
(1995) 02 CAL CK 0029

In the Calcutta High Court

Case No : Death Reference No. 2 of 1993 and Criminal Appeal No. 266 of 1993

Rabindra Parida alias Rabindra Pariza alias Aurn and Others APPELLANT
Vs

State of West Bengal RESPONDENT

Date of Decision : 03-02-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 235(2), 313, 354(3), 366
Penal Code, 1860 (IPC) — Section 302, 34, 392, 394, 411

Citation : (1995) CriLJ 2256 : 100 CWN 57

Hon'ble Judges : Vidyanand, J;Gitesh Rajan Bhattacharjee, J

Bench : Division Bench

Advocate : Satyabrata Bhattacharjee, for the Appellant;Kazi Safiullah, Sashanka Ghosh and Madhuri Das, for the Respondent

Judgement

Gitesh Rajan Bhattacharjee, J.—This judgment deals with and disposes of the reference made u/s 366, Cr. P.C. by the learned Additional Sessions Judge, 11th Court, Alipore, seeking confirmation of death sentence imposed by him on the accused persons in S. T. 3(9) 92/S.C. 13(2) 92 and the appeal preferred by the appellants/accused persons against the order of conviction and sentences including the death sentence passed by the learned Additional Sessions Judge in the said case.

2. The informant Rabindra Jhunjunwala was residing at the relevant time in the 3rd floor flat at P-51, C.I.T. Scheme VII-M, Maniktala, Calcutta with his wife Sunita Jhunjunwala and three minnor children. At the relevant time two servants were also working in his house. The appellants/accused persons have been convicted and sentenced by the learned trial Judge for committing murder of the said Sunita Jhunjunwala in the said flat on the 18th September, 1991 and also for committing robbery in that flat at that time. Each of the three accused has several names and in evidence reference to each accused has been made on different occasions by referring to any of such names. To obviate the possibility of any confusion regarding the identity of each accused while appreciating the

evidence, it is considered necessary to note here the several names of the accused persons which has transpired in evidence. The accused Rabindra Paridha is also known as Rabindra Parija as well as Arun. The accused Babula Jana is also known as Bishal. The accused Jagat Kr. Jana is also known as Jagadish.

3. From the evidence of P.W. 2 Rabindra Jhunhunwala we get that the accused Jagadish was engaged by him in his house as demestic servant 18/ 19 days before the date of occurrence and the accused Bishal was employed in his house as demostic servant 3/4 days after the accused Jagadish was employed. The accused Arun, as we get from P.W. 2, also worked in the house as demostic servant only for three days before the above named other two accused were engaged as demostic servant. P.W. 2 however says that Arun sometimes used to come to their house to meet Jagadish. From P.W. 2 we also get the time of departure of different members of the family every day. Jagadish used to escort Megha and Swati, the two daughters of Rabindra Jhunhunwala, to the bus step at about 6.30 a.m. so that the said two daughteres could board the school bus there. The evidence of P.W. 2 is that as usual between 8.30 a.m. and 9 a.m. he left house for his Dall Mill Factory, situated at 2, Canal East Read, Ultadanga and while he left for that Dall mill on the date of acccurrence, namely, 18th September, 1991 there remained his wife and his youngest child Prince and the two servants Jagadish and Bishal in the house. Jagadish had by that time returned from the bus stop where he had gone with the two daughters of Rabindra Jhumjhunwala so that they could board the school bus. The youngest child Prince was a boy and a student of Julien Day School and he used to leave the flat forgoing to school at about 9.30 a.m. From P.W. 2 Rabindra Jhunhunwala we also get that he usually used to return for lunch between 2.30 and 3 p.m. On that day also he returned at 3 p.m. The age of the eldest daughter of Rabindra Jhunhunwala, that is, Megha was about eight years and that of the second daughter, Swati was about six years while the age of the son Prince on the date of occurrence was about four and half years.

4. P.W. 14 Ram Prasad Jhunhunwala, the father of Rabindra Jhunhunwala lives at 8, Madan Chatterjee Lane (Sitala Gali). He lives there with his wife P.W. 8 Shanti Devi and their youngest son P.W.9 Rajendra and his wife P.W. 13 Kusum. Megha Jhunhunwala, the eldest daughter of Rabindra Jhunhunwala was examiend as P.W. 4. Since she was aged about nine years at the time of her examination in Court she was tested by the learned trial judge about her competnece to depose by putting certain questions and each was administered to the witness only after the trial Judge was satisfied that the witness was quite intelligent and was also giving right answers to questions put by him. She testifies to the fact that on the date of occurrence, namely, on 18th September, 1991 which was Wednesday she left her residence for school at about 6.30 a.m. with her sister and they were escorted up to the bus stop by the accused Jagadish. She also says that her younger brother Prince used to leave for this school at about 9.30 a.m. On that day she and her sister Swati returned to their flat from their school at about 1 -30/2 p.m. and they found that the entrance

door of the flat was open and after going inside the flat they found the almirah open in the room and found neither their mother nor the servants. They shouted and searched for their mother and then found that their mother Sunita Devi was lying in the bathroom and blood was coming out of her mouth and her lips are covered with cloth which has been described as patti. Megha removed that patti and tried to raise her mother but she did not respond. Then Megha rang up the wife of her maternal uncle at Salt Lake. She also rang up her aunt at Sitala Gali and informed them about the state of affairs in the flat. From her cross examination we get that after going back (from the school) and on seeing all that she has described, she tried to ring up her father but could not contact. She also says that the patti which she found on the lips of her mother was of red colour. On receipt of Megha's telephone P.W. 6 Shrimati Sarada Devi, the wife of the deceased Sunita's brother came to the flat of Rabindra Jhunhunwala along with her son P.W. 7 Sanjay Bhaniramka alias Pinku. P.Ws. 6 and 7 corroborate the deposition of Megha about the telephonic information conveyed to them by her at about 2 p.m. They came to the flat of Rabindra Jhunhunwala with 20/25 minutes thereafter. P.W, 6 Sarda Devi says that on going to the flat she was led by Megha to the place where the body of her mother had been lying and Megha told that she untied the cloth from her mouth. She says that she found that the almirah was open and the key was placed in the hole of the almirah and that the articles were found to be at sixes and sevens in the house. She also did not find the V.C.R. at the place where it used to remain. According to her evidence, about ten minutes after she reached the flat Megha's grand-father, grand-mother, uncle and uncle's wife Kusum and Dilip Jhunhunwala arrived at the flat. She also says that she knows (the accused) Bishal and Jagadish who used to work at that time in the flat of Rabindra Jhunhunwala and before them Arun also worked for few days in their house. She further says that she knows Arun as he worked in her house also for 2/3 days. She identifies all of them but she says that when she went to the flat after receiving Megha's call she did not find the accused Bishal and Jagadish in the flat. She says that Sunita was scheduled to come to their residence at about 4 p.m. on that day and as such at 12-30 p.m. she rang up (Sunita) but there was no response though the telephone rang.

5. The second batch of comers to the flat of Rabindra Jhunhunwala on receipt of Megha's telephone are P.W. 13 Kusum Jhunhunwala, P.W. 14 Ram Prasad Jhunhunwala, P.W. 8 Shanti Devi Jhunhunwala, P.W.9 Rajendra Jhunhunwala and P.W. 5 Dilip Jhunhunwala. P.W. 13 Kusum Jhunhunwala is the wife of Rajendra Jhunhunwala who is the brother of Rabindra Jhunhunwala. They reside at 8, Madan Chatterjee Lane. She corroborates the evidence of Megha and says that at about 2 p.m. Megha rang her up and reported that her mother had been lying in the bathroom and that her mouth was tied by cloth which was untied and the almirah of the flat was open, and she asked her to come sharp. She next says that just after attending the call when she was about to go out she saw that her husband had returned from the mill and she told him and her parents-in-law what she heard from Megha and then they started for Megha's house. On

reaching the Kankurgachhi flat (of Rabindra Jhunjhunwala) she found that the two sisters Megha and Swati were weeping and found Sarda Devi and Pinku (Sarda's son) consoling them. She further says that on going to the bathroom she found that the major portion of the body (of Sunita) was inside the bathroom and only legs were outside the bathroom. She also found the red cloth, some other clothings, some broken bangles, spectacles etc. near the dead body and also blood on the floor and on the mouth. She identifies all the three accused and says that the accused Jagadish and Bishal were working in the house of Rabindra Jhunjhunwala for 10/15 days and before that Arun worked in that house for 3/4 days. In her cross-examination she says that she did not do anything positive but her husband asked Dilip to inform police.

6. P.W. 8 Shanti Devi is the mother of Rabindra Jhunjhunwala, She resides at 8, Madan Chatterjee Lane with her husband and her one son Rajendra and Rajendra's wife. According to her evidence on the concerned date at about 2 p.m. Kusum, the wife of her youngest son reported to her weeping that she had come to know from Megha over phone that Megha's mother had been lying in the bathroom and not responding to any call and asked them to go sharp. On hearing this Shanti Devi, her husband Ram Prasad, her son Rajendra and his wife Kusum, and Dilip, son of the elder brother of Shanti Devi's husband came to Kankurgachhi flat and found that the two daughters Megha and Swati were weeping and also found that Megha's Mammi Sarda and her son Pinku were present there and Sarda was trying to console Megha and Swati. She also testifies that Sunita Devi's body was inside the bathroom and legs outside. She deposes that she found the almirah open and found the key placed in the key hole of the almirah and the articles were lying at sixes and sevens and also did not find the V.C.R. She identifies the ornaments given to Sunita Devi at the time of marriage. It may be mentioned here that these ornaments were found missing from the flat after the occurrence and the subsequent recovery of the same implicates the accused persons. P.W.9 Rajendra Jhunjhunwala is the son of the P.W.8 Shanti Devi and the brother of Rabindra Jhunjhunwala. He resides with his parents at 8, Madan Chatterjee Lane, Sitala Gali. According to his evidence on the relevant date he returned home (8, Madan Chatterjee Lane, Sitala Gali) from their Dall mill at about 2 p.m. and then his wife reported to him about the telephone call from Megha and thereafter he along with his wife, mother, father and Dilip Jhunjhunwala went to the Kankurgachhi flat. They reached there at the Kankurgachhi flat at about 2.30 p.m. At that time Megha and her sister Swati and their Mammi Sarada and her son Pinku were only present in the flat. But they did not find the servants there. He also testifies to the fact that Sunita Devi's body was lying inside the bathroom and legs outside. He says that some clothings, some broken glass bangles were found scattered around the body and a red cloth was found there by the side of the body. He found a key lying on the floor in the passage, and in the bedroom he found the almirah open and the key placed on the key hole of the almirah. The learned Advocate for the appellants/accused submitted that while some witnesses said that the key was lying on the

passage some said that the key was in the key hole of the almirah and therefore there is a vital contradiction which would cast a serious doubt about the prosecution version of the occurrence. Firstly, I would like to say that even any seeming contradiction in the evidence of some witnesses as to where the key was found lying after the occurrence would not by itself be a sufficient ground for discrediting the entire prosecution case or the vital part of the same. Secondly, from a reading of the entire evidence it would appear, and this is also made clear by the evidence of P.W. 9 Rajendra Jhunjhunwala that in fact two sets of keys were found, one lying on the floor of the passage and the other in the key hole of the almirah in the bedroom from which the articles had been removed. Therefore, there is no contradiction in the prosecution evidence about the keys found in the flat by the witnesses who arrived that soon after the occurrence. P.W. 9 Rajendra Jhunjhunwala also says that they found the articles inside the almirah ransacked and did not find the golden ornaments. They also did not find the V.C.R. He also testifies to the fact that the accused Jagadish and Bishal were two servants who used to work in the house of Sunita Devi at the relevant time. From him we also get that their dall mill is run on partnership between his father and the latter's friend Ram Krishan Sarath. He looks after the Dall mill on behalf of his father. He says that on his request Dilip had first tried to connect the P.S. over phone and having failed they went to the P. S. to report the matter. In his cross-examination he says that no neighbour was found present when he reached there nor does he remember if any neighbour or outsiders subsequently came at that flat. It has been commented upon by the learned Advocate for the accused appellants that the absence of neighbours is somewhat unusual. Even if it is accepted that no neighbours came there after the incident when the relatives of the deceased reached there, that by itself does not falsify the death or for that matter, murder of Sunita Devi in that flat regarding which there is overwhelming evidence. In his cross-examination it has also been taken that there is another house to the north of the flat of Sunita. There is also another house to the east of that flat about 5/6 cubits away. Such topographical descriptions are of no consequence in a case like this where a gruesome murder of a helpless housewife has been committed inside the bathroom of her flat by her own servants staying in the flat and who must have, taking advantage of the confidence and faith reposed in them by their master, taken all pre-arranged and precautionary measures to commit the murder inside the flat in secrecy without drawing the attention of the passers-by and neighbours and without giving sufficient opportunity to the victim to raise cries to be heard by neighbours and passers-by. As we have seen from Megha's evidence when she first saw the dead body of her mother in the bathroom her mouth was tied by a red cloth. Obviously, that was done by the miscreants for giving no opportunity to the victim to raise cries for attracting attention of neighbours and passers-by. For servants who are supposed to be faithful and staying in the flat it is not at all difficult to seize an opportunity to suddenly overpower the mistress of the house while she was alone with them in the flat by taking a surprise move to shut her mouth thereby preventing her from raising any cries loud enough to attract the attention of

others who might or might not have been there in the neighbourhood outside the flat. P.W. 9 Rajendra says that besides the Dall mill business his father does business in share by applying for it. It has been suggested to him in his cross-examination on behalf of the accused persons that he, his father Rabindra and Ramesh (another brother of Rabindra) in the absence of the children went in their tempo van driven by Ramji Chowdhury to the flat of Rabindra and used the duster of the vehicle for tying it on the neck of Sunita and by pressing the same caused her death. It is further suggested to him in cross-examination that they murdered Sunita on her refusal to sign blank cheque on demand and then manufactured the story. It is also suggested to him in cross-examination that by a premeditated plan they discharged their faithful servant only 10/20 days before two unknown persons were engaged as their servants and that to cover up their crime they drove away the two servants just on reaching and they directed the driver to go away after they drove the vehicle up to the flat. It is needless to mention that all these defence suggestions were denied not only by this witness but by other witnesses to whom also such suggestions were given. Suffice it to say that such suggestions, - far from being substantiated by evidence - are desperately crude and devoid of any plausibility capable of generating even a semblance of acceptability from any angle of view.

7. P.W. 5 Dilip Jhunjhunwala, as we have seen, is the son of the brother of the father of Rabindra Jhunjhunwala. He has an electronic shop at 5, Dwarka Nath Tagore Lane. His evidence is that on 18th September, 1991 at about 2 p.m. when he was returning from his shop his uncle Rajendra Jhunjhunwala met him and informed that a telephone call from Megha came to Kusum and Megha informed about the condition of her mother etc. in the flat and requested to come sharp. He says that then they went to the Kankurgachhi flat. His evidence as to what he saw after reaching the Kankurgachhi flat of Rabindra Jhunjhunwala is rather consistent with what the other witnesses have said which I have already discussed. He says that for 2/ 3 minutes he tried to contact the police station over telephone, but having failed he went to the Maniktala P.S. and lodged a general diary there at about 3 p.m. Exhibit 9 is that general diary entry wherein it is recorded that one Dilip Jhunjhunwala came to the P.S. and stated that his aunt Smt. Sunita Devi Jhunjhunwala was lying dead inside her flat at P-51, C.I.T. Scheme VII-M. It is argued by the learned Advocate for the appellants accused that this G. D. entry being the first information to the police regarding the commission of the offence the same should have been treated as F.I.R. and that, the formal F.I.R. recorded on the basis of subsequent statement of Rabindra Jhunjhunwala cannot be taken into consideration in the case as the same cannot be treated as F.I.R. in this case. This contention, I must say, is devoid of merit. As we have seen the concerned G. D. entry is only a cryptic information that Sunita Devi was lying dead inside her flat and nothing more. There it is not even stated that she was murdered or any offence was committed. Such a cryptic information was lodged and recorded only for the purpose of inviting police attention to the matter. A bald statement that a particular person was lying dead,

for obvious reason, cannot constitute the first information report regarding the commission of an offence and therefore there is no reason to ignore the first information report which was recorded subsequently on the basis of the statement of Rabindra Jhunjunwala.

8. P. W. 14 Ram Prasad Jhunjunwala is the father-in-law of the deceased Sunita Devi. He also came to the Kankurgachhi flat on the date of occurrence along with the other persons, namely, his wife Shanti Devi Jhunjunwala, Kusum, Rajendra and Dilip after getting message from Megha. He says that on that day, that is, 18-9-1991 in the morning he telephoned from his house to the mill to send his tempo driver to him. It may be mentioned here that P.W. 15 Ramji Chowdhury is that tempo/van driver. P.W. 14 Ram Prasad Jhunjunwala says that at about 9/9.30 a.m. he handed over one cheque and share application form to his tempo driver (Ramji) and asked him to get signature of Sunita thereon. His further evidence is that after returning from Sunita's house Ramji reported to him that Bahuji (meaning, Sunita Devi) was not in the flat and that she would be back at 3 p.m. He also says that on 19th September, 1991, that is, on the next day in the morning Ramji came to his house at about 9 a.m. and reported that on the previous day when he had been returning from Kankurgachhi flat he saw that the three servants Arun, Jagadish and Bishal were going towards Maniktala Main Road with a green bag and further told that while he came to the flat at Kankurgachhi Jagadish and Bishal opened the door and reported to him that Bahuji had left for her relatives house and would return at about 3 p.m. The learned Advocate for the appellants/accused criticised as to why Ramji did not tell Ram Prasad on 18th September, 1991 that he had seen the three servants Arun, Jagadish and Bishal go through Maniktala Main Road and that while he came to the flat of Rabindra Jagadish and Bishal opened the door and reported to him that Sunita had left for her relative's house. In this connection P.W. 15 Ramji Chowdhury says that he reached the Kankurgachhi flat at about 10-30 a.m. with the share application form and cheque given to him by Ram Prasad Babu and when he rang the door bell of the Kankurgachhi flat the servants Jagadish and Bishal opened the door and told that Bahuji was absent and on his query further told that she had gone to her relative's house and would come back by 3 p.m. He also says that when he had been waiting (thereafter) at 3A Bus Stand he found that Jagadish, Bishal and Arun were proceeding through Maniktala Main Road and also found a green coloured (Hara) bag in the hand of Jagadish. Returning to the house of Ram Prasad, according to his evidence, he reported to him about the absence of Bahuji and her expected return at about 3 p.m. and he was then directed by Ram Prasad to go to the mill. P.W. 15 further says that on the next day, that is, on the 19th September, 1991 he told Ram Prasad Babu that on the previous day he found that the three servants were proceeding through Maniktala Main Road with a green bag and that Bishal and Jagadish on the previous day opened the door and told him that Sunita had gone to her relative's house and would be back by 3 p.m. These statements of Ramji Chowdhury that the accused Jagadish and Bishal opened the door of the Kankurgachhi flat on the

previous day when he went there and that the three servants including Arun were seen by him thereafter, while he was waiting at the bus stand, to proceed along the Maniktala Main Road with a green coloured bag in the hand of Jagadish were not of any significance on the 18th September, 1991 to Ramji because he was not yet aware when he came back to Ram Prosad on 18th that Sunita Devi had been murdered. In the circumstances it is quite understandable why he did not report these facts to Ram Prosad on 18th when he came back to him from the Kankurgachhi flat. By next day however obviously the fact of murder of Sunita Devi became known to everybody and that is why Ramji might have, quite appropriately, considered it fit and proper to report that on the previous day when he went to the Kankurgachhi flat the two servants opened the door and reported that Sunita was not in the flat, and also that later while he was waiting at the bus stand he saw that the three servants were going along the Maniktala Main Road together with a green coloured bag in the hand of one of them. These facts necessarily are vital clues regarding the involvement of the accused persons in the commission of the crime and understandably, that is why Ramji reported the same to Ram Prosad next day although on the earlier day these facts were not reported as the same did not, at that time, appear to be of any significance to Ramji for being reported to Ram Prosad. It is submitted by the learned Advocate for the appellants/accused that it is improbable that the two accused Jagadish and Bishal would come together to open the door and tell that Sunita Devi was not in the flat and had gone out, if really they had committed the murder of the said lady. I do not find any improbability in the matter.

9. P.W.2 Rabindra Jhunhunwala is the husband of the deceased Sunita Devi. On the date of the occurrence he left his flat between 8.30 and 9 a.m. and returned at 3 p.m. By that time his other relatives had already arrived at his flat on receipt of Megha's message over phone. He testifies to the fact that by the side of the dead body of his wife, lungi, half pant, shirt of Jagadish and Bishal and one ashani and one Do-pattaya were lying and the almirah where the golden ornaments used to be kept was found open and the ornaments and one V.C.R. were found missing. He found that his wife was lying in a pool of blood and blood was coming out of her mouth. Police Officers arrived at the flat at about 3.30/3.15 p.m. and recorded his statement on the basis of which formal F.I.R. was drawn up later at the P.S.

10. P.W. 2 Rabindra Jhunhunwala is also a witness to the arrest of the two accused Bishal and Arun at the Howrah Station on 27th September, 1991. His evidence is that he accompanied the police officer on the basis of information at about 11 a.m. and the said two accused Bishal and Arun were found there at platform No. 13. He also says that police interrogated both of them and being led by them they went along with the police officer at Kailash Building, Chowranghee Road wherefrom accused Jagadish was arrested. He further says that from each of the accused some articles were recovered and seized by the police. From the evidence of the I.O. it would however appear that the accused Bishal and Arun were taken to Lalbazar (police headquarters) for interrogation by

the police after their arrest at Howrah Station and from there pursuant to their statement they went to the Kailash Building on Chowranghee Road on being led by the said accused persons and from there the accused Jagadish was arrested and certain articles were recovered. It has been argued by the learned Advocate for the appellants/ accused that while the I.O. says that the accused Bishal and Arun were taken to Lalbazar from the Howrah Station and later they were taken to Kailash Building, Chowranghee Road, P.W. 2 Rabindra Jhunjunwala does not say that the accused Bishal and Arun were taken to Lalbazar from the Howrah Station after their arrest. In my opinion, this is really no contradiction as Rabindra Jhunjunwala while deposing on the aspect of arrest and recovery from the accused persons were confining himself only to the salient aspects of the arrest and recovery and that is why his statement does not include the Lalbazar part of the events relating to the accused Bishal and Arun. He identifies the articles recovered and seized from his house including the lunght, shirt and pant of the accused found near the dead body of his wife. He also identifies the bunch of keys which his wife used to keep with her always and which was seized by the police from his flat and marked as exhibit-I as well as the key which was seized and marked as exhibit-IV. He also identifies the various other articles recovered from the different accused persons. In the F.I.R. which was lodged by this witness P.W. 2 Rabindra Jhunjunwala he stated that checking the almirah he could remember that gold and jewellery worth Rs. 2 lacks including diamond sets etc. were missing and that the details of the missing ornaments would be supplied later on. It was also stated in the F.I.R. that their national V.C.R. was also taken away by the miscreants. The learned Advocate for the appellants/ accused submitted that in the F.I.R. the petitioner could not give the details of the ornaments and articles taken away by the miscreants and this shows that the informant kept the door of concection open. This, in my opinion, is not a justified criticism. Immediately after the occurrence the mental condition of the husband of the deceased must have been in a very disturbed state and at that time it was naturally not expected that he would be able to give a detailed list of all the articles missing from his house, more so where, as in this case, the number of missing articles and ornaments are rather numerous.

11. P.W. 26 D. Baidya, Sub-Inspector of Police is the first investigating Officer (I.O.) of the case. At the relevant time he was attached to Maniktala P.S. On receipt of information about the death of Sunita Devi from Dilip Jhunjunwala he recorded the same in the General Diary and then went to the spot with the officer-in-charge of the Maniktala P.S. Manas Banerjee, S. I. Subrata Basak and force and reached the flat at about 3.15 p.m. He directed S. I. Subrata Basak to call a doctor after finding that the dead body was lying there in the bathroom of the flat, a portion of the body being outside the bathroom. It may be mentioned here that P.W. 10 Dr. Santosh Kr. Das who is a practioner of that locality was called in by the police to that flat at about 4 p.m. and then the doctor on examination found that Sunita was dead and accordingly he issued a death certificate which has been marked exhibit 12. From the evidence of P.W. 26 S.I.

D. Baidya we also find that at about 3.15 p.m. the officers of the Detective Department, Lalbazar also arrived at the flat. S.I. D. Baidya recorded the statement of Rabindra Jhunjunwala and on being directed by the O.C. he took up the investigation of the case. He prepared the inquest report exhibit 10/2. He says that P.W. 24 S.I. Amulya Ratam Dey made seizure of the articles found scattered on the floor of the flat. He examined the witnesses Dilip Jhunjunwala, Megha Jhunjunwala, Swati Jhunjunwala, Sohanlal Sharma, Prince and Sarda Devi Jhunjunwala u/s 161, Cr. P.C. At about 9 p.m. he returned to the P.S. and filled up the formal F.I.R. on the basis of the recorded statement of Rabindra Jhunjunwala. The formal F.I.R. has been marked exhibit 2/6. At the P.S. on that date he examined and recorded the statements of Shanti Devi Jhunjunwala, Kusum Jhunjunwala and Rajendra Jhunjunwala. On the next day that is on 19-9-1991 he recorded the statements of P.W. 14 Ram Prosad Jhunjunwala and P.W.15 Ramji Chowdhury. The learned Advocate for the appellants/accused submitted that the I.C.did not examine Ram Prosad Jhunjunwala and Ramji Chowdhury on 18-9-1991 for the purpose of facilitating concoction of the case. I do not think that there is any substance in this suggestion. As we have seen, Ramji Chowdhury came to the Kankurgachhi Flat on 18-9-1991 when the death of Sunita Devi in that flat did not yet come to light. At that time he was told by the two servants that Sunita Devi had gone out and would return at about 3 p.m. Ramji Chowdhury accordingly left the place and went to Ram Prosad Jhunjunwals and reported that Sunita Devi was not in the flat and would return by 3 p.m. and thereafter he had gone to the mill. Therefore Ramji Chowdhury was not available readily on 18-9-1991 for examination by the I.O. because he did not go to the Kankurgachhi flat second time on 18-9-1991. But he as well as Ram Prosad Jhunjunwala was examined on the very next day by the I.O. P.W. 18 Ramesh Jhunjunwala is another brother of Rabindra Jhunjunwala and son of Ram Prosad Jhunjunwala. He says that on 18-9-1991 at about 8.15/8.30 p.m. when he came to his father's residence at 8, Madan Chatterjee Lane from his factory he heard the incident of death of Sunita from his father. His evidence therefore shows that his father Ram Prosad Jhunjunwala who had earlier on receipt of information about the death of Sunita Devi gone with the other members of the family present in the house to the Kankurgachhi flat, had returned to his Madan Chatterjee Lane house before 8.15/8.30 p.m. That is why Ramesh on coming to his father's residence at 8, Madan Chatterjee Lane on that evening at about 8.15/8.30 p.m. came to know from his father (Ram Prosad Jhunjunwala) about the incident of death of Sunita Devi. Since both Ram Prosad Jhunjunwala and Ramji Chowdhury were not present in the Kankurgachhi flat in the evening on 18-9-1991, the I.O. had no opportunity to examine those two witnesses in that evening either at the flat or at the P.S. when he examined the other witnesses who were present there. Accordingly it cannot be said that the non-examination of Ram Prosad Jhunjunwala and Ramji Chowdhury on 18-9-1991 stands un-explained. They were examined on the every next day and I do not find that there was anything wrong in it. P.W. 26 D. Baidya, the I.O. says that on 20-9-1991 he took further statement of the complainant Rabindra

Jhunjhunwala who gave the details of the articles lost. He also there is nothing wrong in it. We have already seen that in the F.I.R. recorded on the very date of occurrence Rabindra Jhunjhunwala had stated that he would give the list of missing articles later and I have already discussed that there was no improbability in it. It may be mentioned here that on 20-9-1991 the Detective Department took up the investigation of the case pursuant to the order of the Commissioner of Police and accordingly Shri D. Baidya handed over the case diary and the anamats (seized articles) to Amitava Lahiri S.I. of Detective Department, Lalbazar. D. Baidya says that during his tenure of investigation despite search he failed to apprehend the accused persons.

12. P.W. 27 A. Lahiri is an S. I. of Police attached to the Detective Department, Lalbazar. As I have already mentioned he took charge of the Investigation from the first I.O. D. Baidya. His evidence is that on 27-9-1991 on the basis of information he along with Rabindra Jhunjhunwala went to Howrah Station and there at about 10-20 a.m. arrested the accused Rabindra Parida alias Arun and accused Bishal on the identification of the complainant. He also speaks about recovery of seizure from these two accused there in presence of two witnesses. He further says that the two arrested accused persons were then taken to Lalbazar and were interrogated and their statements were recorded. On the basis of such statements and on being led by the two accused persons they went to Kailash building on that very date at about 5.45/6 p.m. and two witnesses were called there and in their presence a servant's quarter at the 16th floor of that building which was occupied by one Baikunta Beara was searched and on the identification of the complainant and the accompanying two accused persons, the accused Jagadish was arrested from inside the said room. There one green coloured bag with national V.C.R. and certain other articles were recovered from the possession of the accused Jagadish and seizure list was prepared in presence of witnesses. On 28-9-1991, that is, on the very next day the three accused were produced before the learned Magistrate and police custody of the accused persons was prayed for. The I.O. Shri Amitava Lahiri says that on 7-10-1991 while in police custody the accused Arun made further statement on interrogation and led the I.O. to premises No. 19, Chetlahat Road, Alipore where the I.O. interrogated Dilip Pal in presence of another witness Jalal. Dilip Pal was pointed out by the accused Arun alias Rabindra Parida. The evidence of the I.O. of A. Lahiri is that on being asked by the accused Rabindra alias Arun. said Dilip Pal produced one cloth putli (Bundle) which, on opening, was found to contain some ornaments and a wrist watch and those articles were seized under proper seizure list in presence of witnesses. He also identifies the articles seized by him. I may mention here that at Howrah Station railway tickets from Howrah to Balasore were seized from the two accused persons arrested there along with the other articles.

13. P.W.16 Lalu Das and P.W.21 Babu Srivastava are the two witnesses in whose presence the arrest of the two accused Arun and Bishal were made on the platform No. 13 of the Howrah Railway Station and recovery and seizure were

made from the possession of these two accused. P.W. 16 Lalu Das says that on 27-9-1991 at about 10.30. a.m. he was standing on platform No. 13 of the Howrah Railway Station and his friend Babu was with him and in their presence police caught hold of and arrested the two accused persons. He also identifies the articles recovered in his presence. In his cross-examination he says that one Bablu whose title he does not know requested him to stand at platform No. 13 of the Howrah Station forgoing to Rishra and they were so waiting. He says that Bablu was to purchase their railway tickets but no specific train was mentioned by Bablu. He further says that they had no meeting with Bablu on that date. He says that they were standing at about the middle point of the platform and many persons were present near them and police caught hold of the two accused persons in front of them. P.W. 21 Babua Srivastab also says that on 27-9-1991 he met Lalu Das at Howrah Staion and he and Lalu Das together were waiting on platform No. 13 as one of their friends had to take them to Rishra. It was about 10.30 a.m. at that time and on the said platform No. 13 police caught hold of two accused persons. He also speaks of seizure. He says that they were standing at a place wherefrom No. 13 starts. It has been submitted by the learned Advocate for the appellants/ accused that while P.W. 16 Lalu Das says that they were standing at about the middle point of the platform P.W. 21 Babua says that they were standing at a place wherefrom platform No. 13 starts. The learned Advocate for the appellants/accused therefore finds contradiction in the evidence of these two witnesses as to actually where they were standing. It is needless to say that in respect of a crowded platform the description regarding the place where one might have been standing on a particular occasion need not be taken to project a geometrical accuracy. Their evidence is consistent about the fact that the two accused were arrested from platform No. 13 when these two witnesses were standing there. They were waiting for another person for going to Rishra. It has been argued by the learned Advocate for the appellants/accused that the Court may take judicial notice of the fact that Rishra-bound trains do not start from platform No. 13 and that platform No. 13 is meant for South Eastern Railway trains. It may be mentioned here that the two accused persons were found waiting on plantform No. 13 when they were arrested. They had tickets with them for travelling to Balasore. Balasore being a place in the Sought Eastern Railway the presence of the accused persons on platform No. 13 with tickets for Balasore is not an unexpected event. It may be mentioned that Rishra-bound trains do not ordinarily start from platform No. 13 but for that reason the presence of the two witnesses Lalu and Babua on that platform at the relevant time need not be doubted. The witnesses have said that they were waiting for another person who had to purchase ticket for them for travelling to Rishra. Obviously, therefore they were waiting there not for exactly boarding a train from that platform but awaiting the arrival of another person in connection with their proposed visit to Rishra. The reason as to why the witnesses were standing on platform No. 13 could have been asked on behalf of the accused persons in their cross-examination but that does not seem to have been done. In the circumstances, it will not be justified to disbelieve the evidence of these two

witnesses. It may be mentioned here that it has been suggested to these two witnesses during their cross-examination that they were not going to Rishra but were going to Balasore which however they have denied. Such suggestion also lends support to the presence of the two witnesses on the platform at the relevant time.

14. Regarding the arrest of and recovery from the accused Jagadish the prosecution have examined P.W. 17 Bhanu Prosad Sharma besides the I.O. and the complainant, etc. In 1991 he used to go for work as security guard at Kailash building. According to his evidence on 27th he was on security duty in the evening at Kailash building when police came there with the two accused persons. The police told that they would go to the 16th floor of the building and then P.W. 17 Bhanu Prosad Sharma (Security Guard) and B.D. Yadav, another security guard with police and three men who also went there with the police went to the 16th floor and police knocked one servants room in that floor and then Baikunta opened the door. His evidence corroborates the prosecution case that the police arrested the accused Jagadish from that room and also recovered one V.C.R. and certain other articles there from a green bag. From him we get that Baikunta was a servant of one Mr. Bansari. The other security guard of Kailash building who was present at the relevant time is P.W. 11 Bishnu Deo Yadav. He also corroborates the evidence of P.W. 17 Bhanu Prosad Sharma regarding arrest of the accused Jagadish from the room of Baikunta on 27-9-1991 at about 6/6.30 p.m. and recovery of green coloured bag and its contents including V.C.R. and ornaments etc. on production of the same by the said accused Jagadish.

15. Regarding further recovery of incriminating articles from Alipore Road by the police on 7-10-1991 as a sequel to the statement and guidance of the accused Rabindra Parida alias Arun P.W. 19 Dilip Pal who is a resident of 19, Alipore Road which is just beside Chetlahat Road says that police came to their house with the accused at about 3.30 p.m. and the accused asked him to bring out the materials that he (the accused) had kept in his custody (i.e., the custody of the witnesses). He says that the said accused kept those articles in his custody stating that there had been disturbance in his family at his country home and by selling these articles he would raise money and distribute the same among the family members. The witness Dilip Pal returned the articles to police. Some such articles were one gold chain, two pieces of gold balas, one piece of Titan lady's wrist watch, etc. He further says that one Jalal who resides in that para also came to him at that time. In his cross-examination he says that he picked up acquaintance with the said accused in a tea shop in their para in 1990. The place where the witness resides is a basti bari where many people reside. He further says that about 15/20 days before the articles were recovered the same were kept in his custody and during this period he did not inform the police. He further says that even earlier, about six months before, the said accused kept chain with him and subsequently took the same away. P.W.20 Mohammed Jalal who is also another witness to the seizure made on production of articles by P.W. 19 Dilip

Pal, was only tendered by the prosecution. In his cross-examination he however says that he signed on a blank paper at their para but he identifies his signature and says that Dilip Pal signed before him. P.W. 27 Amitava Lahiri, the I.O. says that he did not arrest Dilip Pal since Dilip Pal voluntarily produced the articles. He says that if stolen articles are recovered from any person the question whether such person should be arrested or not depends on the circumstances. As regards Baikunta Beara from whose room at Kailash Building the accused Jagadish was arrested and recovery was made the I.O. Shri Amitava Lahiri says that he did not arrest him (Baikunta) as his complicity was not found. The learned Advocate for the appellants/accused submitted that it was somewhat unusual that the police did not arrest Baikunta although one accused, namely, Jagadish was arrested from Baikunta's room and recovery of the stolen articles were also allegedly made from that room of baikunta. Similarly, it has been argued by him that in spite of alleged production of the stolen articles by Dilip Pal he was not arrested by police. As we have seen such criticism is answered in the deposition of the I.O. Amitava Lahiri from which it is clear that the police did not arrest Baikunta and Dilip Pal in spite of recovery of stolen articles from their rooms because police did not find their complicity in spite of the fact that recovery was made from their rooms. Now, even if they had any complicity in the matter in the sense that they had knowledge or reason to believe that the concerned articles were stolen properties that would not have exonerated the accused persons in respect of their liability for participation in the commission of the crime.

16. P.W. 12 Dr. Rabindra Basu is the autopsy surgeon who held post mortem examination on the dead body of Sunita Devi Jhunjhunwala. He is a Professor and head of the Department of Forensic and State Medicine and Vice-Principal, N.R.S. Medical College and Hospital. He held the post mortem examination on 19-9-1991 at 1.45 p.m. He describes the injuries found by him on the dead body as well as the internal injuries. He says that all the injuries found by him were fresh and showed evidence of ante-mortem reaction. On the basis of his findings the autopsy doctor is of the opinion that death was caused due to the effects of strangulation associated with smothering, ante-mortem and homicidal in nature. The doctor was also of the opinion that death of Sunita Devi took place sometime between 24 to 30 hours from the time of his holding the post mortem examination on 19-9-1991 at 1.45 p.m. The evidence of the autopsy surgeon thus establishes that the Sunita Devi was murdered by strangulation with smothering and such murder was committed on 18-9-1991 sometime between 7.45 a.m. and 1.45 p.m. This rather convincingly fits in with the prosecution case about the manner of Sunita Devi's murder and the probable time of commission thereof.

17. The defence plea, as can be gathered from the tenor of cross-examination of the prosecution witnesses as well as from the statements made by the accused persons while examined u/s 313, Cr. P.C., seems to be a plea of alibi inasmuch as it is the plea of the accused persons that they were not present there. It is also the defence case as suggested to the prosecution witnesses in cross-examination

that the murder was committed not by the accused persons but by the husband of the deceased and his other relations conjointly. The accused Rabindra alias Arun however admitted in his examination u/s 313, Cr. P.C. that he had worked in the flat of P.W. 2 Rabindra Jhunjhuriwala at Kankurgachhi for about three days. He however says that then he had come home. He also admits in his examination u/s 313 Cr. P.C. that Prince used to go out (for school) at about 9.30 from his house and that Rabindra Jhunjhuriwala used to go out between 8.30 a.m. and 9 a.m. forgoing to their Dall mill factory at East Canal Road, Ultadanga. He further admits that Megha and Swati used to return from school at about 1.30/2 p.m. and that on that day at 8.30/9 a.m. when P.W. 2 Rabindra had started for the dall mill his wife Sunita Devi, son Prince, accused Jagadish and accused Bishal were the only persons present in the flat. He says that police had brought him from Orissa and assaulted him and made him sign on a blank paper and put him in jail. Similar statement also has been made by the accused Bishal u/s 313 Cr. P.C. to the effect that he was held and brought from Orissa. The accused Jagadish has acknowledged u/s 313, Cr. P.C. that Megha and Swati are Rabindra Kumar Babu's daughters and they used to return from school at about 1.30/2 p.m. He however says that he was in his village at the relevant time. In answer to the question that Megha had identified him and the two accused in the Court as being domestic helps/ servants in their house, the accused Jagadish says that he had worked before, 5/6 months previously. He however says that at the relevant time and on the date of occurrence he was in his village at Orissa. He says that police have held and brought him from Orissa although he says that he has done work and gone to his village about 5/6 months ago.

18. Now let us look to the seizures made in the case. The seizure list exhibit 3 is dated 18-9-1991. The seizure under the said seizure list was made between 5 and 6 p.m. on 18-9-1991 in the flat of Rabindra Jhunjhuriwala. The articles seized under said seizure list include two lungis, one full sleeved shirt having blood stains, one short pant, one cotton sari, one red cloth piece with blood stains, one ashari, broken pieces of plastic churries, one pair of spectacles, one key and also one bunch of keys. It appears from the seizure list that the key was found lying at the time of seizure on the floor of the passage near the main entrance gate of the flat. It also appears that the bunch of keys was found at the time of seizure in the door of the almirah in the room. The other articles were found to be lying at or in the neighbouring place where the dead body was found lying. It also appears that at the time of seizure the items at serial Nos. 1 and 5, namely, lungi and short pant were identified by Rabindra Jhunjhuriwala as the articles which belonged to Bishal and the articles at serial Nos. 3 and 6, namely, the shirt and lungi were identified by him as article belonging to Jagadish. Exhibit 4/6 is the seizure list dated 27-9-1991. That seizure list was prepared between 11.30 a.m. and 12.30 p.m. on that date at Howrah station on platform No. 13. on recovery of the articles seized thereunder from the accused Babula Jana who is also known as Bishal. That seizure list in respect of seizures made from the said accused Bishal includes, besides one railway ticket from Howrah

to Balasore, several items of gold and silver ornaments such as gold bangles fitted with small pearls, gold bala fitted with red stone, gold hair pin, gold ear jhumka, gold button, gold ring fitted with diamond, neck chain fitted with locket with diamond stones, silver payal etc. Exhibit 5/6 is the seizure list dated 27-9-1991 prepared between 10.35 a.m. and 11.25 a.m. The articles seized under that seizure list was received from the accused Rabindra Parida on platform No. 13 of the Howrah Railway Station. The articles seized thereunder include gold Ambriti Bala, gold bala fitted with red stones, four pieces of gold bangles fitted with small pearls, gold bangle fitted with pearls, gold necklace, gold tiklis, gold hair pin, two pairs of gold cufflinks, gold locket, broken necklace fitted with diamond, pearl chain, tickle fitted with small diamonds, having a locket, button set, silver payal, finger ring fitted with diamond, earring, silver key ring, railway ticket from Howrah to Balasore, etc. Exhibit 6/5 is another seizure list prepared on 27-9-1991 between 6 and 6.30 p.m. in respect of recovery made from the servant's room occupied by Baikunta Beara on the 16th floor of Kailash building, 35/1, Chowranghee Road. That seizure was made at the pointing out of the accused Jagadish. The articles seized under the said seizure list include one large olive green canvas bag containing one national V.C.R. gold necklace, gold churi, gold dhunichi, silver dot pen, silver finger ring, loose pearls, etc. Exhibit 14/2 is yet another seizure list prepared on 7-10-1991 between 3.45 and 4.30 p.m. on production of articles by Dilip Pal. This seizure list include a pair of gold bangles fitted with red coloured stones, pair of gold wrist-let, gold chain with locket, gold nose kamta, one Titan Quartz wrist watch. We have seen that pursuant to the statement of accused Rabindra Parida and on being led by him the police went to the witness Dilip Pal at Chetlahat and there these articles were produced by Dilip Pal. The evidence of Dilip Pal shows that those articles were given to him by accused Rabindra Parida for keeping the same in his custody. The articles seized under the said seizure lists 4/6.57 6, 6/5 and 14/2 have been identified by P.W. 2 Rabindra Jhunjunwala and his mother P.W. 8 Shanti Devi Jhunjunwala as the articles belonging to Rabindra Jhunjunwala and his deceased wife Sunita Devi. The I.O. P.W. 27 A. Lahiri identifies exhibit XXII as the olive green canvas bag which he seized from the accused Jagat Kr. Jana alias Jagadish. Identifying the said bag exhibit XXII P.W. 15 Ramji Chowdhury says that this type of bag was found by him in the hand of Jagadish. We may recollect that in his evidence Ramji Chowdhury stated that on being told by the accused Jagadish and Bishal that Sunita Devi was not in the flat and would return at 3 while Ramji Chowdhury was coming back and was waiting at the 3-A bus stand, he saw that three accused were proceeding along Maniktala Main Road with a green bag in the hand of the accused Jagadish. As regards the recovery and identification of the seized ornaments and wrist watch it has been argued by the learned Advocate for the appellants/ accused that the articles were not placed in the T.I. Parade and as a result of which no reliance should be placed on the deposition of P.W. 2 Rabindra Jhunjunwala and her mother about the identification of the articles and ornaments. This submission, in my opinion is not of any moment in a case like this where the members of the family who used the

articles or who have seen the articles being used by some members of the family identified the articles as such. It is of common experience that persons using articles are capable of identifying the same even if there are no special identifying marks on the same. He therefore, find no reason to discard the evidence of the P.W. 2 Rabindra Jhunhunwala and his mother regarding the identity of the articles recovered from the accused persons.

19. We have discussed above the relevant evidence and the picture that emerges is this. On 18-9-1991 in the forenoon when the deceased Sunita Devi was in her Kankurgachhi flat, her husband and the three children having gone out of the flat by that time for going to their respective places of work and study, there were only the two servants, namely, the accused Bishal and the accused Jagadish in that flat besides Sunita Devi. Thereafter, at about 2 p.m. when her two daughters Megha and Swati returned to the flat from the school they found that the door of the flat was open from inside and after entering the flat they found the dead body of their mother lying in the bathroom with a portion of the body lying outside the bathroom and the mouth was tied by a red cloth. Megha then informed her relations over telephone. They also soon came there Media however could not contact her father although she tried. Megha's father Rabindra Jhunhunwala also returned to the flat thereafter at about 3 p.m. Police was informed, Police came and a doctor was brought who examined and found Sunita Devi dead. The Autopsy Surgeon who held the post mortem examination expressed the clear opinion that the death of Sunita Devi was caused by ante-mortem and homicidal strangulation. When Megha returned from the school and found the dead body of her mother lying in the bathroom the two servants the licensed Jagadish and Bishal were not present in the house and a huge number of articles including ornaments, wrist watch etc. were found missing from the house and the almirah and the articles were found ransacked and things were lying at sixes and sevens in the flat. On that day at about 12.30 p.m. P.W. 6 Sarda Devi rang up Sunita but there was no response. This is an indication that Sunita was murdered before 12.30 p.m. and indeed after 9.30 a.m. when she was alone in the flat and when the two servants Bishal and Jagadish were supposed to be present in the flat with Sunita, P.W. 15 Ramji Chowdhury reached the flat at about 10.30 a.m. and when he rang the door bell the accused Jagadish and Bishal who were the two servants of the house opened the door and told that Sunita Devi was absent and had gone to her relative's house and would be back by 3 p.m. Soon thereafter when Ramji was waiting at the 3-A bus stand for returning to Ram Prosad Jhunhunwala who had sent him to the flat he found that both the servants accused Jagadish and Bishal along with the former servant accused Arun were proceeding along the Maniktala Main Road with a green coloured bag in the hand of the accused Jagadish. This indicates that it was the accused persons who had committed the murder of Sunita when she was alone in the flat and that was done sometime between 9.30 a.m. and 10.30 a.m. or thereabout. The time of murder as indicated is corroborated by the evidence of the Autopsy Surgeon. Subsequently on 27-9-1-991 the two accused Bishal and

Arun were arrested on a platform of the Howrah Station with booty taken away from the flat of Rabindra Jhunjunwala after committing the murder of Sunita. These two accused were also found to have railway tickets for Balasore with them at the time their arrest. Pursuant to their statement and being led by them police went to Kailash building at Chowranghee Road on that very date and there from a servants room of a flat on the 16th floor the police arrested the accused Jagadish and recovered on his showing the green coloured bag and a part of the booty including the missing V.C.R. Subsequently again, pursuant to the statement of the accused Rabindra Parida alias Arun and on being led by him the police recovered a part of the booty from the room of P.W. 19 Dilip Pal with whom the same had been kept by the accused Rabindra Parida alias Arun. That the deceased Sunita was murdered by strangulation in her flat on 18-9-1991 is an easy conclusion in view of the evidence of the autopsy surgeon. That the three accused were seen by Ramji Chowdhury after 10.30a.m. proceeding along with Maniktala Main Road with a green bag in the hand of the accused Jagadish a little while after Ramji was told by the accused Jagadish and Bishal that Sunita had gone to her relative's house and was expected to return by 3 p.m. is a clear circumstantial indication that would lead to the unavoidable conclusion that the murder of Sunita must have been committed by the three accused persons conjointly. It is in evidence that the accused Arun used to go to Jagadish in the flat of Rabindra Jhunjunwala. They were therefore known to each other from before the date of murder. The green bag which was found by Ramji in the hand of Jagadish was subsequently recovered from Jagadish with part of booty including the V.C.R. therein. Parts of booty were also recovered from the possession of the accused Arun and the accused Bishal immediately on their arrest at Howrah Station on 27-9-1991. All these facts and circumstances when considered together lead to the only inevitable conclusion that the murder was committed by the three accused persons under a common intention and a concerted design and these three accused persons also at that time committed robbery in the flat of Rabindra Jhunjunwala. It is argued by the learned Advocate for the appellants/accused that since the recovery of the booty, if at all, from the accused persons were made quite some days after the date of occurrence, such recovery does not lead to the conclusion that the murder of Sunita was committed by the accused persons or that the robbery was committed by them. It is argued that at best the accused persons, in view of the delayed recovery, could be convicted u/s 411, I.P.C. and nothing more than that. I am sorry, I find it difficult to subscribe to this view. It is not that recovery of the booty is the only factor for which the accused are liable to be convicted u/s 302 I.P.C. for murder. Recovery is only a supporting factor. But even apart from the recovery there are other unerring circumstances indicating the involvement of the petitioners in the commission of murder and robbery in the flat of Rabindra Jhunjunwala on the relevant date. The abandoned wearing apperals of some of the accused persons were found lying near the dead body of Sunita. The conduct of the two accused Rabindra and Bishal in falsely telling to Ramji at about 10.30 a.m. that Sunita Devi was not in the flat and had gone to the relative's house

and would return by 3 p.m. speaks volume they were going away along Maniktala Main Road soon thereafter with the accused Arun and with the green bag in the hand of the accused Jagadish. The absence of the two accused servants since then till their arrest a few days later projects incriminating abscondence on the part of the servants. All these facts and circumstances when considered with the recovery of booty from each accused as well as recovery at their instance including recovery of the green bag from the accused Jagadish containing booty lead to the only conclusion beyond reasonable doubt that the three accused persons conjointly and in a concerted way with common intention committed the murder of Sunita Devi and also robbery at that time in the flat of the Rabindra Jhunjhunwala. Conviction of each of the accused persons u/s 302/34 I.P.C. for murder of Sunita is therefore irresistible. The accused persons are also found liable to conviction u/s 394 I.P.C. which reads thus:-

"394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which any extend to 10 years, and shall also be liable to fine."

In this case since hurt was caused to Sunita Devi and indeed she was murdered even in committing robbery , the accused are liable to conviction u/s 394 I.P.C. The learned Court below however convicted the accused persons u/s 392 I.P.C. apart from Sections 302/34 I.P.C. The charge framed by the learned trial Court u/s 392 I.P.C. however contains allegation of facts which would constitute the offence u/s 394 I.P.C. and not simply u/s 392 I.P.C. The relevant charges framed by the learned trial Court is that the accused persons committed robbery of the property of Rabindra Jhunjhunwala family and at the time of committing the said robbery volutarily caused hurt to Sunita Devi Jhunjhunwala and thereby committed an offence punishable u/s 392 I.P.C. Since the fact which are the ingredients of the offence punishable u/s 394 I.P.C. have been clearly stated in the charge and evidence also have been led to prove such facts consistently with the charge there is absolutely no bar for converting in this appeal to conviction of the trial Court u/s 392 I.P.C. into conviction u/s 394 I.P.C. For this Court sitting in appeal this is permissible u/s 386(b)(ii) or even Section 386(b)(iii) Cr. P.C. In the circumstances, the appellants/accused are found liable to be convicted u/s 302/34 I.P.C. as well as u/s 394 I.P.C. Accordingly the conviction of the appellants/ accused persons u/s 302/34 I.P.C. is hereby upheld and confirmed, and their conviction by the trial Court u/s 392, I.P.C, is hereby altered to conviction u/s 394, I.P.C.

20. Now coming to the question of sentence the first question that has to be considered is whether this is a fit case for imposing the extreme penalty of death sentence on all the appellants/accused for their conviction u/s 302/34, I.P.C. The learned trial Judge imposed death sentence on all the three accused in consideration of the fact that the murder was of inhuman and "inequitous"

nature and that it was committed by those who were, being servants, expected to protect the house-wife deceased Sunita from any probable outside danger but instead of that taking advantage of the absence of the other inmates of the house they pounced upon and murdered her by strangulation and smothering and committed robbery. The learned trial Court also considered, in awarding the capital sentence that it was a calculated, cold blooded, gruesome, pre-planned murder. In Jagmohan Singh Vs. The State of U.P., one of the propositions laid down is that the discretion in the matter of sentence is to be exercised by the Judiciary after balancing all the aggravating and mitigating circumstances of the crime. In Bachan Singh Vs. State of Punjab, the Supreme Court after considering the said proposition as well as other propositions laid down therein held that the soundness or the application of the propositions and the premises on which they rest were not affected in any way by the legislative changes since effected. The Supreme Court further observed that the legislative changes since Jagmohan do not have the effect of abrogating or nullifying those principles and that the only effect is that the application of those principles is now to be guided by the paramount consideration of legislative policy discernible from Sections 354(3) and 235(2) Cr. P.C., namely, (1) the extreme penalty can be inflicted only in gravest cases of extreme culpability; and (2) in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. In Jagmohan Singh's case (supra) it was reiterated that if a murder is diabolically conceived and cruelly executed it will justify the imposition of the death penalty on the murder. In Bachan Singh's case (supra), it has been observed inter alia in para 199 that in a sense, to kill is to be cruel and therefore all murders are cruel, but such cruelty may vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist. In the said decision in para 207 it has been observed that a real and abiding concern for the dignity of human life postulates resistance to taking a life through laws instrumentality and that ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. In Jagmohan Singh's case (supra) the Supreme Court observed that if the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence. In the recent decision of Shankar @ Gauri Shankar and Others Vs. State of Tamil Nadu, the Supreme Court observed thus in paragraph 45 :-

"45. It can therefore be seen that the choice as to which one of the two punishments provided for murder is the proper one in a given case will depend upon the particular circumstances of that case and the Court has to exercise its discretion judicially and on well -recognised principles after balancing all the mitigating and aggravating circumstances of the crime. The Court also should see whether there is something uncommon about crime which renders sentence of imprisonment of life inadequate and calls for death sentence. The nature of the

crime and the circumstances of the offender should be so revealing that the criminal is a menace to the society and the sentences of imprisonment for life would be inadequate. The sentence of death should be reserved for the rarest of rare cases after a due consideration of both mitigating and aggravating circumstances. *** ** Thereafore what circumstances bring a particular case under the category of rarest of rare cases vary from case to case depending upon the nature of the crime, weapons used and the manner in which it is perpetrated, etc."

21. It is needless to mention that in the matter of sentencing, even when the grave and depraved nature of the crime has been established, the case of each accused may have to be considered separately. In the case of Shankar @ Gauri Shankar and Others Vs. State of Tamil Nadu, the trial court sentenced the accused nos. 1 -3 (A-1 to A-3) to death and A-4 to A 8 to imprisonment for life in respect of murder charges. The High Court on appeal acquitted A-7 and A-8 of all the charges and confirmed the convictions and sentences of the appellants. So far as A-1 and A-3 are concerned, both the courts, namely, the high Court and Trial Court concurrently held that this was one of the rarest of rare cases where the sentence of death alone would meet the ends of justice. A-1 was said to be the leader of the gang consisting of other accused. There were allegations of murders of as many as six persons. The Supreme Court found that A-1 indulged in these crimes in an organised manner. His own confession, though retracted, which was found to be true and voluntary gives the details of the diabolical and cruel manner in which he participated in killing the deceased 1 to 3 (D-1 to D-3) as well as D-4 to D-6. The Supreme Court observed that the crime was gruesome, cold blooded, heinous, atrocious and cruel, and A-1 was proved to be an ardent criminal and thus a menace to the society and that it was an exceptional case where the crime committed by him was so gruesome, diabolical and revolting that it shocked the collective conscience of the community and there could not be any doubt that his case was one of the rarest of rare cases fully warranting the imposition of the death sentence (vide, para 52 *ibid*). In paragraph 53 of the said decision in Sankar v. State of T. N. (*supra*) the Supreme Court observed that A-2 throughout had been actively associated with A-1 and participated in every crime and that so far as murders of D-1 to D-3 were concerned A-2 played an active role in most cruel and diabolical manner as was found from his own retracted confession. It was further observed therein that as a close associate of A-1 in every unlawful business activity, A-2 went on participating with him in these organised crimes and the reasons given in respect of A-1 for awarding the death sentence equally applied to the case of A-2 also. The Supreme Court also took into consideration that apart from their own retracted confession the evidence of P.W. 1 (approver) as corroborated by the other evidence also independently established the active participation of A-1 and A-2 in the murder of D-2 to D-6. So far as A-3 is concerned, the Supreme Court observed that he was not related to A-1 and that the quality of the evidence relied upon for holding A-3 guilty of murder charge also had to be taken into

account in awarding death sentence. It was submitted before the Supreme Court on behalf of the appellants that so far as individual participation of A -3 in the murders of D-2 and D-3 was concerned, there was only the evidence of P.W. 1 and in respect of all the three, that is, D-1 to D-3 the retracted confession of A-1 and A-2 were there but one could not be used for corroborating other mutually and therefore the quality of evidence was not of such a high degree in respect of the nature of participation by A-3 on which the court can give that high value to impose death sentence. The Supreme Court in paragraph 54 of the said decision in Sankar found force in the above submission regarding the quality of evidence in respect of the nature of participation by A-3. Apart from the discrepant evidence of P.W. 1 regarding the nature of participation of A-3 in the commission of the crimes there was no other evidence to the actual nature of participation of A-3. In the murders of D-2 and D-3 although there was enough corroborative evidence in general for the purpose of finding common intention in respect of the offence punishable under sections 302/34 IPC, the Supreme Court in paragraph 54 (ibid) recorded the view that the retracted confession of co-accused (A-1 and A-2) cannot be taken into consideration for assessing the nature of participation of A-3 for the purpose of deciding whether his case was one of the rarest of rare cases. The Supreme Court therefore did not confirm the death sentence of A-3 and reduced the death sentence of A-3 to imprisonment for life. It is therefore evident that there may be cases where the evidence unerringly proves participation of all the accused persons where the number of such persons is more than one, in the commission of the offence, yet the evidence may fail to indicate the quality of individual participation in respect of some or all of the accused persons. If the evidence establishes beyond reasonable doubt participation of all the accused persons in the commission of offence with the requisite intention all the accused persons would be found guilty of such offence in view of Section 34 of the Indian Penal Code and all the accused persons will be liable to conviction for the offence in which they participated irrespective of the question of the degree or quality of their individual participation. But then judging of the evidence for the purpose of being satisfied beyond reasonable doubt about the participation of the accused persons in the commission of an offence for the purpose of conviction of such accused is something distinctly different from the question of judging the evidence for ascertaining the degree or quality of individual participation of the particular accused in the commission of the offence for the purpose of determining the sentence to be imposed upon the particular accused, and this is so even in a case where the nature of the crime is revoltingly diabolical, notoriously depraved and heinously gruesome. Even in such a case of exceptional nature the quality or the degree of individual participation in the commission of the crime would be a matter for separate consideration for the purpose of determining the nature of the sentence to be imposed on the particular accused. Unfortunately, in our present case there is no evidence or circumstantial indication about the degree or quality of individual participation of the appellants/accused persons in the commission of the murder from which it could be visualised that the degree of participation of each accused

or any one or more of the accused persons at the individual level was such that the diabolical nature of such participation of the particular accused would warrant and justify a death sentence in the individual case. It is not unlikely that while only one or two of the accused persons took the leading and diabolically gruesome role in executing the murder, the role of other or others were of much lesser diabolical degree as would not have warranted a sentence of death for him or them. In the circumstances, there is a likelihood that sentence of death, by aggregation, for each and every accused may lead to miscarriage of justice in the matter of sentencing, and therefore such a possibility should be avoided. There is also no evidence or any circumstantial indication that the role of any particular accused individually was such as would justify a sentence of death on such accused alone. In the circumstances, to avoid any possible error in sentencing, it is proper to impose life sentence instead of death sentence on each accused.

22. Accordingly, we uphold and confirm the conviction of the appellants/accused persons u/s 302/34 IPC but we reduce the death sentence to imprisonment for life in respect of each of the accused appellants. We also alter the conviction u/s 392 IPC to one u/s 394 IPC for reasons already discussed but we maintain the sentence awarded for the said conviction by the learned court below. We also maintain the sentence of fine imposed by the learned court below for conviction u/s 302/34 IPC. In the result each of the appellants/accused persons is convicted u/s 302/34 IPC as well as u/s 394 IPC. For their conviction u/s 302/34 IPC each of the appellants/accused persons is sentenced to imprisonment for life and also to a fine of Rs. 5,000/-, in default, to rigorous imprisonment for one year each. For their conviction u/s 394 IPC each of the appellants/accused persons is sentenced to rigorous imprisonment for 10 years and also to a fine of Rs. 5,000/-, in default, to further R.I. for one year each. Both the substantive sentences shall run concurrently. The death reference case as well as the appeal under consideration stands disposed of accordingly.