
(2016) 04 BOM CK 0112

In the Bombay High Court

Case No : Criminal Confirmation Case No. 2 of 2015 with Criminal Appeal No. 43 of 2016.

State of Maharashtra

APPELLANT

Vs

Imdad Ali Waid Ali Sayyad

RESPONDENT

Date of Decision : 25-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313
Evidence Act, 1872 — Section 27, 32, 8
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 2 BomCR(Cri) 804 : (2016) 4 MhLJCrI 175

Hon'ble Judges : B.R. Gavai;Mrs. Swapna Joshi, JJ.

Bench : Division Bench

Advocate : V.A. Thakare, A.P.P, for the Appellant; F.N. Haidari, Advocate. (appointed), for the Respondent

Final Decision : Partly Allowed

Judgement

B.R. Gavai, J. (Oral) - Since the learned Additional Sessions Judge, Chandrapur vide his Judgment and Order dated 3.12.2015 passed in Sessions Case No.81 of 2014 has awarded death sentence to the appellant/accused herein and directed him to be hanged by neck till death, present reference has been made to this Court. The Criminal Appeal has been filed by the appellant being aggrieved by the Judgment and Order of sentence as recorded by the learned trial Judge thereby holding him guilty for the offences punishable under Sections 302 and 201 of the Indian Penal Code and sentencing him to death and to suffer rigorous imprisonment for three years respectively and to pay a fine of Rs.1000/ in default, to suffer simple imprisonment for three months respectively.

2. The prosecution case, in nutshell, as could be gathered from the material placed on record, is thus :

The accused is husband of deceased Shamshad. Deceased Isana was daughter of deceased Shamshad and the appellant. Deceased Harunisa was mother of

deceased Shamshad. It is the prosecution case that the matrimonial relations between deceased Shamshad and the appellant were not cordial. It is further the prosecution case that the appellant wanted the house, in which they were residing and which belonged to Shamshad, to be transferred by Shamshad in his name. It is the prosecution case that, on account of dispute between deceased Shamshad and the appellant, the appellant left the house 2 to 3 years prior to the date of incident and that, after the appellant left the house, Shamshad married one Rafiur Raheman, who was much younger to her in age. It is further the prosecution case that Shamshad had married Rafiur Raheman without divorcing the appellant. It is also the prosecution case that, even thereafter, the appellant used to visit the house demanding Shamshad to transfer half share in the house in his name.

3. The further prosecution case is that, on the day of incident i.e. on 2.4.2014, between 8.00 to 8.30 p.m., the accused came at the house of deceased Shamshad and picked up a quarrel on some grounds and thereafter, by means of knife, assaulted Shamshad, Isana as well as Harunisa. The neighbourers heard the hue and cry from the house of deceased Shamshad and thereafter, some of the neighbourers including Tawangarkhan Gulzarkhan (PW-5) and the second husband of deceased Shamshad namely Rafiur Raheman carried all the three injured persons to the Civil Hospital, Chandrapur, where Shamshad and Isana were declared dead by the doctor and Harunisa was alive. Harunisa was transferred to the Intensive Care Unit in the hospital. Asil Ali (PW-1), son of deceased Shamshad and the appellant, was informed by the neighbourers on telephone. He immediately came to their house, but it was reported to him that all the injured were shifted to the Civil hospital, Chandrapur. When he went inside the house, he found the house flooded with blood. He then went to the hospital, where he came to know that his mother and sister had died and his grandmother was seriously injured. It is further prosecution case that, on inquiry by Asin Ali with injured Harunisa in the I.C.U., she told him that the accused had come to their house and had picked up a quarrel with Shamshad and thereafter, assaulted her by means of Khanjar. Accordingly, Asin Ali (PW-1) lodged oral report with the Police Station, Ramnagar, Chandrapur below Exh.10. On the basis of oral report, printed F.I.R. came to be registered vide Crime No.104 of 2014 below Exh.11.

4. On the basis of said F.I.R., P.I. Shivaji Vishwanath Bachate (PW-10) carried on investigation. He immediately visited the spot, prepared spot panchanama, seized various incriminating articles from the spot. The dead bodies of Shamshad and Isana were referred for post mortem. He recorded dying declaration of injured Harunisa below Exh.69. He also sent requisition to the Executive Magistrate for recording the dying declaration of deceased Harunisa. Accordingly, the dying declaration came to be recorded by the Santosh Vijayrao Khandre (PW-7), Executive Magistrate. Since the accused was not traceable, search warrant came to be issued below Exh.71. The accused came to be arrested after about 1 ? months from the date of incident on 13.5.2014. While arresting the

accused, certain material was seized from him vide panchanama below Exh.74 on 17.5.2014. A statement was made by the accused on a memorandum under Section 27 of the Indian Evidence Act below Exh.50 with regard to concealment of knife used in commission of the crime. Said knife came to be seized vide panchanama below Exh.51. During investigation, voluminous evidence was collected by prosecution. We do not propose to reproduce the entire material inasmuch as in the later part of the Judgment, we will consider the vital material, on which the prosecution as well as the defence rely.

5. On conclusion of investigation, charge sheet came to be filed in the Court of learned Chief Judicial Magistrate, Chandrapur. Since the offence was exclusively triable by the Court of Sessions, the case was committed to the Court of learned Sessions Judge, Chandrapur. The learned Sessions Judge framed charges on 20.9.2014 below Exh.3. The accused pleaded not guilty and claimed to be tried. The prosecution in all examined ten witnesses in addition to exhibiting voluminous documentary evidence. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentence as aforesaid. As such, the present reference and appeal by the accused.

6. We have heard Ms F.N. Haidari, learned Counsel appointed to appear from the Legal Aid Panel on behalf of the appellant/accused. The learned Counsel appearing on behalf of the appellant/convict submits that the prosecution case is full of lacunas. She submits that, on one hand, it is the prosecution case that the second husband of Shamshad namely Rafiur had taken all the three deceased to the hospital and on the other hand, Tawangarkhan Gulzarkhan (PW-5) in his evidence claims that it is he who had taken the deceased to the hospital. Learned Counsel further submits that the prosecution had neither examined the said Rafiur or Shalik who is said to have informed Asil Ali (PW1) about the incident. The learned Counsel further submits that the alleged eye witness i.e. Tawangarkhan Gulzarkhan (PW-5) cannot be said to be a trustworthy eye witness. The learned Counsel submits that the said witness is also a panch witness to all the panchanamas and therefore, he is a stock witness. Learned Counsel submits that though Tawangarkhan Gulzarkhan (PW-5) was throughout with the Investigating agency, his statement is recorded on the next date. She submits that the very conduct of the said witness in not informing the police about the said incident creates a serious doubt regarding veracity of his testimony. The learned Counsel further submits that the prosecution has also not seized the blood stained clothes from this witness. The learned Counsel relying on various Judgments of the Apex Court as well as this Court submits that if blood stained clothes of the witness, who alleges to have taken the injured persons to the hospital, are not seized, the very credibility of said witness is at stake. The learned Counsel, therefore, submits that the evidence of said eye witness Tawangarkhan Gulzarkhan (PW-5) is required to be totally discarded.

7. The learned Counsel submits that, insofar as two written dying declarations are concerned, the said dying declarations are not trustworthy at all. She

submits that, in the dying declaration which is below Exh.55, there are various erasers. It is further submitted that the dying declarations do not have a certification by doctor at the beginning as well as at the end regarding mental as well as physical condition of deceased Harunisa to make the dying declarations. She further submits that, even in the dying declaration below Exh.69, there is no certification by the doctor. The learned Counsel further submits that, if the thumb impression on both the dying declarations are compared, it will show that the dying declarations are not genuine. The learned Counsel further submits that perusal of evidence of Dr. Vikrant Dhawande (PW-8) as well as medico-legal papers below Exh.63 (report of Harunisa by General hospital, Chandrapur) would show that the patient was not in the fit condition to make the dying declaration. The learned Counsel further submits that the document below Exh.66 (Requisition to the Civil Surgeon for Postmortem examination) would also fortify the said position. The learned Counsel further, for the same reason, submits that the oral dying declarations allegedly given to Asil Ali (PW-1) and Tawangarkhan Gulzarkhan (PW-5) cannot be believed.

8. Ms F.N. Haidari, learned Counsel further submits that, if the timings of both the written dying declarations are compared, it could be seen that there is overlapping of time and it is not possible that both the dying declarations could be recorded within the said span of time.

9. Insofar as seizure of the weapon allegedly used by the present appellant under memorandum under section 27 of the Indian Evidence Act, 1872 is concerned, the learned Counsel submits that the seizure is from the open place being accessible to one and all and therefore, the said recovery would be of no assistance to the prosecution. She further submits that, in any way, the circumstance regarding blood stains being found on the said knife and other materials having blood of blood group "A", which is the blood group of deceased Harunisa, having not been put to the appellant, the said circumstance cannot be used against the appellant.

10. It is further submitted that the charge under section 452 of the Indian Penal Code is not framed. The learned Counsel further submits that though it has come in the evidence of I.O. P.I. Bachate (PW-10) that the mobile seized from the accused was belonging to one Umesh, there is no investigation as to how the same has come in the hands of the appellant. She further submits that the CDRs (Call Detail Reports) are also not proved. It is, therefore, submitted that the order of conviction is not sustainable in law and the appeal filed by the appellant/accused deserves to be allowed.

11. The learned Counsel relies on the following Judgments of the Apex Court as well as this Court in support of various propositions which have been enumerated herein above :

a) 2014 ALL MR (Cri) 3882, Mahesh Vasant Salunke v. State of Maharashtra.

b) 2016 (1) Mh.L.J. (Cri) 493, Vilas @ Bandu Punjabrao Misal v. State of

Maharashtra.

c) 2005 ALL MR (Cri) 1599, Suresh s/o. Arjun Dodorkar (Sonar) v. State of Maharashtra.

d) 2010 ALL MR (Cri) 147, Suresh s/o. Shrirang Mandawgane v. State of Maharashtra.

e) 2014 ALL MR (Cri) 5089, Parasram Chandrasha Ghante v. State of Maharashtra.

f) 2009 ALL MR (Cri) 2931, Dnyandeo Dhandiba Jadhav and Others v. State of Maharashtra.

g) 2014 (1) SCC (Cri) 677, Sujit Biswas v. State of Assam.

h) Criminal Appeal No.384 of 2009, Praful @ Prabhakar Ramaji Kohad v. State of Maharashtra (Judgment by Nagpur Bench).

(i) 2013 ALL MR (Cri) 2750, Ishwar s/o. Pandurang Masram v. State of Maharashtra.

(j) 2013 ALL MR (Cri) 2240 (SC), Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan.

(k) 1995 Supp. (3) 357, Akhilesh Hajam v. State of Bihar.

(l) Criminal Appeal No.341 of 2012 (SC), D. Thamodaran .v. Kandasamy and another.

12. Per contra, Mr.V.A.Thakare, learned A.P.P. for the State submits that the evidence of Tawangarkhan Gulzarkhan (PW-5) clearly implicates the present appellant. He submits that the F.I.R. is immediately lodged by the son of present appellant himself. He submits that there is no reason as to why a son should falsely implicate his father. It is further submitted that, insofar as both the dying declarations are concerned, the evidence of Dr.Ulhas Sarode (PW-6) would reveal that deceased Harunisa was fully fit and conscious at the time of recording her statement by the Executive Magistrate. He has further submitted that he had examined Harunisa and opined that she was fit to give statement. It is, therefore, submitted that the attack on the dying declarations is without substance. The learned A.P.P. further submits that merely because the blood stained clothes of witnesses are not seized, it cannot be a ground to falsify the prosecution version. The learned A.P.P. further submits that the circumstances like : driving license of the appellant being seized from the spot; seizure of knife used in the crime under memorandum of the appellant under section 27 of the Indian Evidence Act; the C.A. report finding the said seized materials having blood of blood group "A", which is the blood group of deceased Harunisa unflinchingly establish the prosecution case beyond reasonable doubt. The learned A.P.P. further submits that merely because there are certain loopholes in the investigation, it cannot be a ground for disbelieving the prosecution case, if it

otherwise establishes guilt of the accused.

13. The learned A.P.P. relies on the following Judgments in support of submissions made by him.

- a) Vadivelu Thevar and another v. State of Madras, AIR 1957 SC 614.
- b) Surajdeo Yadav v State of Bihar, AIR 1996 SC 3157.
- c) Kathi Bharat Vajsur and another v. State of Gujarat, (2012) 5 SCC 724.
- d) Babu Ram v. State (Delhi Administration) and Others, 1998 SCC (Cri) 597.
- e) Ganga Singh v. State of Madhya Pradesh, (2013) 7 SCC 278.
- f) Sri Bhagwan v. State of Uttar Pradesh, (2013) 12 SCC 137.
- g) (2005) 10 SCC 701, Mishrilal and Others v. State of M.P. and Others.
- h) Khuji @ Surendra Tiwari v. State of M.P., AIR 1991 SC 1853.
- I) State of Punjab v. Mohinder Singh and Others, reported in (2007) 13 SCC 560.
- j) Yuvaraj Ambar Mohite v. State of Maharashtra, (2006) 12 SCC 512.
- k) Balwant Singh and another v. State of Haryana, AIR 1995 SC 84.
- l) Shivaji Sahabrao Bobade and another v. State of Maharashtra, (1973) 2 SCC 793.
- m) Anjanappa v. State of Karnataka, (2014) 2 SCC 776.
- n) State of Haryana v. Harpal Singh and Others, (1978) 4 SCC 465.
- o) Ponnusamy v. State of Tamil Nadu, represented by its Inspector of Police, (2012) 11 SCC 355.
- p) Vithal v. State of Maharashtra, 2007 Cr.L.J. 317.
- q) Sheikh Rafi v. State of A.P. and another, 2007 Cri.L.J. 2746.
- r) Jai Dev and another v. State of Punjab, AIR 1963 SC 612(1).
- s) Himachal Pradesh Administration v. Shri Om Prakash, (1972) 1 SCC 249.
- t) Ashok Debbarama @ Achak Debbarama v. State of Tripura, AIR 2014 SC (Supp) 1434.
- u) Jai Shree Yadav v. State of Uttar Pradesh, 2004 Cri.L.J. 4826.
- v) Bachan Singh v. State of Punjab, 1980 (2) SCC 684.
- w) Machhi Singh and Others v. State of Punjab, 1983 (3) SCC 470.
- x) Deepak Rai v. State of Bihar ,203 (19) SCC 421.
- y) Shubnam v. State of Uttar Pradesh, 2015 (6) SCC 632.

- z) Mofil Khan and another v. State of Jharkhand, 2015 (1) SCC 67.
- aa) Ravji @ Ram Chandra v. State of Rajasthan, 1996 (2) SCC 175.
- bb) Babloo @ Mubarik Hussain v. State of Rajasthan, 2006 (13) SCC 116.
- cc) Umashankar Panda v. State of M.P., 1996 (8) SCC 110.
- dd) Purushottam Dashrath Bhorate v. State of Maharashtra, 2015 (6) SCC 652.
- ee) State of Maharashtra v. Rakesh Manohar Kamble @ Neeraj Ramesh Wakekar and another, 2014 ALL MR (Cri).
- ff) State of Maharashtra v. Shtrughana Baban Meshram, 2015 (4) Bom.C.R. (Cri) 744.

14. With the assistance of the Ms F.N.Haidari, learned Counsel appointed to appear on behalf of the appellant and Mr.V.A.Thakare, learned A.P.P., we have scrutinised the entire evidence in detail. From the material placed on record, it would reveal that the prosecution case mainly rests on the following :

- A) two dying declarations Exh.55 and Exh.69, one recorded by the I.O. and the another recorded by the Executive Magistrate,
- B) two oral dying declarations one given to Asil Ali (PW-1) and the another one given to Tawangarkhan Gulzarkhan (PW-5),
- C) motive that the appellant was enraged since deceased Shamshad had refused to transfer part of the house in the name of the appellant.
- D) the ocular testimony of Tawangarkhan Gulzarkhan (PW-5),
- E) the F.I.R. lodged by Asil Ali (PW-1) implicating the present appellant,
- F) finding of driving license and mobile handset of the appellant on the spot,
- G) seizure of rexine bag and key chain from the appellant while he was arrested, wherein the mobile number of the appellant was written,
- H) memorandum of accused under section 27 of the Indian Evidence Act leading to seizure of the weapon used in the crime,
- I) the Query report by Medical Officer certifying that the injuries on the person of the deceased are possible by the said weapon and the Chemical Analyser's report finding blood stains of blood group "A" on the driving license of the appellant and the weapon seized at his instance.

15. We will deal with each of the factors independently. Firstly, we will deal with the dying declarations.

16. Exh.69 is the dying declaration recorded by I.O. Shivaji Vishwanath Bachate (PW-10). Perusal of the said dying declaration would reveal that there is no endorsement on the same prior to recording of the dying declaration that maker

thereof was examined by the Medical Officer and that he found the maker of the statement to be physically and mentally fit to give the statement. No doubt that, in the said dying declaration, deceased Harunisa has clearly implicated the present appellant. On the dying declaration, there is a thumb impression of the deceased showing the time put therein as "10.40 p.m.". There is also a signature of Dr. Ulhas Sarode (PW-6) below the said dying declaration. The same also shows time to be "10.40 hours". However, even at the end of the dying declaration, there is no endorsement that Dr. Ulhas Sarode was present throughout recording of the dying declaration and that the deceased was in a physical and mentally fit position to make statement.

17. The next is the dying declaration recorded by Santosh Vijayrao Khandre (PW-7), Executive Magistrate. Perusal of the dying declaration would reveal that though there is an endorsement prior to declaration by Dr. Ulhas Sarode (PW-6) that the deceased was fit for giving statement, no time is mentioned therein. It could be seen that, in the said dying declaration, on the first page, there is a printed format having column nos 1 to 11. However, it appears that, since the space in column no.8 was insufficient, after the printed format, again narration has been written. The thumb impression of the deceased is taken at two places one is at column no.10 on the first page and the second one is at the end at page no.2 of the said declaration. The timing at which the said dying declaration starts is shown to be "10.25 hours". Perusal of the said dying declaration would reveal that, at various places, there are erasers and new words are substituted. Perusal of evidence of Santosh Khandre (PW-7) would reveal that the said witness has clearly admitted in his cross-examination that neither the Medical Officer nor he had mentioned timing about fitness given by the Medical Officer below Exh.54. He has further admitted that the erasers and over writings upon Exh.55 (Dying declaration) is in his handwriting. He has further admitted that he has not made his initials near erasers and over writings upon Exh.55.

18. It could further be noted that the medical case papers regarding treatment of deceased Harunisa. which is at Exh.63 shows that when she was admitted at 9.10 p.m., her general condition was not satisfactory. The medical papers would also show that the blood transfusion was given to her twice while she was under treatment. The evidence of Dr.Vikrant Dhawande (PW-8), who was treating the said patient, shows that he has clearly admitted in his examination-in-chief itself that the patients general condition was not satisfactory. He has further stated that he had tried to treat her by blood transmission and even after blood transmission, the patient was not improving. He has admitted that the patients condition was critical.

19. It is further to be noted that, at around 9.30 p.m., on the date of incident, an intimation was given by the Duty Officer-in-charge, Police Aid Centre, General Hospital, Chandrapur to the Medical Officer seeking certification as to whether deceased Harunisa was fit to give statement. Same is exhibited below Exh.56. On the said memo, a certificate is given by Medical Officer that the patient was

not able to give such a statement. Along with the said requisition, a statement has been recorded by the Duty Officer-in-charge, Police Aid Centre of one Ayyub Bhai Kasam Bhai Kacchi. He narrates about Shamshad, Isana and Harunissa being brought to the hospital wherein Shamshad and Isana were found to be dead. He further states that Harunisa was in critically injured condition. She was brought to the Casualty ward.

20. Perusal of the evidence of Dr.Ulhas Anna Sarode (PW-6) would further reveal that he states that the Executive Magistrate called for his opinion in between 8.20 p.m. to 8.25 p.m. He further states that the Executive Magistrate started recording statement of Harunisa at 8.25 p.m. and completed the process of recording her statement within 10 to 15 minutes thereafter. Thereafter, he left the I.C.U. and did not examine her thereafter.

21. It could be seen that the endorsement in respect of the time at which the dying declaration below Exh. 69 was over is shown to be "10.40 p.m.". Whereas the dying declaration below Ex.55 shows that it commenced at "10.25" and has come to an end at "11.45". As already discussed herein above, the evidence of Dr.Vikrant Khushalrao Dhawande shows that the general condition of Harunisa was not satisfactory and the memo below Exh. 56 shows that, at 9.30 p.m., the patient was not able to give statement and hence, the statement of one another person namely Ayyub Khan was recorded. All these aspects create a serious doubt as to whether the deceased was in a condition to give dying declaration or not. No doubt that it is a settled law that, even on the basis of dying declaration, conviction of accused can be rested. However, for doing the same, the Court must come to the conclusion that the dying declaration is free from any doubt; it is trustworthy, reliable and is one which inspires confidence in the mind of the Court. From the aforesaid factors narrated herein above, we find that it cannot be said that the two written dying declarations are free from doubt; inasmuch there is a serious doubt as to whether the deceased was in physically and mentally fit condition to give the dying declarations.

22. Insofar as the oral dying declarations allegedly given to Asil Ali (PW-1) and Tawangarkhan Gulzarkhan (PW-5) are concerned, we find that since it is in serious doubt as to whether the deceased was in a physically and mentally fit condition to make a statement, the said dying declarations also cannot be relied upon.

23. Insofar as motive is concerned, we find that prosecution has failed to prove that the house was in the name of deceased Shamshad. On the contrary, the material placed on record would show that the house was in the name of deceased Harunisa. As such, we find that prosecution has also failed to establish motive beyond reasonable doubt.

24. That leaves us with the evidence of Tawangarkhan Gulzarkhan (PW-5). He states in his evidence that, on the day of incident, he had gone of Warora naka and had come back to his house at around 8.30 p.m., and noticed that there

were shouts coming out from the house of Harunisa. He further states that he also rushed towards the house of Harunisa. He witnessed that the accused was holding Khanjar and caught hold the hair of Isana and thereafter assaulted her by said Khanjar upon back side of her neck. Earlier also, he had seen blood oozing from her remaining body. Isana thereafter fell on the ground and thereafter, Shamshad came out of house. Shamshad was also seriously injured and blood was oozing from various parts of her body. The accused thereafter assaulted behind the back side of her neck and thereafter Shamshad fell on the ground. The said witness further states that he has witnessed that blood was flowing just like water from tap. He thereafter tried to search for an auto but he could not get the same. At last, he brought one ambulance by driving the same. Tawangarkhan Gulzarkhan (PW-5) further states that, after he raised shouts, some people gathered on the spot. He thereafter carried Harunisa, Shamshad and Isana to Government Hospital, Chandrapur in the same Ambulance with the help of people. Harunisa was also serious at that time but she was alive and talking. Harunisa was stating that the assault was done by the accused. The doctor, on examination, declared Shamshad and Isana dead and admitted Harunisa for further treatment.

25. The evidence of this witness is sought to be attacked on two grounds : First that he is a stock witness, inasmuch as he is also a witness to all the panchanamas. Secondly, it is sought to be attacked on the ground that he was not telling truth. It is also submitted that though he was with police throughout the night, his statement came to be recorded on the next date.

26. The Bench consisting of Hon"ble three Judges of the Apex Court, as early as in the year 1957, in the case of Vadivelu Thevar and another v. State of Madras reported in AIR 1957 SC 614 have observed thus :

"11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that " no particular number of witnesses shall, in any case, be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence - 9th Edition, at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in Section 134 quoted above. The section enshrines the well recognised maxim that " Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside

those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interested ness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable

evidence in support of the prosecution.

27. It could thus be seen that Their Lordships have held that there are three categories of witnesses : a) wholly reliable, b) wholly unreliable and c) neither wholly reliable nor wholly unreliable. It has further been held by Their Lordships that in case of wholly reliable testimony, there should be no difficulty in coming to the conclusion either way i.e. conviction or acquittal on the testimony of a single witness. It has further been held that, even in case of wholly unreliable witness, there should be no difficulty inasmuch as the evidence of said witness could be of no use. It has been held by the Hon"ble Apex Court that, only in the case of third category, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

28. In the light of these guiding principles, our first duty would be to examine as to in what category of aforesaid three categories, testimony of Tawangarkhan Gulzarkhan (PW-5) would come. As already discussed herein above, we have held that the evidence of Tawangarkhan Gulzarkhan (PW-5) insofar as oral dying declaration is concerned, the same cannot be believed. However, the principle " falsus in uno, falsus in omnibus " is not applicable in India. As such, we will have to scrutinise the evidence for separating chaff from the grain.

29. An Opportunity was given to the appellant herein to cross-examine the witness to challenge the veracity of this witness. As already discussed herein above, in examination-in-chief, Tawangarkhan Gulzarkhan (PW-5) has given eye witness account. However, perusal of the cross-examination would reveal that there is no attack in the cross-examination to the eye witness account given by the said witness. Perusal of the cross-examination would reveal that the attack in the cross-examination is only on two aspects. One with regard to physical and mental condition of Harunisa to make the dying declaration. The suggestions are that either Harunisa could not have made dying declaration to this witness or he could not have entered in I.C.U. wherein the deceased could have talked to him. However, insofar as the actual attack is concerned, no effort of whatsoever nature has been made in his cross-examination to attack the veracity of this witness. On the contrary, perusal of the entire cross-examination would reveal that the entire effort has been made in order to bring the case under one of the exceptions to Section 300 of the Indian Penal Code. In the circumstances, we have no hesitation to hold that the testimony of Tawangarkhan Gulzarkhan (PW-5) has gone totally unchallenged and unshaken insofar as the aspect of this witness personally witnessing the incident is concerned.

30. Insofar as the contention of the learned Counsel for the appellant herein that Tawangarkhan Gulzarkhan (PW-5) is a stock witness is concerned, neither any suggestion is given to this witness or P.I. Bachate (PW-10) that he is a stock witness and he is deposing falsely at the instance of police. In that view of the matter, merely because the witness has acted as a panch witness, in our view, it would not be sufficient enough to discard his testimony. It is further to be noted

that the spot panchanama which also contains map of the spot of incident would clearly show that the house of Tawangarkhan (PW-5) is exactly opposite to the house of the deceased Harunisa, where the incident has taken place. The map would also show that on the western side, in front of the house where the incident has taken place, there is cement tiled road and an electric pole no.D14/D270 and 4/6/A/P007. Since we have disbelieved the evidence of Tawangarkhan Gulzarkhan (PW-5) insofar as oral dying declaration is concerned and believed his evidence insofar as actual witnessing the incident is concerned, his evidence would fall in the category neither "wholly reliable" nor "wholly unreliable". As such, as a matter of caution, it will be necessary to have some corroboration to the ocular testimony of Tawangarkhan (PW-5).

31. Insofar as the contention of the learned Counsel for the appellant herein that, since the clothes of Tawangarkhan Gulzarkhan (PW-5) were not seized, an adverse inference should be drawn is concerned, it will be relevant to refer to the observations in the Judgment of Their Lordships of the Apex Court in the case of Balwant Singh v. State of Haryana reported in AIR 1995 SC 84, which are thus :

"There is nothing on record to show that the clothes of PW 8 and PW 10 had not been stained with blood while lifting the deceased and the mere negligence of the investigating officer to take their clothes into possession cannot affect the trustworthiness of these witnesses. The explanation given by PW 3 about the absence of entry of the arrival of injured Suraj Bhan at the Primary Health Centre is sound and does not detract from the reliability of the prosecution case. "

32. It will also be appropriate to refer to the Judgment of the Apex Court in the case of Jai Shree Yadav v. State of U.P. reported in 2004 Cr.L.J. 4826, wherein it is observed thus :

"It was also pointed out from his evidence that though his father was profusely bleeding the clothes of this witness were not blood stained which indicated that he never even touched the body of his father which is an unnatural conduct on the part of a son present at the time of the murder of his father. This witness when cross-examined in this regard, submitted that since his father had died already he did not carry the body of his father nor did he touch the body of his father. In our opinion different people react differently to a given situation and from the fact that this witness did not choose to fall on the body of his father or carry his dead body from where it was lying, by itself cannot be a ground to reject his evidence."

33. In that view of the matter, we find that the contention on behalf of the appellant herein that since blood stained clothes of Tawangarkhan (PW-5) are not seized, his evidence cannot be believed needs to be rejected.

34. Asil Ali (PW-1) is son of the appellant herein and deceased Shamshad. He is the first informant. On the basis of his oral report below Exh.10, the First Information Report vide Crime No.104 of 2014 below Exh.11 came to be registered.

35. By now it is a settled principle of law that the First Information Report is not a substantive piece of evidence, but it can be used either for the purpose of corroboration or contradiction. Asil Ali (PW-1) is not an eye witness. However, on receipt of information, he has immediately lodged the F.I.R. In the F.I.R., he has clearly implicated his first father to be the person who had assaulted his mother, sister and grandmother with knife. The First Information Report is sought to be attacked on the ground that there is a delay of 2? hours in recording the FIR. However, in the cross-examination of either Asil Ali (PW-1) or cross-examination of I.O. P.I. Bachate (PW-10), no question has been asked by the defence with regard to delay in lodging the F.I.R. In any case, it appears that, after receipt of the information regarding commission of crime in the Police Station, P.I, Bachate (PW-10) immediately set the investigation into motion. He visited the spot and the hospital. As such, we find that the attack on the said ground would not be of much assistance to the defence.

36. That leaves us with the memorandum of appellant herein under section 27 of the Indian Evidence Act and consequent recovery of weapon used in commission of the crime. The memorandum under section 27 is below Ex.50. Only such part of the statement on memorandum under section 27 which distinctively leads to the discovery of incriminating material would be admissible in evidence. Though the memorandum below Exh.50 is totally incriminating in nature, only such part of the statement which leads to discovery of incriminating material can be read in evidence. In the memorandum, the accused has stated that, while going along the road, he had kept concealed near graveyard the knife with which he had attacked his wife, daughter and mother-in-law. Perusal of panchanama at Exh.51 would reveal that the accused asked the police party to stop the vehicle near "Waghai Devasthan" and alighted from the vehicle. The appellant herein led the panchas and security guards to a room constructed with kaccha bricks. On the eastern side of Waghai Devasthan and stated that he had slept in the said room at night after the incident and thereafter, he took out and produced one blood stained iron knife kept concealed in the hay in the said room. The said panchanama is duly exhibited in the evidence of Tawangarkhan (PW-5). Except a general statement that the appellant had not made a confession, no questions with regard to said weapon being not concealed are put to Tawangarkhan (PW-5) in his cross-examination. The I.O. P.I. Bachate (PW-10) has also stated in his evidence that the appellant had shown the spot and thereafter, he had handed over knife from the concealed spot having blood stains. No cross-examination of P.I. Bachate (PW-10) has been made on that aspect. The panchanama would also show that there is a specific mention with regard to sealing of the said weapon.

37. The Query Report at Exh.22 would reveal that the Medical Officer has given the opinion that the injuries caused by the appellant herein could be possible by the said weapon which was seized at the instance of the present appellant.

38. Insofar as the finding of blood stains of blood group "A", which is the blood group of deceased Harunisa is concerned, we are in agreement with the learned

Counsel for the appellant that since the said specific question was not put to the accused in his examination under section 313 of the Code of Criminal Procedure, it cannot be used against him.

39. However, the present case is not a case based on the circumstantial evidence wherein the prosecution would be required to prove each and every incriminating circumstance beyond reasonable doubt and would be further required to establish the chain of events which leads to no other conclusion than guilt of the accused. As already discussed herein above, we find the evidence of Tawangarkhan (PW-5) to be trustworthy insofar as actual act of assault is concerned and the circumstances which we have stated herein above and which have been found to be duly proved, are only to corroborate the testimony of Tawangarkhan (PW-5) which, in our view, is otherwise believable, insofar as witnessing the incident is concerned.

40. That leads us to the last issue. The appellant herein in his examination under section 313 of the Code of Criminal Procedure below Exh.108 has stated thus :

"I, accused named ? Sayyad Imdad Ali Wahed Ali, aged ? 51 yrs., resident of Bhanapeth Ward, give statement as under -

I along with wife named ? Shamshad, daughter Isana, sons ? Asil and Sahil and the mother-in-law together was leading family life happily. Two-three years prior to the incident, when the Talaq (divorce) had not taken place, my wife Shamshad had kept a young boy named Rafiq Ur Rahman as a husband and driven me out from the house of mother-in-law, following which I had to face defamation in our society. On the day of incident, I had gone to the house of mother-in-law for convincing my wife. At that time, wife Shamshad said, " Sale (abusive term), you have now become an aged one. You are not having a vigour as before. Only a young boy can satiate the need of my body. I am happy with Rafiur. You are no more required now. " On being so uttered, I got provoked and got very much furious. In a fit of anger, I delivered blow of knife from their house itself, on the person of Shamshad. At that time, my mother-in-law and the daughter came forward to obstruct me. But, as I lost control on mind, I assaulted them also with the same knife. I did not deliver blow on their person deliberately.

This is my statement. It is read over and explained to me in Hindi language. It is recorded correctly as per my version."

No doubt that since the statement under section 313 of the Code of Criminal Procedure is not a statement made on oath, conviction on the basis of such sole statement would not be tenable.

41. Their Lordships of the Apex Court in the case of Ashok Debbarama @ Achak Debbarama v. State of Tripura reported in AIR 2014 SC (Supp) 1434 have considered the legal position with regard to purpose of statement made under section 313 of the Code of Criminal Procedure. It is observed thus :

21. We are of the view that, under Section 313 statement, if the accused admits

that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in *State of Maharashtra v. Sukhdev Singh and another* (1992) 3 SCC 700 : (AIR 1992 SC 2100) held that since no oath is administered to the accused, the statement made by the accused under Section 313 CrPC will not be evidence *stricto sensu* and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 CrPC. But, Sub-section (4) says that the answers given by the accused in response to his examination under Section 313 CrPC can be taken into consideration in such an inquiry or trial. This Court in *Hate Singh Bhagat Singh* (AIR 1953 SC 468) (*supra*) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In *Narain Singh v. State of Punjab* (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him.

22. This Court in *Mohan Singh v. Prem Singh and another* (2002) 10 SCC 236 : (AIR 2002 SC 3582) held that the statement made in defence by accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 CrPC cannot be made the sole basis of his conviction. In this connection, reference may also be made to the judgment of this Court in *Devender Kumar Singla v. Baldev Krishan Singla* (2005) 9 SCC 15 : (AIR 2004 SC 3084) and *Bishnu Prasad Sinha and another v. State of Assam* (2007) 11 SCC 467. The above mentioned decisions would indicate that the statement of the accused under Section 313 CrPC for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

23. We may, however, indicate that the answers given by the accused while examining him under Section 313, fully corroborate the evidence of PW10 and PW13 and hence the offences levelled against the Appellant stand proved and the trial Court and the High Court have rightly found him guilty for the offences under Sections 326, 436 and 302 read with Section 34, IPC."

42. It could thus be seen that Their Lordships of the Apex Court have held that though no conviction solely on the basis of statement under section 313 of the Code of Criminal Procedure can be made, however, the statement made by the accused under section 313 of the Code of Criminal Procedure can certainly be taken aid of to lend credence to the evidence led by the prosecution. As already discussed herein above, from the ocular testimony of Tawangarkhan (PW-5) corroborated by the F.I.R. lodged by Asil Ali (PW-1) - son of the deceased

Shamshad and the appellant herein, the memorandum of appellant under section 27 and consequent discovery and seizure of weapon used in the crime from the place shown by the appellant herein and the Query Report below Exh.22, which shows that the injuries sustained by the three deceased persons are possible by the said weapon, it can be said that the prosecution has established beyond reasonable doubt that it is the present appellant who is author of the crime and as such, additional circumstance of the statement made by the accused under section 313 of the Code of Criminal Procedure can very well be used to give credence to the prosecution case which is otherwise independently established.

43. We have, therefore, no hesitation to hold that the order passed by the learned trial Judge convicting the appellant herein for the offence punishable under Section 302 of the Indian Penal Code for causing death of deceased Shamshad, Isana and Harunisa warrants no interference.

44. Having concluded that the appellant herein is guilty of the offence punishable under Section 302 of the Indian Penal Code, we proceed to hear the learned Counsel for the appellant on the question as to whether the death sentence deserves to be confirmed or needs to be substituted with other sentence.

45. We have extensively heard Mr.V.A.Thakare, learned A.P.P. for the State and Ms. F.N.Haidari, learned Counsel for the appellant herein on the quantum of sentence.

46. Mr.V.A.Thakare, learned A.P.P., relying on various Judgments of the Apex Court, submits that the crime committed by the appellant herein has been committed in the most brutal manner. The learned Counsel submits that the appellant herein had premeditated to do away his wife, daughter and mother-in-law and has killed them in a brutal manner. The learned A.P.P. submits that, from the nature of injuries, it will be clear that the crime is gruesome and shocking to the conscience of the Society wherein three innocent helpless victims have been deprived of their lives for no fault of theirs. The learned A.P.P. further submits that there are various aggravating circumstances which are available in the present case like the murder having been committed so as to take revenge against the wife for not transferring the property in the appellant's name. Three members of the family have been done with. The victims are innocent, helpless women. It is submitted that it is nothing else but a cold blooded murder without provocation. The learned A.P.P. relies on the Judgment of the Apex Court in the cases of Shubnam v. State of Uttar Pradesh, 2015 (6) SCC 632; Mofil Khan and another v. State of Jharkhand, 2015 (1) SCC 67; Ravji @ Ram Chandra v. State of Rajasthan, 1996 (2) SCC 175; Umashankar Panda v. State of M.P., 1996(8) SCC 110 and Purushottam Dashrath Bhorate v. State of Maharashtra, 2015 (6) SCC 652. The learned A.P.P. also relies on the Judgment of this Court in the case of State of Maharashtra v. Rakesh Manohar Kamble @ Neeraj Ramesh Wakekar reported in 2014 ALL MR (Cri) 2043, to which one of us (B.R.Gavai, J) was a party.

47. As against this, Ms Haidari, learned Counsel appearing on behalf of the appellant herein submits that the appellant is entitled to mercy. He is 57 years of age. He is not a menace to the Society since there are no criminal antecedents to his credit. She submits that the crime is committed at the spur of moment, in a heat of passion, on account of provocation from the wife. She further submits that the prosecution has not placed on record evidence to show that the appellant herein is a continuing threat to the Society. The learned Counsel submits that it can be, at the most, said that the appellant herein had an intention to commit murder of his wife; however, it appears that, since the daughter and mother-in-law of the appellant came to rescue his wife, accidentally they were also assaulted, due to which they succumbed to the injuries. The learned Counsel, therefore, submits that merely because three casualties have happened in the incident, it cannot be said that the appellant herein had an intention to cause death of all the three ladies. The learned Counsel submits that, from the entire material placed on record, it appears that the appellant herein had lost his mental balance on being provoked by his wife about his capacity and enraged with the same, he has assaulted his wife and when the other two came to help her, he has also assaulted them. The learned Counsel relies on the Judgments of the Apex Court in the cases of *Rajesh Kumar v. State*, through Government of NCT of Delhi reported in (2011) 13 SCC 706; *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546; *State of Uttar Pradesh v. Narendra and Others*, (2014) 10 SCC 261 and *Amar Singh Yadav v. State of Uttar Pradesh*, (2014) 13 SCC 443.

48. The law as to -in what circumstances death penalty would be warranted or not, has been succinctly laid down by the Constitution Bench of Their Lordships of the Apex Court in the case of *Bachan Singh v. State of Punjab* reported in 1980 (2) SCC 684. In the last 35 years, there are various judicial pronouncements by the highest Court of the Country further explaining the legal position. Recently, in the case of *Shabnam* (cited supra), Their Lordships have again reiterated the legal position. It will be appropriate to re-produce paragraph nos. 24 and 25 of the said Judgment. They are thus :

"24. We would not lumber the discussion by tracing the entire death penalty jurisprudence as it has evolved in India, but only limit the exercise to cull out the determinants which would weigh large in our mind to award appropriate sentence while balancing the mitigating and aggravating circumstances. We are mindful of the principles laid down by this Court in *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20 : 1973 SCC (Cri) 169; *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 and *Macchi Singh v. State of Punjab*, (1983) 3 SCC 470: 1983 SCC (Cri) 681, as followed by this Court up to the present. The aforesaid decisions indicate that the most significant aspect of sentencing policy in Indian criminal jurisprudence regarding award of death penalty is that life sentence is a rule and death sentence is an exception only to be awarded in "the rarest of rare cases". 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 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. The circumstances which should or should not be taken into account, and the circumstances which should be taken into account along with other circumstances, as well as the circumstances which may, by themselves, be sufficient, in the exercise of the discretion regarding sentence cannot be exhaustively enumerated. "

"25. The guidelines and principles for classification of circumstances and determination of the culpability indicia as laid down by this Court in the aforesaid cases have been succinctly in *Ramnaresh v. State of Chattisgarh*, (2012) 4 SCC 257 : (2012) 2 SCC (Cri) 382. The said are extracted as under : (SCC pp. 285-86, paras 76-77) :

"Aggravating circumstances :

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances :

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstance which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles :

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

49. It could thus be seen that Their Lordships have held that most significant aspect of sentencing policy in Indian Criminal Jurisprudence regarding award of death penalty is that life sentence is a rule and death sentence is an exception only to be awarded in "the rarest of the rare case". It has further been held that 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.

50. It could further be seen that the Apex Court has culled out various aggravating circumstances and mitigating circumstances. The principles laid down by the Court requiring the Court to apply the test to determine, if it was the "rarest of the rare" case for imposition of death sentence. The Court must come to the conclusion that imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice. It has further been held that the death sentence should be imposed when 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 relevant circumstances. It has been further laid down that the Court should take into consideration the method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

51. In the light of these guiding principles, we will have to consider as to what are the aggravating circumstances in the present case. We find that, in the present case, the aggravating circumstance is that the appellant herein has committed murder of his own wife, daughter and mother-in-law. Undisputedly, three innocent persons have been deprived of their lives by the appellant. No doubt, that the wife of the appellant herein has sustained inasmuch as 16 external injuries whereas the daughter and the mother-in-law have sustained six and three injuries respectively. We have basically convicted the appellant herein on the basis of evidence of Tawangarkhan (PW-5) seeking corroboration from the other circumstances including his statement under section 313 of the Code of Criminal Procedure. In the present case, though it has been the case of prosecution that the motive behind commission of crime in the present case is denial by deceased Shamshad to transfer the house in the name of appellant herein, the prosecution has utterly failed to prove the said motive. On the contrary, it has come in the evidence of prosecution witnesses itself that the house was in the name of Harunisa i.e. mother-in-law of the appellant herein and not in the name of Shamshad. In that view of the matter, it cannot be said that

the offence was committed since deceased Shamshad refused to transfer the house property in the name of the appellant herein. Insofar as the evidence of Tawangarkhan (PW-5) is concerned, his evidence only shows that he had seen the appellant herein assaulting deceased Isana and deceased Shamshad. However, he is also not aware about the genesis of incident. Insofar as evidence of Asil Ali (PW-1) to the effect that his grandmother told him that the appellant herein assaulted his mother, sister and grandmother is concerned and the appellant was saying that, as the house property was not transferred in his name, he has assaulted them is concerned; as already discussed herein above, we have disbelieved the written dying declaration so also the oral dying declaration. In the light of this, we find that the statement of appellant herein under section 313 of Cr.P.C., which we have relied on while convicting the appellant, will have to be taken into consideration. The statement has been reproduced in to by us herein above. It shows that, 2-3 years prior to the incident, deceased Shamshad had kept a young body namely Rafiq Ur Rahman as a husband and had driven the appellant herein out from the house of mother-in-law. He has stated that, on account of this, he has to face defamation in the Society. He has further stated that, on the day of incident, he had gone to the house of his mother-in-law for convincing his wife. At that time, his wife Shamshad abused him saying that he has now become an aged one and that he was not having a vigour as before. The appellant further states that his wife told him that only a young boy can satiate the need of her body and that she was happy with Rafiqur and that he was no more required now. The appellant further states that, on being so uttered, he got provoked and got very much furious. In a fit of anger, he delivered a blow of knife which was lying in the house itself, on the person of Shamshad. He further states that, at that time, his mother-in-law and daughter came forward to obstruct him. But, as he had lost control on his mind, he assaulted them also with the same knife.

52. It is further to be noted that Asil Ali (PW-1), who is son of the appellant herein and deceased Shamshad, on the question being put to him that, as to whether on account of second marriage by his mother without any divorce with the appellant, mental condition of appellant was disturbed, the witness has replied that the appellant was half mad or mentally disturbed even prior to second marriage. He has further admitted that it was true to say that the appellant used to visit their house and used to behave abnormally i.e. making abuses, throwing articles. He has further admitted that the family had not taken any care or caution about abnormal behaviour of the appellant prior to the incident.

53. As held in the catena of cases, balance between aggravating circumstances and mitigating circumstances has to be drawn giving full weight-age to the mitigating circumstances. It has further been held that just balance has to be drawn between the aggravating circumstances and mitigating circumstances and the death sentence is to be awarded when the option to impose sentence of imprisonment for life, cannot be conscientiously exercised. It has further been

held that, while taking decision, question has to be asked and answered as to whether there is something uncommon about the murder which renders sentence of life inadequate and calls for death sentence. Another question that is required to be answered is as to whether the circumstances of the crime are such that there is no alternative to imposition of death sentence, even giving weight-age to mitigating circumstances which speaks in favour of the offender.

54. On the material placed on record and from the evidence of Asil Ali (PW-1) itself, it could be seen that the appellant herein was mentally imbalanced person. It is admitted position that either the appellant had left the house or was driven away prior to 2-3 years of the incident. It is also admitted position that deceased Shamshad had married a boy much younger than her in age, without seeking divorce from the appellant herein. The possibility that the appellant would have come to take revenge against deceased Shamshad for her betrayal and hence, assaulted her and while doing so, since the deceased daughter and mother-in-law came to her rescue, he assaulting them also, cannot be ruled out. As already discussed herein above, prosecution has failed to bring on record the real genesis of the incident. However, there is nothing on record to show that the appellant herein had pre-meditated to do away all three members of the family. We, therefore, find that the appellant would be entitled to benefit of the first mitigating circumstance.

55. Insofar as the second mitigating circumstance is concerned, the age of the appellant herein may not be a determining factor but nonetheless it would be a relevant consideration. The appellant herein is aged about 57 years. One of the considerations in the case of Shankar Kisanrao Khade (supra) for converting the death sentence to life imprisonment was age of the accused therein namely Shankar Kisanrao Khade. Insofar as the third mitigating circumstance is concerned, prosecution has placed nothing on record to show that the appellant herein may indulge in such crimes again and there is no possibility at all of his being reformed and rehabilitated. Insofar as the fourth mitigating circumstance is concerned, as discussed herein above, the possibility of the appellant herein being mentally defective and at that moment, the said defect impairing his capacity of understanding, thereby leading to his criminal conduct cannot be ruled out. Insofar as the fifth mitigating circumstance is concerned, on account of the appellant's wife deserting him and she marrying a boy much younger than her in age and the resultant humiliation in the society and neglect by the members of his family, the possibility of the appellant herein taking the extreme step to do away his wife, as an outburst of persistent humiliation and mental torture and in the result, also assaulting his daughter and mother-in-law, who had come to save his wife, also cannot be ruled out. As already discussed herein above, the possibility of the appellant herein having an intention only to harm his wife and by accident, since the two other unfortunate victims had come to the rescue of their mother or daughter, they being assaulted and hence, succumbing to the injuries also cannot be ruled out. In that view of the matter, we find that if balance sheet of aggravating circumstances and mitigating circumstances is

drawn, the same would tilt in favour of the appellant herein.

56. Now we will deal with the cases which are cited by the learned A.P.P. Insofar as the case of *Shabnam v. State of Uttar Pradesh*, 2015 (6) SCC 632 (supra) is concerned, accused Shabnam was daughter of Master Shaukat Ali (deceased's father). She was having an affair with other accused Saleem. The entire family was opposed to the affair between the accused persons. Not only that, but accused Shabnam had also conceived. Both the appellants, therefore, hatched a conspiracy to do away with all the family members. Accused Shabnam first administered sedative mixed in tea to the deceased persons and thereafter, the appellants therein assaulted six members of the family with axe and also even did not spare the innocent child of ten months. In this background, Their Lordships observed thus :

"33. Of all the crimes that shock the souls of men, none has ever been held in greater abhorrence than parricide, which is by all odds the most complete and terrible inversion, not alone of human nature but of brute instinct. Such a deed would be sufficiently appalling where the perpetrator and the victims are uneducated and backward, but it gains a ghastly illumination from the descent, moral upbringing, and elegant respectful living of the educated family where the father and daughter are both teachers. Here is a case where the daughter, appellant-accused Shabnam, who has been brought up in an educated and independent environment by her family and was respectfully employed as a Shikshamitra (teacher) at the school, influenced by the love and lust of her paramour has committed this brutal parricide exterminating seven lives including that of an innocent child. Not only did she forget her love for and duty towards her family, but also perpetrated the multiple homicide in her own house so as to fulfil her desire to be with the co-accused Salim and grab the property leaving no heir but herself. The appellant-co-accused Salim hatched the intricate plan with her, slayed the six deceased persons with an axe, escaped the crime scene, hid the murder weapon and supported the false story of occurrence. Both the appellants accused wrench the heart of our society where family is an institution of love and trust, which they have disrespected and corrupted for the sake of their love affair.

34. The appellants-accused have put an end to seven innocent lives while they lay asleep defenceless and unsuspecting, in safety of their own house, absolutely unaware of the gory scheme of their daughter and her paramour. The appellant-accused driven by the opposition to their alliance from the deceased family and alive to the conception of their illegitimate child, had hatched the depraved plan to first administer them sedatives mixed in tea prepared by appellant-accused Shabnam, who the family would not raise suspicion at, and thereafter, bleeding them to death by slitting the vital blood vessels in their throats. The appellants-accused couple did not even spare the ten month old infant, who could not have protested to their liaison, and ruthlessly throttled him to death so as to leave no survivors for claiming share in the family's property in the future. As soon as the

family members were rendered dead, while appellant-accused Saleem fled from the spot disposing of the murder weapon and other evidence of crime, the appellant-accused Shabnam feigned unconsciousness and laid by the side of deceased father's mutilated body, to callously insinuate that the crime had been committed by an outsider while she was asleep on the roof-top. The appellant-accused lovers have consistently denied their guilt throughout the trial and, on the prosecution case being proved, stooped down to implicate each other in the commission of offence so as to exonerate themselves from the consequences of their obnoxious act."

57. It could thus be seen that, in the said case, the appellant therein had prepared a complete plan to do away with the six deceased members of the family. Initially, they were given sedative and when they were not in a position to do anything, they were assaulted while in sleep. This was done since the family members were opposed to the affair between the appellants therein and they did not want anybody in the family to claim share in the property. In the present case, we find that there is no evidence of pre-meditation. There was no motive. It is also not as if that the appellant herein had taken benefit of the unsuspected victims while he was living with them.

58. Insofar as the Judgment in the case of Mofil Khan and another is concerned, all the accused therein were brothers and nephews of deceased Haneef Khan. The accused armed with sharp edged weapons like sword, tangi, bhujali and spade had first assaulted Haneef Khan in the mosque. The deceased succumbed to the injuries inflicted by the accused persons leaving the deceased at the spot. The appellants therein proceeded towards the house of the deceased whereupon, hearing cries of their father, the deceased's son Gufran Khan @ Pala and Imran Khan had come out on the street. The accused assaulted the two unarmed brothers with the aforesaid weapons, due to which the brothers collapsed and died in front of their house. Thereafter, the accused and others entered the house of the deceased and committed murder of Kasuman Bibi, wife of the deceased and his four sons namely Anish Khan, aged 5 years; Danish Khan, aged about 8 years; Yusuf Khan (physically disabled), aged about 18 years and Maherban Khan, aged about 12 years. After committing murder of the six persons, the accused threatened other members of the household including their mother, Jainub Khatoon (PW-2) of meeting the same fate, if they inform the police about the said incident and thereafter, left the house taking away certain documents relating to the lands, passbook, jewellery etc. It could thus be seen that, in the said case, all the accused persons with premeditated mind to do away the entire members of the Haneef Khan's family so to grab the property had committed crime in extremely brutal manner. In the said case, there was a clear motive i.e. intention to grab the property. Not only that, but there was no provocation in the said case and the accused persons therein had assaulted unsuspecting Haneef Khan and other members of his family.

59. The third case on which the learned A.P.P. relies is the case of Purshottam

Dashrath Borate and another (cited supra). In the said case, the victim was serving as an Associate in the BOP Branch of Wipro Company in Pune. The Company had arranged for and hired a private cab service to transport its employees from their residence to the workplace and back after completing their work. In addition, to ensure the safety and security of its female employees, the Company had imposed a mandatory condition upon the owner of the cab that a security guard be present in the said vehicle, if a female employee was being transported. On the fateful day, the cab was deputed to pickup the deceased from her residence at 10.30 p.m. After picking her up, the cab was also supposed to collect three other employees. As per the usual practise, at about 10.15 p.m., the deceased received a missed call from the driver of the cab informing her of the pickup. The deceased called back accused no.1 to pick her up in 10 minutes to take her to the workplace, upon which PW-12 and his son went down from their flat to drop her to the cab. At the time of pickup, accused no.2 was sitting in the rear seat behind the driver. The next employee to be collected by the cab was one Sagar Bidkar. During the journey, between 10.30 p.m. and 11.00 p.m., the deceased received calls on her mobile phone by one Jeevan Baral, a friend of the deceased residing in Bangalore, PW-14 who heard the victim questioning as to where he was taking the cab, why he had stopped in a jungle and what he was doing. Thereafter, the phone call between the deceased and PW-14 was abruptly disconnected and attempts to call the deceased were rendered futile as her mobile phone was found to be switched off. In the said case, prosecution has proved that accused nos. 1 and 2 being aware of the fact that the deceased would be travelling to her workplace that night and that she would be the first to be collected, under the guise of taking the deceased to the workplace, they hatched a conspiracy to abduct her and take her to a secluded place. Prosecution further proved that the accused committed the heinous crime of gang rape and thereafter, murdered the victim therein by strangulating her with her own odhani, slashing her wrist with a blade and smashing her head with a stone. It was further proved that the accused stripped the deceased of her possessions and money and then left her body in the field of one Kisan Bodke. Thereafter, the accused showing ignorance, picked up PW-11 from his residence at around 12.45 a.m. and informed him that the deceased had not come for work that day and the cause of delay was on account of a punctured tyre. It could thus be seen that it was a case wherein both the accused who were knowing that they would be picking up the accused from her residence for taking her to the workplace, hatched a conspiracy to abduct her to commit rape on her and thereafter, do her away. They executed the plan as planned by committing gang rape on the victim and thereafter, murdering her. They did not stop at that, but contending ignorance informed PW-11 that the deceased was not picked up by them. In the said case, it was not an act of provocation or one committed on the spur of moment. But it was the case of meticulously executed plan and cold blooded murder without provocation and pre-planned crime. Their Lordships of the Apex Court in para no.40 clearly observed that the said case was not a case where the offence was committed by the

accused persons under the influence of extreme mental or emotional disorder.

60. Insofar as the Judgment in the case of Ravi @ Ram Chandra (cited supra) is concerned, in the said case the appellant was in his house along with his wife, mother and three minor children. In the said case, the Court came to the specific conclusion that the appellant therein in a cool and calculated manner wanted to kill the wife and three minor children while they were asleep and without giving an occasion to give any resistance whatsoever. It was also proved that the appellant therein was fully determined to commit the crime of murder and was conscious of the nature of crime being committed by him. It was also proved that when his mother tried to prevent him, he did not spare his mother and injured her with an axe in an attempt to kill her also. Not only that, but he also attempted to kill his neighbour's wife namely Smt. Galal (PW-4), who was also asleep. It was also proved that he wanted to flee away and when his neighbour came in his way and inquired as to what has happened, he also killed him in extremely brutal manner. It could thus be seen that, in the said case, the Apex Court found that the appellant therein had committed heinous crime in extremely brutal manner and in a conscious state of mind and in a calculated manner. Their Lordships have specifically come to the conclusion that there was no evidence to show that the accused therein was in a confused state of mind or was having psychic disorder.

61. In the case of Umashankar Panda (cited supra), the accused committed murder of his wife and two daughters who died on the spot. He also caused injuries to his another daughter Komal and two sons namely Balakrishna and Sonu with intent to commit murder. However, they survived even after sustaining grievous injuries. The accused therein thereafter fled from the spot. It was again a case wherein all the family members were asleep and when they were asleep, the accused started to kill his wife with the help of a sword and on hearing the shoutings, the children woke up. The wife questioned the accused why he was trying to kill her and the accused without giving any answer, inflicted more injuries on her head, hand and foot. The eldest daughter tried to save her mother. The accused started inflicting wounds on his first daughter with the same sword. He also inflicted injuries with the same sword to another daughter and finding that the sword he had used had been bent, he left that sword and took out another big sword, kept in a box in the room, and with the help of the second sword, he inflicted injuries to the other children. Not only that, after doing that, he made an extrajudicial confession to a witness stating that "I had slaughtered all of them, how the three left alive ?" In the said case, the Apex Court specifically came to the conclusion that there was no provocation and therefore, there was nothing to suggest that there was any quarrel between the accused and his wife or amongst any one of the family members. Their Lordships further found that the way in which the crime was executed clearly shows that it was a pre-meditated one and not on account of sudden provocation or any mental derangement.

62. It could thus be seen that, in all the afore-said three cases, the accused with pre-meditation and without there being any provocation, had committed brutal crime, in which the unsuspecting victims were murdered in a gruesome manner.

63. Insofar as the cases of Shabnam, Ravji @ Ram Chandra and Umashankar Panda are concerned, the unsuspecting deceased therein, when they were asleep and not in a position to resist, were brutally assaulted leading to their death. In the case of Shabnam, accused Shabnam who had illicit relation with accused no.2, first administered sedative to the members of the family and thereafter, they assaulted the entire members of the family. Not only that, but deceased Shabnam also tried to create a scene that she had become unconscious due to the heinous act.

64. Insofar as the present case is concerned, it could be seen that the prosecution has failed to prove motive. We have further found that the pre-meditation at the most could be against wife Shabnam. We have also found that the possibility of provocation being given by deceased Shabnam also cannot be ruled out. It is also not the case, where the appellant was living with the deceased persons and had taken disadvantage of living in the same house and caused death of unsuspecting victims.

65. Now we will deal with the cases cited on behalf of the Appellant.

Insofar as the case of Rajesh Kumar (cited supra) is concerned, the accused therein, in order to take revenge against Mukesh (PW-2), who is his sister's brother, who was not giving money, committed murder of two sons of Mukesh in a brutal manner. The plea of insanity was rejected by the trial Court as well as the High Court and death sentence was conferred upon him. While commuting the death sentence into the sentence for imprisonment for life, Their Lordships observed thus :

"73. In the instant case, the State has failed to show that the appellant is a continuing threat to society or that he is beyond reform and rehabilitation. On the other hand, in paragraph 77 of the impugned judgment the High Court observed as follows :

"We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance."

74. It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the

appellant is not a continuing threat to society in the absence of any evidence to the contrary. Therefore, in paragraph 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstances has been very truncated and narrow in so far as the appellant is concerned.

82. Unfortunately, the High Court contrary to the ratio in the aforesaid cases, fell, in this case, into an error by approving the death sentence as it was swayed by the cruel manner in which the two children were done to death by the appellant. The mitigating circumstances in favour of the appellant, were not properly considered.

66. In the case of *State of U.P. v. Narendra*, (2014) 10 SCC 261, seven accused armed with deadly weapons had come to the house of the first informant Pushplata and killed her husband, two sons and her brother. The deceased persons were assaulted since accused Rajpal Singh had a dispute over ownership of land with deceased's husband Dr. Rajveer Singh. The learned trial Court had convicted the accused therein for the offence punishable under Section 302 of the Indian Penal Code and sentenced them to death. The High Court converted the death sentence into imprisonment for life. Their Lordships of the Apex Court upheld the finding of the High Court that longevity of incarnation may make the accused see reason and passage of time may make them ponder over the crime they have committed. It was further observed by the Apex Court that this might arouse in them a feeling of remorse and repentance.

67. In the case of *Amar Singh Yadav* (cited supra), the appellant before the Apex Court was working as a Police Constable. He had married one Urmila Devi. However, he had illicit relations with two other women and had neglected the family. Urmila Devi, therefore, got effected deduction of half salary of the accused from the department directly to pull on the expenses of the family. On account of this, the accused hatched a conspiracy to do away with the family. He along with his companion took his wife and four children in a Maruti Van on the pretext of making some purchases regarding marriage of his daughter. At the time of return, the accused got Maruti Van stopped 25-30 metres ahead of Udharanpur bridge on Jahanganj road and he along with the driver came out of the Van. They sprinkled the petrol all around the Van after locking the doors thereof and set the Maruti Van ablaze with an intention of burning all the occupants of the Maruti Van to death. They tried to push the vehicle down in the pit so that the occupants might not escape but meanwhile, Inspector Police Station, Chhibramau along with his companion Police Constables arrived there and he without caring for his life broke open the doors of the burning vehicle and took out the accused's wife and all four children from the burning car. Out of them, the wife and two daughters died. Fortunately, one son and one daughter

survived. The learned trial Court convicted the accused and sentenced to death. The High Court upheld the conviction and death sentence. However, Their Lordships of the Apex Court converted the death sentence to life imprisonment. While doing so, Their Lordships observed thus :

"27. Though we are convinced that the prosecution has proved the guilt of the accused beyond all reasonable doubt, the accused committed the crime in a most cruel and inhuman manner. The helpless wife and young children, who fell victims to the avaricious conduct and lust of the appellant still the case does not fall within the four corners of the principle of "the rarest of the rare case", though no leniency can be shown to the appellant.

28. There is no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. "

68. In the light of aforesaid Judgments (cited supra) on behalf of the appellant as well as prosecution, we will be required to consider the quantum of sentence in the present case. In the case of *Swamy Shraddhananda @ Murli Manohar Mishra v. State of Karnataka* reported in (2008) 13 SCC 767, Their Lordships of the Apex Court have found a middle path where the case may just fall short of the rarest of rare category, but, having regard to the nature of crime, the Court may strongly feel that a sentence of life imprisonment subject to remission, which normally works out to a term of 14 years, would be grossly disproportionate and inadequate, Their Lordships, therefore, observed thus :

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years" imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh (supra) besides being in accord with the modern trends in penology.

94. In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be."

69. Again, in the case of Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107, Their Lordships observed thus :

"73. While we are convinced that the case of the prosecution based on the evidence displayed, confirmed the commission of offence by the appellants, without any iota of doubt, we are of the considered opinion, that still the case does not fall within the four corners of the principle of the "rarest of the rare case". However, considering the plight of the hapless young lady, who fell a victim to the avaricious conduct and lust of the appellant Sandeep, the manner in which the life of the deceased was snatched away by causing multiple injuries all over the body with all kinds of weapons, no leniency can be shown to the said appellant.

74. In the decision reported in Swamy Sharaddananda, even while setting aside the sentence of death penalty and awarding the life imprisonment, it was explained that in order to serve ends of justice, the appellant therein should not be released from the prison till the end of his life. Likewise, in Ramraj v. State of Chhattisgarh [AIR 2010 SC 420] this Court, while setting aside the death sentence, directed that the appellant therein should serve a minimum period of 20 years including the remissions and would not be released on completion of 14 years of imprisonment.

75. Taking note of the above decisions and also taking into account the facts and circumstances of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release."

70. In the case of Shankar Kisan Khade (supra), the victim was a minor girl about 11 years and was also intellectually challenged. The accused used her as a tool to satisfy his lust and she was thereafter done away. He was convicted for an offence punishable under Section 302 of the Indian Penal Code and was sentenced to death. Their Lordships of the Apex Court observed thus :

59. Remember, the victim was a minor girl aged 11 years, intellectually

challenged and elders like the accused have an obligation and duty to take care of such children, but the accused has used her as a tool to satisfy his lust. Society abhors such crimes which shock the conscience of the society and always attract intense and extreme indignation of the community. R-R test is fully satisfied against the accused, so also the crime test and the criminal test. Even though all the above mentioned tests have been satisfied in this case, I am of the view that the extreme sentence of death penalty is not warranted since one of the factors which influenced the High Court to award death sentence was the previous track record of the accused."

Their Lordships further observed in paragraph 62 thus :

"62. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. The High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence. "

71. It could thus be seen that Their Lordships have taken a view that merely pendency of criminal cases cannot be aggravating circumstances to be taken note of while awarding death sentence.

72. We have already enumerated the aggravating as well as mitigating circumstances herein above. We have held that, at the most, pre-meditation could be there for committing murder of deceased Shamshad. We have also held that the possibility of deceased Isana and Harunisa succumbing to the injuries while they were making an attempt to save Shamshad cannot be ruled out. We have further held that the possibility of provocation also cannot be ruled out. We have held that, from the evidence of son of the appellant itself, it could be seen that the appellant herein was not a person of stable mental status. We have further held that the possibility of volcano erupting on account of continuous neglect by the family and humiliation faced in the society, on account of desertion by wife and she living with a man of much younger age, thereby resulting in the incident cannot be ruled out. In any case, it is not as if the appellant herein was residing with the members of the family and had taken advantage of assaulting them when they were asleep. Prosecution has also failed to prove motive in the present case.

73. It could further be seen that the prosecution has also not placed any material on record to show that the appellant herein was a continuing threat to the Society and that he was beyond reform and rehabilitation, which is required to be proved by the prosecution as held by the Apex Court in the case of Rajesh Kumar (supra).

74. We are, therefore, of the view that, in the present case, though the appellant is guilty of causing death of members of his family in a brutal manner, the case may just fall short of "the rarest of the rare" category. However, at the same time, having regard to the nature of crime, we are of the considered view that

the sentence of life imprisonment subject to remission, which normally works out to the term of 14 years, would be grossly disproportionate and inadequate. We find that the present case is a fit case wherein the middle path as laid down by the Hon"ble Supreme Court in the cases of Swami Shraddananda, Sandeep, Shankar Kisanrao Khade and Amar Singh Yadav (supra) needs to be followed.

75. We find that, taking into consideration the circumstances of the case, it will be in the interest of justice to commute the death sentence into sentence for life imprisonment with further direction that the appellant must serve in jail for a minimum period of 30 years without remission before his case can be considered for premature release.

76. The appeal is, therefore, partly allowed.

77. The death sentence awarded by the learned trial Court is commuted to the sentence of life imprisonment. However, we direct that the appellant herein must serve in the jail for a minimum period of 30 years without remission, before consideration of his case for premature release.

78. In view of the order passed in the present Criminal Appeal, the Reference shall also stand disposed of. The Criminal Appeal and the Reference are accordingly disposed of.

79. At this stage, we place on record our deep appreciation for the valuable assistance rendered by Ms F.N.Haidari, learned Counsel (appointed) for the appellant and Mr.V.A.Thakare, learned A.P.P. appearing on behalf of the State. Thorough preparation by both of them on facts as well as law deserves recognition.

80. Fees of Ms F.N.Haidari, learned Counsel appointed from the Legal Aid Panel to appear on behalf of the appellant herein are quantified at Rs.15,000/-.