

(2010) 02 CHH CK 0025

In the Chhattisgarh High Court

Case No : Criminal Ref. No. 1 of 2009 and Cri. Appeal No. 75 of 2009

State of Chhattisgarh and etc.

APPELLANT

Vs

Vinod Kumar Vaishnav

RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Constitution of India, 1950 — Article 1, 19, 2, 21, 5
Criminal Procedure Code, 1973 (CrPC) — Section 161, 235(2), 313, 354(3), 366
Evidence Act, 1872 — Section 106, 134
Penal Code, 1860 (IPC) — Section 302, 304B, 34

Citation : (2011) 1 CGLJ 149 : (2010) CriLJ 3522

Hon'ble Judges : T.P. Sharma, J; Rajeshwar Lal Jhanwar, J

Bench : Full Bench

Judgement

T.P. Sharma, J.—Reference for confirmation of death sentence submitted by 2nd Additional Sessions Judge, Baloda Bazar, Sessions Division Raipur in Criminal Reference No. 1/2009 and Criminal Appeal No. 75/2009 filed on behalf of the appellant Vinod Kumar against the judgment of conviction and order of imposing death sentence dated 6-1-2009 in S.T. No. 22/2007 arising out of common judgment are being disposed of by this common judgment.

2. The 2nd Additional Sessions Judge, Baloda Bazar, Sessions Division Raipur (C.G.) has submitted reference u/s 366 of the Code of Criminal Procedure (for short "the Code") for confirmation of death sentence passed in Sessions Trial No. 22/2007 upon the appellant for commission of culpable homicide amounting to murder of his wife-deceased Minakshi alias Banti punishable u/s 302 of the IPC.

3. The appellant-Vinod Kumar has also preferred an appeal (Criminal Appeal No. 75/2009) against the aforesaid judgment of conviction and order of sentence on the ground that without the clinching and credible evidence and in absence of rarest of rare case for imposing the capital punishment, the Court below has convicted the appellant and awarded capital punishment and thereby committed an illegality.

4. Brief facts of the prosecution is that prior to commission of the present offence, the appellant was convicted u/s 304-B of the IPC and has been sentenced to rigorous imprisonment for 7 years. His sentence was suspended by the High Court of Chhattisgarh and he was released on bail, during the pendency of the appeal. On fateful day i.e. 21-9-2007 the deceased Smt. Minakshi alias Banti, wife of the appellant was present in her house at village Bhumia, Police Station Simga, District Raipur along with her mother P.W. 1 Godawari Bai and younger sister Varsha. They were watching Television. At about 11.30 p.m. at night the deceased Smt. Minakshi told her mother P.W. 1 Godawari Bai that her son-in-law namely Vinod Kumar (the appellant) has come, at that time the appellant Vinod Kumar came to the house. Thereafter, the appellant Vinod Kumar and deceased Minakshi along with her two years minor child went inside the room. After closing the door, P.W. 1 Godawari Bai also went for sleeping. On 22-9-2007 at about 5.00 a.m. she along with her daughter Varsha after completing her necessary house works went to tea shop for opening the shop. She sent her neighbour Manoj for purchasing sugar. Her daughter Varsha came to her and told that her sister Smt. Minakshi (since deceased) was lying over the cot with injury over her neck and blood was oozing from the injury. Then she went to the house and saw the dead body of Minakshi, which was lying on the cot. Cut injury was found over the neck, another injury was found over the head. Blood was oozing from the injuries. P.W. 1 Godawari Bai started weeping. Neighbours, Sarpanch and Kotwar came. The appellant was suspecting his wife and committed the murder of the deceased and fled from the house. P.W. 1 Godawari Bai went to the police station and lodged vide FIR Ex. P1 and merged intimation vide Ex. P.2. The investigating officer left for scene of occurrence. After summoning the witnesses vide Ex. P.4, inquest over the dead body of deceased Minakshi was prepared vide Ex. P.5. Two bed sheets, one blanket and one pillow cover stained with blood were recovered from the spot vide Ex. P.6. Bloodstained tea shirt worn by the minor child of the deceased was also seized vide Ex. P.7. Dead body of deceased was sent for autopsy to Government Hospital Simga. Autopsy was conducted by the team of Doctors namely Dr. G. Gautam and G. S. Som P.W. 12 vide Ex. P.17 and found the following injuries.

1. Fracture of right side of parietal bone of 2 1/2" x 1 1/2" x muscle deep.
2. One incised wound of 5" x 2" x muscle deep over the front part of the neck.
3. Trachea, skin of the neck and internal part of the neck were found cut.
4. Sterno Hyoid muscle anterior jugular vein, pre-tracheal vein were also found cut.

Cause of death was shock as a result of haemorrhage and death was homicidal in nature. Spot map was prepared vide Ex. P.3. The letters in the form of agreement executed by the appellant Ex. P.8 and Ex. P.9 were seized from Godawari P.W. 1 vide Ex. P.11. Photographs of dead body were taken as Articles 1, 2 and Article 5. On 23-9-2007 the appellant was taken into custody. He has

made disclosure statement of local made knife and big iron hammer (Ghan) vide Ex. P. 14. The big hammer and local made knife were taken out from the pit containing water near the hand pump at the instance of appellant and the same was seized from the appellant vide Ex. P.15. Full pant and full shirt of the accused was seized vide Ex. P.16. Hammer and knife were sent for medical examination. After examining the weapon, P.W. 12, Dr. G. S. Som has opined that fatal injury found over the dead body could be caused by the aforesaid hammer and knife. Clothes were also examined by Dr. G. S. Som vide Ex. P. 19 to Ex. P.21.

5. Statements of witnesses were recorded u/s 161 of the Code. After completion of investigation, charge-sheet was filed before the Court of J.M.F.C. Baloda Bazar who in turn committed the case to the Court of Session.

6. In order to prove the guilt of the appellant, the prosecution examined as many as 12 witnesses. The accused was examined u/s 313 of the Code where he denied the circumstances appearing against him and has adduced evidence that her mother-in-law Godawari Bai is a woman of easy virtue and is prostitute. She has killed her husband by poisoning. With a view to create pressure upon the villagers, she has falsely implicated the appellant. Even she has not sent his wife with him and only after meeting she sent the deceased with the appellant. Again after one month of the said meeting, she brought the deceased with her to her house. He has tried his level best to resolve the problem. On the date of incident i.e. 22-9-2007 he was present in the house of his brother Chandrasekhar Vaishnav at Janjgir. Godawari Bai herself has committed the murder of her daughter. She was having illicit relation with Giridhari and Godawari has also threatened the appellant. He has also taken the defence that deceased was also having illicit relation with Giridhari. He has also pleaded in his defence that he has not committed the murder of his first wife but the trial Court convicted him u/s 304-B of the IPC.

7. The appellant has examined D.W. 1 Chandrasekhar Vaishnav, who has deposed in his evidence that the appellant is his cousin brother and he used to visit his house frequently. At the time of Ganesh festival, he was present in his house for 2-3 days. During that time, the police of the Crime Branch, Janjgir came to his house and told that wife of the appellant has died and they took the appellant along with them. By adducing aforesaid evidence, the appellant has taken the plea of alibi that on the date of incident, he was not present at village Bhumia but was present at Janjgir in his cousin brother's house, far away from village Bhumia.

8. After affording opportunity of hearing to respective parties, the learned Additional Sessions Judge convicted the appellant u/s 302 of the IPC and considering the case to be rarest of rare case imposed death sentence and also fine of Rs. 100/- upon the appellant.

9. Shri Janak Ram Verma, learned Counsel for the appellant and Shri Ashish

Shukla, learned Additional Public Prosecutor for the State are heard. The judgment impugned and record of the Court below perused.

10. Learned Counsel for the appellant vehemently argued that the appellant has not committed any offence. He was not present in village Bhumia on the date of commission of the offence and was present at his cousin brother's house situated at Janjgir. His mother-in-law P.W. 1 Godawari Bai is a prostitute and with a view to create pressure on villagers, she herself has killed her daughter and has falsely implicated the appellant in crime in question. He further argued that the conviction is based on the evidence of P.W. 1 Godawari Bai but her evidence is full of omissions, contradictions and discrepancies and is not safe to rely. According to the case of the prosecution, one Manoj and Varsha have seen the dead body first time. The prosecution has not examined them to unfold the real story. Non-examination of the aforesaid witnesses is fatal to the prosecution. The appellant has not made any disclosure statement and nothing has been seized at his instance. Seized articles have not been sent for chemical analysis to prove the presence of blood and blood group. In absence of presence of blood or blood group the seizure of article is of no consequence. On the date of incident, the appellant was not present in the room of the deceased. P.W. 1 Godawari Bai was present in the adjoining room and has not heard any sound. She has not seen the appellant. Counsel for the appellant further submitted that this is a case of murder and death penalty has been imposed. In case of serious offence of murder in which sentence of death penalty has been imposed, the prosecution was under obligation to prove its case beyond all shadow of doubts, without any leaving room for doubt and was under obligation to prove that this is a case of rarest of rare and the appellant has brutally murdered his wife. This is not a case of exceptional nature. The murder has not been committed in a most cruel, heinous and dastardly manner deserving the exceptional sentence of death.

11. Counsel for the appellant has placed reliance in the matter of Shashidhar Purandhar Hegde and Another Vs. State of Karnataka, in which the Apex Court has held that in case of conviction based on circumstantial evidence, the prosecution is required to prove the complete chain of circumstances. The prosecution is also required to prove that the articles were stained with human blood. He has placed reliance in the matter of State of Haryana Vs. Jagbir Singh and Another, the Apex Court held that in case of recovery of articles on the basis of disclosure statement, the prosecution is required to prove the fact that prior to the disclosure statement, the fact was not within the knowledge of the investigating officer. He has also placed reliance in the matter of Ravinder Parkash and Another Vs. State of Haryana, , the Supreme Court has held that non-examination of police officer who has registered the complaint creates considerable doubt about the prosecution case. He further placed reliance in Orsu Venkat Rao Vs. State of Andhra Pradesh, wherein the Apex Court held that in case of evidence of eye-witnesses not found trustworthy, the conviction of the appellant/accused is not sustainable. Lastly, he further placed reliance in the matter of Sebastian alias Chevithiyen v. State of Kerala 2009 Cri LR 416 : AIR

2009 SC 2371 where it was held by the Supreme Court that for imposition of death penalty, the prosecution is required to prove that case is squarely covered under the category of rarest of rare case.

12. On the other hand, learned Counsel for the respondent/State vehemently opposed the criminal appeal and supported the death reference that the appellant, the husband of the deceased, was under obligation to protect his wife but instead of protecting the deceased (his wife), the appellant himself has committed the murder of his wife. On the date of incident, the appellant, the deceased (wife) and two years old child were inside the room. At night, room was bolted from inside. At the time of morning, the appellant was not present in the room. The body of deceased was lying over the cot in injured condition. The appellant has not offered any explanation that how his wife, who was in custody of the appellant, received fatal injury. The accused/appellant has caused the death of his wife by using a big hammer (Ghan) and big knife by which the appellant has caused injury over the neck and head of his wife in a brutal manner and that too during pendency of criminal appeal against the appellant, who has earlier caused the dowry death of his first wife. The case falls under the rarest of rare category and the death penalty would be the only punishment for the appellant. Counsel for the respondent/State has placed reliance in the matter of *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, *State of Karnataka Vs. Bhaskar Kushali Kotharkar and Others*, and *Trimukh Maroti Kirkan Vs. State of Maharashtra*, in which it has been held that in case of offence committed in secrecy the person is under obligation to explain the circumstances and further held that the Courts are under obligation to impose appropriate punishment and in case of death falls under the category of rarest of rare the only punishment of death penalty would be appropriate.

13. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the prosecution and defence. In the present case, homicidal death as a result of fatal injury on Smt. Minakshi (since deceased), wife of the appellant has not been substantially disputed by the appellant, on the other hand, also established by the evidence of P.W. 12 Dr. G. M. Som and autopsy report Ex. P. 12, P.W. 12 GM. Som, who conducted autopsy, has deposed in his evidence that on 22-9-2007 at about 2.00 p.m. he has examined the dead body of deceased Smt. Minakshi and found the injuries as described in paragraph 4 of this judgment including the fracture of frontal bone, deep incised wound over the neck affecting trachea, jugular vein, pro-tracheal vein and Sterno-hyoid muscle, death was homicidal in nature.

14. As regards the complicity of the appellant in crime in question, the conviction is based on following circumstances:

- i) The appellant and the deceased were present in one room at the time of incident and deceased was in custody of the appellant.
- ii) The appellant has not offered any explanation that how the deceased received

injury and how she died.

iii) The appellant fled away from the house after commission of offence without intimating to any person.

iv) The appellant has made disclosure statement of the weapon.

v) The weapon of offence big hammer and knife was recovered at the instance of the appellant.

vi) The knife and hammer have been recovered at the instance of the appellant from hidden place i.e. a pit filled in water.

15. As regards the presence of accused inside the room along with deceased, the prosecution has examined P.W. 1 Godawari Bai, mother-in-law of the appellant, who has deposed in her evidence that on the date of incident at night she took meals and went to her room for sleeping. Her daughters Smt. Minakshi (since deceased) and Varsha were watching T.V. After some time, Minakshi (since deceased) told her that her son-in-law has come and also told to close the door. She came out from the room and saw the appellant. At that time, the appellant came and went inside his room to sleep. Then, she went inside her room and closed the door from inside. After sometime, the appellant knocked her door and requested to take his son which she refused thereafter the appellant went inside his room with his son. On the second day morning at about 5-5.30 a.m. after completing her house work, she went to tea shop for opening the shop from where she sent her son Manoj for purchasing sugar. At about 7.30 a.m. her second daughter Varsha came to her and told that Minakshi was lying stained with blood and she was not talking. She along with Varsha rushed towards her house where she saw dead body of Minakshi lying over the cot covered with blanket and only face was open. One injury was visible in her neck and blood was oozing from other injury. The appellant was not present in the house and then she raised shouts that the appellant has killed her daughter Minakshi and fled away. After hearing her cries, neighbours Jagmohan, Mohan, Panch and Sarapanch, Kotwar came and then she went to the police station for lodging the FIR where she lodged FIR Ex. P.1 and merged intimation vide Ex. P.2. P.W. 2 Keyur Bhushan Sharma, P.W. 3 Kumari Bai Verma, P.W. 4 Vidya Sahu and P.W. 6 Shambhoo Das have deposed in their evidence that they were called by P.W. 1 Godawari Bai and told them that the appellant has murdered his daughter Minakshi and has fled.

16. The defence has examined D.W. 1 Chandrasekhar, cousin of the appellant and resident of Bamnidih, Dist. Janjgir, has deposed in his evidence that in the year 2007 at the time of Ganesh immersion the appellant came to his house and stayed there for 2-3 days. At that time, Janjgir police of Crime Branch visited his house and informing him that wife of the appellant has died, they took the appellant along with them. In paragraph 4 of his cross-examination, this witness admitted that the appellant told him that he has come to attend the function of Ganesh immersion but he did not inform him that from where he came. He has

denied the suggestion that the appellant did not stay at his house. In paragraph 14 of cross-examination, he has deposed that he could not say as to on the date of incident i.e. 22-9-2007 since 12.00 in the night till 7.00 a.m. whether the accused was present in his house or not. This witness has specifically deposed that police of Crime Branch visited his house and they took the appellant with them but defence has not examined the officers of the Crime Branch to prove the aforesaid fact. This witness has not given definite date and time of stay of the appellant in his house. Even it is difficult to presume that the appellant was at village Bhimia which is far way from Janjgir would go to his house to see Ganesh immersion. It appears mat only with a view to take plea of alibi, the defence has examined this witness.

17. In the present case, the prosecution has not examined Varsha, daughter of P.W. 1 Godawari Bai and neighbour Manoj, who had seen the dead body for the first time. The death and presence of dead body of Minakshi in the room has not been disputed by any party, therefore, the non-examination of Varsha and Manoj would not be fatal to the prosecution. The defence has cross-examined the substantive witness P.W. 1 Godavari Bai at length. In paragraphs 17 and 18 of her cross-examination, she denied the suggestion that on account of Giridhari Yadav, a milk vendor, she herself killed her daughter Minakshi. In paragraph 19, she has specifically deposed that at the time of incident the appellant was present in her house. In paragraph 20 of her cross-examination, she has explicitly deposed that on the date of incident during day time and at night, the appellant was present in her house and at about 11.00 at night the appellant came, went to his room along with the deceased. She further deposed in paragraph 21 that her room is not adjoining the room of the appellant and there was courtyard between both the rooms. In her detailed cross-examination, she has specifically stated that on the date of incident, the appellant was present in his room along with his wife i.e. the deceased Minakshi and at morning time the appellant was not present in the room and she had seen the injured dead body of the deceased.

18. P.W. 1 Godavari Bai is only a solitary and relative witness. In the present case, the defence has cross-examined this witness at length but has not been able to elicit anything in her cross-examination to discredit her testimony relating to the presence of appellant in her room along with his wife and the very second day morning he was absent from room; the dead body of the deceased was found in injured condition in his room. Ex. P. 3 map also reveals that there is courtyard between the room of the deceased and the room of this witness. The appellant is son-in-law of this witness and husband of the deceased and they are close relatives. Only on the ground of relationship her statement cannot be discarded. On the other hand, the relatives are persons reluctant to spare the culprit and implicate any innocent falsely. While dealing with the question of evidentiary value of relative witness, the Apex Court in the matter of Sucha Singh and Another Vs. State of Punjab, and R. Prakash Vs. State of Karnataka, , has held that close relatives of the deceased would normally be most reluctant to

spare the real assailants and to falsely mention the name of another person. While dealing with the question of reliability of relative witness, in the case of *Bhargvan v. State of Kerala* AIR 2004 SC 1058 : 2004 Cri LJ 646, the Apex Court has held that a close relation would be the last to screen the real culprit and falsely implicate an innocent person. The relevant paragraph is as under:

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag, in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence.

The present case is substantially rests on the statement of solitary witness Godawari Bai P.W. 1. Conviction can be based on the testimony of sole witness it is the quality and not the quantity of evidence that is relevant for proving or disproving a fact. The Apex Court in the matter of *Jhapsa Kabari and Others etc. Vs. State of Bihar*, has held that there is no bar in basing conviction on the testimony of solitary witness so long as the said witness is reliable and trustworthy, Para 9 reads as follows:

...There is, however, no bar in basing conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy. The Sessions Court and the High Court examined the testimony of P.W. 1 and found no reason to disbelieve it. We have also gone through the testimony of P.W. 1. We are also of the view that her deposition is most natural, reliable and trustworthy. She could not be shaken in the cross-examination. Simply because 14 years" old boy did not name her in the fardbayan, in the facts of the case, is of no consequence and does not require her evidence to be rejected. He must have been under a mental tension on account of the murder of his father and uncle. In our view, there is no infirmity in the conviction and sentence of Bhikar Raut and Isralil Kabari for offence u/s 302/34, IPC.

19. While dealing with the question of conviction on the basis of solitary witness Apex Court has held in case of *Chittar Lal Vs. State of Rajasthan*, that the conviction can be based on the testimony of sole witness it is the quality and not the quantity of evidence that is relevant for proving or disproving a fact. Para 7 reads as follows:

...Therefore, the plea that P.W. 3's testimony is doubtful lacks substance. The other plea was that conviction should not have been made on the basis of a

single witness P.W. 3's testimony. This plea is equally without essence. The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). Administration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent, cases where the testimony of a single witness only could be available, in number of crimes offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability, if the testimony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact....

20. The prosecution has adduced another set of evidence relating to discovery of weapon on the basis of confessional statement of the appellant. In the present case, bailable warrant was issued to Investigating Officer but at the request of defence, the case of prosecution was closed by the Court below vide order dated 11-4-2008, therefore, the Court below did not examine the investigating officer. While dealing the question of non-examination of I.O., in *Ram Dev v. State of U.P.*, 995 Supp (1) SCC 547, the Supreme Court held as under:

The non-examination of investigating officer does not affect credibility of eye-witnesses. However, it is desirable for the prosecution to produce him even if documents to be proved by him accepted by the defence as genuine documents.

However, P.W. 5 Mahavir Chouhan has deposed in his evidence that the appellant made a disclosure statement of knife and one big hammer and also one stick which were kept in a pitch under the water near the hand pump which was recorded in Ex. P. 14. It was further deposed that he went along with the appellant near the pitch shown by the accused. One Totaram took out one knife and hammer inside the water and stick was lying near the pitch. He has further deposed that knife and hammer were seized vide Ex. P. 15. Police had also seized the clothes of the appellant vide Ex. P.16.

21. The prosecution has also examined Totaram P.W. 9, who has deposed that he was called by the police and directed him to search the weapon which the appellant has kept inside the water in pitch, then he entered into the water and asked the accused about the place where weapons were lying. Thereafter, the accused shown the place i.e. side of pitch where weapon was lying and then he searched and found one hammer. Again he asked the accused about another weapon and upon being pointed out by the accused, another part of pitch was shown where one country made knife was lying. He also deposed that both the weapons were seized vide Ex. P.15. The defence has cross-examined this witness in detail. In paragraph 4 of his cross-examination, he has admitted that the

appellant was residing with his wife and used to play cards. He has also admitted in paragraph 5 of his cross-examination that on the date of incident he has not seen the appellant because the appellant fled from the village. In paragraph 6 of his cross-examination, he has deposed that one day prior to the incident, the appellant was playing cards. In paragraphs 7 & 8 of his cross-examination, he has admitted that police officers took the appellant in handcuffs near the pitch. Depth of pitch was 3 feet and water was dark in colour and was not transparent. He has also deposed that with the help of the appellant he searched the weapon easily in time. P.W. 5 Mahavir Chouhan has also admitted in paragraph 3 of his cross-examination that the appellant was in custody and was in handcuffs. He has also stated in paragraph 3 of his cross-examination that the appellant is a person who has shown the pitch where weapons were hidden. In paragraph 5 of his cross-examination, he has also admitted that weapons were kept under the water.

22. In the present case, the prosecution has failed to examine the investigating officer to whom the appellant has made disclosure statement but the evidence of P.W. 5 Mahavir Chouhan and P.W. 9 Totaram revealed that the appellant has made the disclosure statement of knife and hammer and that both weapons are kept under the water in a pitch, which was shown by the appellant and both the weapons were found and thereafter police seized the weapons. In the matter of State of Karnataka Vs. Bhaskar Kushali Kotharkar and Others, , the Apex Court has held that if the accused is not prejudiced then the non-examination of investigating officer is not fatal to the prosecution. Paragraphs 6 & 7 read as under:

6. In the instant case, the Sessions Judge issued summons to these two witnesses but these police officers did not turn up for giving evidence and the Sessions Judge closed the prosecution case as one of the accused had been in prison as an under-trial for a fairly long period. The counsel for respondents 1 to 4 though contended that they were seriously prejudiced by the non-examination of the Investigating Officer, this plea could not be substantiated by cogent fact and circumstances. It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses given any evidence contrary to their previous statement recorded u/s 161, Code of Criminal Procedure or if there is any omission of certain material particulars only by examining the Investigating Officer who must have recorded the statement of these witnesses u/s 161, Code of Criminal Procedure In the present case, no such serious contradiction is pointed out in respect of the evidence of the important eye-witnesses P.W. 1, P.W. 2 and P.W. 10. So also the non-examination of the Head Constable who recorded FI statement is not of serious consequence as P.W. 1 was examined to prove the fact that she had given the statement before the police. The learned single Judge was not justified in reversing the order of the Sessions Court by holding that the non-examination of the investigating officer and the constable who recorded the FI statement had caused

prejudice to the accused.

7. The learned single Judge did not consider the evidence of the two eye-witnesses and that on P.W. 10 in detail. The appeal was disposed of on technical grounds. P.W. 1 is none other than the wife of the deceased. P.W. 2 is a neighbour who happened to be at the place of incident for purchasing some grocery items. P.W. 1 deposed that Respondents 1 to 4 and others came to her house at about 7/7.30 p.m. on 20-9-1993. First accused Bhaskar Kushali Kotharkar and the 5th accused Dattaran Kushali Kotharkar dragged her husband and thereafter all the accused caused various injuries on his body. She identified these respondents and we do not find any infirmity in her evidence.

23. The prosecution has not proved the origin of blood and its group in the present case. It revealed from the evidence of prosecution that hammer and knife were recovered from the pitch containing water on 23-9-2007 at about 5.00 p.m. i.e. after more than 24 hours of the incident and both were kept under the water. In these circumstances, it is difficult to presume that blood will be present on the weapons.

24. Knife and hammer have been recovered at the instance of the appellant shows that either the appellant has concealed these articles under the water in hidden position which was not within the knowledge of other persons including the investigating officer or the appellant was having knowledge of the fact that these weapons have been kept under the water. The appellant has not offered any explanation that how he knows the fact that weapons were hidden under the water. In absence of such explanation, it can be inferred that the appellant has hidden those weapons under the water. The incident took place inside the room of the appellant where the appellant was present along with the deceased. The presence of appellant being husband of the deceased Minakshi in the room was not unnatural. On the second day morning, the dead body in injured condition of the deceased was found on the cot and the appellant was not present, but he was taken into custody on second day. The appellant has not offered any explanation that how his wife died as a result of injury and who has caused the injury while he and his wife were inside the room and room was bolted from inside.

25. Admittedly, this is a special circumstance and it must be within the knowledge of the accused, therefore, in accordance with Section 106 of the Evidence Act, the appellant was under obligation to prove the fact that how his wife received injury and how she died. While dealing with the same question in the matter of Trimukh Maroti Kirkan Vs. State of Maharashtra, , the Supreme Court held that if the offence was committed in the dwelling house, where the husband also resided and if the accused husband did not offer any explanation as to the injuries received by his wife or if the explanation is false, then there is strong circumstance which indicates that he committed the crime. Paragraphs 14 and 15 are relevant and read as follows:

14. If an offence takes place inside the privacy of a house and in such circumstances where the appellants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* 1944 AC 315 - quoted with approval by Arijit Pasayat, J. in *State of Punjab Vs. Karnail Singh*, . The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

While dealing with same question in the matter of *Dhananjoy Chatterjee alias Dhana v. State of W.B.* AIR 1995 SCW 510 (supra), the Supreme Court held that in case of offence committed in secrecy, the person who was present in such places is under obligation to offer explanation.

26. In the present case, the evidence of P.W. 1 Godawari Bai, mother of the deceased and mother-in-law of the appellant inspires confidence, trustworthy and is safe to rely to the extent that the appellant was present in his room along with the deceased at the time of alleged incident and on second day morning he was not present in his room. Dead body of Minakshi was found inside the room in an injured condition. The present appellant has not offered any explanation that how his wife received injury and died and knife and hammer, weapons of offence, have been recovered at the instance of the appellant from the pitch in a hidden

place which was not within the knowledge of investigating officer or any other person. After commission of crime, the appellant was not present in his house and has offered explanation that he was present at Janjgir to attend the function of Ganesh immersion which was patently false.

27. In case of circumstantial evidence, the prosecution is under obligation to prove the chain of circumstances so complete sufficient for drawing an inference that the appellant is present and has committed the offence and except the appellant no other person has committed the offence. The prosecution has proved the following circumstances against the appellant:

(A) The appellant was present in the intervening night of 21st and 22nd September, 2007 in his room along with the deceased.

(B) On second day morning i.e. 22-9-2007, the appellant was not present and has absconded from the room.

(C) The deceased Minakshi, wife of the appellant, was found dead in his room, as a result of fatal injury,

(D) The appellant has offered false explanation of his presence at Janjgir to attend the function of Ganesh immersion.

(E) The weapons of offence have been recovered at the instance of the appellant in the pitch containing water in hidden position.

If the aforesaid circumstances are considered together, then the same would be sufficient for drawing an inference that the appellant was a person who has caused injury to his wife and in consequence thereof has caused her death. The evidence adduced on behalf of the prosecution is sufficient for drawing an inference that the appellant has caused homicidal death of his wife.

28. In the case of State of Rajasthan v. Khuma AIR 2004 SC 4677 : 2004 Cri LJ 4873 (supra), the last seen theory was not found trustworthy. The present case is not based on last seen theory, therefore, the aforesaid case is distinguishable on the grounds and facts. In the case of State of Haryana Vs. Jagbir Singh and Another, , the extra judicial confession was not found true. The present case is not based on extra-judicial confession of the appellant and also distinguishable on the grounds and facts.

29. As regards the motive, P.W. 1 Godawari Bai has specifically deposed that the appellant used to quarrel with his wife which shows that the appellant was having intention to cause homicidal death amounting to murder of his wife. After appreciating the evidence available on record, the learned Additional Sessions Judge has convicted the appellant u/s 302 of the IPC.

30. As regards the question of sentence is concerned, the learned Sessions Judge has imposed capital punishment i.e. death penalty upon him. While imposing the death penalty, learned Additional Sessions Judge has considered the fact that prior to the commission of the present offence, the appellant has been convicted

u/s 304-B of the IPC for causing dowry death of his first wife and during pendency of the appeal he was released on bail. while he was on bail, he has committed the second offence of murder of his wife by using dangerous weapon i.e. heavy hammer and knife. It revealed that there is no chance of improvement/reformation in his personality.

31. The death penalty or imprisonment for life for the commission of murder u/s 302 of the IPC has been provided. In case of conviction u/s 302 of the IPC or any conviction for an offence punishable with death or in the alternative the imprisonment for life, the Court is required to assign the reason for awarding such penalty and the special reason for awarding death sentence in accordance with Sub-section (3) of Section 354 of the Code. Section 354 Sub-section (3) of the Code reads as under:

Section 354(3): When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

The question of imposition of death penalty is still academic issue. While dealing with the question of imposition of death penalty for the commission of murder, the Apex Court in the case of Bachan Singh Vs. State of Punjab, held that provision of death penalty as an alternative punishment for murder is not violative of Article 19 of the Constitution of India. Paragraph 132 is relevant and reads as under:

132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware as we shall

presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Code of Criminal Procedure and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19.

While dealing with the question of imposition of death penalty, in the case of Smt. Shashi Nayar Vs. Union of India and others, ; Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, and State of U.P. Vs. Satish, the Apex Court has held that in case of imposing death penalty, capital punishment provided by law is proper award in rarest of the rare cases and not as a normal rule. In the case of Sushil Murmu Vs. State of Jharkhand, the Apex Court has summarized the law with regard to imposition of death sentence. Paragraphs 15 and 16 read as under:

15. The following guidelines which emerge from Bachan Singh Vs. State of Punjab, will have to be applied to the facts of each individual case where the question of imposition of death sentence arises (SCC p. 489, para 38):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

16. In rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death

penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

- (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
- (2) When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.
- (3) When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride-burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
- (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
- (5) When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

32. While dealing with the question of imposing death sentence, in the case of Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, , the Apex Court has held that for awarding death sentence, the Court is required to consider the manner of the offence whether the case falls under the category of rarest of rare. Brutality is involved in every murder but how took place is relevant factor. In case of murder by gunshot, it has been held that brutality was not of such nature as to award capital punishment. While dealing with the question of brutality in the matter of Asharfi Lal and Others Vs. State of Uttar Pradesh, , the Supreme Court has held that it is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. In case of gruesome murder of two innocent girls to wreak their personal vengeance over the dispute, the death sentence awarded to the appellants was confirmed. Paragraph 3 reads as under:

3. We have heard learned Counsel for the appellants mainly on the question of sentence but we are not impressed with his submission. The two appellants Ashrafi Lal and Babu were guilty of a heinous crime out of greed and personal vengeance and deserve the extreme penalty. This case falls within the test "rarest of rare cases" as laid down by this Court in Bachan Singh Vs. State of

Punjab, as elaborated in the later case of Machhi Singh and Others Vs. State of Punjab, . The punishment must fit the crime. These were coldblooded brutal murders in which two innocent girls lost their lives. The extreme brutality with which the appellants acted shocks the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by Section 302 of the Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellants deserve for having committed the reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death on the two appellants Asharfi Lal and Babu is confirmed.

While considering the same question in the case of Machhi Singh and Others Vs. State of Punjab, , the Apex Court has held that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime". Life imprisonment is the rule and death sentence is an exception. Paragraph 33 is relevant and reads as under:

33. In this background the guidelines indicated in Bachan Singh Vs. State of Punjab, will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when the imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

33. In the light of the aforesaid legal propositions regarding imposition of capital punishment, we have examined the present case. In the present case, two circumstances are against the appellant which have been considered by the Court below for imposition of death penalty. The first circumstance is that the appellant has committed the offence of murder of his wife inside the room after commission of murder of his first wife and there is no chance of his rehabilitation. Secondly, that the appellant has committed the offence in brutal and cruel manner by using big hammer. Paragraph 28 of the impugned judgment reveals that the present appellant has been convicted u/s 304-B of the IPC and sentenced to rigorous imprisonment for 7 years. He was on bail. Paragraph 28 also reveals that the aforesaid fact was well within the knowledge of the deceased and her mother and on the assumption that the appellant has been falsely implicated in the aforesaid offence the deceased performed marriage with the appellant. It shows that the deceased was of the view that the present appellant has been falsely implicated in the offence u/s 304-B, IPC. At the time of commission of offence of murder, the appellant has used the big hammer and knife. The size and shape of hammer has been described in Ex. P.15 which revealed that the hammer in the present case was a dangerous weapon and was sufficient to crush the head or any part of the body of the deceased. Autopsy has been conducted by P.W. 12 Dr. G.S. Som who has deposed in his evidence that fracture of right side of parietal admeasuring 2 1/2" x 1/2" x muscle deep was found over the head and second injury was found over the neck. It appears that first injury found over the head was caused by the hammer. The size of injury was 2 1/2" x V2" and depth was upto muscle deep shows that the appellant has not used the hammer with full force otherwise it would have been the gravest injury on the head. The injury found over the body of the deceased shows that the appellant assaulted the deceased twice one by hammer with normal force and second by knife. As held by the Supreme Court in the case of Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, that in every incident of murder brutality is involved but that brutality by itself will not bring it within the ambit of rarest of rare case, for imposition of death penalty the Court is required to prove the fact that brutality in the present case was exceptional and rarest of rare and also to show that there is something uncommon about the crime which renders the sentence of imprisonment for life inadequate and called for a death sentence.

34. An appeal against the conviction of the appellant u/s 304-B of the IPC is pending before this Court for consideration. The deceased herself was satisfied that the appellant has not committed any offence punishable u/s 304-B of the IPC. The appellant has not used the hammer in a brutal manner and has not applied it with full force sufficient for crushing the head or any part of the body. The offence has been committed inside the room and ample opportunity was available to the appellant to cause more repeated injury in brutal manner but except to only injury the appellant has not caused any other injury. This is not a case of separation of human neck from the body. Admittedly, in the present case

of murder, brutality is involved but brutality is not of such nature to bring the case in the category of rarest of rare fit for imposing capital punishment.

35. For the foregoing reasons, we are of the considered view that the prosecution has proved the case against the appellant for commission of culpable homicide amounting to murder of his wife punishable u/s 302 of the IPC but has not succeeded in bringing the case within the category of rarest of rare case for imposing death penalty in our opinion, measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view of rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. Considering the absence of element of brutality or exceptional and uncommon circumstances, we are also of the view that the punishment awarded to the appellant herein is in excess of requirement of the situation. Therefore, we are unable to confirm the death sentence passed by the learned Second Additional Sessions Judge Baloda Bazar.

36. Consequently, the reference for confirmation of death sentence u/s 302 of the IPC made u/s 366 of the Code by the Second Additional Sessions Judge, Baloda Bazar in S.T. No. 22/2007 is not confirmed in criminal reference. The criminal appeal filed by the appellant is partly allowed and in exercise of powers u/s 368(a) of the Code, the sentence of death penalty imposed upon the appellant for the offence punishable u/s 302, IPC is altered to minimum sentence of imprisonment for life provided under law.