

(1998) 04 BOM CK 0012

In the Bombay High Court

Case No : Confirmation Case No. 1 of 1997, with Criminal Appeal No. 92 of 1997

The State of Maharashtra

APPELLANT

Vs

Babu @ Babusya Vithal Rathod and others

RESPONDENT

Date of Decision : 17-04-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 35, 354(3), 366

Evidence Act, 1872 — Section 106, 114, 3, 59, 9

Penal Code, 1860 (IPC) — Section 149, 302, 392, 396, 397

Citation : (1998) 5 BomCR 863

Hon'ble Judges : Vishnu Sahai, J; Ashok Desai, J

Bench : Division Bench

Advocate : T.E. Mane, for the Appellant; S.R. Borulkar, Deepak N. Salvi and Shahaji R. Shinde, A.P.Ps., for the Respondent

Judgement

Vishnu Sahai, J.—Since both the matters arise out of the same set of facts and a common judgment we are disposing them off together.

2. Vide judgment and order dated 11th December, 1996, passed in Sessions Case No. 46 of 1996, the 2nd Additional Sessions Judge, Sangli, convicted and sentenced the appellants of Criminal Appeal No. 92 of 1997, in the manner stated hereinafter:

(i) Babu @ Babusya Vithal Rathod, Gulab @ Gulya Abbas Bhosale and Kamalakar Abdul Pawar u/s 396 I.P.C. to death;

(ii) Kamalakar Abdul Pawar u/s 302 I.P.C. to death.

(iii) Babu @ Babusya Vithal Rathod, Gulab alias Gulya Abbas Bhosale and Kamalakar Abdul Pawar u/s 397 I.P.C. to 5 years R.I. and to pay a fine of Rs. 500/- each, in default to suffer R.I. for a period of 1 year.

(iv) Kamalakar Abdul Pawar u/s 392 I.P.C. to 3 years R.I.

(v) Mahesh Nagnath Gaikwad, under sections 396, 397 and 392 I.P.C. to 10

years R.I. and to pay a fine of Rs. 500/-, in default to undergo R.I. for a period of 1 year under the first count and a separate sentence of 3 years R.I. under the second and third counts.

(vi) Rekha @ Bormali Nagnath (Mahesh) Gaikwad, Ushabai @ Pappi Kamlakar Pawar, Surekha (r) Talangi Gulab Bhosale, Pinki @ Dengi Gelya Shinde, Ambu Bhalchandra Pawar, and Vijayabai Dhondya Shinde to 10 years R.I. and to pay a fine of Rs. 200/- each, in default to suffer R.I. for a period of 1 year (in the operative part it has not been mentioned on what count the said sentence has been awarded, but it appears to have been awarded for the offence u/s 396 I.P.C.); and

(vii) Ushabai @ Pappi Kamlakar Pawar, Surekha @ Talangi Gulab Bhosale, Pinki @ Dengi Gelya Shinde, and Ambu Bhalchandra Pawar u/s 411 I.P.C. and R.I. for 2 years.

The sentences of the appellants were ordered to run concurrently.

The said convictions and sentences have been challenged by the appellants vide Criminal Appeal No. 92 of 1996.

3. Confirmation Case No. 1 of 1997, arises out of the reference dated 11-12-1996 made by the 2nd Additional Sessions Judge, Sangli, in Sessions Case No. 46 of 1996 for confirmation of the death sentences of appellants Babu @ Babusya Vithal Rathod, Gulab @ Gulya Abbas Bhosale and Kamalakar Abdul Pawar.

4. The prosecution case can be compartmentalised in three separate instances, all of which occurred on the night of 10/11-6-1995, between 9.30 p.m. and 1.30 a.m., wherein all the appellants and the absconding accused Hotelya Yeshwant Shinde, Shelya Hotelya Shinde and Babu Uddhav Potdar are said to have participated.

The first incident pertains to a dacoity cum murder wherein Rajendra Raichure and Balwant Shamrao Pawar were looted and murdered. In it Keshav Shivaji Bhandare P.W. 14 and Anil Ramchandra Vadnere P.W. 18 were also looted and injured. The factual matrix from which it arises is as under:

On 10-6-1995 at about 6 p.m. Keshav Shivaji Bhandare P.W. 14, went to the house of Rajendra Raichure in village Khole for bringing "Karvanda" (berries). After taking dinner both of them along with cash of Rs. 700/- which was kept with Rajendra proceeded for Junoni on the Sholapur - Kolhapur road. Sometimes after reaching Junoni they saw a truck coming from Sangola and proceeding towards Kolhapur. By waving their hands they stopped the truck. They found ladies sitting in the cabin of the said truck. The driver of the truck Balwant Shamrao Pawar, asked them to sit over the cabin of the truck. Consequently they sat there-upon. The time was about 7 P.M. At that time four persons were already sitting there. Thereafter the truck proceeded further. It was stopped at Nagaj stop as a passenger with a black suit case (Anil Ramchandra Vadnere P.W.

18) had given a signal for stopping it. The said passenger entered into the cabin of the truck and sat therein. At that time the cleaner of the truck, Sahadev Chagan Manvatkar came out from the cabin and sat along with Keshav Bhandare. Thereafter the truck proceeded towards Kolhapur.

After some time the four persons who were sitting over the cabin of the truck started threatening Keshav Bhandare and Rajendra Raichure. They started enquiring from them as to how much money they had, started assaulting Rajendra with a wooden plank, whereupon Rajendra took out the money and handed over the same to them. They also enquired from Keshav Bhandare whether he was having money and he replied in the negative. Thereafter one of the persons assaulted Keshav Bhandare on his head with a wooden plank and another gave a knife blow on the right side of his chest and right forearm. It is said that Rajendra Raichure implored the appellants not to assault Keshav Bhandare, whereupon one of the persons tied his feet with a rope another caught both of his hands; and the third gave one knife blow on his chest.

In his statement in the trial Court Keshav Bhandare pointing out to appellant Mahesh stated that he had inflicted knife blows on him; and pointing out towards Kamlakar stated that he had given him blows with wooden plank. Pointing out towards Babu, Gulab and Kamlakar, he stated that Babu had caught hold of hands of Rajendra, Gulab had inflicted knife blows on Rajendra and Kamlakar had tied the feet of Rajendra with a rope.

After assaulting Keshav and Rajendra, appellants Babu, Gulab, Kamlakar and Mahesh came out of the truck. The ladies who were sitting in the truck also came out of the truck and by holding hands of the truck driver Balwant started pushing him (The English translation that the driver was dragged is inaccurate). They took him towards the hill, beating him all along. It is said that two men climbed in the truck from the side of the cleaner and one from the side of the driver. One of them started snatching the bag of Anil Vadnere, P.W. 18. The said person and another, started assaulting Anil Vadnere with knives. The third person assaulted him with a stick. Thereafter they snatched his finger ring, cash to the tune of Rs. 500/- and his brief case wherein his camera of Pentex make and two flash guns, one shawl, one trouser, two shirts and a towel were kept.

The miscreants are said to have been recognized in the light which was in the cabin of truck, head lights of the truck and moon light.

When Keshav Bhandare saw that Balwant was being taken away he alighted from the truck and rushed towards a hut situated in the nearby field. On hearing his call one person from the hut with a torch in his hand came out. By that time a jeep had also come from Kerewadi side and stopped near the truck. At that time Anil Vadnere and Sahadev also reached there. On the said jeep all of them proceeded to Kavathe Mahankal Police Station. On reaching there A.P.I. Uttam Bagal P W. 20 found that Anil Vadnere and Keshav Bhandare were seriously injured and consequently sent them to Rural Hospital, Kavathe Mahankal.

5. After the first incident the appellants proceeded to Agalgaon and reached the farm house of Radhabai Ganpat Koli P.W. 11, at about 11.30 p.m. the same day where the second incident took place. At the said time Radhabai Koli was talking to her son Narayan Koli. They heard some commotion. Narayan Koli felt something fishy. About 4 to 5 persons who were aged about 22 to 25 years and were dressed in blackish underpants and banians entered Radhabai's house. They took the gold ornaments which were under her bedding as also her earrings and also took away the earrings and necklace of her daughter Rekha. Thereafter they snatched the mangalsutra, gold nose ring, silver painjan from the person of her daughter-in-law Laxmi P.W. 12. Next they took out a gold mangalsutra, two small finger rings of gold and three wrist watches from a container which was in a suit case, which Narayan had brought from Bombay. When Narayan asked them not to take the said articles one of them inflicted a knife blow on his chest. In electric light Radhabai and her daughter-in-law Laxmi Koli (wife of Narayan), recognized the miscreants.

In their statement in the trial Court Radhabai and Laxmi Koli pointed towards Babu, Gulab, Kamlakar and Mahesh, as the persons who had committed dacoity and participated in the assault at their house. Radhabai in addition pointed out towards Ushabai and Vijayabai as participants and assailants. She pointed out towards Kamalakar and stated that he had inflicted the knife blow on Narayan.

6. We now come to the third incident. After committing dacoity at Radhabai's house, the appellants proceeded to Langarpeth (Taluka Kavathe-Mahankal) and reached the house of Tanaji Bhaurao Patil, P.W. 8 situated in a field near the railway line the same night at about 1.30 am. The evidence of Tanaji Patil is that there were about 5 to 6 persons, including females and one of them gave a stick blow to him. He implored them that they should not assault him and could take away whatever they wanted. Thereafter they took away a radio and a watch which were lying in the room and some hens from the shed. Before leaving they again assaulted him with a stick. Among the articles taken away by them was a wrist watch of H.M.T. make of 17 jewels (Article No. 106).

In his statement during trial Tanaji Patil pointing out towards the appellants stated that they were the persons who had committed dacoity at his house and assaulted him.

7. After sending Keshav Shivaji Bhandare P.W. 14 and Anil Ramchandra Vadnere P.W. 18 to Rural hospital Kavathe-Mahankal, A.P.I. Vijay Uttam Bagal P.W. 20 along with Sahadev Manvatkar proceeded to the place of the incident where he found a truck with both head lights and cabin light on. In the head lights of the truck he recorded the F.I.R. of Sahadev Chagan Manvatkar and forwarded the same to Police Station Kavathe Mahankal for registering the offence. On the basis of the F.I.R. P.S.O. Hazare registered C.R. No. 62 of 1995 under sections 395, 396 and 397 I.P.C. at Police Station Kavathe Mahankal. The F.I.R. is at Exhibit 75. Thereafter Sahadev Chagan Manvatkar was sent for medical examination.

8. The injuries of Tanaji Patil P.W. 8 and Sahadev Manvatkar (not examined) were medically examined by Dr. Anita Prakash Gujar P.W. 17 at Rural Hospital Kavathe Mahankal, on 11-6-1995 at 8.15 a.m. and on 12-6-1995 at 6 p.m. respectively.

On the person of Tanaji Patil the doctor found the following injuries:

- (i) Contusion lacerated wound over Rt. parietal region. It was a scalp deep and 4 cm. in size.
- (ii) C.L.W. on left frontal region on parietal region scalp deep.
- iii) Contusion with superficial abrasion on forehead, and
- iv) Bleeding through nose and black eyes.

The said injuries were attributable to a blunt weapon.

On the person of Sahadev Chagan Manvatkar the doctor found one contusion on the forehead which was attributable to a hard and blunt object. According to Dr. Gujar the injuries of the said persons were 6 hours old.

Going backwards, the injuries of Keshav Shivaji Bhandare RW. 14 and Anil Ramchandra Vadnere P.W. 18 were medically examined on 10th June, 1995, at about 11.20 p.m. by Dr. Vilas Krishna Khot P.W. 16. On the person of Anil Ramchandra Vadnere the doctor found the following injuries:

- 1) Incised wound over chest lateral border of sternum left side at the level of nipple, size 1 1/2 cm. x bone deep.
- 2) Incised wound lateral surface middle 1/3 of left arm, size 2 x 1/2 cms. skin deep.
- 3) Incised wound left chest posterior auxiliary line 2 x 12 cm. muscle deep.
- 4) Incised wound left arm posterior to injury No. 2 size 2 cm. x % cm. skin deep.
- 5) Incised wound antero internal surface of forearm, size 1 1/2 cm. x 1/2 cm. x muscle deep.
- 6) Contusion left scapular region extending to left arm, size 5 x 1 cm.
- 7) Contusion over right shoulder region, size 4 cm. x 1 cm.

In the opinion of the doctor the injuries 1 to 5 were grievous in nature were caused by a sharp weapon and injuries 6 and 7 which were simple in nature were by a hard and blunt object.

On the person of Keshav Shivaji Bhandare, the doctor found the following injuries:

- 1) C.L.W. left parietal region of scalp, edges are irregular. Fresh bleeding present;
- 2) Incised wound anterior surface on left shoulder, size 1 1/2 cm. x 1/2 cm. x muscle deep;

3) Incised wound on left chest super lateral surface of nipple 1 1/2 cm. x 1/2 cm. x muscle deep.

4) Injury with diffuse swelling ulnar surface of wrist.

5) Injury with diffused swelling medial surface of right knee.

In the opinion of the doctor injuries 2 and 3 which were grievous in nature were caused by a sharp object and the remaining injuries which were simple in nature, by hard and blunt object.

According to Dr. Khot the injuries of both the injured were caused within 6 hours.

9. The autopsy on the corpse of Rajendra Raichure was conducted on 11 -6-1995 by Dr. Ananda Nana More RW. 9 who found the following three injuries on it:--

1) Stab injury at left of chest, Transverse 4 cm below clavicle and 4 cm. upward and laterally of left mammary gland 2 cm. x 1 cm. x upto chest cavity.

2) Contusion at left side cheek admeasuring 2 cm. x 1 cm.

3) Contusion at right side of forehead 2 cm. x 1 cm. All these injuries were ante mortem.

On internal examination the doctor found laceration on left side of the lungs; and pulmonary vein and aorta cut through and through. In the opinion of the doctor the deceased died on account of shock as a result of severe haemorrhage due to stab injury which was sufficient in the ordinary course of nature to cause death.

On the person of Balwant Pawar the doctor found the following ante mortem injuries:

1) Clean lacerated wound at right side of the forehead vertically measuring 10 cm. x 2 cm x 1 cm.

2) Fracture at right side scalp vertically Rt. eye to mid of temporal region.

3) Incised wound at right side of scalp post, vertically 2 cm. x 1 cm.

4) Stab wound at left side of chest mid-clavicle line in between 4th x 5th ribs.

5) Incised wound at right side of axilia posteriorly transverse 2 cm. x 1 cm.

6) Incised wound at rt. side of lumber region posteriorly transverse 1 cm. x 1 cm. x 1 cm. (3 in number).

7) Incised wound at Rt. scapula vertically 2 cm. x 1 cm. x 1/2 cm.

8) Incised wound at left scapula 2 cm x 1 cm. x 1 cm.

9) On external examination only fracture at right side scalp vertically, and right side of mid of temporal region of scalp.

On internal examination he found fracture of right side forehead, scalp and right

auricle; pericardium and auricle of heart punctured.

In the opinion of Dr. More the deceased died on account of shock due to severe haemorrhage, as a result of stab injury and head injury. Excepting injuries 5, 6, 7 and 8 the said injuries were individually sufficient to cause his death in the ordinary course of nature.

10. Going backwards, on 10-6-1995 at 11.15 p.m. A.R.I. Shivaji Maruti Roopnar of Kavathe Mahankal Police Station, (P.W. 21), received information on wireless that a dacoity was committed in a truck within the jurisdiction of Police Station Kavathe Mahankal. Accordingly he set out to apprehend the dacoits and returned at 2.30 a.m., after an unsuccessful endeavour. At that time the P.S.O. informed him that a wireless message had been received that a dacoity was also committed in village Agalgaon and the dacoits were proceedings towards eastern direction. At about 7.30 to 8 a.m. police constables Roopnar and Mullani suspected that dacoits had come to S.T. stand at Jath. They reached there and arrested five ladies, namely, Rekha, Ushabai, Surekha, Pinki, and Ambu and sent them on a private jeep to the police station. A.P.I. Shivaji Roopnar took the said appellants in custody and thereafter on a jeep proceeded for tracking the other dacoits. In Jath inside a banana grove he arrested appellant Kamlakar. While he was returning along with Kamlakar he found that the police and P.W. 13 Suresh Tammanna Masal had arrested appellants Babu, Gulab and Mahesh.

In the presence of public panch Achutrao Appasaheb Gaikwad P.W. 15, A.P.I. Shivaji Roopnar recovered the looted property, weapons of assault and blood stained clothes from the appellants under two separate panchanamas; one relating to the male accused, i.e. appellants Babu, Gulab, Kamlakar and Mahesh, Exhibit 51 and the other relating to female accused/appellants viz. Rekha, Ushabai, Surekha, Pinki, and Ambu (Exhibit 52). In exhibits 51 and 52 it has been separately mentioned as to what recovery was made from which appellant.

On 18-6-1995 A.R.I. Roopnar arrested appellant Vijaybai. During interrogation, she revealed that she had handed over some looted property to one Babu Poddar of Jalkot, taluka Tulzapur. On 23rd June, 1995, the said Babu Poddar produced before A.R.I. Roopnar, two gold bars of 22 gms. and 5 gms. respectively.

It is significant to point out that there is no recovery panchanama in respect of the said seizure and this has not been disputed by the learned Additional Public Prosecutor Mr. S.R. Borulkar also.

Apart from A.P.I. Roopnar, the investigation was conducted in the usual manner by A.P.I. Vijay Uttam Bagal, P.W. 20, and Circle Inspector Ganesh Shivajirao Gavali, P.W. 22. The former interrogated the witnesses, prepared the panchanamas of the dead bodies of the deceased persons and the spot panchanama and the latter on 3-7-1995 sent a letter to the Taluka Executive Magistrate, for holding test identification of the appellants.

11. The identification of the appellants was conducted on 6-7-1995 within the

precincts of Tehsil Jath, by Tahasildar-cum-Executive Magistrate, Eknath Bhimrao Dudhal, P.W. 19.

Since the substantive evidence is identification by the witnesses in Court we are advertng both to identification by the witnesses at the test parade and in Court.

In the test identification appellants Babu, Gulab, Kamlakar and Mahesh were identified by all the three eye-witnesses who have been examined in the instant case, viz. Tanaji Patil, Radhabai Koli and Keshav Bhandare, P.Ws. 8, 11 and 14 respectively. The said witnesses also identified them in Court. Thus against the said appellants there is the evidence of three identifications.

Though at the test identification appellant Rekha was identified by all the three witnesses but since Radhabai and Keshav Bhandare did not identify her in the Court against her there is a solitary identification viz.. of Tanaji Patil P.W. 8, who identified her both at the test identification parade and in the Court.

Ushabai was correctly identified by Tanaji Patil and Keshav Bhandare at the test identification parade but Radhabai could not identify her, though she identified her in Court. Keshav Bhandare could not identify her in Court. It was only Tanaji Patil who identified her both in the test identification parade and in the Court and therefore against her there is only one identification.

Surekha, Pinki and Ambu were correctly identified by Tanaji Patil and Keshav Bhandare. Radhabai could not identify them either at the test parade or in Court. Keshav Bhandare did not identify them in the Court. It was only Tanaji Patil who identified them both in the test identification parade and in the Court and therefore against them there is only one identification.

Vijaybai was correctly identified by Tanaji Patil and Radhabai both at the test parade and in Court. Although Keshav Bhandare correctly identified her at the test parade he could not identify her in the Court. Hence against her there is the evidence of two identifications.

12. After completion of investigation the appellants were charge-sheeted. The case was committed to the Court of Sessions in the usual manner. The appellants were charged on a number of counts, including those on which they were found guilty by the learned trial Judge.

During trial in all prosecution examined 23 witnesses. In respect of the first incident two eye-witnesses were examined viz. Keshav Shivaji Bhandare P.W. 14 and Anil Ramchandra Vadnere P.W. 18 (the latter had not been sent to the test identification parade).

With regard to the second incident two eye-witnesses viz. Radhabai Koli P.W. 11 and her daughter-in-law Laxmi Narayan Koli P.W. 12 were examined, (the latter was not sent to test identification parade).

With regard to the third incident one eye-witness Tanaji Patil P.W. 8 was examined. In defence no witness was examined.

The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above.

13. We have heard Mr. T.E. Mane for the appellant and Mr. S.R. Borulkar, A.P.P. with Mr. Deepak N. Salvi, A.P.P. and Mr. Shahaji R. Shinde, A.P.P. for the respondent. Since in addition to the appeal preferred by the appellants there was the statutory reference in terms of section 366 Cr.P.C. for confirmation of death sentences of appellants Babu, Gulab and Kamlakar we have meticulously perused the statements of the prosecution witnesses, the material exhibits tendered and proved by the prosecution, the statements of the appellants recorded u/s 313 Cr.P.C. and the impugned judgment. After reflecting over the matter we are of the judgment that the reference for confirmation of death sentences of the appellants Babu, Gulab and Kamlakar deserves to be rejected and Criminal Appeal No. 92 of 1997 preferred by the appellants deserves to be partly allowed inasmuch as the death sentences awarded to the appellants Babu, Gulab and Kamlakar deserve to be substituted by a sentence of rigorous imprisonment for life.

14. We may straight away mention that two of the findings recorded by the trial Court viz.

(i) that a dacoity was not committed at the house of Radhabai P.W. 11 but a robbery was committed; and

(ii) no dacoity was committed at the house of Tanaji Patil, P.W. 8, are contrary to the weight of evidence on record, and unsustainable.

The evidence of Radhabai shows that the appellants Babu, Gulab, Kamlakar, Mahesh Ushabai, and Vijaybai participated in the dacoity at her place wherein Narain Koli was murdered. Since Radhabai did not identify Ushabai at the test Parade, her evidence only proves the participation of the five appellants other than Ushabai and once it is proved that five appellants participated in the said incident, then the offence would be dacoity with murder and not robbery.

Again we find that the learned trial Judge was wholly unjustified in holding that no dacoity took place at the house of Tanaji Patil. Paragraphs 2, 4 and 6 of the evidence of Tanaji Patil show that 5 or 6 dacoits, including ladies, participated in the incident; looted property belonging to him; and assaulted him, both prior to and after looting of the property. In Court Tanaji Patil identified all the appellants.

15. The evidence adduced by the prosecution against the appellants is of a dual nature: (A) Identification and (B) Recovery of looted property.

We would first like to take up the evidence of identification. We wish to emphasise that the evidence of identification can be safely accepted, if there is evidence to indicate:-

a) that in between the arrest of the suspects and the identification they were not shown;

- b) the witnesses came in close contact with the miscreants and thus had the opportunity to identify them during the course of the incident;
- c) there was plenty of time for the witnesses to have recognised the faces of the miscreants;
- d) there was adequate light wherein the witnesses could have recognised the miscreants and
- e) the test identification was held in accordance with law.

It is from this perspective that we have to analyse the ocular account rendered by the identifying witnesses (1) Keshav Shivaji Bhandare P.W. 14, Radhabai Koli P.W. 11 and Tanaji Patil P.W. 8.

16. We have gone through the evidence of the eye-witnesses as also that of the police witnesses and we are satisfied beyond a shadow of doubt that in between the arrest and prior to their being put for test identification the appellants were not shown to any of the witnesses. It is true that Tanaji Patil P.W. B, Radhabai Koli P.W. 11, Keshav Shivaji Bhandare P.W. 14 and A.P.I. Shivaji Maruti Roopnar P.W. 21 were suggested in cross-examination that the suspects were shown to them prior to the test identification, but they have categorically denied the said suggestion. The appellants have failed to show by preponderance of probabilities that they were shown to the said witnesses prior to the test identification. They have failed to create a reasonable doubt in our mind of the likelihood of their being shown prior to the test identification. It is pertinent to note that police had no animus or grudge against the appellants and in the absence of the same we fail to fathom any plausible reason on its part to show them to the witnesses prior to the test identification.

17. We next take up interconnected questions whether the witnesses came in close contact with the appellants during the course of the incident and had adequate opportunity and light to recognise their faces and features. Our answer to these questions is in the affirmative.

In this connection we would like to begin with the evidence of Keshav Bhandare, P.W. 14, who deposed about the first incident. A perusal of the statement of this witness shows that on 10-6-1995 at about 6 p.m. he went to the house of the deceased Rajendra Raichure; had dinner; and thereafter, at about 7 p.m. boarded a truck along with Rajendra Raichure. At that time some ladies were sitting in the cabin of the truck. The truck driver directed them to sit over the cabin of the truck where appellants Babu, Gulab, Kamlakar and Mahesh were sitting. At Nagaj bus stop a passenger (Anil Ramchandra Vadnere P.W. 18), got into the truck and sat inside the cabin. After some time Babu, Gulab, Kamlakar and Mahesh started enquiring from him and Rajendra Raichure as to how much money they had. Thereafter they started assaulting Rajendra Raichure with a wooden plank. Babu caught hold of the hands of Rajendra ; Kamlakar tied the legs of Rajendra with a rope; and Gulab inflicted knife blow on Rajendra. He also

stated that Mahesh and Kamlakar had assaulted him with knife and wooden plank respectively. He further stated that the lady appellants dragged the truck driver Balwant Pawar and dragging him took him towards the hill.

17-A. It is significant to point out that the ocular account discloses about three sources of light; (i) light inside the cabin of the truck; (ii) head lights of the truck; and (iii) moon light. Keshav Bhandare recognised the faces and features of the appellants in the said light.

When the statement of Keshav Bhandare is read along with that of Anil Vadnere it becomes crystal clear that he was with the appellants for about 2 1/2 hours. During the said time he came in close contact with them and hence had sufficient opportunity to recognise their faces and mark their features. It should be borne in mind that he was sitting in the truck, next to the male appellants. No wonder, he speaks about the individual roles of the male appellants. And we believe his evidence in this regard.

Learned Counsel for the appellants failed to throw a cloud of doubt on the claim of the prosecution that he had sufficient light and opportunity to graphically witness the incident. The conformity between the manner of assault as deposed to by him and the medical evidence to which we have extensively referred to in paragraph 8 and 9 demonstrates the truth of this.

Accordingly we accept his evidence of identification of the appellants.

18. We now take up the second incident.

The evidence of Radhabai P.W. 11 shows that there was electric light in her farm house. It also shows that the dacoits were in the age group of 22 to 25 years and came in close contact with her and her daughter-in-law Laxmi and snatched their ornaments. Her evidence also shows that there was electric light on the place of the incident, wherein she recognized the appellants Babu, Gulab, Kamlakar, Mahesh, Ushabai and Vijayabai. She stated that Kamlakar had struck a knife blow to her son Narayan. Her evidence is corroborated by medical evidence and that of Laxmi P.W. 12. The latter stated that the incident took place for about 40 to 45 minutes.

In our view Radhabai P.W. 11 who came in close contact with the appellants during the course of dacoity had adequate light and opportunity and hence must have had no difficulty in recognizing the faces of the appellants for it should not be forgotten that the dacoity lasted for about 30 to 45 minutes. In that view of the matter we accept her identification evidence against the appellants.

19. Again with regard to the third incident we find that Tanaji Patil P.W. 8 had sufficient light and opportunity to identify the miscreants during the course of the dacoity. His evidence show that the dacoits came in close contact with him and assaulted him. They also took away his radio, watch and some hens. He also stated that before leaving the dacoits again assaulted him. His evidence is corroborated by medical evidence. During the course of cross - examination it

was suggested that on account of darkness he could not recognize the miscreants but he repelled the said suggestion and stated that there was moon light.

In our view he also had adequate light and opportunity to recognize the appellants during the dacoity and accordingly we accept his identification of the appellants.

20. But for the aberration that in violation of the provisions of the Criminal Manual which are to the effect that not more than 2 suspects should be put together in one parade and in the instant case all the four male appellants Babu, Gulab, Kamlakar and Mahesh were put together for test identification in the same parade we find that the identification has been held in accordance with law. Apart from the said infirmity Mr. Mane, learned Counsel for the appellants, could not point out any defect regarding the manner in which the test identification was held.

21. Mr. Mane strenuously urged that violations of the provisions of the Criminal Manual in a case resting on identification evidence vitiates the evidence of identification in view of three Division Bench decisions of this Court, enumerated herein-after:

- (i) Ramcharan Bhudiram Gupta Vs. State of Maharashtra,
- (ii) Vilas Vasantryao Patil Vs. The State of Maharashtra,
- (iii) 1997 ALL. M.R.93, Pravin Kumar Kailash Chandra Shukla and others v. The State of Maharashtra.

We have gone through the said decisions and we regret that they do not lay down the proposition canvassed by Mr. Mane. In the said decisions after appreciating the infirmities in the manner in which identification was conducted this Court came to the conclusion that it would not be safe to place reliance on the identification evidence.

In Vilas Vasantryao Patil Vs. The State of Maharashtra, in para 6 Majithia, J., (as he then was), with regard to the provisions of the manual observed thus:

"These instructions are not statutory but have been consistently followed to ensure a fair and unassailable identification parade."

22. At this stage it would be pertinent to refer to the submission of Mr. Borulkar that in as much as the evidence shows that witness Keshav Bhandare P.W. 14 remained with the appellants for 2 1/2 hours in the truck and thereafter dacoity and murder in the truck was committed and the dacoity at the house of Radhabai lasted for 30 to 45 minutes even had there been no test identification parade still on the basis of identification of the appellants by the witnesses in the Court a conviction could have been recorded.

Mr. Borulkar urged that in the long time available to the witnesses they had

ample opportunity to mark the features of the appellants. In this connection Mr. Borulkar invited our attention to the observations contained in paragraph 6 of the Supreme Court decision reported in 1993 Cri. L.J. 1800 Romesh Kumar and another v. State of Punjab, they read thus:

"6. Learned Counsel for the appellants has vehemently argued that in the absence of test identification parade no reliance can be placed on the testimony of Ashok Kumar P.W. 3. We do not agree with the learned Counsel. Ashok Kumar has stated that he knew the appellants and even otherwise he was in the company of the appellants for about three hours and had witnessed the killings of Chhinda at their hands. There was, thus no question of holding any test identification parade in this case."

23. In the light of the evidence in this case we find Mr. Borulkar's contention pregnant with substance. We also feel that the solitary defect in the identification pointed out by Mr. Mane would not vitiate the value of the test identification parade but at the best may marginally diminish it.

24. It is true that against Rekha, Ushabai, Surekha, Pinki and Ambu there is the evidence of a solitary identification. But it is not an inflexible requirement of law that a conviction cannot be recorded/sustained on a solitary identification. Normally on dictates of prudence the courts are loath to convict on a solitary identification for the same as observed in paragraph 46, in the magnum opus of the law of identification, 3 Division Bench decision of the Allahabad High Court Asharfi and Another Vs. The State, , "....cannot eliminate the possibility of the pointing out being purely through chance...."

But the present case is an exception to the said rule for there we find that the witnesses and the appellants remained with one another for a sufficiently long time; the witnesses came in close contact with the appellants; most of them were injured witnesses; and there was sufficient light to enable them to recognise the faces and features of the appellants.

25. In addition we find that there is also evidence of recovery of looted property from some of the appellants. The said recovery was effected by P.W. 21 A.P.I. Roopnar, in the presence of public panch Achutrao Gaikwad P.W. 15 at the police station, under two panchanamas. Exhibits 51 and 52. The former relating to male appellants and the latter to female appellants. As seen earlier appellants Babu, Gulab, Kamlakar, Mahesh, Rekha, Ushabai, Surekha, Pinki and Ambu were arrested on 11-6-1995 at about 8 a.m. i.e. within less than 12 hours of the incident along with the looted property.

In Exhibits 51 and 52 the property recovered from each of the appellants has been separately enlisted.

From the possession of appellant Babu a 17 jewel wrist watch belonging to Tanaji Patil P.W. 8 was recovered. The said watch was identified in Court by Tanaji Patil.

From the possession of Gulab a camera of pentex make, 3 flashes and one lens

were recovered. They belonged to P.W. 18 Anil Ramchandra Vadnere and were identified by him during trial.

From the possession of Kamalakar a bunch of keys belonging to Laxmi Narayan Koli P.W. 12 was recovered and the said keys were identified by her during trial.

From the possession of Ushabai, a mangalsutra, gold necklace, gold mangatti, shirt and ladies purse, belonging to Radhabai P.W. 11 and a banian belonging to Laxmi Narayan Koli P.W. 12 were recovered and the said articles were duly identified by Radhabai and Laxmi Koli.

From the possession of appellant Pinki a nose ring a gold almond type of ornament, gold bead and silverwala belonging to Radhabai, P.W. 11 were recovered and during trial they were duly identified by Radhabai.

From the possession of appellant Surekha one pair of silver anklet, one pair of silver painjan and one gold ear ring belonging to Radhabai P.W. 11 were recovered. The same were identified by Radhabai during trial.

We may also mention that appellant Rekha was arrested along with other lady appellants and from her recovery of one rexin bag of blue colour having currency notes of the total value of about Rs. 2000/- and one ladies wrist watch were recovered, but in all fairness we must add that they could not be identified during trial. But at any rate it is pertinent to point out that appellant Rekha has not been able to account for the possession of these articles.

26. Mr. Tanaji Mane, learned Counsel for the appellants strenuously urged that since no identification of recovered property has been held it would not be proper to accept the evidence of identification pertaining to recovery for the first time in Court.

27. We have anxiously reflected over and given our thought to this submission and we regret that we cannot accept the same as an inflexible requirement of law having universal application. Ordinarily it is incumbent for the investigating agency to have identification of recovered property done but the failure to do so in a given case would not be fatal. In this connection it is necessary to advert to the observations contained in para 12 of the decision of the Apex Court *Erabhadrapa v. State of Karnataka*, wherein the Apex Court has observed thus;

" There is no merit in the contention that the testimony of these witnesses as regards the identity of the seized articles to be stolen property cannot be relied upon for want of prior test identification. There is no such legal requirement,"

In the said paragraph the Apex Court has observed "ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family".

28. We make no bones in observing that in the instant case, even had there been no identification evidence the conviction of most of the appellants could have been sustained on the strength of mere recovery of stolen articles.

Section 114 of the evidence Act reads thus:

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Illustration (a) to section 114 reads thus:

"(a) that a man who is in possession of stolen goods soon after that theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

28-A. A perusal of section 114(a) shows that if a man is found in possession of stolen goods soon after the theft and cannot account for his possession either of the presumptions enumerated below can be drawn:

(a) he is the thief; or

(b) he has received the goods knowing them to be stolen.

In the instant case there can be no quarrel that the recoveries were made from the appellants soon after the incident, because they were made within 12 hours of the three incidents. As we have seen earlier recovered articles were identified by witnesses. A perusal of the statements of the appellants recorded u/s 313 Cr. P.C. would show that they have not been able to account for the possession of the recovered articles. In our view the said recoveries irresistibly lead to the inference that the appellants from whom they were made committed the offences for which they have been convicted. We are fortified in our view by the decision of the Apex Court *Gulab Chand Vs. State of Madhya Pradesh*, cited by Mr. S.R. Borulkar. A perusal of paragraphs 1 and 4 of the said decision would show that the murder and robbery took place on the night of 23rd/ 24th April, 1979 and articles were recovered from Gulabchand on 27th April, 1979 and no plausible explanation was given by Gulabchand as to how he came in possession of the recovered articles. The Supreme Court held that the presumption contained in section 114(a) of the Evidence Act would be drawn and Gulabchand had been rightly convicted for the offences under sections 302/394 I.P.C.

29. It would also be pertinent to point out that all the 10 appellants reside within close vicinity of one another and judicial notice, based on a perusal of the map of State of Maharashtra, can be taken of the fact that places of their residence are situated about 200 kms. from the place they were arrested along with the looted property. In our view the appellants have failed to offer any cogent and convincing explanation regarding their presence along with the looted property at the place and time of their arrest.

30. We do not find any merit in the argument of Mr. T.E. Mane, learned Counsel for the appellants that the recovery has been foisted upon the appellants by the police because we do not find even an iota of enmity on the part of the police

against the appellants. It should be borne in mind that recovery which has been effected from the appellants is of an enormous value running into lakhs and it is impossible to accept that recovery of such a magnitude and manifold nature could have been planted by the police as was sought to be urged by Mr. T.E. Mane. Again we do not find any merit in Mr. Mane's submission that the police arrested the appellants from Yallmma temple in Jath where they had come to pay obeisance. The appellants have failed to furnish any evidence which probablises such a plea.

31. We make no bones in observing that we find the evidence of the witnesses of arrest of the appellants and of recovery made from them viz. Suresh Tammanna Masal P.W. 13, Achutrao Appasaheb Gaikwad P.W. 15 and A.P.I. Shivaji Maruti Roopnar P.W. 21, to be implicitly reliable. To repeat, the said witnesses bore no animus against the appellants and in the absence of the same we are not prepared to believe that they would have foisted recovery of the magnitude, which was not possible to foist, on the appellants and would have falsely deposed about their arrest.

32. We may also mention that there is another circumstance which clinches the participation of the appellants in the crime, i.e when arrested their clothes were found to be stained with human blood. It is true that the blood group has not been determined by the chemical analyst but as observed by the Supreme Court in paragraph 10 in the decision Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, , presence of human blood on the clothes of accused is also a circumstance which goes against them unless they can offer a reasonable explanation. We find that in the instant case the appellants have failed to offer any plausible explanation for their clothes being stained with blood and in that view of the matter the inference stipulated by section 106 of the Evidence Act, which provides that when any fact is especially within the knowledge of any person, the burden of providing that fact is upon him, would be drawn against them.

33. In our view the conviction of the appellants is founded on enormous evidence of a manifold nature which inspires confidence. We feel that the learned trial Judge was justified in convicting the appellants for the offences for which he has found them guilty.

34. Finally Mr. T.E. Mane, learned Counsel for the appellants strenuously urged that the instant case does not warrant for imposition of death sentence on appellants Babu, Gulab and Kamlakar because:

- a) the said appellants were young in years at the time of the incident;
- b) the main object of the said appellants was to commit dacoity and murders of the deceased persons were only ancillary acts, and
- c) there was nothing to indicate that these appellants were of a depraved mind or the acts committed by them were either diabolical, ghastly or gruesome.

35. To fortify his submission Mr. Mane placed reliance on the decision of the Apex Court reported in 1997(4) Crimes 181, A. Devendran v. State of Tamil Nadu. He invited our attention to paragraphs 3 and 20 in particular. He brought to our notice that in the said case a pre-planned dacoity was committed by the appellants and others by scaling down the chimney of the house of two of the deceased persons. During the course of robbery Devendran strangled the two ladies who came on his way. Thereafter as soon as the driver Nagrajan entered the house he fired upon him. Mr. Mane urged that on these facts the Supreme Court held in para 20 that it could not be held that the appellant was of a depraved mind and the deaths causes were either diabolical, ghastly or gruesome and consequently set aside the death sentence of Devendran and sentenced him to undergo life imprisonment. He urged that the facts in the present case are less gross.

Mr. Mane also referred to the decision of the Supreme Court Ediga Anamma Vs. State of Andhra Pradesh, , wherein in paragraph 26 the Supreme Court observed that if the offender is too young or too old he should not be awarded death sentence.

36. Repudiating the validity of the submission of Mr. Mane, on the question of sentence Mr. S.R. Borulkar, learned Additional public Prosecutor invited our attention to the decisions of the Apex Court Ediga Anamma Vs. State of Andhra Pradesh, , Sevaka Perumal, etc. Vs. State of Tamil Nadu, and Kamta Tiwari Vs. State of M.P.,

In AIR 1974 S.C.P. 799 (supra) Mr. Borulkar invited our attention to the following lines contained in para 26.

"On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a strainer sentence."

He urged that since in the instant case the evidence is that the deceased Rajendra Raichure was rendered helpless and hapless by the appellants Babu, Gulab and Kamalakar and thereafter done to death, they deserve death penalty. He invited our attention to the evidence of Keshav Bhandare, which shows that after Kamalakar has tied the feet of Rajendra Raichure with rope, Babu had caught hold of his hands and Gulab stabbed him with knife. He also invited our attention to the evidence of Radhabai who stated that when her son Narayan Koli, remonstrated with the appellants for taking away the looted property, appellants, Kamalakar stabbed him.

37. Mr. Borulkar also invited our attention to paragraph 11 of the decision reported in Sevaka Perumal, etc. Vs. State of Tamil Nadu, wherein the Supreme Court observed young age could not be a ground for reducing the sentence from death to life imprisonment. Mr. Borulkar placed reliance on the observations contained in paragraphs 6 and 7 of the decision reported in Kamta Tiwari Vs. State of M.P., to show that in a gruesome" murder only sentence of death should

be imposed.

37-A. We have considered the submissions of the Counsel for the parties on this highly contentious issue. We find that the evidence on record does reveal that the appellants Babu, Gulab and Kamalakar were young in years at the time of the incident. We have seen that the incident took place on the night of 10/11-6-1995. In their statements u/s 313 Cr.P.C. which were recorded on 18-6-1996 the said appellants stated their ages to be as under:

- 1) Babu @ Babusya Vithal Rathod, aged about 22 years;
- 2) Gulab @ Gulya Abbas Bhosale, aged about 19 years, and
- 3) Kamalakar Abdul Pawar aged about 22 years

This would mean that appellants Babu and Kamalakar were aged about 21 years at the time of the incident and Gulab was aged about 18 years at that time.

37-B The Supreme Court in the case Raisul Vs. State of U.P., , with regard to the age in the statement of the accused observed that the estimate of age given by the accused should be accepted to be correct and the Court would not be justified in substituting it by its own estimate. In the said case the accused had given out his age as 18 years. The trial Court was of the estimate that he was aged about 24 years and therefore sentenced him to death. The Supreme Court treating him to be 18 years sentenced him to. life imprisonment.

38. The question to which we now address ourselves is whether we should uphold the death sentences of the said appellants as urged with fanatic fervor by Mr. Borulkar or reduce them to life imprisonment as contended by Mr. T.E. Mane. In our judgment it would be correct to accept Mr. Mane" s submission.

39. Section 354(3) of the Code of Criminal Procedure, 1973 superseded the provisions contained in section 367(5) of the Criminal Procedure Code of 1898. Section 354(3) Cr. P.C. reads thus:

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

A perusal of section 354(3) Cr.P.C. would show that it is founded on the postulate that in offences punishable with life imprisonment or death a person should normally be sentenced to imprisonment for life and special reasons have to be assigned for imposing a death sentence.

The said provision in our judgment gave birth to the principles which is in vogue these days namely that death sentence should be restricted to the "rarest of rare cases".

40. In deciding the question whether in a given case a sentence of death or imprisonment for life should be imposed a balance sheet should be prepared by

courts wherein the mitigating circumstances necessitating the imposition of a sentence of life imprisonment and the aggravating circumstances justifying the awarding of a sentence of death should be set out. It is only where there are no mitigating circumstances or they are of an innocuous character or stand grossly outweighed by the aggravating circumstances should the Court impose a sentence of death.

In other words the Court should only impose a sentence of death if it has no exit-gate.

41. It is impossible to classify the mitigating and aggravating circumstances. In this respect we can do no better than to quote the observations contained in paragraph 26 of the judgment of the Apex Court reported in *Ediga Anamma Vs. State of Andhra Pradesh*, which read thus:

"26. Let us crystalise the positive indicators against death sentence under Indian Law currently. Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if other involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being u/s 302 read with section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanly opt for life, even like where a just cause or real suspicion of wifely infidelity, pushed the criminal into the crime. On the other hand the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like steel the heart of law for a strainer sentence."

42. Apart from the circumstances narrated in *Ediga Anamma Vs. State of Andhra Pradesh*, , detailed above, death sentence is also to be awarded if the evidence discloses that the accused is of a depraved mind or committed the murder/ murders in a diabolical, ghastly or gruesome manner which steals all sympathy of the Court. Some of those instances can be the tender age of the deceased, the well calculated and planned manner in which the deceased was done to death and the circumstances peculiar to the case. For instance, in case of a murder of a lady the circumstance that she was raped prior to her murder, would definitely be an aggravating circumstance.

43. However, we have no hesitation in observing that normally the courts should not sentence a person to death if he is constructively liable for the offence. Death sentence in our judgment is warranted where the evidence distinctly indicates that the injuries inflicted by the accused were independently sufficient in the

ordinary course of nature to cause death. In respect of this proposition, apart from the observations contained in *Ediga Anamma Vs. State of Andhra Pradesh*, which we have extracted above, there is no dearth of authorities, but to eschew prolixity we are only referring to three of them, viz. those reported in:

- i) *Sultan and Another Vs. State of Haryana*,
- ii) *Hari Har Singh and Others Vs. The State of U.P.*,
- iii) 1998 Bom.C.R. (Cri.) 811 : J.T. 1988 SC 375 , *Ronny alias Ronald James Alwaris etc. v. State of Maharashtra*.

In *Sultan and Another Vs. State of Haryana*, as is apparent from paragraph 7, two persons had fired at the deceased. The shot of one of them was sufficient in the ordinary course of nature to cause the death of the deceased and of the other which hit the clavicle was not. Both of them had been sentenced to death. The Supreme Court reduced the sentence of the accused whose shot was not fatal to life imprisonment.

In *Hari Har Singh and Others Vs. The State of U.P.*, as is apparent, from a perusal of para 14 two accused persons caused fire arm injuries to the deceased. Since the medical evidence did not indicate which of the injuries was sufficient in the ordinary course of nature to cause death, the Supreme Court set aside their sentence of death and instead sentenced them to imprisonment for life. We now take up the decision of the Supreme Court reported in *Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra*, . This was also a case of a very brutal murder wherein an old woman after being subjected to rape along with two others was murdered. In the said case all the three accused had been sentenced to death. The Supreme Court substituted their death sentence by that of imprisonment for life. From a perusal of para 48 it appears that the Supreme Court was influenced by the fact that it was not clear as to what part was played by which accused and therefore it reduced their sentence. In this connection it would be proper to extract the relevant part of para 48, which reads thus:

"From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that role of one has been more culpable in degree than that of others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" case, it would serve the ends of justice if the capital punishment is commuted into life imprisonment."

44. If the balance-sheet of the extenuating and aggravating circumstance is examined, then, in our judgment, the scales tilt in favour of extenuating circumstances. Apart from the fact that in view of the decision reported in 1997(4) Crimes 181 (supra), appellants Babu, Gulab and Kamalakar could not be said to be having a depraved mind or guilty of committing the murders in a diabolical, ghastly or gruesome manner, we also find that they were young in years when the incident took place and the sentence of death which was awarded

to them on 16-12-1996 has been hanging on their heads since nearly the last 16 months. Way back as 1944 the Federal Court in the case of AIR 1944 1 (Federal Court) substituted the sentence of death by transportation for life on some grounds, out of which one was that "He has besides been awaiting the execution of his death sentence for over a year".

In the case of appellant Babu there is an additional ground, viz. he did not intact injuries on the deceased Rajendra, much less, injuries sufficient in the ordinary course of nature, to cause his death. The only role assigned to him is that he caught hold of his hands. It may be mentioned that vis-a-vis the assault on the deceased Balvant and Narayan Koli, he has been assigned no role.

45. Before parting with the question of death sentence we feel it pertinent to refer to the three authorities cited by Mr. Borulkar. So far as the authority reported in Ediga Anamma Vs. State of Andhra Pradesh, is concerned in our view the aggravating circumstances enumerated in our case are out weighed by the mitigating circumstances detailed by us and hence the said authority would have no application.

The authority reported in Sevaka Perumal, etc. Vs. State of Tamil Nadu, , it is true that in paragraph 11 of the said authority the Apex Court has said that young age is not a ground for substituting a death sentence by that of imprisonment for life, but in the instant case we have made the said substitution not only on the ground that appellants Babu, Gulab, and Kamlakar were young in years but also having regard to the other grounds set out above. Hence this decision would also have no application. The decision Kamta Tiwari Vs. State of M.P., would have also no application. In that case the Supreme Court refused to substitute the death sentence by a sentence of imprisonment for life because it found no mitigating circumstances and instead found aggravating circumstances in plenty. In that case the accused had lured a 7 year old girl, who treated him as her uncle by giving her biscuits, raped her, killed her and then dumped her dead body in a well. The Supreme Court on these facts took the view that the act of the accused was barbaric and the only sentence justified in law was death.

46. For the said reasons in our view, the instant case cannot be classified in the category of "rarest of rare cases" and the death penalty deserves to be substituted by sentence of imprisonment for life.

47. We however, feel that it is only the death sentence awarded to appellants Babu, Gulab and Kamlakar which requires interference. Their other sentences as also those of the remaining appellants, in our view, are adequately commensurate with the gravity of the crime and require no interference.

48. In the result the reference made by the Additional Sessions Judge, Sangli for confirmation of death sentences of appellants 1. Babu @ Babusya Vithal Rathod, 2. Gulab @ Gulya Abbas Bhosale and 3. Kamalakar Abdul Pawar which has given rise to Confirmation Case No. 1 of 1997 is rejected.

Criminal Appeal No. 92 of 1997 is partly allowed. Although we maintain the convictions of the appellants Babu @ Babusya Vithal Rathod, Gulab @ Gulya Abbas Bhosale and Kamalakar Abdul Pawar, on all the counts, as also the convictions and sentences of appellants Mahesh Nagnath Gaikwad, Rekha @ Bormali Nagnath (Mahesh) Gaikwad, Ushabai @ Pappi Kamlakar Pawar, Surekha @ Talangi Gulab Bhosale, Pinki @ Dengi Gelya Shinde, Ambu Bhalchandra Pawar, and Vijayabai Dhondya Shinde on all the counts but we set aside the sentences of death awarded to the appellants Babu @ Babusya Vithal Rathod. Gulab @ Gulya Abbas Bhosale and Kamalakar Abdul Pawar for the offence u/s 396 I.P.C. and of appellant Kamalakar Abdul Pawar for the offence u/s 302 I.P.C. and instead sentence them to undergo a sentence of rigorous imprisonment for life. We however maintain their sentences on the other counts.

Appellants Babu @ Babusya Vithal Rathod, Gulab @ Gulya Abbas Bhosale, and Kamalakar Abdul Pawar are in jail. They shall be detained therein till they serve out their sentences. As regards appellants Mahesh Nagnath Gaikwad, Rekha @ Bormali Nagnath (Mahesh) Gaikwad, Ushabai @ Pappi Kamlakar Pawar, Surekha @ i Gulab Bhosale, Pinki @ Dengi Gelya Shinde, Ambu Bhalchandra Pawar, and Vijayabai Dhondya Shinde from the roznama it is not clear whether they are in jail or on bail. In case they are in jail, they shall be detained therein till they serve out their sentences. If on bail they shall be taken into custody forthwith to serve-out their sentences.

Before parting with this judgment we would like to place on record our appreciation for the assistance rendered to us by Counsel of the parties in disposal of these matters.