

(2011) 03 BOM CK 0059

In the Bombay High Court

Case No : Criminal Confirmation Case No. 1 of 2010 in Sessions Case No. 150 of 2008 and Criminal Appeal No. 7 of 2011

State of Maharashtra

APPELLANT

Vs

Sandesh alias Sainath Kailas Abhang
 Sandesh alias
Sainath Kailas Abhang Vs State of Maharashtra

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Arms Act, 1959 — Section 25
Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 354(3), 366, 371
Evidence Act, 1872 — Section 114, 118
Penal Code, 1860 (IPC) — Section 201, 302, 307, 363, 366

Citation : (2011) 8 RCR(Criminal) 2451

Hon'ble Judges : B.H. Marlapalle, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : M.H. Mhatre, APP for the State, for the Appellant; Abhaykumar Apte, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—The sole accused came to be tried for the offences punishable under Sections 302, 307, 397, 394, 376(e) of the Indian Penal Code and Section 25 of the Arms Act as well as Section 135 of the Bombay Police Act. The learned Additional Sessions Judge, Pune by judgment and order dated 12th May, 2010 as pleased to convict the accused for the offences punishable under Sections 302, 307, 376(e), 394 and 397 of the Indian Penal Code. For the offence punishable u/s 302 of the Indian Penal Code the accused has been sentenced to death penalty and it has been directed that he shall be hanged by neck till his death. Hence, this confirmation case by the State of Maharashtra u/s 366 of the Code of Criminal Procedure. At the same time, the accused has filed the appeal against the order of conviction and sentence for all the offences for which he has been convicted.

2. As per the prosecution case, PW2 and PW8 were married on 07.02.2007 and PW8 was employed with a private bank at its branch in Bibwewadi area of Pune city. On 31.08.2007 the couple shifted to Flat No. 301 of Purple Castle Society, Chintamaninagar, Bibwewadi, Pune as tenant and just below their flat, the maternal uncle of PW2 was staying with his family in Flat No. 202. On 10.09.2007, PW8 came home for lunch and left the house at 1:30 p.m.. His grandmother Shalini Jadhav was also staying with them. Around 02:00 p.m. when the grandmother was watching TV, she heard door bell and therefore, opened the door of the flat. The accused told her that Saheb had sent him for repairing of car puncture. The grandmother being unaware of this assignment, she called PW2 to talk to the accused and consequently, when PW2 came to the main door, the accused repeated the same assignment. She informed that she had no such knowledge and he could come in the evening by which time her husband would be at home. As a matter of precaution, she also called her husband on cell phone but he did not respond. This was between 02:00 to 02:15 p.m.. By this time the accused entered into the flat, bolted the door from inside and took out a deadly weapon (Kukri) and threatened the ladies. Naturally, there was some resistance and on this the accused started giving blows, which resulted in large number of bleeding injuries on the person of both PW2 & the grandmother. Multiple assaults were so brutal that the grandmother fell on the floor in a pool of blood. The accused demanded the ornaments on the person of the grandmother. He snatched "Mangalsutra" from the person of PW2 and also a gold chain but he did not stop the assaults. PW2 was in her fifth month of pregnancy and therefore, she tried her best to see that she would not receive any assault on her stomach. The accused further demanded to search out jewellery and cash in the house which was his main object and at that time PW2 threw before him a purse containing gold ornaments. He collected them but at this stage when the grandmother made little movement he gave a deadly blow by the said weapon on her neck. When he demanded more cash and gold jewellery, PW2 informed him to search the entire house and take away whatever he wanted. He became more aggressive on her. He asked PW2 to remove her clothes, under the threat of further brutal attack and raped her. Even thereafter he gave blows of weapon on PW2. He then went to the bathroom and cleaned himself and fled from the flat by bolting the door from outside, just before 03:00 p.m.. After having realized that the grandmother was not alive, PW2 with great courage managed to crawl upto the second bed room so as to give call to the maternal aunt in the flat below and she was successful in the same. Consequently, when the maternal aunt (PW1) came to the main door of the flat, PW2 crawled upto the main door and opened it. PW1 immediately provided some clothes to PW2 to cover herself and called PW8 and thereafter, PW8 reached home by about 03:00 p.m.. The Police were alerted and they reached the spot within a short time. PW8 with the help of PW1 and other relations lifted PW2 and immediately took her to Bharati Vidyapeeth Hospital. On preliminary management of the case, PW8 was advised to shift his wife to Ruby Hall Clinic and consequently, PW2 was brought to Ruby Hall Clinic at about 5:30 p.m.. She

was operated immediately and was in ICU upto 18.09.2007 and was discharged on 28.09.2007.

3. In the meanwhile, the statement of PW1 was recorded by the Police on the basis of which, Crime No. 111/2007 came to be registered with Bharati Vidyapeeth Police Station. The grandmother was declared dead and her dead body was sent for postmortem.

4. During the course of investigation, the Police brought the dog squad as well as photographer (PW11) to the place of offence. On 11.09.2007 the Police talked to PW2 in the hospital and on the basis of the description given by her, sketches of the accused were prepared by PW12 (Girish Charwad). The sketches so drawn were published in the local news papers and on 19.09.2007 PW16 (Ashok Shelke) who was attached to the Crime Branch, Pune received information that the suspect in the case was residing at the Upper Indira Nagar area. When the Police party went there and made inquiries, the suspect was not traced and the Police party came to know that the native place of the suspect was village Awasari Khurd in Ambegaon taluka. The Police party also came to know his name as Sandesh alias Sainath Kailas Abhang. The Police party, therefore, went to Awasari Khurd village and arranged the trap. At about 12:00 noon when the accused was coming out of his house in Abhang Mala, he was taken in custody. PW16 asked his name and he disclosed the same as Sandesh Kailas Abhang and stated that he was staying at Upper Indira Nagar. The accused was brought back to Pune and came to be arrested at about 04:30 p.m. by PW17 (P.N. Sonawane, Police Inspector of Bharati Vidyapeeth Police Station). The arrest Panchnama was drawn and the accused was also sent for medical examination.

5. The Inquest Panchnama of the dead body of Shalini Jadhav was drawn at Exhibit45 on 10.09.2007. PW7 Dr. Milind Wable conducted the postmortem and signed the postmortem report at Exhibit40. Recoveries of gold ornaments, mobile phone and clothes of the accused as well as weapon were made. All these articles were sent for chemical analysis and finally the chargesheet came to be filed on 04.12.2007. The case being exclusively triable by the Sessions Court it was committed and charge at Exhibit4 was initially framed on 04.08.2008.

6. The prosecution examined in all 18 witnesses and three of them i.e. PW3 Dr. Suresh Deshpande, PW4 Dr. Shubhada Deoskar and PW7 Dr. Milind Wable were the medical practitioners. PW6 Neela Talathi, PW9 Indrajit Patil, PW10 Rahul Gudmeti were the Panch witnesses whereas PW14 Pandurang Kaldante and PW15 Sadashiv Dhanwade were the goldsmiths. PW5 Ujjwala Sorate was the Naib Tahasildar and had conducted the T.I. parade. PW11 Sharad Kshtriya was the Police Photographer and PW13 Rajendra Sawant was the Panch witness as well as a friend of the accused. The purported extrajudicial confession made to this witness was relied upon by the prosecution in support of its case. PW16 Ashok Shelke, PW17 Pukhaji Sonawane and PW18 Ranjit Dhure were the Police officers. PW18 was the incharge of Band Garden Police Station and on 11.09.2007 he had received instructions from the Deputy Commissioner of Police, ZoneII, Pune to

record the statement of PW2 while she was admitted in Ruby Hall Clinic and therefore, he had recorded the statement which was endorsed by the doctor on duty (Exhibit73).

7. PW7 (Dr. Milind Wable) stated before the Trial Court that the dead body of Shalini Jadhav was brought to Sassoon Hospital at 11:55 p.m. on 10.09.2007 by Bharti Vidyapeeth Police Station and he along with Dr. B.D. Mohole conducted the postmortem between 5:30 to 6:30 AM (next morning). As per him, the age of the deceased was about 65 years and he noted the following external and internal injuries on the dead body:

(1) Horizontal incised wound on right zygomatic prominence, measuring 4 x 0.5 cm tailing laterally for 2 cms. Bone deep. Angles and margins clean cut .

(2) Horizontal incised wound on chin extending to right, measuring 5 x 05 cms. Bone deep angles and margins clean cut .

(3) Tangential chopped wound, inferior angle of chin, extending downwards, measuring 14 x 10 cms. Muscle deep with avulsin of skin. Skin flap hanging, angles and margins clean cut .

(4) Horizontal chopped wound, 1.5 cms. below right ear, extending posteriorly measuring 10 x 3 cms. Vertebra deep. All underlying soft tissues including carotids and jugulars severed. Angles and margins clean cut .

(5) Contusions over right parietal eminence, 4 cm in diameter. Reddish purple in colour.

(6) Obliquely vertical incised wound on back, below nape of neck, in the midline, measuring 8 x 3 cms. Bone deep angles and margins clean cut .

(7) Abrasion over medial end of right clavicle, measuring 0.5 cms in diameter, reddish in colour.

(8) Oblique linear abrasion on right shoulder, measuring 10 x 0.3 cms. Reddish in colour.

(9) Horizontal incised wound on poster lateral aspect of right wrist. 2.5 x 0.5 cms, bone deep. Angles and margins clean cut .

(10) Horizontal chopped wound on right palm at the level of metacarpals. Measuring 10 cms long, circumferentially with traumatic amputation of all fingers except thumb. Four amputated fingers lying separately.

(11) Oblique incised wound on right thumb, 2.5 x 0.5 cm. Bone deep. Angles and margins clean cut .

(12) Incised wound in first right web measuring 3 x 1.5 cms. Muscle deep. Angles and margins clean cut .

(13) Oblique incised wound on left shoulder Test Identification Parade, measuring

5 x 1 cms. Tailing medially for 4 cms. Muscle deep. Angles and margins clean cut .

(14) Horizontal incised wound, 4 cms. Below inj. No. 13 on upper third of left arm, measuring 1 x 0.3 cms. Muscle deep. Angles and margins clean cut .

(15) Oblique linear abrasion, 0.5 cms. Below and medial to inj. No. 14, measuring 5 cms in length. Reddish in colour.

(16) Tangential chopped wound on left palm at the level of base of metacarpals, measuring 14 x 10 cms. Bone deep with clean fracture of 1st, 2nd and 3rd metacarpals. Angles and margins clean cut .

(17) Circumferential chopped wound of distal inter phalangeal joint of left little finger with traumatic amputation. Distal phalanx missing. Margins clean cut .

(18) Circumferential chopped wound of proximal interphalangeal joint of left ring finger with traumatic amputation. Distal part of finger separated. Margins cleancut.

(19) Circumferential chopped wound of left index finger with traumatic amputation at the level of middle phalanx. Distal part of finger separated. Margins cleancut.

(20) Horizontal stab wound, on left side of abdomen, 7 cms. lateral to midline and 4 cms. above the level of umbilicus measuring 8 x 2 cms opening in abdominal cavity. Angles and margins cleancut.

(21) Oblique linear abrasion on right side of abdomen, 10 cms lateral and below umbilicus 5 x 0.5 cms. Reddish in colour.

(22) Multiple chopped wounds, crisscrossing each other over left scapular region, size varying from 7 x 1 cms to 12 x 5 cms tailing upwards distributed in an area of 12 x 12 cms underlying scapula shows cleancut injuries. Angles and margins cleancut.

(23) Obliquely vertical incised wound over midline on back, at the level T12 to L1 measuring 11 x 2.5 cms. Bone deep. Tailing upwards for 4 cms. Angles and margins cleancut.

Internal injuries:

(1) Internal injuries corresponding to Ext. inj. No. 4 are mentioned along with external injury above.

(2) Internal injuries corresponding to Ext. inj. No. 5. Hematoma under scalp 6 x 4 cms. Subdural haemorrhage both frontal lobes measuring 8 x 6 cms.

(3) Internal injuries corresponding to Ext. inj. No. 20. Cleancut fracture 9th to 11th ribs alongwith inter costal muscles, measuring 8 x 2 cms. Stab wound of mesentery, measuring 4 x 1 cms. Stab wound of coil of intestine, measuring 1.5

x 0.5 cms and opening in lumen.

8. As per doctor, the cause of death was traumatic and hemorrhagic shock as a result of multiple chop wounds. PW7 confirmed the contents of postmortem report (Exhibit40) and the said report was signed by him. He further stated before the Court that all the injuries sustained by the deceased were possible due to assaults and blows by the weapon "Kukri" (muddemal article No. 19) shown to him in the Court. In his cross examination, he admitted that the weapon shown to him before the Court (article No. 19) was not shown to him earlier by the Police nor his opinion was sought. The photographs of the deceased as taken by PW11 Sharad Kshatriya, were also placed on record at Exhibits1 to 10.

The Trial Court held, on the basis of the medical evidence in terms of the postmortem notes as well as the oral testimony of PW7, that Shalini Jadhav died a homicidal death consequent to the brutal attack on 10.09.2007. This finding of the Trial Court is not much in dispute and there is no infirmity in the same.

9. PW3 Dr. Suresh Deshpande was the head of Surgery Department at Ruby Hall Clinic and he stated before the Trial Court that at about 5:30 p.m. on 10.09.2007 he received PW2 as a patient brought to the Casualty Department. He rushed there within two minutes and attended to her at about 5:40 p.m.. At that time she was conscious and shouting. She was immediately taken to ICU and he started the treatment. She had sustained 19 stab injuries on her person and was immediately taken for operation. In the meanwhile, suspecting some vaginal injuries, he sought assistance of PW4 Dr. Shubhada Deoskar and in the meanwhile, Dr. Aparna Deshmukh had recorded the medical case history at Exhibit23. He had also taken photographs of PW2 with her injuries while she was in the operation theatre and the same were placed before the Court at Exhibits 15 to 22. As per the doctor, PW2 had suffered the following injuries:

(a) Face

(1) 3" x 1.5" wound below the left ear, cutting muscles of posterior triangle, no vascular injury.

(2) 3" x 1" superficial wound nape of neck.

(3) 3" x 1" wound behind the right ear, deep to bone.

(b) Right Hand

(1) A deep irregular wound in the web space between thumb and index finger, muscles divided with injury to the tendon of index finger.

(2) A deep irregular wound in the web space between the ring and little finger chipping the bone.

(c) Left Hand

(1) Lunar shaped wound over the dorsum of the thumb with chip fracture of the

distal phalanx and division of the extensor tendon.

(2) 0.5" x 0.5" injury dorsum of left hand at the base of ring finger.

(3) Deglove injury of the ring finger with avulsion of nail.

(4) Small cut over the proximal phalanx of the ring finger.

(d) Left Arm

(1) Large incised wound over left shoulder 6" long cutting muscles and head of humerus with active bleeding.

(2) 7" long incised wound over the posterior aspect of arm, muscles divided but no bony injury.

(e) Right Arm

(1) Oblique wound 5" long over right shoulder extending over the scapular region with division of superficial muscles.

(f) Back

(1) 6" long oblique wound extending lower cervical to upper thoracic region cutting underlying muscles.

(2) 10" long oblique wound in lower thoracic region across the midline extending deep to spinous processes with fractures of ribs on both.

(3) 3" long wound at posterior aspect of left shoulder.

(4) 8" long incised wound starting from just behind the axilla going down below the left breast with fracture of scapula.

(5) 5" long injury below scapula dividing muscles.

(6) 8" long injury just above the iliac crest, muscle deep.

(7) 9" long oblique wound left gluteal region.

10. PW3 issued the injury certificate at Exhibit24. As per him, the patient was never unconscious on her admission in the hospital till her discharge. The doctor opined that if the medical treatment was not given to PW2, she would have bled to death. He also confirmed that the injuries noticed on the person of PW2 were likely to be caused by a sharp and heavy weapon like Muddemal Article No. 19 shown to him in the Court. In his cross examination, he stated that as soon as the operation was over, the Police had contacted him but he did not know for what duration the Police had talked. He was not aware as to when the Police spoke to PW2. At the same time, he confirmed that looking at the injuries sustained by PW2, it could not be said that her speaking ability was impaired at any time. He reiterated that all the injuries sustained by her were having clean cut margins. The evidence of this witness undoubtedly proved and the Trial Court rightly held that if PW2 had not received the medical treatment in time, she

could not be alive.

11. PW6 Neela Talathi was the resident of Flat No. C104 in Purple Castle and she was the witness for the Spot Panchnama at Exhibit38. She stated that on 10.09.2007 she was called by the Police at 5:30 p.m. at Flat No. 301 in D building whereas she was residing in C building. When she entered the flat, she found blood stains on the floor and on the access to both the bedrooms. She saw that the dead body of Shalini Jadhav was lying near the bed and there were marks of injuries caused by the blows of weapons. In the passage between bathroom and living room, four amputated fingers were lying. The Police were present at the spot and all the articles with blood stains lying there like salwar, black half sleeves T shirt, ash colour ladies nicker were wrapped in papers by the Police. The Official Photographer took the photographs of the dead body. She identified these photographs as Article Nos. 1 to 10 before the Court and stated that those were photographs of the existing situation of the spot. The map of the flat was prepared in her presence and it was correct. The Spot Panchnama was drawn in her presence and she signed the same. Muddemal Articles No. 5 bed sheet ,No. 6 Salwar, No. 7 T shirt and No. 8 nicker which were shown to her before the Trial Court were identified by her as the same articles which were shown on the spot by the Police on 10.09.2007.

12. The sketch/ map of the flat drawn by the Police indicated that as soon as the main door is opened, there is a living room of 18x13 feet attached to a gallery of 9x8 feet. At the western side there is kitchen of 8x8 feet and towards southern side there were two bedrooms of 12x10 feet each. Between two bedrooms there is common toilet and one bedroom on the western side had an attached bathroom. It also indicated that right from the main entrance of the door through the living room and then in both bedrooms, the floor was blood stained. If the victim was required to call the maternal aunt, she was required to come to the eastern side bedroom below which the balcony of Flat No. 202 was located.

13. As per PW12 Girish Charwad, who was an expert in drawing the sketches, under the instructions of Police, he went to Ruby Hall Clinic at about 11:30 a.m. on 11.09.2007 and met the injured lady (PW2) for drawing the sketch of the suspect. He noticed that the patient was having excellent memory and good grasping power and gave him the detail description of the suspect. As per the description given by her, he drew the sketch (Exhibit55) and showed it to her and she confirmed the same. He identified the patient as PW2 before the Court and stated that the accused sitting before the Court matched the sketch drawn by him. He also produced the office copy of the requisition (Exhibit56). In his cross examination, he denied the suggestion that the nose of the suspect in the sketch was different from the nose of the accused present in the Court. He also stated that after the accused was arrested he had seen him and was satisfied that the sketch drawn was correct. He had seen the accused in custody after he was arrested and at that time he was having slight stubble. He also verified the sketches published in the news papers on the basis of the sketch drawn by him.

In her cross examination, PW2 stated before the Court that she did not remember whether she had met the person drawing the sketch on 11.09.2007. But in the examination in chief, she had stated that on 13.09.2007 she had given description of the accused to the artist sent by the Police for drawing his sketch. PW17 Pukhaji Sonawane was the Investigating Officer. He stated before the Court that PW12 was requested by the Police to visit the patient so as to obtain the description of the suspect and draw his sketch. Thus, the prosecution proved that PW12 has drawn the sketch of the suspect as per the description given to him by PW2 and the same was published in the local news papers.

14. PW16 Ashok Shelke was attached to the Crime Branch, Pune as Assistant Police Inspector on 19.09.2009 and was aware of Cr. No. 111/2007 registered at Bharti Vidyapeeth Police Station for the offences punishable under Sections 302, 397, 307 of the Indian Penal Code. The senior officers with the Crime Branch had directed him to take search of the suspect in the said offence on the basis of a copy of the sketch drawn by the PW12. On 19.09.2007 the Crime Branch received information that the suspect in the case was residing at Upper Indira Nagar, therefore, the Police party visited the said locality. Though the suspect was not found there, his permanent address i.e. village Awasari Khurd in Ambegaon Taluka and his full name was obtained from the neighbourers in Uppar Indira Nagar. It is pertinent to note at this stage, that as per the arrest memo, the permanent address of the accused was Upper Indira Nagar, VIT College Road, Lane No. 5, House No. 2, Bibwewadi, Pune and his native place address was at and post Awasari Khurd, Taluka Ambegaon, District Pune (Police Station Manchar). The Police party, therefore, visited village Awasari and arranged the trap at Abhang Mala where the house of accused was located. The Police party checked and verified the description in the sketch when they saw the person coming out from Abhang Mala. After their satisfaction that it was similar looking accused person, they took him in custody. When the accused was taken in custody, he was wearing one gold chain and was in possession of mobile handset of Samsung Company (Muddemal Article No. 13). IMEI number of the mobile handset was 359217000389400. When the accused was asked about the mobile phone, he replied that it was his own. The Police party verified IMEI code of the mobile handset and it was satisfied that the same tallied with the statement of the injured witness and PW8. The Police party called two Panchas and seized the mobile handset as well as the gold chain under the seizure Panchnama (Exhibit51), which has been proved by the evidence of PW10 Rahul Gudmeti. PW16 verified before the Court that the Article Nos.13 and 14 were the same which were recovered from the accused. As the crime was registered with Bharti Vidyapeeth Police Station, he made a report at Exhibit64 and consequently, the accused came to be arrested. He also stated before the Court that the accused was arrested by him and his appearance tallied with the sketch at Exhibit55.

In his cross examination, PW16 stated that he could not disclose the name of the person who had given information to the Crime Branch of the accused and he did not record the statement of any person of the Abhang Mala area. He also

conceded before the Court that there is no other evidence except his report and statement that the accused was taken in custody from Abhang Mala. He also stated that he along with his team had gone to Abhang Mala in a private vehicle and one motorcycle and the team consisted of 10 persons. There is nothing brought in the cross examination to doubt the evidence of this police officer that he had picked up the accused from Awasari Khurd on 19.09.2007 and handed over him to Bharti Vidyapeeth Police Station on the same day.

15. PW13 Rajendra Sawant is a resident of village Awasari Khurd and a friend of the accused since childhood. He stated before the Court that the accused had left the village about three years ago and was residing at Bibwewadi, Pune. The accused used to come to village Awasari Khurd occasionally and on 15.09.2007 he came to the village at about 6:00 p.m.. On that day there was celebration of Ganpati festival and therefore, the persons had gathered in Abhang Mala area. On the next day i.e. on 16.09.2007 around 11:00 a.m. both of them met and at that time, Nayneesh Abhang was also with the accused. The accused gave him one gold chain (Gof) and told that he was in need of money, therefore, the accused requested PW13 to sell it and give him cash. PW13, therefore, went to Laxmi Alankar jewellers as the proprietor of the said shop was an acquaintance of his grandfather and sold the ornament. It weighed about 2 tolas and the owner of Laxmi Alankar jewellers gave him an amount of Rs. 13,600/-. PW13 retained with him Rs.3,000/ and the balance amount of Rs. 10,000/ was given to the accused. In the afternoon on the same day, PW13, the accused and Nayneesh Abhang went to a hotel for lunch. The accused also disclosed to him that he was having a mobile handset belonging to his friend, therefore, he wanted to purchase a SIM card. With the ration card and voters identity card of his grandmother, the accused purchased a SIM card from Sangam Mobile Shop. But, PW13 did not remember the SIM card number. On 21.09.2007 the Police had gone to the house of PW13 and he was taken to Laxmi Alankar Jewellers. The owner of the shop produced the gold chain (Gof) which was sold by PW13 and it was seized by the Police. The Police recorded the statement of PW13. He was also taken to the Court to record his statement u/s 164 of the Code of Criminal Procedure (Exhibit59). He stated that as per his disclosures the statement was recorded before the Court and the contents therein were the same and he had signed the same in the Court. He also stated that the accused before the Court was his friend Sandesh alias Sainath Kailas Abhang and he had given him the gold chain (Gof) to sell. He identified the gold chain (Article No. 14) to be the same which was sold by him at the instance of the accused. In his cross examination, there was nothing brought out to doubt the testimony of this witness on the material circumstances i.e. recovery of gold chain (Gof) which was sold to Laxmi Alankar Jewellers and seized from the said shop. He reiterated that on 21.09.2007 when his statement was recorded by the Police, the incidents as described by him were fresh in his memory. He also stated in his cross examination that the statement at Exhibit59 was signed by him after he had read and it was recorded as per his say. He denied the suggestion that at the instance

of the Police he was standing in the witness box to give false evidence. He also denied that the recovered mobile handset was belonging to Nayneesh and not the accused.

(Continued on 24th March, 2011)

16. It has come in the evidence of PW17 Pukhaji Sonawane who was the Investigating Officer that he had reached the subject flat i.e. Flat No. 301 in D building of Purple Castle society at about 4:00 p.m. on 10.09.2007 and after recording the complaint of PW1 at Exhibit9 and registering Cr. No. 111/2007 on that basis, he recorded the statement of PW8. PW8 had given him the description of the stolen property i.e. golden ornaments and mobile handset. The purchase receipt of mobile handset at Exhibit42 was also handed over by PW8 to PW17. The seizure panchnama at Exhibit51 drawn on the arrest of the accused on 19.09.2007 was in respect of the Muddemal Article Nos. 13 and 14 and as noted earlier it also contained the model number of the mobile handset. PW17 stated before the Trial Court that the model number of the handset i.e. IMEI written on the seizure panchnama Exhibit51 was the same as was written on the purchase receipt Exhibit42. This evidence of PW17, PW8 r/w seizure panchnama Exhibit51 and the evidence of PW13 (Rajendra Sawant) proved that the mobile handset purchased by PW8 and kept in the custody of his wife (PW2), was seized from the accused on 19.09.2007 when he was taken in custody by PW16 (API Ashok Shelke).

17. Now coming to the gold chain (Gof), the evidence of PW10 Rahul Gudmeti has to be read with the evidence of PW13 Rajendra Sawant as well as PW16 Ashok Shelke. Article No. 15 gold chain was recovered from the accused when he was taken in custody on 19.09.2007 and PW13 stated before the Trial Court as noted earlier that the accused had shown him the mobile handset as well as the gold chain. This Article No. 15 was shown to PW2 before the Trial Court and she stated that while she was at Ruby Hall Clinic on 22.09.2007 the Police had brought 14 to 15 gold ornaments and from the said ornaments, she had identified her ornaments and mobile phone. They were all in an envelope which was opened before the Trial Court and it contained Article Nos. 13, 14, 15, 16, 17, 18 and 23. She identified Article No. 15 (gold chain (Gof)) which was worn by her grand mother inlaw and snatched away by the accused.

PW14 Pandurang Kaldante is the goldsmith from village Awasari Khurd. He knew PW13 Rajendra Sawant as the grandson of Harnabai Tambe and Babu Tambe whom he was known for years as his customers. He stated before the Trial Court that PW13 came to his shop with gold chain (Gof) and he wanted to sell it for raising the money to meet the medical bills of his grand parents. PW14, therefore, purchased the said gold chain from PW13 and paid an amount of Rs. 13,600/-. On 21.09.2007 the Police visited his shop along with the accused and PW13 and the said article was recovered from PW14 under the seizure panchnama (Exhibit49). It was the same gold chain Article No. 15. PW14 had purchased it from PW13. He identified the same article before the Court in his

substantive evidence. In his cross examination by the defence counsel, he stated that he knew all residents of Abhang Mala, so also, he was knowing the grand parents of PW13. On 21.09.2007 the Police had reached his shop in the afternoon along with the accused and PW13. He identified the accused as the same person who was taken to his shop by the Police along with PW13 on 21.09.2007.

18. PW15 Sadashiv Dhanawade is another goldsmith at Dhankawadi, Pune. He stated before the Trial Court that on 22.09.2007 he was called at Bharti Vidyapeeth Police Station at about 4:30 p.m. along with another Panch. He was told by the Police that some stolen ornaments were to be identified by an injured lady (PW2) who was undergoing treatment in Ruby Hall Clinic and a panchnama was to be drawn. He was also told that one mobile handset was also seized and it was to be shown to the patient for identification. The Police inquired with him whether similar types of ornaments could be made available and he obliged. He accompanied the Police with similar ornaments and mobile handset and they went to the 5th floor of Ruby Hall Clinic in Room No. G511 where PW2 had been admitted. The seized ornaments and the ornaments brought by him were kept on table along with some mobile handsets. The ornaments were kept in one line and numbered like 1 to 6 and mobile handsets were kept in one line at numbers 13 and 14. PW2, in his presence, identified the ornaments at Sr. Nos. 2, 4 and 6 (even numbers) and told to separate them. In similar fashion, she identified the mobile handset kept at Sr. No. 13. As per this witness, the identification panchnama was drawn at Exhibit62. This witness further stated that after this identification of the ornaments and mobile handset was over, the Police party returned his ornaments by panchnama drawn at Exhibit62. In his cross examination, there was nothing brought on record to raise suspicion on the testimony of this witness on the point of identification of the ornaments and mobile handset by PW2 in the hospital.

19. PW9 Indrajit Patil is another panch witness and resident of Padmavati, Pune. He stated before the Trial Court that on 21.09.2007 he was called at Bund Garden Police Station at about 2:00 p.m. along with his friend Milind Pawar. One accused person was present in the Police Station and he identified before the Trial Court the accused as the same person who was at Bund Garden Police Station. The accused had told his name as Sandesh alias Sainath Kailas Abhang and further stated that he was ready to produce the gold ornaments which he kept with his paternal aunt Sunanda Mandlik at village Kadus, Taluka: Khed. The accused also disclosed that he had kept the weapon and clothes on his person in his house at village Awasari Khurd and was ready to produce the same. He had also stated that he had sold the gold chain (Gof) in Laxmi Alankar shop at village Awasari Khurd and he was ready to show that shop. The Police prepared the memorandum of disclosure at Exhibit48 and it was signed by the witnesses. Thereafter, the Panchas, the accused and the Police proceeded towards village Kadus on Pune Nashik road in a government vehicle. When the vehicle entered in village Kadus, the accused asked to stop the jeep in front of the house and he

got down from the jeep and asked others to follow him and said that the said house belonged to his paternal aunt Sunanda Mandlik, who was present in the house. On demand of the accused, Sunanda Mandlik produced the ornaments namely one small gold chain, one gold earring, a small pendant of Mangalsutra with beads and stones and six beads of Mangalsutra. The witness further stated that the Police took those ornaments in custody, wrapped them in one paper and obtained the signatures of the witnesses. When they reached village Awasari, the accused told the driver to take the jeep to Abhang Mala. The accused asked the driver to stop the jeep in front of one house which was stated to be his house. All of them entered in his house where the accused opened one steel box and from that he produced one Kukri with its cover and also the navy blue colour full pant, a full shirt of saffron colour having checks and one underwear. All these articles were taken by the Police and marked as Muddemal Article Nos. 19 to 22 under the seizure panchnama Exhibit49. Thereafter, they proceeded to Laxmi Alankar shop by jeep. After they reached the said shop, the accused asked the owner of the shop to produce the gold Gof which was shown to him and the owner of the said shop Pandurang Kaldante (PW14) produced the gold chain (Gof) which weighed 2 tolas. It was also a part of the seizure panchnama at Exhibit49. All these articles were shown to this witness (PW9) in the Court and he identified to be the same which were recovered from the house of Sunanda Mandlik and the gold chain recovered from Laxmi Alankar shop. In his cross examination, he stated that he had passed his B.E. (Mechanical) and at the relevant time he was working as an Engineer with M/s Bharat Foge Company in Mandhwa, Pune. He also stated that the Police had approached him with a request to act as Panch. He also clarified that he had never acted as Panch earlier to 21.09.2007. He also admitted that the gold ornaments recovered from the house of paternal aunt of the accused were not weighed there. He denied the suggestion that the clothes and the weapon were not sealed at the place from where they were recovered. He also reaffirmed that the seizure panchnama at Exhibit49 was drawn at village Awasari Khurd itself. He denied the suggestion that the seizure panchnama was signed at Band Garden Police Station. He reiterated that his as well as his friend's signatures on the seizure panchnama were obtained at village Awasari Khurd.

20. Thus, the prosecution had undoubtedly proved that the gold ornaments Article Nos. 14, 15, 16, 17, 18 and 23 either belonged to PW2 or the deceased and they were robbed by the accused during the incident on 10.09.2007 along with the mobile phone Article No. 13.

21. PW1 Sumitra Birajdar is the maternal aunt of PW2 and she was the first person to arrive at the scene of offence on the call given by PW2 immediately after the incident at about 02:45 p.m. on 10.09.2007 and she had called PW8 on his mobile phone and he reached his house by 3:00 p.m.. She stated before the Trial Court that when she was in her house and at about 2:15 p.m. she received a call on her mobile phone from PW8 informing that he would reach her house within 1520 minutes for doing medical examination of her daughter so as to get

the insurance policy. However, within 510 minutes, thereafter, she heard shouts of PW2 calling her "Mami, Mami" from the window. Therefore, she sent her maidservant Chingu to the balcony to check why PW2 was calling. Chingu went to the gallery of the flat and told her that she saw PW2 with blood on her face. PW1, therefore, rushed to the flat of PW2 on the third floor by staircase and noticed that the door was bolted from outside. She opened the door from outside and PW2 opened the door from inside. She saw PW2 was standing fully naked and therefore, she helped her to wear the clothes. At that time, she saw the bleeding injuries all over the body of PW2 and the PW2 told her to go inside the flat and see the condition of her grandmother-in-law. PW1, therefore, went inside and found that the four fingers of her grandmother-in-law were lying in front of the bathroom. She also saw that her grandmother-in-law was lying in the pool of blood in the bedroom on the floor. Her neck was slit and the wrist of her left hand was also cut half. The entire flat was smeared with blood. She then went to her flat and from her mobile called PW8 and informed him the condition in his house. Within 1015 minutes, PW8 reached his house and along with him PW2 was taken in the car to Bharti Vidyapeeth Hospital. While in the car, she made enquiries with PW2 who had described the whole incidence. PW1 further stated that after the PW2 was taken to Bharti Vidyapeeth Hospital, PW1 returned back to the house. By that time, the Police had reached the flat and her statement was recorded at Exhibit9. It has further come in the evidence of PW1 that after the PW2 was shifted to Ruby Hall Clinic, on 11.09.2007 she met PW2 and asked her the description of the young robber-assailant. PW2 had given the description of the boy as a young fellow of about 5".6" to 5".8" height with fair complexion having straight nose and big eyes. He had removed his beard and mustache and was wearing the shirt of faint saffron colour and blue colour pant. PW2 also told her that when the boy left the flat he had taken with him the gold mangalsutra, chain, earrings and mobile handset. When asked about specific time, PW2 told her that the incident took place between 2:15 to 2:45 p.m.. Based on this, the supplementary statement of PW1 was recorded by the Police. In her cross examination, she stated that on 12.09.2007 the Police again came to flat No. 301 and the key of the said flat was with the Police till that date. The statement of this witness at Exhibit9 and treated as FIR was silent on the offences of robbery and rape but in the supplementary statement she had spoken about the offence of robbery as well. This witness has corroborated the testimony of PW2 on the entire incident and the identity of the robber-assailant.

22. PW2 Shubhada Patil, a young lady of 25 years, is a star witness of the prosecution. She stated before the Trial Court that after her husband left at 1:30 p.m. from the house on 10.09.2007, grandmother-in-law was watching TV and between 2:00 to 2:15 p.m. the door bell of the flat rang. The grandmother-in-law opened the door and saw the accused who claimed that he was sent by Saheb (i.e. PW8) to repair puncture of the car. PW2, therefore, came out of the bedroom and inquired the accused who repeated the same reason. She, therefore, called her husband but he disconnected the mobile phone. She,

therefore, told the accused to come in the evening and on that, the accused immediately came inside and bolted the door from inside. He removed one weapon like sickle from his shirt, as a result, PW2 and the grandmotherinlaw were frightened and shouted loudly. Consequently, the accused ran towards them and asked them to keep quiet otherwise he would finish them. The accused inflicted a blow by the said weapon near the neck of the grandmotherinlaw and when PW2 tried to obstruct that blow, he inflicted the blows on her fingers and palms of both the hands. The accused pushed both PW2 and grandmotherinlaw in the bedroom and while doing so, he continued to assault both of them. They told him to take whatever he wanted from the house even then he assaulted the grandmotherinlaw, therefore, she collapsed. He then snatched the gold chain from her neck and also Mangalsutra of PW2. He demanded the bangles and rings from the hands of the grandmotherinlaw but she told him that the same were not of gold but of Bentex company. Thereupon the accused got angry and inflicted more blows by the weapon on her hands and cut her four fingers and the wrist of other hand was also cut off and was hanging. At that time, the accused told them that he had not come to rob such limited ornaments and he wanted to rob whatever ornaments and cash was available in the house. PW2 took out one purse and from that purse, he took out the gold chain (Gof), locket and gold earrings. However, he did not stop there and continued to assault PW2 with the weapon on her neck, arms and hands, therefore, she was totally frightened. The accused had asked about the weight of the ornaments and she replied it could be 4 to 5 tolas. He asked to take out further ornaments and cash and she again repeated that he could take search of the house and whatever was available he would take it away. At that time, the grandmotherinlaw made some movement which was seen by the accused and he gave kicks and also said "what is use of this old lady being alive?" After sometime when the grandmotherinlaw made little movement, he again assaulted on her chest and slit her throat with the weapon. He then rushed towards PW2. She was pregnant of 5 months and in order to save the baby, she suffered all assaults on her back and hip. The grandmotherinlaw did not make any movement and at that time, the accused asked her to undress. He also undressed himself and raped her. In anger, she gave him kick on which he got more violent and inflicted more blows with the weapon. She was wearing Salwar, T shirt and nicker of gray colour, which she identified before the Court. She also identified the weapon "kukri" which was used by the accused. Thereafter, he went to the bathroom and washed himself as well as the weapon. She further stated that along with the ornaments he had also taken away the mobile phone of Samsung Company. She stated that the height of the accused was 5".7" to 5".8" with fair complexion. His nose was straight and little big in size. He smelt of liquor. PW5 Ujjwala Sorate, Resident Nayab Tahasildar, had conducted the T.I. parade on 20.10.2007 as the Special Executive Magistrate and in the said parade PW2 had identified the accused out of seven persons standing in a row (including six dummies). She also identified the accused in her substantive evidence before the Trial Court.

The testimony of PW2 proved that it was the accused who assaulted her as well as her grandmother-in-law and killed the grandmother-in-law. She survived solely because of the medical treatment. The cross examination of this witness was as short as it could be and she denied the suggestion that the accused was not the same person who had assaulted both the women.

23. Now coming to the offence punishable u/s 376(e) of the Indian Penal Code is concerned, it is seen from the record that such a charge was not framed initially and the charge was amended on 06.05.2009 after the depositions of PW2 were closed on 15.04.2009. However, after the charge was amended, she was recalled and was examined on 19.05.2009. She has, in her depositions, furnished explanation as to why she did not disclose the accused had forced her into sexual intercourse and this explanation has been supported by her husband (PW8) in his substantial evidence before the Court. PW4 Dr. Shubhada Deoskar was the Consultant Gynecologist, who was called upon by PW3 Dr. Suresh Deshpande after he examined PW2 and PW4, stated before the Court that she examined PW2 at about 5:30 p.m.. She had conducted her external and per vaginal examination and found that there was active bleeding from vagina and there was lacerated wound at the fourchette. She had separated her labia, majora and found lacerated wound posterior end of the introitus. She further stated that in the medical papers at Exhibit23 which were written by the Resident Doctor Mrs. Prachi Deshmukh, on page7 of the said case papers, the history of assault and rape was noted and she was called to examine the patient. She stated before the Trial Court that considering the nature of injuries sustained by PW2 at her private part, the history given by her and laboratory report of the presence of sperms in vaginal swab, she was of the opinion that there was evidence of forcible sexual intercourse. In this regard, she referred to the laboratory report at Exhibit26 which is signed by the pathologist Dr. Neeta Munshi and she identified her signature on the said report. She also confirmed the injury certificate at Exhibit27 which was issued by her. In her cross examination, the defence could not bring out any material to disbelieve the testimony of PW4 on the material circumstance of forcible sexual intercourse.

24. The Chemical Analyzer's reports have been placed on record at Exhibits86 to 90. The blood group of the deceased remained inconclusive as per Exhibit86. As per Exhibit87, the blood group of PW2 is "B". Articles 9, 10 and 11 listed in Exhibit87 were clothes namely Saree, Peticoat and blouse and the said report went to show that the said articles smeared with blood of group "B". As per the report at Exhibit88 the weapon "Kukri" which was recovered at the instance of the accused was smeared with blood of group "B" and the pant and underwear of the accused also had blood stains of group "B". Though his blood was sent for Chemical analysis, as per Exhibit89 the blood group remained inconclusive. As per the medical report dated 24.03.2011 submitted by the Superintendent of St. George Hospital, Mumbai, the blood group of the accused is "A Rh positive". The presence of blood of group "B" on Kukri (weapon), trouser and underwear of the accused remained unexplained by him in his statement recorded u/s 313 of the

Code of Criminal Procedure. The weapon (kukri) has been seen by us in the Court and undoubtedly, it is a deadly weapon. A single blow of this weapon could also result in death either immediately or by bleeding if no medical treatment could be made available to the victim. Such a weapon would not be available with a mechanic like the accused unless procured especially. It is also not like a knife or sickle and it is a special weapon which is used by the criminals or by the decoits so as to inflict a deadly attack.

25. Mr. Apte, learned Counsel for the accused submitted that the prosecution evidence on record did not prove beyond a reasonable doubt that PW2 was subjected to forcible sexual intercourse during the incident. He also pointed out that if the medical papers at Exhibit23 indicated the history of assault and rape and if such evidence was disclosed by the medical papers, no explanation has come through the evidence of PW17 as to why the charge sheet filed by him did not mention about the said offence of rape. He also pointed out that the medical examination of the accused, if conducted at any Government Hospital and more particularly showing his capability to indulge in sexual intercourse, was not placed on record before the Trial Court. He also referred to the cross examination of PW2 and further pointed out that PW2 and PW8 being young couple and the fact that PW8 had come home for lunch before the incident; did not rule out the possibility that the couple had engaged in sexual intercourse prior to the incident and therefore, the opinion of PW4 regarding presence of sperms in vaginal swab itself could not connect the accused in the offence of rape unless there was some further evidence of DNA test or chemical analysis report indicating the semen blood group so as to connect the accused with the offence of rape.

(Continued on 25.03.2011)

26. Though the medical examination of the accused was apparently carried out during investigation, we did not find the result or report thereof in the evidence adduced during trial. Therefore, by our order dated 23.03.2011, we had directed to conduct the medical examination of the accused by invoking the powers of Appellate Court u/s 391 of Code of Criminal Procedure. Accordingly, the Superintendent, St. George Hospital, Mumbai has sent his report dated 24.03.2011, which shows the blood group of the accused to be "A Rh positive", and that he is capable of performing sexual intercourse. It is well settled that the primary object of the provisions of Section 391 of Code of Criminal Procedure is the prevention of a guilty man's escape through some careless or ignorant action on the part of the prosecution before the Trial Court or for the vindication of an innocent person wrongly convicted, where the Court omitted to record the circumstances essential for the elucidation of the truth. In the case of Rambhau and Another Vs. State of Maharashtra, , a Larger Bench of the Supreme Court held that Section 391 of Code of Criminal Procedure forms an exception to the general rule that an appeal must be decided on the basis of the evidence which was before the Trial Court and the powers being an exception, shall always have to be exercised with caution and circumspection so as to meet the ends of

justice. At the same time, it is equally well settled that the powers u/s 391 of Code of Criminal Procedure cannot be pressed into service in order to fill up the lacunae in the prosecution's case.

27. It has come in the evidence of PW1 that immediately after the offence she was the first person to enter the flat of PW2 and at that time, she had seen PW2 without any clothes on her person. PW2 has also stated before the Trial Court that she was wearing Salwar, T shirt and nicker of gray colour at the time of incident. The evidence of PW17 Pukhaji Sonawane who was the Investigating Officer proved that these clothes were blood stained and recovered from the spot. It is not possible that these clothes were likely to be dropped from her person unless she was forced to remove them. The medical evidence at Exhibit23 clearly indicated that on 10.09.2007 when PW2 was shifted to Ruby Hall Clinic she gave the sexual assault history and the doctor who recorded the case history has been identified by the PW3 as well as PW4. On page7 of the medical evidence Exhibit23 there is clear noting of rape during the incident. The defence had tried to bring on record before the Trial Court through the evidence of PW2 and PW8 that they had indulged in sexual intercourse before the incident. PW2 stated before the Trial Court that the doctor had advised her not to have sexual intercourse till her delivery and she was already in the fifth month of her pregnancy. PW8 stated before the Trial Court that there was no sexual intercourse between him and his wife (PW2) any time preceding 48 hours of the incident. The opinion of PW4 r/w the medical certificate at Exhibit26 proved beyond any doubt that PW2 was subjected to forcible sexual intercourse on 10.09.2007 and during the incident, by the accused.

28. In case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, , the Supreme Court while dealing with the nature of evidence required to be considered in the case of a victim of rape, held thus:

If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. This rule is subject to the qualification that corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation ;or when the "probabilities factor" is found to be out of tune. Corroboration of the victim of the sexual offence may be considered essential to establish the offence in the backdrop of the social ecology of the western world. But it is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. Rarely will a girl or a woman in India make false allegations of sexual assault due to various psychosocial factors. And when in the face of those factors the crime is brought to light there is a built-

in assurance that the charge is genuine rather than fabricated.

In the subsequent decision, in case of the State of Maharashtra Vs. Chandraprakash Kewalchand Jain, , the Supreme Court held that:

A prosecutrix of a sexoffence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration.

Hence, having regard to the totality of the circumstances brought before the Trial Court by the prosecution and in the evidence of PW1, PW2, PW4 and PW8 we have no hesitation to hold that the Trial Court was right in recording the finding that the accused raped PW2 during the incident on 10.09.2007 in her house and she was pregnant of more than 16 weeks at that time. Failure of conducting the DNA test would not affect or vitiate the prosecution case and we are satisfied that PW2 had sufficient reasons, keeping in mind the advice given by her husband, not to disclose to the Police that she was subjected to forcible sexual assault by the accused. The findings of the Trial Court, in support of its order of conviction, do not suffer from any infirmities.

29. Now coming to the issue of sentence, it was submitted by Ms. Mhatre, the learned APP by relying upon the decision in the case of Machhi Singh and Others Vs. State of Punjab, that the Trial Court was right in calling the instant case as the "rarest of rare cases" and imposing the death penalty. She submitted that any other sentence was not justified considering the totality of the circumstances which were proved by the prosecution before the Trial Court. She further submitted that the aggravating circumstances in this case over weighed the mitigating circumstances and in fact there was hardly any mitigating circumstance. She further submitted that even before this incident there was a criminal case bearing Cr. No. 226/2006 registered against the accused for the offence punishable u/s 379 of the Indian Penal Code but he was acquitted. She further submitted that there is no case to interfere with the order of sentence in the peculiar facts and circumstances of this case and that the sentence of death by hanging is required to be confirmed.

30. Mr. Apte, the learned Counsel for the accused, on the other hand, referred to the decision of this Court in the case of the State of Maharashtra v. Babu alias

Ravindra Suresh Kamble 2011 All MR (cri) 1 and submitted that the case of the accused cannot be termed as the "rarest of rare cases" and even if the accused is found to be guilty of the charge punishable u/s 376(e) of the Indian Penal Code along with other offences as held by the Trial Court, there is no case to award the sentence of death. He submitted that the accused is a young man in his twenties and it cannot be believed perse that he is beyond reformation/ rehabilitation in the society if given such a chance. The mitigating circumstances which ought to be considered in favour of the accused have not been considered by the Trial Court and unless the Trial Court had recorded the finding that the accused was unfit to remain to be a member of the civil society, the Trial Court could not have awarded the sentence of death, more so, considering obligation imposed on the Trial Court u/s 354(3) of the Code of Criminal Procedure.

31. In the case of Babu alias Ravindra Suresh Kamble (supra), the victim was a young girl of 5 years and she was kidnapped, raped and murdered by the accused. The accused was convicted for the offences punishable under Sections 302, 363, 376(2)(f) and 201 of IPC. For the offence punishable u/s 302 of IPC, he was sentenced to capital punishment of death. However, in Criminal Confirmation Case No. 1/2009, this Court commuted the death sentence into life imprisonment and also directed that the sentence of imprisonment u/s 376(2)(f) of IPC shall run after the life sentence u/s 302 of IPC. In addition, this Court directed that the sentences of imprisonment under Sections 363 and 201 of the Indian Penal Code shall run concurrently with the above sentences of imprisonment. Mr. Apte submitted that the nature of offences in the instant case are not more aggravating than in the case of Babu Kamble (supra) and therefore, he urged before us not to confirm the sentence of death and rather to commute it to the sentence of life imprisonment, in the same manner as in Babu Kamble's case.

32. In the case of Bachan Singh Vs. State of Punjab, , the Constitution Bench upheld the constitutional validity of the death sentence and the following propositions could be deduced from the said decision:

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

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

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

(d) A balance sheet of aggravating and mitigating circumstances has to be drawn

up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

The Supreme Court further held that for making the choice of punishment or for ascertaining the existence or absence of special reasons in that context, the Court must pay due regard both to the "crime" and the "criminal". What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. The Supreme Court, therefore, held that it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments and further cautioned that it is only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist.

33. Following the decision in the case of Bachan Singh (supra), the Three Judge Bench of the Supreme Court in case of Machhi Singh and Ors. v. State of Punjab (supra), held as under:

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weight to the mitigating circumstances which speak in favour of the offender?

In the case of Dhananjay Chatterjee alias Dhana Vs. State of W.B., , while upholding the death sentence awarded by the Courts below, the Supreme Court held in paragraph 15 thus:

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

More recently in case of B.A. Umesh Vs. Regr. Gen. High Court of Karnataka, , while upholding the death sentence awarded by the Courts below, the Supreme Court stated:

Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her. As has been indicated by the Courts below, the antecedents of the Appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation. The offences committed by the Appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of a similar type in the house of one Seeba.

In the case of *Rameshbhai Chandubhai Rathod v. the State of Gujarat* JT 2011 (2) SC 35, a three Judge Bench of the Supreme Court decided a reference made to it on the issue of death sentence and having regard to the facts in the case, it held that it would not be proper to maintain the death sentence. It preferred to adopt a viamedia in the light of the earlier judgments in case of *Ramraj @ Nanhoo @ Bihnu Vs. State of Chhattisgarh*, and *Mulla and Another Vs. State of Uttar Pradesh*, and commuted the death penalty to life imprisonment. In that case the accused who was 28 years of age was employed as a watchman in a housing society. The daughter of one of the flat owners and a student in the 4th standard was kidnapped, raped and murdered. The accused was convicted exclusively on the basis of the circumstantial evidence for the offences punishable under Sections 363, 366, 376, 302 and 397 of the Indian Penal Code. He was awarded the sentence of death for the offence punishable u/s 302 of the Indian Penal Code. The High Court had confirmed the death sentence by holding that the case fell in the category of rarest of rare cases as held in the cases of *Bachan Singh* and *Machi Singh* (supra).

The learned Counsel for the accused, relying upon the decisions in the cases of *Rameshbhai Rathod* (supra) and *B.A. Umesh* (supra), submitted that the antecedents of the accused before the Trial Court were not such as to hold that he would be a menace to the society and is incapable of rehabilitation. He, therefore, urged that as done by the Supreme Court in case of *Rameshbhai Rathod* (supra), a viamedia can be adopted in the instant case as well.

34. The mitigating circumstance for the accused in the instant case is his young age. In the earlier case filed against him and arising from Cr. No. 226/2006 for the offence punishable u/s 379 of the Indian Penal Code, he has been acquitted. But, these circumstances by themselves cannot be sufficient to interfere with the death sentence and we will have to consider the aggravating circumstances as well. The accused has studied upto 12th standard, had left his village about 3 years back, was staying at Pune and was working as Mechanic. In his statement recorded u/s 313 of the Code of Criminal Procedure, he stated that he owned 12

acres of irrigated agricultural land and was financially sound. As against this, if we consider the circumstances of the incident, it is clear that the weapon which he used was especially procured and it is not available with any mechanic. In our view, the weapon is deadlier than even a butcher's knife. The intention in procuring this weapon also speaks of the character of the accused and leads to an inference that he was not intending to stop at one robbery. After the accused entered the flat of PW2, he had seen two helpless women and one of them in her family way and other an old lady of 65 years of age. The moment he threatened with the weapon they had kept quiet but he started inflicting bleeding assaults on these ladies. He snatched the gold chain around the neck of the deceased and demanded the bangles in her hand. When she disclosed that they were not of gold, he got furious and amputated her four fingers. He, thereafter, amputated the wrist of other hand of the same old lady while she was lying on the floor in the injured condition. In the meanwhile, he continued his deadly assaults on PW2 who in determination to save the child in her womb, sustained the attacks on her back, neck and hands. After the accused collected the booty, he could have walked out of the flat but he did not do that and noticing some movement of the old lady, he rushed towards her and uttered "what is use of this old lady being alive?" and gave a blow on her neck with the weapon in his hand. The accused, thereafter, forced PW2 to undress herself and raped her and even thereafter he inflicted further injuries on her back and neck. He was in the flat for about 30 minutes. After committing these crimes he went to the bathroom, washed himself as well as the weapon and walked out of the flat under the belief that he killed both the victims. It appears that the lifeline of PW2 was very strong and she was lucky to have received the medical aid immediately and she survived. It has also come in the evidence of PW4 Dr. Shubhada Deoskar that the medical treatment given by her to PW2, saved the pregnancy despite the vaginal injuries inflicted by the accused to PW2. This is not a case which was based on the circumstantial evidence. PW2 was an eye witness to the murderous attack on her grandmother-in-law as well as herself. The circumstances may also go to believe that the accused was hungry of blood like a beast. The evidence of PW13 (Rajendra Sawant) and a childhood friend of the accused also proved before the Trial Court that the accused did not have any remorse or repentance of what he had done on 10.09.2007 but he proudly told him that he cut two ladies (human beings) and therefore, he was not scared of anyone.

The behaviour of the accused during the incident and thereafter, till he was arrested, makes us believe that he is likely to be a nuisance to the orderly and civilized society. The accused could think of satisfying his lust inspite of the bleeding injuries sustained by the PW2 and though a dead body was lying in the room which was full of blood. After committing such acts the accused showed an unusual calm in washing himself and the weapon before leaving which, to us, appears extremely perverse. We are, therefore, satisfied that having regard to the mitigating and aggravating circumstances in this case, no other sentence other than the sentence of death would serve the cause of justice. The sentence

of life imprisonment would be altogether inadequate. Hence, we confirm the sentence of death awarded by the Trial Court for the offence punishable u/s 302 of IPC. There is no case made out to interfere with the sentence awarded by the Trial Court for the other offences and hence, the appeal filed by the accused must fail.

35. In the premise, the confirmation case is allowed and the order of conviction and sentence passed by the learned Additional Sessions Judge, Pune in Sessions Case No. 150/2008 including the sentence of death by hanging till he is dead, is hereby confirmed.

Criminal Appeal No. 7/2011 filed by the accused is dismissed.

36. The Registrar (Judicial) is directed, while complying with the requirements of Section 371 of Code of Criminal Procedure, to forward a copy of this order to the accused at his jail address as well as to the Registrar (Judicial) of the Supreme Court, forthwith.

37. For the reasons separately recorded in the oral judgment, the Court passes the following order:

In the premise, the confirmation case is allowed and the order of conviction and sentence passed by the learned Additional Sessions Judge, Pune in Sessions Case No. 150/2008 including the sentence of death by hanging till he is dead, is hereby confirmed.

Criminal Appeal No. 7/2011 filed by the accused is dismissed.

The Registrar (Judicial) is directed, while complying with the requirements of Section 371 of Code of Criminal Procedure, to forward a copy of this order to the accused at his jail address as well as to the Registrar (Judicial) of the Supreme Court, forthwith.