scope and power of the High Court under S. 367 of the Criminal Procedure Code did not come up for consideration in that case. Since we are of the view that S. 367 of the Criminal Procedure Code has invested this Court with the power to direct further enquiry to be made or additional evidence to be taken, we thought it fit to put the question regarding the finding of the human blood on the clothes (Arts. 24 and 25) of the accused 1 in view of the report of the Chemical Analyser and the finding of human blood on the clothes (Arts. 26 and 27) of the accused No. 2 as well as the finding of the blood of blood group "O" on the full-pant (Art. 26) of the accused No. 2. The accused No. 1 stated before us that the certificate of the Chemical Analyser (Ex. 52) regarding the finding of the human blood on Arts. 24 and 25 was not true. The accused 2 stated that the blood found on his full-pant Art. 26 and the Bengali shirt Art. 27 was not Ramu's blood. Since these questions have now been put and the accused 1 and 2 were afforded an opportunity of giving their explanation, the circumstances can now be used against them.

17. Even if the position were otherwise, we do not think that on the basis of the

questions which had been put by the learned Additional Sessions Judge to accused 1 and 2, the learned Additional Sessions Judge was not justified in taking the presence of the human blood stains on the clothes of the accused Nos. 1 and 2 into consideration while deciding upon their role in respect of the assault on the deceased Ramu. The questions put, clearly were about the seizure of the clothes from them with reference to the seizure memos in which it was stated that those clothes were stained with blood. Both the accused stated that the evidence about the seizure was false. The learned Additional Sessions Judge would have done well to put a specific question with regard to the articles on which the blood stains were found while referring to the report of the Chemical Analyser. However, the evidence was sufficiently brought to the notice of the accused 1 and 2 by the learned Additional Sessions Judge and it would not have been normally necessary to put a further question regarding the clothes being stained with human blood when they had denied that these clothes belonged to them except for the purpose of giving an additional opportunity and this was also provided by putting a question with regard to the report of the Chemical Analyser at Ex. 52.

18. Apart from the finding of the blood-stained clothes, the prosecution relied on the discovery of the blood-stained sticks (Arts. 21 and 22) in consequence of the disclosures made by them. The evidence of Suryabhan (P.W. 2) and A.S.I. Wagh shows that the accused No. 1 made a statement that he would point out the wooden stick and the statement was taken down in writing as portion marked A in the memorandum Ex. 20, and thereafter the stick (Art. 21) came to be seized. Though there was a mention in the memorandum Ex. 21 that the accused No. 1 Kaliram had stated that he had kept the Babhul stick hidden in a heap of wood in Vishnupant's field, the substantive evidence does not show that the accused No. 1 had made the statement that he had hidden the wooden stick at the place indicated. Their evidence also shows that after his arrest accused No. 2 Bansilal stated that he would produce the Babhul stick and that statement was recorded in the memorandum Ex. 24. Though the record purports to show that the accused No. 2 had stated that he had hidden the stick in the heap of thorny bushes, the substantive evidence does not show that accused No. 2 had stated that he had hidden the stick or he had kept it there. The mere finding of the blood-stained sticks in these circumstances would not be sufficient to show that the accused 1 and 2 had kept the sticks Arts. 22 and 23 or that they were in possession of those sticks. It could at the most be said that they had knowledge of the places where the sticks were kept though the report of the Chemical Analyser showed that these sticks were stained with human blood. Apart from the absence of the evidence of authorship, what is important is Munnibai's version in her cross-examination that it was true that the accused dropped the bundle of the dead body and the sticks used by them and the clothes in the well. The possibility of the sticks being taken or concealed in the places indicated, is ruled out by the narrative she gave about the acts of the accused Nos. 1 and 2 since the killing of Ramu until the accused 1 and 2 left after the alleged outrage

on her. Disagreeing with learned Additional Sessions Judge on this point, we find that the possession or concealment of the blood-stained sticks cannot be attributed to accused Nos. 1 and 2 and the discovery evidence is not entitled to any weight.

19. The learned counsel for the accused Nos. 1 and 2 referred to a contradiction brought out in the cross-examination of Vishnupant (P.W. 5). He had referred to the accused No. 1 Kaliram telling him that his wife was saying that the accused No. 1 had killed Ramu in the field and that she was abusing him. He was contradicted by the statement before the police which was to the effect that his wife was saying that somebody had killed Ramu. The controversy was whether the word "Kisine" (somebody) or the word "Usine" (that man meaning accused 1 Kaliram) was used. Since this dispute was raised during the cross-examination of Vishnupant (P.W. 5) and the learned trial Judge had reserved the ruling on the interpretation, it would have been only proper to question the Investigating Officer A.S.I. Wagh on this point because the statement was recorded in his handwriting. Unfortunately a blanket reference was made in his cross-examination and what was elicited was that Vishnupant had stated the portions marked A to C in his statement before the police (Ex. 54 to 56). However nothing turns up on this contradiction because the reference by Vishnupant was to the statement made by accused 1 Kaliram that his wife was saying something which implicated the accused No. 1. In any event accused No. 1's wife Bindiya was not an eye-witness to the incident and whatever she might have stated, would not be relevant because u/s 8 of the Evidence Act, it is only the conduct of the accused No. 1 alone which would be relevant and not what statement Bindiya made. The learned Additional Sessions Judge, entirely overlooked this legal position while referring to this aspect in para 38 of his judgment. Even accepting the position that Bindiya had used the word "Usine", the prosecution would not be in a position to reap any advantage out of this and if we go to the conduct of the accused No. 1 it is apparent that he had been denying that he had any part to play in the incident and was in the village until the police arrived.

20. Returning to the evidence of Munnibai, we have already pointed out that there was no reason for her to implicate the accused 1 Kaliram falsely. She knew him before the incident and he had been in the village after the incident when Munnibai had been raising all the furor regarding the death of her husband and so far as his identify as the assailant is concerned, there can be absolutely no difficulty. On behalf of the accused No. 2 it was urged that he was not known to Munnibai before the incident and the only opportunity she had to see him was while the incident was in progress in the hut in the light of the electric light and since no identification parade was held, the identification by Munnibai for the first time in the Court six months after the incident, cannot be trusted. If Munnibai's account is to be accepted, she had the opportunity of seeing both the assailants for quite some time and in such circumstances it would be impossible for a person in her position to forget the distinguishing features of the assailants who had been subjecting Munnibai and her husband to such an ordeal. We are not

taking into consideration Munnibai's version regarding the accused having left her after sunrise near the house of Vishnupant. Obviously she wanted to implicate accused 1 and 2 in the offence of rape and made the statement regarding the accused No. 2 reaching her up to the house of Vishnupant in order to lend credence to her stand. She stated that she had not given the description of the other assailant before the police. But what is of importance is that she had stated that the other person was wearing a Bengali shirt and a pyjama. From Vishnupant's evidence it is clear that though the accused No. 2 was a stranger to the village, he had been in the village because he had come to his field on the day before the incident and he knew him by his face. He also stated that he had told him that he was working as a labourer for digging the well in the field of Yeshwantrao Agarkar and had visited his field because that work had been closed on that day. In the first information report Munnibai had stated that the other person had worn Bengali shirt and white pyjama. The incident in question had occurred in the night between 15th and 16th February, 1988 and the accused No. 2 Bansilal came to be arrested at 3 p.m. on 17-2-1988. The evidence clearly showed that he was wearing a full-pant and Bengali Shirt (Arts. 26 and 27) at the time of the arrest and these clothes were seized under the seizure memo Ex. 23 and at that time they were stained with blood. It may be pointed out that A.S.I. Wagh had stated in his examination-in-chief that on 17-2-1988 Munnibai and Vishnupant identified the accused No. 2 and that he had a Bengali shirt and pant on his person. The learned trial Judge has accepted the evidence of A.S.I. Wagh on the point of identification ignoring that the identification before him by then would be hit by Section 162 of the Criminal Procedure Code, as that was the statement made in the course of the investigation. This position follows also from the observations of the Supreme Court in Ramkishan Mithanlal Sharma Vs. The State of Bombay, , but as pointed out there the exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial. Though we are clear that A.S.I. Wagh could not have spoken about the identification by Munnibai in his presence because that would amount to a statement before the police, the circumstance that both Munnibai and Vishnupant had the occasion to see the accused 2 at the time of his arrest, has been firmly established by the evidence of A.S.I. Wagh and his evidence on this point has not been questioned in the cross-examination. Thus after the incident, Munnibai had the occasion to see accused 2 in the same clothes on the second day after the incident at the time when she could not have forgotten his distinguishing features. It would have been proper for the Investigating Officer to hold an identification parade, but that was not done. The learned Assistant Government Pleader urged that it was not necessary in the present case to hold an identification parade because Munnibai had stated that she could identify the other assailant in the first information report. We, however, find it difficult to agree with the learned Assistant Government Pleader on this point because it appears to us that the question of holding an identification parade would arise only in the event of the witness claiming to be in a position to

identify a person whom she had not before the incident. However, though no identification parade was held in the present case, we are satisfied that it does not make Munnibai's version suspect having regard to the special circumstances mentioned above which make her account regarding the participation of the accused No. 2, trustworthy.

21. There is one more circumstance which requires mention and it is that though Munnibai (P.W. 1) stated that she had asked Vishnupant (P.W. 5) to give her money as she wanted to leave the village and he had not paid her. Vishnupant stated that she had not demanded money from him. The submission on behalf of accused Nos. 1 and 2 was that Munnibai may have herself killed Ramu and was in a hurry to leave the village. Munnibai admitted in her cross-examination that Ramu had kidnaped her and that she was not married to Ramu. She gave her age as about 19 to 20 years and had referred to Ramu always as her husband. As long as they resided as man and wife, the question whether they were married lawfully or not, cannot legitimately arise in case like this. She denied all the suggestions about there being quarrels between her and Ramu in the night of the incident and her assaulting Ramu with stick. The learned trial Judge has rightly observed that it could not be the work of a single person and particularly a woman to have killed Ramu in the night in the solitary place and carried the dead body all by herself for being discarded in the well about 411 feet away. If she were to be the murderer, evidently she would not have stayed in the village after the day-break and her impulse would be to leave the village immediately. The absence of blood-stains on her clothes makes the theory propounded by the defence wholly unacceptable. It was quite natural for Munnibai to get scared after her husband was killed and try to leave the place. Nothing therefore, turns upon her asking Vishnupant for money for leaving the village. The next submission was that there were as many as three incised injuries on Ramu's person and they could not have been caused only by the use of sticks and therefore, the killer must have used a sharp edged weapon for assaulting Ramu and since Munnibai did not refer to the use of a sharp edged weapon but only to the use of Babhul sticks, her version became suspect. The incised injuries were on the left ear, forehead and the right ear and must have been caused by a knife or some such sharp edged weapon. Since Munnibai woke up after the beating began she could not have referred to the use of any other weapon by the accused Nos. 1 and 2 before she woke up and she could only describe the beating after waking. The probability of accused Nos. 1 and 2 being armed with a knife is apparent from Munnibai's version that while she was screaming, the accused No. 1 threatened that if she gave another scream, she would be stabbed with knife till death and so she got frightened and stopped crying. In these circumstances merely because Munnibai was not able to speak about the manner in which the incised injuries were caused, her account cannot be disbelieved. The evidence discussed above clearly shows that accused Nos. 1 and 2 went to Ramu's hut at night and after mercilessly beating him tied up his body, wrapped it in a bundle and discarded the dead body in the well. They also saw to it that

the dead body was covered with sheaves of fodder and after accomplishing it left the place. Having regard to the numerous injuries found on the person of the deceased, there can be no escape from the conclusion that the accused Nos. 1 and 2 intended to cause his death and caused his death in furtherance of the common intention. Their conviction under S. 302 read with Section 34 of the Indian Penal Code was quite in order.

22. With regard to the sentence what weighed with the learned Additional Sessions Judge was that the motive for the accused Nos. 1 and 2 to commit the murder was to gratify their lust by putting Ramu out of the way and that the fact that the dead body was carried like that of an animal. We do not think, in view of our finding that rape has not been committed, that the extreme penalty of death should be imposed in this case. The act was no doubt gruesome and revolting, but then this murder was in no way different from other murders and in no event can the present case be described as one of those rarest of rare cases in which the death penalty can ultimately be imposed. In our view the lesser sentence of imprisonment for life would meet the ends of justice.

23. In the result, we partly allow the Criminal Appeal Nos. 244 and 245 of 1988, affirm the conviction of the appellants u/s 302 read with S. 34 of the Penal Code and sentence them to suffer rigorous imprisonment for life. The conviction and sentence of the appellants u/s 376 read with S. 34 of the Indian Penal Code are set aside. In view of the order in Criminal Appeal Nos. 244 and 245 of 1988, we reject the reference in Confirmation Case No. 2 of 1988 and instead of confirming the death sentence, award lesser sentence of imprisonment for life as stated above. The reference is answered accordingly.

24. Answer accordingly.