

(2014) 03 BOM CK 0096

In the Bombay High Court

Case No : Criminal Confirmation Case No. 3 of 2013 and Criminal Appeal No. 501 of 2013

The State of Maharashtra

APPELLANT

Vs

Rakesh Manohar Kamble @ Niraj and Amarsing

Rakesh Manohar Kamble @ Niraj and Amarsing Vs The State
of Maharashtra

RESPONDENT

Date of Decision : 20-03-2014

Acts Referred:

Arms Act, 1959 — Section 25 3 4
Criminal Procedure Code, 1973 (CrPC) — Section 129 161 235(2) 354(3) 37
Penal Code, 1860 (IPC) — Section 120-B 302 34 364 366
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(xii)

Citation : (2014) ALLMR(Cri) 2043 : (2014) 2 BomCR(Cri) 664

Hon'ble Judges : C.V. Bhadang, J;B.R. Gavai, J

Bench : Division Bench

Advocate : B.H. Dangre, Public Prosecutor, Mr. S.S. Doifode, APP in Criminal Confirmation Case No. 3 of 2013 and Mr. R.P. Thote in Criminal Appeal No. 501 of 2013, for the Appellant; R.P. Thote, Advocate in Criminal Confirmation Case No. 3 of 2013, Mrs. B.H. Dangre, Public Prosecutor and Mr. S.S. Doifode, learned , Assistant Public Prosecutor in Criminal Appeal No. 501 of 2013, for the Respondent

Final Decision : Partly Allowed

Judgement

B.R. Gavai, J.—The Confirmation Case No. 3 of 2013 arises out of the Reference made by the learned Additional Sessions Judge, Nagpur in Special Criminal Case No. 25/2006 for confirmation of the death sentence awarded to the original accused no. 1 Rakesh Manohar Kamble and original accused no. 6 Amarsingh s/o Kisansing Thakur. The appellants/original accused no. 1 Rakesh and original accused no. 6 Amarsing have also preferred the appeal challenging the Judgment and order dated 28th June, 2013 by which the appellants are convicted for the offences punishable u/s 302 read with Section 34 of the Indian Penal Code and

sentenced to death; convicted for the offence punishable u/s 376(2)(g) of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 10,000/- and in default of payment of fine to suffer further rigorous imprisonment for two years; convicted for the offence punishable u/s 364 read with section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/- and in default of payment of fine to suffer further rigorous imprisonment for nine months, convicted for the offence punishable u/s 366 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for ten years and to pay a fine of Rs. 5000/- and in default of payment of fine to suffer further rigorous imprisonment for nine months; convicted for the offence punishable u/s 506 (Part II) read with Section 34 of the Indian Penal Code and sentenced to suffer simple imprisonment for five years and to pay a fine of Rs. 1000/- and in default of payment of fine, to suffer further rigorous imprisonment for two months, and also convicted them for the offence punishable u/s 457 read with Section 34 of the Indian penal Code and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs. 1000/- and in default of payment of fine, to suffer further rigorous imprisonment for three months.

2. The prosecution case, in brief, as could be gathered from the material on record is as under:

The accused no. 1 Rakesh was working in the poultry farm of one Sharif. He was residing there for quite some time and was creating terror in the village by threatening the villagers of Lonara. P.W. 1 Prabha w/o Shamrao Meshram was residing in the said village along with her husband Shamrao, who is mentally challenged, son Atul who was also undergoing treatment for mental ailment and daughter Kanchan aged about 19 years, the deceased victim. On the fateful midnight of 17th-18th December, 2005 they were sleeping in their house. Accused no. 1 Rakesh Kamble had threatened the residents of the Vasti. Thereafter, he demanded water from P.W. 1 Prabaha, from the outside of the house. She gave water to him through window of the house. After taking water, he put lota in the window. Accused no. 1 Rakesh was asking her to open the door, but she did not open the door. He then gave leg blows on the door of the house. Thereafter, she opened the door. Accused no. 1 Rakesh and accused no. 6 Amarsingh entered into the house. Accused no. 1 Rakesh told her husband and son to sleep. Accused no. 1 Rakesh was possessing knife and accused no. 6 Amarsing was possessing Katta. Accused told her husband and son to sleep by covering them by blanket. Accused also told the first informant and Kanchan to sleep. Sensing that accused had an ill eye on Kanchan, she signaled Kanchan to run away to the house of her uncle P.W. 9 Bhimrao. Therefore, Kanchan ran away. Accused nos. 1 and 6 ran behind her. Thereafter, she also ran behind her. Kanchan told the brother-in-law of the first informant to save her. Bhimrao (P.W. 9) took Kanchan in the house. Accused no. 1 and 6 went to the house of Bhimrao and broke up the door of his house. Thereafter, they removed her daughter Kanchan out of the house of Bhimrao by assaulting him. Accused nos. 1 and 6

took Kanchan towards the land owned by one Shri Mankar.

3. The first informant informed the Police Patil about the incident. He came with her near her house. According to the prosecution case, some boys tried to rescue Kanchan and the Police Station was informed about the incident by telephone. The first informant and the villagers were frightened due to said act of Rakesh and his accomplice since they were armed with deadly weapon. Therefore, villagers could not dare to rescue Kanchan. On gathering information as to who was Rakesh's accomplice, the first informant learnt that he was Amarsing and that he was residing at poultry farm with accused no. 1. At around 7.00 a.m. Sanjay Mankar saw the clothes of Kanchan lying in his field. The news spread in the village. The first informant went to see the clothes of Kanchan. On going ahead, the dead body of Kanchan was seen lying in the shrub adjacent to the embankment of field of Shri Deshpande. There was not a single cloth on her person. There were injuries on the cheek, head and breast.

4. P.W. 15 API Chanpurkar had received information since Police Constable had come to her house to give information that the Police Station had received a phone call that Rakesh Kamble was creating terror. She, therefore, directed the police officials i.e. one A.S.I. and four others, who were on patrolling duty, to visit the spot of the incident at Lonara. She also went to the Police Station and immediately proceeded to Lonara village with remaining staff. She registered the First Information Report against Rakesh Kamble and Amarsingh vide Crime No. 361/2005 for the offences punishable under Sections 364, 302, 456, 376(g) read with Section 34 of the Indian Penal Code. The said First Information Report is at Exh. 86.

5. P.W. 15 Sapoli Chanpurkar informed about the incident to S.D.P.O., Shri Pansare (P.W. 17). He rushed to the spot. P.W. 15 Chanpurkar handed over further investigation to P.W. 17 S.D.P.O., Shri Pansare, with the special report which is at Exh. 153. P.W. 17 Pansare along with the staff and panch prepared running spot panchanamas in presence of the panch witnesses, of various spots of occurrence i.e.. house of P.W. 1 Prabha, house of P.W. 9 Bhimrao, field of Shri Mankar, field of Shri Deshpande, below Exh. 91. Inquest panchanama was prepared which is at Exh. 89. 26 photographs of the spot of incident were snapped by P.W. 17 Pansare. The corpse was sent for post mortem. Various statements were recorded by P.W. 17 Pansare on 18th December, 2005. Various other incriminating material came to be seized by him during the course of investigation. After receipt of the post mortem report, he made queries with the medical officer below Exh. 117. He received answers vide Exh. 118.

6. Since the accused were absconding, letter was sent by local crime branch, Nagpur to S.D.O., Katol for search of absconding accused no. 1 Rakesh and 6 Amarsing. Police Inspector Mr. Patole attached to Kalmeshwar Police Station arrested accused Rakesh Kamble, on 6.6.2006 vide arrest panchanama below Exh. 171. Accused was sent for medical examination. His blood samples and clothes were seized by Investigating Officer Shri Pansare, received from Police

Constable Manoj Bawiskar attached to Police Station, Kalmeshwar.

7. After investigation of the matter, charge sheet came to be filed before the Court of Judicial Magistrate, First Class, Saoner for the offences u/s 120-B, 457, 506, (Part-II)364, 366, 302 all read with section 34 and Section 376(2)(g) of the Indian Penal Code, Section 3 read with Section 25 and Section 4 read with Section 25 of Arms Act and Section 3(1)(xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

8. Since the offences were exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Saoner committed the case to the Court of Sessions for trial against the accused persons.

9. P.W. 18 Arun Bhadikar, to whom subsequent investigation was transferred, received information that absconding accused Amarsing is in jail at Nagpur. After obtaining requisite permission from the State of Maharashtra for transfer of the accused vide permission letter below Exh. 177, arrest of the accused no. 6 Amarsing was effected from Jail by P.S.I., Bhusari below arrest panchanama Exh. 178 dated 29th March, 2010. The blood samples of the accused no. 6 Amarsing was collected and sent for medical analysis. Though the confessional statement was made by accused no. 6 below Exh. 179 that he had concealed one country made hand gun, nothing could be recovered on the basis of the said memorandum. Supplementary charge sheet came to be filed against the accused no. 6.

10. During the pendency of the trial, accused no. 3 Tarabai Meshram, accused no. 4 Lakhansing Thakur and accused no. 5 Pawan Meshram were discharged vide order dated 31st July, 2007. Accused no. 2 Sheikh Sharif was also discharged vide order dated 15th February, 2007. Hence, the trial proceeded against accused no. 1 Rakesh and accused no. 6 Amarsing.

11. The learned trial Judge framed charges against the accused nos. 1 and 6 for the offences punishable under sections 457 read with section 34, 506II read with section 34, 364 read with 34, 366 read with section 34, 376(2)(g) read with section 34, 302 read with section 34 of the Indian Penal Code; u/s 3 read with section 25 and u/s 4 read with section 25 of the Arms Act, and u/s 3(1)(xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act. Accused pleaded not guilty and claimed to be tried.

12. The defence of the accused is of total denial and they claimed to be falsely implicated.

13. At the conclusion of the trial, the learned trial Judge convicted both the accused and sentenced them as aforesaid. Insofar as the offence punishable u/s 3 read with section 25 and Section 4 read with Section 25 of the Arms Act and Section 3(1)(xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 are concerned, both the accused are acquitted.

14. Since the learned trial Judge ordered sentence of death, the record has been

transferred to this Court for confirmation, which has resulted in registration of Confirmation Case No. 3 of 2013. Accused have also approached this Court by way of Criminal Appeal No. 501 of 2013, being aggrieved by the Judgment and order of conviction and sentence.

15. Heard Mrs. B.H. Dangre, learned Public Prosecutor and Shri R.P. Thote, learned counsel (appointed) to appear on behalf of the appellants/accused.

16. Mrs. B.H. Dangre, learned Public Prosecutor submits that the prosecution has proved each and every incriminating circumstance beyond reasonable doubt. She submits that the circumstances are so interwoven to each other, that they lead to no other conclusion than the guilt of the accused.

17. The learned Public Prosecutor submits that the evidence of P.W. 1 Prabha read with the evidence of P.W. 2 Atul Meshram and P.W. 9 Bhimrao would clearly show that the accused persons on the fateful night, had come to the house of P.W. 1 Prabha with an ill-eye on deceased Kanchan. Since P.W. 1 Prabha apprehended that the accused had ill eye over deceased Kanchan, she was signaled to go out. She further submits that the evidence of this witness would show that deceased ran away and took shelter in the house of her uncle P.W. 9 Bhimrao. The accused forcibly entered in the house of P.W. 9 Bhimrao, assaulted him and thereafter deceased was forcibly taken away by the accused persons.

18. The learned Public Prosecutor further submits that the evidence of the independent witnesses viz. P.W. 12 Shobha Tayade, P.W. 14 Madhukar Bansod and P.W. 16 Pramilabai, would show that they heard screams of the deceased urging the accused to leave her. It is, thus, submitted that the evidence of these witnesses would corroborate the version given by P.W. 1 Prabha, P.W. 2 Atul Meshram and P.W. 9 Bhimrao.

19. The learned Public Prosecutor further submits that in the running spot panchanama below Exh. 91 and seizure memo below Exh. 90 stains of blood have been found at various spots mentioned in the Panchanama.

20. The learned Public Prosecutor further submits that the medical evidence in the nature of post mortem report, the evidence of P.W. 8 Dr. Anindya Mukherjee, letter seeking opinion at Exh. 117 and the reply to the queries Exh. 118, would clearly show that the deceased was raped and assaulted. The learned Public Prosecutor further submits that the time gap between the deceased being taken away by the accused persons and her dead body being found in naked condition is also very narrow. The learned Public Prosecutor further submits that the abscondence of the accused is another circumstance against them. The learned Public Prosecutor, therefore, submits that applying the law as laid down by the Hon"ble Apex Court in the case of circumstantial evidence, the prosecution has proved each and every incriminating circumstance and also established that the chain of circumstances are so interwoven to each other, that leads to no other conclusion than the guilt of the accused. The learned Public Prosecutor, in this respect, relied on the Judgment of the Apex Court in the case of Shankarlal

Gyarasilal Dixit Vs. State of Maharashtra, , & Sharad Birdhichand Sarda Vs. State of Maharashtra, .

21. Insofar as the confirmation of death sentence is concerned, the learned Public Prosecutor submits that the accused persons, with ill motive of causing terror in the society, have committed drastic act of kidnapping the deceased from her home, and when she tried to save her and sought shelter in her uncle's home, they forcibly took her to the agricultural field and have ravished her modesty and committed her murder in a deadly manner. The learned Public Prosecutor submits that the evidence of the witnesses along with the past conviction of the appellants for the offence under the M.C.O.C., Act would show that the accused had caused such terror in the village, that nobody even dared to make an attempt to save the deceased. It is submitted that heinous act on the part of the appellant has shocked the conscience of the society and as such it is only the death sentence which is befitting such heinous act. The learned Public Prosecutor, in this respect, relies on the following Judgments of the Hon''ble Apex Court.

- i) Bachan Singh Vs. State of Punjab, .
- ii) Machhi Singh and Others Vs. State of Punjab, .
- iii) Laxman Naik Vs. State of Orissa, .
- iv) Dhananjay Chatterjee alias Dhana Vs. State of W.B., .
- v) Molai and another vs. State of Madhya Pradesh 2000 SCC 177
- vi) Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra, .

22. The learned Public Prosecutor however, fairly pointed out to our notice the other line of Judgments, wherein the Apex Court instead of death sentence has found commutation of sentence for a specified terms like for a period of 30 years without remissions or for remainder of the life to be an alternative to the death sentence. The Judgments in this respect, brought to our notice by the learned Public Prosecutor are as under:

- i) Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, .
- ii) Sangeet and Another Vs. State of Haryana, .
- iii) Gurvail Singh @ Gala and Another Vs. State of Punjab,
- iv) Shankar Kisanrao Khade vs. state of Maharashtra (2013) 5 SCC
- v) State of Rajasthan Vs. Jamil Khan, .
- vi) Bhaikon @ Bakul Borah Vs. State of Assam,
- vii) Neel Kumar @ Anil Kumar Vs. The State of Haryana,
- viii) State of U.P. Vs. Satish, .

23. As against this, Shri Thote, learned counsel appearing on behalf of the appellants/accused submits that there is inordinate delay in lodging the First Information Report and as such in view of the Judgment of the Hon'ble Apex Court in the case of Mahtab Singh and Another Vs. State of U.P., the delay in lodging First Information Report is fatal to the prosecution case.

24. The learned counsel appearing on behalf of the appellants/accused submits that the prosecution has failed to prove the case beyond reasonable doubt. The learned counsel submits that the investigation as well as the prosecution is full of lacunas. The learned counsel submits that there are material contradictions between the evidence of P.W. 1 Prabha and P.W. 15 API Chanpurkar. He submits that, whereas P.W. 1 Prabha states that she had not gone to the Police Station to lodge First Information Report, in the evidence of P.W. 15, A.P.I., Chanpurkar, it is stated that P.W. 1 Prabha had come to the Police Station to lodge the first information report. The learned counsel further submits that the question as to whether the first information report lodged by P.W. 1 Prabha is a genuine or not, itself is a matter of serious doubt. It is, therefore, submitted that the very foundation of the prosecution case is weak.

25. Insofar as the evidence of P.W. 2 Atul Meshram is concerned, the learned counsel submits that it is admitted that P.W. 2 Atul Meshram is not mentally sound and as such his evidence cannot be taken into consideration.

26. The learned counsel, insofar as the evidence of P.W. 9 Bhimrao is concerned, submits that the same is also not trustworthy. It is stated that P.W. 9 Bhimrao, in his cross examination itself, has admitted that he came to know about somebody taking Kanchan towards the school, after he opened the door when he went to Otta of Maroti Baba. The learned counsel, therefore, submits that the question as to whether this witness has really seen the incident itself is doubtful.

27. The learned counsel, insofar as the evidence of P.W. 14 Madhukar Bansod is concerned, submits that, the witness has stated that no identification parade was held and as such his evidence is also of not much use to the prosecution case.

28. The learned counsel, insofar as the evidence of P.W. 16 Pramila Bai is concerned, submits that she has admitted that she saw two persons taking Kanchan towards agricultural field from 2-3 furlong and as such doubt is cast as to whether this witness has really seen the accused persons or not.

29. The learned counsel further submits that, from the evidence of P.W. 17 SDPO Shri Pansare it is clear that though certain incriminating articles were found in the house of P.W. 9 Bhimrao, he has not seized the same. It is, therefore, submitted that serious doubt is cast as to whether the prosecution has done the investigation in an honest manner or not.

30. The learned counsel further submits that from the evidence of Doctor Anindya it is clear that injuries which were caused to the private part of the deceased, were also possible on account of other reasons like cycling and

running etc. and as such the prosecution has failed to prove that the rape was committed on the deceased.

31. The learned counsel further submits that insofar as the motive on account of previous enmity is concerned, there is nothing in the evidence of the witnesses and as such prosecution has utterly failed to prove the motive. It is further submitted that, in any case the circumstance regarding the motive was never put to the accused and as such said circumstance cannot be used against them. The learned counsel, therefore, submits that the prosecution has failed to prove the case beyond reasonable doubt and as such the appeal requires to be allowed.

32. The learned counsel further submits that the prosecution having failed to prove the incriminating circumstances and that chain of circumstances is so interwoven to each other, that leads no other conclusion than the guilt of the accused; the appeal deserves to be allowed. The learned counsel placed reliance on the case of State of Goa vs. Sanjay Thakran and another, reported in 2007 (2) Crimes 294 (SC).

33. The learned counsel further submits that, the prosecution has failed to examine the wife of Bhimrao, who had received injuries and as such non examination of the said witness is fatal to the prosecution case. Reliance in this respect is placed on the Judgment of the Apex Court in the case of Prabhat @ Bhai Narayan Wagh and others vs. State of Maharashtra, reported in 2013 (7) SRJ 238.

34. The learned counsel in the alternative submitted that, the present case cannot be said to be a rarest of rare case, warranting death sentence. Reliance in this respect is placed on the following Judgments of the Apex Court:-

- i) Bachan Singh Vs. State of Punjab,
- ii) Mohan vs. State of Maharashtra 2011 ALL Cri 3593
- iii) Bhaikon @ Bakul Borah Vs. State of Assam, .
- iv) Rameshbhai Chandubhai Rathod Vs. The State of Gujarat, .

35. With the assistance of the learned Public Prosecutor and learned counsel for the appellants/accused, we have scrutinized the entire evidence on record.

36. Undoubtedly, the present case is based on the circumstantial evidence. The law on the aspect of conviction in the case of circumstantial evidence has now been very well crystallized. It will be relevant to refer paragraphs 152, 153 and 154 of the Judgment of the Apex Court in the case of Sharad Birdhichand Sarda vs. State of Maharashtra, 116, which read as under:-

152. Before discussing the cases relied upon by the High Court, we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant V. State of Madhya

Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi. v. State of Uttar Pradesh and Ramgopal v. State of Maharashtra. It may be useful to extract what Mahajan, J has laid down in Hanumant case:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra where the following observations were made:(SCC para 19, p. 807: SCC(Cri) p. 1047).

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

37. This view has been consistently followed by the Apex Court in various Judgments. In the light of the aforesaid principle, we will have to examine as to whether the prosecution has firstly proved the incriminating circumstances and secondly as to whether incriminating circumstances established by the prosecution are so interwoven to each other, that lead to no other conclusion than the guilt of the accused. We will have to examine as to whether the chain of evidence is so complete as not to leave any reasonable doubt for the conclusion consistent with the innocence of the accused and as to whether it shows that in all human probability it can be said that the act must have been done by the accused.

38. The first circumstance is last seen theory. In this respect, the evidence P.W. 1 Prabha, P.W. 2 Atul and P.W. 9 Bhimrao would be relevant. P.W. 1 Prabha in her evidence has stated that the accused no. 1 Rakesh Kamble had threatened the residents of the Vasti. He was residing in poultry farm of one Sharif Mohammad. He demanded water to her out of her house. She gave water to him through window of the house. After drinking water, he put lota in the window. Accused Rakesh was asking to open the door but she did not open. He gave leg blows on the door of her house. Again he gave leg blow on the door of the house. Thereafter, she opened the door. Accused Rakesh and Amar entered into the house. Rakesh told her husband and son to sleep. Rakesh was abusing. Rakesh was possessing knife. Amar was possessing katta. He told her husband and son to sleep by covering them with the blanket. Accused told her and Kanchan also to sleep. She told her daughter Kanchan to run away, by making gesture by her hand. Thereafter, Kanchan ran away. Accused no. 1 and 2 ran away behind her. Thereafter, she also ran behind them. Kanchan told her brother-in-law to save her. Bhimrao took Kanchan into his house. Accused no. 1 and 2 went to the house of Bhimrao and broke open the door of the house. Thereafter, they removed her daughter Kanchan out of the house of Bhimrao by assaulting him. Accused no. 1 and 2 took Kanchan towards land owned by Shri Mankar via Nimji road by pushing Kanchan repeatedly. She went running into the Vasti. Shrikant Patil and Homraj Nagpure also came with her. They went towards the land owned by Shri Mankar via Nimji road. They saw the clothes of her daughter Kanchan thrown on the shrub, on the side of the road. They went ahead and saw Kanchan lying in the land owned by Shri Deshpande. She was dead. She was having injuries on chest, cheek and head. P.W. 1 Prabha made phone to the Police Station, Kalmeshwar and lodged report to police.

39. Though the evidence of this witness has been attacked on the ground that there are various omissions and improvements in her evidence, the cross examination reveals that the omissions are not material in nature. Though in her evidence, P.W. 1 Prabha has stated that there was dark on 18.12.2005, in her cross-examination she has specifically denied the suggestion that there was no light on the electric pole in the village. (Though is incorrectly transcribed in English version, we have gone through the vernacular version.) She has specifically denied that there was fog. In her cross examination the previous

quarrel about Rakesh and Kanchan has been brought on record. She has been true in her evidence to admit that she came to know about the name of the other person as Amar, at the time of lodging the report. Though in her cross examination she has stated that she started making search of Kanchan at around 8.00 a.m. in the morning, it will have to be taken into consideration that said witness is a rustic illiterate villager. In any case, perusal of the evidence of P.W. 15 A.P.I., Chanpurkar would reveal that the Police Station had received information about the incident prior to 5.45 a.m.. The other omissions which are brought on record in her evidence are regarding her husband and son being asked by the accused to cover them by blanket, she covering herself with blanket, Kanchan being dragged by the accused, Homraj and Shrikant coming with her etc.. It can, thus, be seen that insofar as her material evidence regarding the accused coming to her house, giving leg blows on the door of the house and the door being opened, she making gesture to Kanchan to run away, thereafter Kanchan running away, taking shelter in the house of Bhimrao, accused breaking open the door of the house of Bhimrao and abducting the deceased, has gone unsheltered.

40. The next is the evidence of P.W. 2 Atul, brother of the deceased and son of P.W. 1 Prabha. His evidence is also of the similar nature. His narration about the accused no. 1 Rakesh demanding water, from window, his mother giving the same to him, accused drinking water and thereafter telling his mother to open the door, substantially corroborates the evidence of P.W. 1 Prabha. He further states in his evidence that his mother did not open the door. Thereafter, accused Rakesh gave leg blows to the door and he broke open the door, he came inside the house, he told all of them to go to sleep by showing the knife, his mother told Kanchan to run away by making gesture by hand and Kanchan ran away saying Kaka Wachava. He further deposed regarding accused Rakesh and Amar running away behind Kanchan, thereafter, Kanchan going to the house of her uncle Bhimrao, thereafter, accused Rakesh and Amar bringing Kanchan out of the house of Bhimrao and taking away Kanchan by Nimje road.

41. In his cross examination also the quarrel between deceased Kanchan and accused has been brought on record. Omissions which are brought in his evidence, are regarding the accused giving two leg blows on the door of the house, Rakesh possessing knife etc.. However, insofar as his evidence regarding accused coming to his house, deceased running away from the house and thereafter he seeing the accused person taking away the deceased Kanchan, has gone unshattered. He has also truthfully admitted in his evidence that he had seen other person while coming to house along with Rakesh, for the first time in his life.

42. P.W. 9 Bhimrao is cousin of father of the deceased. He has stated in his evidence that accused no. 1 Rakesh was serving at poultry farm which is situated at a short distance from village Lonara. He states that when he was sleeping in his house along with his wife Vishakha and daughters Yashodhara & Sneha and

son Manoj, at around 2.00 a.m., or 2.30 a.m. or 3.00 a.m. deceased Kanchan called him from outside and told him to open the door. He took her inside the house. She told him to save her. She was concealed beneath the cot. Accused no. 1 and 2 came inside the house by kicking the door. He gave the said witness 2-3 fist blows. He made inquiry with him about Kanchan. They searched Kanchan in the house. Accused no. 1 was having country made revolver and accused no. 2 was standing in the door. Accused no. 2 was having knife. He further deposed that accused no. 1 Rakesh had beaten his wife on forehead by country made revolver. Accused no. 1 pulled Kanchan from below the cot. Accused no. 1 pulled her outside of his house in the courtyard. Accused no. 1 told him to close the door. They closed the door. Accused no. 1 Rakesh took Kanchan towards School. Accused no. 2 was with accused no. 1. In the morning they found the dead body of Kanchan in the land of Shri Deshpande.

43. The evidence of this witness has been attacked on the ground of certain omissions. The omissions are regarding concealing Kanchan beneath the cot, accused nos. 1 and 2 making inquiry about Kanchan, accused no. 1 assaulting on the forehead of his wife, etc.. The said omissions, in our considered view, are not material. Much attack is sought to be made, insofar as the paragraph no. 6 of his evidence is concerned. However, if the vernacular version of his evidence is read, the said attack would not be justified. If his evidence is read as a whole, it would show that accused had threatened him to close the door after the incident in his house and after he closed the door, he heard the sound of the people gathered near the Ota of Maroti Baba as the people had gathered at that place. He opened the door, went there. There, he came to know that Kanchan was dragged towards the School.

44. It is to be noted that all these witnesses are rustic illiterate villagers. It will be relevant to refer paragraph no. 27 of the Judgment of the Apex Court in the case of Govindaraju Vs. State of Karnataka, , which reads as under:

27. The High Court has appreciated the evidence very deeply and in our opinion, the Sessions Judge had gravely erred in not accepting the evidence of PW1 without any justifiable reason. It is a basic principle that the evidence of witness has to be appreciated as a whole, when the evidence is of an ordinary witness, who is not much educated and comes from a poor strata of society not having the advantage of education. The court has to keep in mind all these aspects. The witness is not expected to remember every small thing, more particularly when he faces the shock of the untimely death of his near relative.

(emphasis supplied)

45. It will also be relevant to refer para no. 7 of the Judgment of the Apex Court in the case of Ramesh Kumar and Others Vs. State of Himachal Pradesh, , which reads as under:

There may be some discrepancies in the timing and distance between the place of occurrence and residential houses. Material witnesses had been the rustic

villagers/labourers earning their livelihood by difficult means. So the case is to be examined keeping these aspects in mind.

Taking into consideration the fact that these witnesses are rustic illiterate villagers, some discrepancies in the timing and details cannot be given much importance as is sought to be urged by the learned counsel for the appellants/accused.

(emphasis supplied)

46. The another limb of attack on the evidence of these witnesses is that they are the interested witnesses and as such reliance could not be placed on the evidence of these witnesses. It will be relevant to refer to paragraph no. 39 of the Judgment of the Apex Court in the case of Subal Ghorai and Others Vs. State of West Bengal, , which reads as under:

39. It is true that the prosecution has relied on the evidence of interested witnesses but, interested witness is not necessarily a bad witness. In fact, if the witness is related to the deceased, there is less chance of his leaving aside the real assailants. The evidence of interested witness has to be analysed with care. But, once the court comes to the conclusion that it is truthful and in accord with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof. In this case, all the eyewitnesses are consistent about the prosecution case as regards assault on the deceased and setting on fire of the houses of Dharas. We are, therefore, not inclined to reject their evidence on the ground that they are related to the deceased. As already noted, two of the eye witnesses i.e. P.W. 12 Jamini and P.W. 13 Mandakini are injured witnesses, whose presence at the scene of offence cannot be doubted. They completely bear out the prosecution case.

(emphasis supplied)

47. It can, thus, be clearly seen that the attack on the ground that these witnesses are interested witnesses would also be not sustainable.

48. Taking into consideration the evidence of these three witnesses, we find that the prosecution has unflinchingly proved beyond reasonable doubt that on the fateful night, approximately between 3.00 to 3.30 a.m. the accused had come to the house of P.W. 1 Prabha Meshram, forced her to open the door, P.W. 1 Prabha with a gesture asked the deceased to run away, deceased ran away from her house and took shelter in the house of P.W. 9 Bhimrao, accused followed her, broke open the door and abducted the deceased from the house of P.W. 9 Bhimrao. We further find that the prosecution has, therefore, proved beyond reasonable doubt, that it is the present appellants who were last seen in the company of the deceased between 3.00 to 3.30 a.m. of the midnight of 17th and 18th December, 2005.

49. Apart from that we find that the aforesaid evidence is also corroborated by the ocular testimony of P.W. 12 Shobha Tayade, P.W. 14 Madhukar Bansod, P.W.

16 Pramilabai Gondane and the evidence of P.W. 13 Nandkishor who has turned hostile.

50. P.W. 12 Shobha Tayade states in her evidence that she was working in the farm of one Sharif Bhai wherein accused no. 1 Rakesh was also working. She states that she knew accused Amar since he was a guest of Rakesh. She stated that on the night of 17th December, 2005 the accused were present in the farm of Sharif till 10.00 p.m. and thereafter they went to Lonara. She states that at around 2.00 a.m. in the midnight she heard voice "Save Save" (Wachava Wachava). She further states that, that was the voice of one girl. She further states that after that day Rakesh and Amar never came back to the poultry firm. Omissions in her evidence are regarding accused Amar coming as guest of accused no. 1, shouts being of a girl etc.. However, insofar as her evidence regarding the accused nos. 1 and 2 in the night going to village Lonara, listening screams of "Save Save", has gone unchallenged.

51. P.W. 14 Madhukar Bansod states in his evidence that on the night of 17th December, 2005 when he was sleeping in his house, he heard the noise of the accused. He came out of the house and stood there smoking bidi. At that time Rakesh and Amar came there and abused and threatened him as "Andar So Ja Nahi To Mar Dunga". Hence, he went inside the house and slept. He states that on the same night at around 3.00 to 3.30 a.m., Kanchan was taken away by Rakesh and Amar towards the forest. Hence, he came out of the house and went towards Otta of Maroti Baba and heard screams "Rakesh Bhau Mala Maru Naka". He stated that it was voice of Kanchan. As accused was holding gun, he failed to go further. On the next day, he came to know that Kanchan was murdered. His evidence is only attacked on the ground that identification parade is not held. However, in our view that would not be relevant, inasmuch as, he was knowing accused no. 1 Rakesh very well, who was residing in that village and he was also knowing accused no. 2 since he had come to the village prior to few days of the incident.

52. The next is the evidence of P.W. 16 Pramilabai Gondane. She states in her evidence that on the night of the incident at around 4.00 p.m. she had heard the voice of Kanchan as "Sod Ga Bhau Tuzya Paya Lagto". However, in her cross examination she has stated that it was night and she saw accused while taking Kanchan. It was around 12 mid night. She has been specifically asked a question in her cross examination as, Can you see in the dark? She has stated that that time lights were on. No doubt, in the cross examination she has stated that she has witnessed the accused persons taking Kanchan towards the agricultural field from 3-4 furlong. However, her evidence insofar as it states that she had heard the screams of Kanchan, has gone unchallenged.

53. Another important evidence is that of P.W. 13 Nandkishor. In fact, he would have been a star witness, had he not turned hostile. In any case, in view of the Judgment of the Apex Court in the case of Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, reported in AIR 1992 SC 1853, that part of the evidence of

the hostile witness, which is found to be trustworthy can always be taken into consideration. He has specifically stated in his evidence that he knew accused Rakesh since he was working in the poultry farm of Sharif since last 5 to 7 years. He stated that on the day of the incident at around 9.00 p.m. he was sitting on otta. That time Rakesh came near Otta and started abusing. Thereafter, he went towards his house and Rakesh went to his farm. He stated that he does not know about the incident. However, he states that in the morning at around 1.00 to 3.00 a.m. Kanchan was screaming "help help". He states that, he does not know the reason, why Kanchan was screaming. He has stated that Kanchan was shouting for help but he failed to do anything. He further states that he knew the other accused person who was wearing white jersey. He had been to the village on the date of the incident.

54. It can, thus, be seen that the evidence of these four witnesses clearly establishes that they had heard the shouts in the midnight " Save Save". The evidence of hostile witness P.W. 13 Nandkishor, P.W. 14 Madhukar and P.W. 16 Pramilabai show that the voice was of Kanchan. Though there is some variance regarding the time of hearing of screams, in view of the law discussed hereinabove, since these witnesses are rustic villagers, some concession will have to be given to them. However, the evidence of these witnesses which is unclinching, supports the testimonies of P.W. 1 Prabha, P.W. 2 Atul and P.W. 9 Bhimrao, that the deceased was abducted by the accused persons and further establishes that when she was being taken away by the accused persons, she was screaming for help.

55. P.W. 4 Sanjay Mankar has stated in his evidence that when he was going to his field for irrigating the land on 18.12.2005, he saw sweater and brassiere which were attached to bush and also chappal. He has further stated that there were blood stains on sweater. He states that thereafter he went to the village and informed it to the Police Patil. He further states that thereafter he along with the Police Patil went to the land and he saw it. He further states that Bhimrao identified these clothes as of Kanchan. The only omission in his evidence is insofar as Bhimrao identifying the clothes as the clothes of Kanchan. However, in his statement u/s 161 of Cr.P.C., he has stated that the villagers identified the clothes. The fact regarding Bhimrao accompanying the villagers, is very much present in the statement u/s 161.

56. The next evidence is of P.W. 3 Shrikant Nagpure. Though he is a witness on the spot panchanama, seizure panchanama as well inquest panchanama, his evidence would also be material insofar as the actual incident is concerned. He has stated in his evidence as:-

On 18.12.2005 at 3.00 a.m. to 3.30 a.m. I was sleeping in my house when the incident took place. Prabhabai Meshram, Atul Meshram and Homraj Nagpure came to my house. Prabhabai was weeping and she was saying that her daughter was kidnapped by threatening her by accused Rakesh and Amar. I awoke police Patil Murlidhar Nagpure. They made inquiry with Prabhabai. Prabhabai told the

incident. Thereafter, we all came near the temple of Maroti. On second day morning Sanjay Mankar came to my house and told that he saw blood stained clothes lying on the bandh of his land.

57. It can, thus, be seen that the evidence of this witness clearly goes to show that on 18.12.2005 at 3.00 a.m. to 3.30 a.m., he was sleeping in his house. Prabhabai Meshram, Atul Meshram and Homraj Nagpure came to his house. Further he stated that Prabhabai was weeping and she was saying that her daughter was kidnapped by threatening her, by accused Rakesh and Amar. He awoke Police Patil Murlidhar Nagpure. On being inquired Prabhabai told about the incident. Thereafter, they all came near the temple of Maroti. He further deposed that on the second day morning Sanjay Mankar came to his house and told that he saw blood stained clothes lying on the bandh of his land. He further deposed about the clothes being seen on the bundh in the land owned by Sanjay Mankar. Thereafter, they saw the dead body of Kanchan having injuries on her person. It can, thus, be seen that the evidence of this witness who is an independent witness, corroborates the evidence of P.W. 1 Prabha inasmuch as she has immediately informed this witness, about the incident.

58. The next in the line of the evidence is P.W. 15 API, Chanpurkar who was attached to Kalmeshwar Police Station. She states in her evidence that at around 5.45 a.m. Police Constable came to her house and gave her information that the Police Station has received the phone call that Rakesh Kamble is creating chaos. He further told that the Police Station has received phone informing that Rakesh Kamble is teasing and abusing the daughter of Prabha Meshram. She immediately directed the police officials who were on patrolling duty to visit the spot of incident at Lonara. She further stated that thereafter she went to the Police station and proceeded to Lonara village with remaining staff. She met Prabaha Meshram. In her evidence, she clearly states that Prabhabai informed as to in what manner the incident had taken place. First Information Report is registered by this witness on the basis of the version given by P.W. 1 Prabha. It can, thus, be seen that the version of P.W. 1 Prabha is corroborated by P.W. 15 API, Chanpurkar, who is the first Police officer, to whom narration about the incident is made by P.W. 1 Prabha.

59. It can further be seen from the material on record that P.W. 15 API Chanpurkar had immediately informed P.W. 17 SDPO Pansare, who arrived on the spot and to whom special intimation report was given by her below Exh. 153. It is to be noted that the date and timing of the report is 9.00 a.m. and in the said report also the name of Rakesh Kamble and Amar the accomplice of Rakesh Kamble are appearing. The investigation thereafter was transferred to P.W. 17 Pansare who has carried out further investigation and prepared running spot panchanama along with inquest panchanama and seizure memo. The said spot panchanama, seizure memo and inquest memo are duly proved in the evidence of P.W. 3 Shrikant Nagpure who has also acted as Panch.

60. From the perusal of the seizure panchanama which is at Exh. 90, it can be

said that the following incriminating materials have been seized from the various spots.

1) Residential house of complaint Sau. Prabha Meshram situated in hutment at village Lonara-Spot-A.

1) One old, used, blue coloured "dupatta" (piece of cloth worn over head and shoulders by women) measuring 7 feet 3 inches in length and 2 feet 3 inches in width and which is torn at one end, of deceased Ku. Kanchan, lying near southern wall in the house. It is valued at Rs. 5.00/-.

2) One big stone is kept in front of the complainant's house for climbing on the verandah, and one white, empty cigarette packet on which word "FOREVER" is written in red colour and which is containing yellow coloured "zilli" (wrapper) is lying beside it. It is valued at Rs. 00.00/-.

2) Spot on Nimji "Pandhan" which is the kacacha road where blood had fallen, Spot-C.

1) At this spot blood is seen fallen at three places near one another within a circular area of 5 feet on the left side of the road. About 20 grams of blood mixed earth has been collected from each of the aforesaid three spots and packed in a single packet. The said blood mixed earth is valued at about Rs. 00-00/-.

2) In order to facilitate the chemical analysis of the aforesaid blood mixed earth, sample of about 30 grams of plain earth has been collected from beside the aforesaid blood mixed earth and packed in a separate packet. The said plain earth is valued at Rs. 00-00/-.

3) Place in the field of Manohar Mankar. Spot-D-1.

1) One light weight, dark blue coloured pair of rubber chappal having two straps and a thong, seized from the aforesaid spot. The said pair of chappal is smeared with mud. The sole of the chappal is worn out and bears blood stains at various places. It is valued at Rs. 10-00/-.

2) One old, used completely blood smeared, blue coloured Salwar with a tying cord, of the deceased girl. The said salwar is torn at the portion corresponding to both the legs while its left side back portion appears to have torn with thorns at three places. It is valued at Rs. 5.00/-.

3) Once black knickers having elastic, on which stains of semen are seen at various places. The said stains have been encircled with sketch pen. It is valued at Rs. 2.00/-.

4) One broken, two fold, black waist string measuring 25 1/2 inches in length and having a knot in the middle. It is valued at Rs. 00-00/-.

5) One blue coloured, broken tying cord measuring 30 inches in length of salwar, bearing stains of blood from place to place. It is valued at Rs. 00-00/-.

6) One blood smeared, white, cotton brassiere (chemise) of which back side portion of hook or button is broken (torn). It is valued at Rs. 00-00/-.

4) Place in the field of Manohar Mankar, spot D-2.

1) Two branches of "Bori" tree bearing stains of blood on the leaves and stems. It is valued at Rs. 00-00/-

5) Place in the field of Manohar Mankar, spot D-3.

1) One moss coloured ladies sweater having a label of CHARGER company on the inner side of nape portion. Floral design is embroidered in white and green thread on its both the front portions. On the front side of the sweater there are six buttons and one safety pin on the upper portion. It is valued at Rs. 50-00/-.

6) Place in the field of Manohar Mankar, spot D-4

1) One broken branch of cotton plant lying on the way in the field. On one leaf of the said branch there is a stain of blood. Since it is impossible to seize the entire branch, one leaf bearing blood stain has been plucked and seized. It is valued at Rs. 00-00/-.

7) Place in the field of Manohar Mankar, spot D-5.

1) One blood smeared, torn, white Kurta of the deceased girl. The said kurta is having design of big blue and small pink coloured dots. It is found on the right side of the foot-track in the field at the said spot. It is valued at Rs. 00-00/-/

8) Spot on "Shivdhura" in the field of Deshpande purchased by (Ravindra Balgar)-Spot-E.

1) One big stone about half portion of which is fixed in the earth while half portion is above earth. There are stains of blood at two places on its upper portion. The said stone has been taken out from the earth. It is weighing 15 kilograms. It is valued at Rs. 00-00/-.

2) One reddish coloured, small stone bearing stains of blood at two places. It is weighing about 400 grams. It is valued at Rs. 00-00/-.

3) One blackish and reddish coloured, small sized stone, bearing stains of blood at two places. It is valued at Rs. 00-00/-.

4) One black, nylon cord measuring three feet in length and having triangular and circular plastic hooks at its both ends. Such type of cord is usually used in woolen sweaters and jackets. It is valued at Rs. 00-00/-.

5) Six, empty, plastic sachets of Gutka, lying from place to place on the spot of occurrence. The said sachets bear name of the company "Malikchand Mava". They are valued at Rs. 00-00/-.

61. P.W. 8 Dr. Anindya Mukherjee has carried out the post mortem. She has quoted the following injuries in column no. 17 of the report.

- 1) Stab wound left infraclavicular region, obliquely placed, directed horizontally and medially of size 3 1/2 cms. x 1 cm. Cavity deep.
- 2) Incised wound, right cheek, obliquely placed of size 3 cm. x 1 1/2 cm. Muzzle deep tailing upwards and medially.,
- 3) Skin deep incised wound, front of abdomen in midline, 7 cm above umbilicus, transversely placed of size 1 cm. x 1/2 cm..
- 4) Multiple linear vertical scratch abrasions in back of trunk in both scapular, infrascapular and lumbar region of size ranging from 3 cm. To 15 cms. Red in colour, directed upwards. Spinal and para spinal area in midline spared.
- 5) Multiple contused abrasion, both iliac crest region and lumbar region of size ranging from 3 cm. x 1 cm. to 6 cm. x 2 cm., each, reddish in colour.
- 6) Multiple linear scratch abrasions present in lateral aspect of right leg in upper 1/3 rd of size ranging from 1 1/2 cms. to 4 cms., red in colour.
- 7) Multiple linear scratch abrasions, vertical, over right buttock and transverse over left buttock with pin head size, multiple abrasions, linear scratch abrasions ranging in size from 4 cms to 6 cms., red in colour.
- 8) Three linear scratch abrasions, medial aspect of right thigh in upper 1/4, vertically placed, directed anteriorly of size ranging from 5 cm. To 6 cm., red in colour.
- 9) Multiple discord contusions, medial aspect of left thigh in upper 1/3rd of size 3 cms. x 2 cms. Each, red in colour.
- 10) Two abrasions, front of left knee of size 1 cm. x 1 cm. Each, red in colour.
- 11) Three linear scratch abrasions, left breast in inferomedial aspect, directed downward of size ranging from 5 cms to 6 cms. each, red in colour.
- 12) Three linear, scratch abrasions, medial aspect to right breast of size ranging from 1/2 cm. to 2 cms. red in colour.
- 13) Linear scratchy abrasion, left cheek of size 3 cm., red in colour.
- 14) Lacerated wound, scalp in left parietal region, obliquely placed of size 2 cms x 1 cm. x bone deep.

She has further found the following injuries on external genitals as mentioned in column no. 15 as under;

Recent Perineal tear present in 6 o'clock (lithotomy position) of size 1 cm. x 1/2 cm. Subcutaneous tissue deep, hymen torn at 7 o'clock (lithotomy position) with bruising at the margins of tears. Dried blood stain present as a trickling mark of blood from lower angle of vagina upto the cleft of buttock 2 cm. Posterior to the anus. Pubic hairs matted.

62. This witness specifically admitted in her evidence that abrasions shown in column no. 17 can be possible due to dragging a person at a long distance and that Scratches can be possible during scuffle. She further stated that injury no. 19 can be possible due to banging any person forcefully. She has stated that vide letter Exh. 117 the following queries were made.

- i) Whether there was rape with the deceased?
- ii) Whether there was a unnatural intercourse?
- iii) Whether there were injuries on private part of deceased?
- iv) Whether hymen was torn?

From her evidence it can be seen that these queries have been answered by her below Exh. 118 as under:-

- i) Evidence of forceful sexual intercourse present.
- ii) Post Mortem findings does not suggest unnatural sexual intercourse, however, final opinion can be given after Chemical Analysis report.
- iii) Injuries over genitals present as mentioned in detail in column no. (15) of postmortem report.
- iv) Hymen torn, mentioned in detail in column no. (15) of postmortem report.

63. From the evidence discussed hereinabove, we find that the prosecution has proved the following circumstances.

- i) That the accused were creating terror in the village on the night of 17th December, 2005.
- ii) That on the midnight of 17th and 18th of December, 2005 at around 3.00 am. Accused had come to the house of P.W. 1 Prabha, drank water, entered the house of P.W. 1, apprehending untoward incident P.W. 1 signalled the deceased to run away, deceased ran away to the house of P.W. 9 Bhimrao Meshram, accused forcefully entered the house of Bhimrao, abducted the deceased and took her away to the agricultural field.
- iii) That while the deceased was forcibly taken by the accused nos. 1 and 2, deceased was begging them to leave her and her screams were heard by P.W. 12 Shobha Tayade, P.W. 14 Madhukar Bansod, P.W. 16 Pramilabai and P.W. 13 Nandkishor-hostile witness.
- iv) P.W. 1 Prabha immediately informed about the incident to P.W. 3 Shrikant Nagpure.
- v) P.W. 4 Sanjay Mankar when was going to his land in the morning of 18th December, 2005 for irrigating his land, he saw the clothes i.e. Sweater and brassiere which were attached to bush and also saw chappal. He saw the blood stains on the sweater and, therefore, he went to village Lonara and informed it to

the Police Patil.

vi) From the evidence of P.W. 3 Shrikant Nagpur, it has been proved that he was informed by Sanjay Mankar about the same. Thereafter, P.W. 3 Shrikant Nagpur and others went to the spot. They found that the clothes were seen on the bandh and in the land owned by Shri Sanjay Mankar. After search they found the dead body of Kanchan in a naked condition. She was lying dead. There were injuries on her person.

vii) The Police Patil informed the Police Station, Kalmeshwar about the incident prior to 6.00 a.m., in the morning of 18th December, 2005. P.W. 15 A.P.I., Chanpurkar informed the police officials on petrolling duty to go the spot. She also came on the spot immediately. P.W. 1 Prabha narrated the incident to her and she recorded the First Information Report on the basis of the report given by P.W. 1 Prabha below Exh. 86.

viii) P.W. 15 A.P.I., Chanpurkar informed P.W. 17 SDPO Pansure about the incident. He reached on the spot, carried out spot panchanama, inquest panchanama and made various seizures which are below Exhs. 89, 90 and 91. Various incriminating articles including the clothes, chappal, sweater of the deceased having blood stains were found on various spots.

ix) Post mortem report and evidence of P.W. 8 Dr. Anindya Mukherjee finds that the death of the deceased was homicidal and the rape being committed on her. Evidence further shows that the deceased was dragged for a long distance and she has received injuries which are possible in a scuffle.

x) It has also been established that immediately after the incident, the accused no. 1 Rakesh who was residing in the village and accused Amarsing who had come to stay with him have absconded from the spot and were absconding for the long period till they were arrested.

The Hon'ble Apex Court in the case of Dhananjay Chatterjee (cited supra) has held that though the abscondence by itself is not a circumstance which may lead to the only conclusion consistent with the guilty of the accused, but is certainly a circumstance which warrants consideration and careful scrutiny.

xi) The motive for the crime has also been proved beyond reasonable doubt. Insofar as the accused no. 1 Rakesh is concerned, his motive apart from lust, was previous enmity with the deceased which has come in the evidence of P.W. 1 Prabha, P.W. 2 Atul and P.W. 15 Chanpurkar and an attempt to create terror in the village so as to establish supremacy. Insofar as accused no. 2 is concerned, the motive is lust and gratification of sexual desire.

64. Before we proceed further, we will consider some of the contentions raised on behalf of the learned counsel for the appellants. Insofar as the attack by the accused on the question of forensic evidence not supporting the prosecution case is concerned, the Apex Court in the case of Rajendra Wasnik (cited supra) has held that merely because the forensic evidence report is inconclusive, it is not

necessary that the irresistible conclusion is only one, that the accused is not guilty. It is held that when the prosecution has been able to establish its case on circumstantial evidence, the non conclusiveness of the forensic science laboratory report would not entitle the accused to the benefit of doubt. In that view of the matter, the contention in that regard is to be rejected.

65. Insofar as the attack by the learned counsel for the accused on defective investigation is concerned, the Apex Court in the case of Sheo Shankar Singh Vs. State of Jharkhand and Another, , has observed as under:

Any such deficiency does not necessarily lead to the conclusion that the prosecution case is totally unworthy of credit. Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case. In Ram Bihari Yadav Vs. State of Bihar and Others, this Court while dealing with the effect of shoddy investigation of cases held that if primacy was given to such negligent investigation or to the omissions and lapses committed in the course of investigation, it will shake the confidence of the people not only in the law enforcing agency but also in the administration of justice.

(emphasis supplied)

66. The deficiencies on which the learned counsel for the appellants is harping, is one regarding non seizure of certain articles from the house of P.W. 9 Bhimrao and non examination of the wife of Bhimrao. We find that in view of the ocular testimony of the eye witnesses nothing much would turn on the first lacuna. Insofar as the second lacuna on which the learned counsel is relying is concerned, it is not necessary that the prosecution must examine all the witnesses. If the prosecution on the basis of the evidence of the witnesses examined by it, is in a position to prove the case beyond reasonable doubt, then non examination of the other witnesses would not be of much consequences.

In that view of the matter, we find that the contention that only on account of faulty investigation the prosecution case should be totally rejected, cannot be accepted.

67. Insofar as the contention of the learned counsel for the accused regarding discrepancies in weapons is concerned, no doubt that in the evidence of some of the witnesses it has come that accused no. 1 was holding the knife and accused no. 6 was holding katta. Whereas in the evidence of some of the witnesses, it has come that accused no. 1 was holding katta and accused no. 2 was holding knife. However, that cannot be a ground to discard the ocular testimonies of the witnesses. In the case of Waman and Others Vs. State of Maharashtra, , the Apex Court has observed as under:

We also verified and considered their statements with reference to the objection raised by the counsel for the appellants. First of all, the contradictions are minor in nature and not related to the major overt act attributed to each accused. It is

relevant to point out that these persons made statements to the police immediately after the occurrence, i.e. on 29.10.2000 and their evidence was recorded before the court in the month of December, 2001 nearly after 1 year. Even otherwise, the prosecution witnesses all are hailing from agricultural family and are villagers, we cannot expect minute details as stated in their earlier statements and before the court. In this regard, it is useful to refer various decisions rendered by this Court as to the minor contradictions in the statements of prosecution witnesses and the admissibility of the same.

It is clear that not all contradictions have to be thrown out from consideration but only those which go to the root of the matter are to be avoided or ignored. In the case on hand, as observed earlier, merely on the basis of minor contradictions about the use and nature of weapons, injuries, their statements cannot be ignored in toto. On the other hand, we agree with the conclusion of the trial Court as affirmed by the High Court about the acceptability of those witnesses, accordingly, we reject the claim of the appellants as to the same.

(emphasis supplied)

68. Insofar as the contention of the learned counsel for the appellants that the circumstance regarding motive was not put to the accused and as such it cannot be relied, is concerned, perusal of the question no. 146 which is put to the accused no. 1 clearly shows that the question regarding previous quarrel between the accused and deceased was specifically put to him, to which he has denied. In that view of the matter, the contention in that regard is without substance.

69. Having considered the various contentions raised on behalf of the learned counsel for the appellants, we proceed further to consider as to whether in the present case the chain of circumstances proved beyond reasonable doubt by the prosecution, is so complete and interwoven to each other that leads to no other conclusion than the guilt of the accused.

70. What is most important in the present case is the time gap between the period when the accused were last seen together with the deceased and finding of the dead body of the deceased. From the evidence of the prosecution witnesses, it can safely be concluded that the deceased was last seen together with the accused between 3.00 to 3.30 a.m. in the midnight of 17th to 18th December, 2005. The dead body was discovered immediately thereafter in the morning after P.W. 4 Sanjay Mankar had noticed blood stained clothes of the deceased in his farm. It will be appropriate to refer to the observations made by the Hon'ble Apex Court in the case of State of Uttar Pradesh vs. Satish (cite supra) which are as under:-

22. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult

in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses Pws 3 and 5, in addition to the evidence of P.W. 2.

(emphasis supplied)

71. The facts of the present case are very much closer to the facts which were for consideration before the Apex Court in the case of State of U.P. vs. Satish (supra). In the present case also from the evidence of P.W. 1 Prabha, P.W. 2 Atul and P.W. 9 Bhimrao it is clearly established that the deceased was last seen in the company of the accused between 3.00 to 3.30 a.m. and the deceased was found dead immediately in the next morning. In that view of the matter coupled with the other circumstances which are discussed hereinabove, we are of the considered view that the possibility of any other person than the accused being author of the crime becomes impossible. Time gap between the deceased last seen together with the accused and her dead body being found, the other villagers viz. P.W. 12 Shobha, P.W. 14 Madhukar, P.W. 16 Pramilabai, P.W. 13 Nandkishor-the hostile witness, listening the screams of the deceased while she was being taken away to the fields, immediate disclosure about the names of the accused by P.W. 1 Prabha to P.W. 3 Shrikant Nagpur and the abscondence of the accused, in our considered view, leads to the only conclusion that it is the present accused who are the author of the crime of committing rape and causing murder of the deceased.

72. We find that the prosecution, on the basis of the evidence led before the court, has proved beyond reasonable doubt that the facts which are established are consistent only with the hypothesis of the guilt of the accused and that they are not explainable on any other hypothesis except that the accused are guilty. The prosecution has established that the chain of circumstances proved beyond reasonable doubt is so complete, as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. A chain of evidence placed on record, shows that in all human probability the act must have been done by the accused alone. In that view of the matter, we find that the learned trial Judge has rightly passed order convicting the accused no. 1 Rakesh and accused no. 6 Amarsing and no interference is warranted with the said findings of the learned trial judge.

73. Now, the next question arises is as to whether the death sentence inflicted to the accused needs to be confirmed or not?

74. The Constitution Bench of the Hon"ble Apex Court in the case of Bachan Singh vs. State of Punjab (supra) while upholding the constitutionality of Section 302 of the Indian Penal Code, insofar as it provides death sentence and section

354(3) of Cr.P.C. has observed thus:

195. In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan-as we have discussed already-do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

196. We will first notice some of the aggravating circumstances which, in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms:

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 sterner sentence.

198. It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the Code of Criminal Procedure, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ram's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2: 1) has completely reversed the view that had been taken in Ediga Anamma regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), "murder most foul" is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation.

As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us 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. This is so because "style is the man". 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. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia*, in general, and clauses 2 (a), (b), (c), and (d) of the Indian penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty u/s 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance u/s 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

202. In *Rajendra Prasad*, the majority said: "It is constitutionally permissible to

swing a criminal out of corporeal existence only if the security of State and society, public order and the interests of the general public compel that course as provided in Article 19(2)to(6)." Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302, Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos"; nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Sec. 302, Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in Bishnu Deo Shaw Vs. State of West Bengal, , which follows the dictum in Rajendra Prasad (ibid).

203. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of "murder" or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of "special reasons" in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

204. Dr. Chitale has suggested these mitigating factors "Mitigating circumstances:-In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:-

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

205. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child" that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

206. According to some Indian decisions, the post-murder remorse, penitence or repentance by the murderer is not a factor which may induce the Court to pass the lesser penalty (e.g. Mominuddin Sardar). Emperor Vs. Mominuddi Sardar, . But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of Messenger and Bitter (ibid), which are in point.

207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Sec. 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is

unquestionably foreclosed.

75. It can, thus, be seen the Constitution Bench of the Apex Court clearly held that in finding out presence or absence of special reasons the court must pay due regard both to the crime and the criminal. It has been held that what is the relative weight to be given to the aggravating and mitigating factors, depends upon the facts and circumstances of the particular case. It has further been held that 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. It has been held that only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist.

76. The Apex Court in the case of Machhi Singh and others vs. State of Punjab (supra) has observed thus;

32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence in no case" doctrine are not far to seek. In the first place, The very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance.

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house,

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. for instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

III Anti-social or socially abhorrent nature of the crime. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry-deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. V Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity. (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

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

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

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

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

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

34. 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 weightage to the mitigating circumstances which speak in favour of the offender?

77. It has, thus, been held that when community's collective conscience is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The Apex Court has further held that the factors that are to be taken into consideration while considering as to whether the death sentence is to be inflicted or not, are the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime and magnitude of crime and personality of victim of murder. It has been further held that life imprisonment is the rule and death sentence is an exception. It has been further held that the balance sheet of aggravating and mitigating circumstances has to be drawn, full weightage is to be given to mitigating circumstances and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. It has been further held that while taking decision question may be asked and answered as to whether there is something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence. Another question that is required to be answered is, are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender.

78. In the case of Laxman Naik vs. State of Orissa (supra) the Apex Court while upholding death sentence observed thus:-

28. The evidence of Dr. Pushp Lata, PW12, who conducted the post-mortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts showing the brutality which she was subjected to while committing rape on her. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence u/s 302 of the Penal Code. As regards the punishment u/s 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant u/s 376.

79. In the case of Dhananjay Chatterjee (supra), the Apex Court while upholding the death sentence has observed thus:-

14. In recent years, the rising crime rate--particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while may receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. 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 defenceless and unprotected state of the victim. Imposition of appropriate punishment is the

manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public's 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.

80. In the case of *Molai and another vs. State of M.P.* (supra), the Apex Court while confirming the death sentence has observed thus:-

37. We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the Courts below as well as before us and in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the Courts below have committed no error in awarding capital punishment to each of the accused. It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of her being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangled her by using her under garment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused (appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the Courts below.

81. The facts which are somewhat similar to the facts in the present case, fell for consideration before their Lordship of the Apex Court in the case of *Rajendra Wasnik vs. State of Maharashtra* (supra), wherein the Apex Court has observed thus:-

18. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.

82. However, as stated hereinabove in some of the cases the Apex Court found the middle way between the extreme penalty of death sentence and sentence for life imprisonment which normally culminates into imprisonment of 14 years.

83. The Apex Court in the case of *Swami Shraddhanand vs. State of Karnataka* (supra) posed a question as to how the sentence of imprisonment for life given to a convict as a substitute for the death sentence must be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first

choice. Answering the said question, the Apex Court observed thus:-

90. Earlier in this judgment it was noted that in the decision in *Shri Bhagwan* there is a useful discussion on the legality of remission in the case of life convicts. The judgment in *Shri Bhagwan*, in SCC para 22, refers to and quotes from the earlier decision in *State of M.P. v. Ratan Singh* which in turn quotes a passage from the Constitution bench decision in *Gopal Vinayak Godse*. It will be profitable to reproduce here the extract from *Ratan Singh* (SCC pp 473-74, para 4).

4. As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer *res integra* and stands concluded by a decision of this Court in *Gopal Vinayak Godse v. State of Maharashtra*, where the Court, following a decision of the Privy Counsel in *Pandit Kishori Lal v. King Emperor* observed as follows: (AIR pp 602-03, para 4-5)

"4....Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.

5. If so the next question is whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Penal Code, Code of Criminal Procedure or the Prisons Act... A sentence of transportation for life or imprisonment for life must *prima facie* be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

7...But the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, *inter alia*, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act... Under the said rules the order of an appropriate Government u/s 401, Criminal Procedure Code, are a prerequisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesseer sentence for a sentence of transportation for life.

8..... The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions u/s 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.

It is, therefore, manifest from the decision of this Court that the Rules framed

under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government u/s 401 of the code of Criminal Procedure and neither Section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period the prisoner's death and remissions given under the Rules could not be regarded as a substitute for a sentence of transportation for life.

Further, in para 23, the judgment in Shri Bhagwan observed as follows: (SCC pp. 306-07)

23. In Maru Ram v. Union of India, a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in Section 433-A we deal only with life sentences, remissions lead nowhere and cannot entitle a prisoner to release. Further, in Laxan Naskar v. State of W.B., after referring to the decision of Gopal Vinayak Godse v. State of Maharashtra, the Court reiterated that sentence for imprisonment for life ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term is served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose.

(emphasis supplied)

91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singhand Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. the matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this

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

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

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

95. In conclusion, we agree with the view taken by Sinha, J. We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High Court by imprisonment for life and direct that he shall not be released from prison till the rest of his life.

84. The Apex Court in the facts of the case found that substitution of the death sentence given to the appellant by the trial court and confirmed by the High Court, by imprisonment for life, directing that he shall not be released from prison till the rest of his life, would subserve the ends of justice. However, the Hon"ble Apex Court in paragraph no. 49 of the said case has itself observed that that "there can not be a rule to say that in a conviction based on circumstantial evidence, the death sentence has to be excluded in all cases.

85. The said middle path has been followed by the Apex Court in various cases. In the case of Deepak Rai. vs. State of Bihar, the Apex Court after considering the entire law upheld the death sentence imposed to the accused and commuted the sentence of accused no. 3 to life imprisonment till the rest of his life.

86. In the case of Sangeet and Another Vs. State of Haryana, , the Apex Court in the facts of the said case and in the absence of evidence found that the death penalty could not have been awarded and converted the same into the sentence for life imprisonment.

87. Again in the case of Sandeep Vs. State of U.P., , the Apex Court finding that the case was not the case which could be termed as the rarest of rare case, converted the death sentence into life imprisonment directing the appellant to serve 30 (thirty) years in jail without remissions, before consideration of his case for premature release.

88. In the case of Shankar Kisanrao Khade (supra) again considering the via media approach between the death sentence and the life imprisonment, His Lordship Justice Madan B. Lokur while delivering the separate but concurring judgment in the said case observed thus:-

124. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra) and even in some of the cases referred to above. It is, this, individualised sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mention below.

89. After considering the various cases wherein the Apex Court has adopted the via media approach while considering the issue of sentence, the Apex Court has observed thus:-

142. These decisions clearly suggest that this Court has been seriously reconsidering, though not in a systemic manner, awarding life sentence as an alternative to death penalty by applying (though not necessarily mentioning) the "unquestionable foreclosed" formula laid down in Bachan Singh.

90. It can, thus, be seen that though in various cases, the Apex Court has confirmed the death sentences while taking into consideration various factors as laid down in the case of Bachan Singh v. State of Punjab (supra) and in some other cases, the Apex Court has adopted via media approach and has converted the death sentence into life sentence directing that the convict must undergo particular years of sentence without remissions before he can be considered for premature release or in some other cases directing the sentences to run consecutively instead of concurrently.

91. In the back ground of this position, we will have to consider as to whether in the present case the death sentence imposed upon the appellants deserves to be confirmed or not?

92. The Apex Court in the catena of Judgments including in the case of Bachan Singh vs. State of Punjab, Machhi Singh and others vs. State of Punjab and in various other judgments, has laid down the factors which are to be taken into consideration before considering the question as to whether the death sentence should be imposed or not. The Apex Court has laid down certain circumstances, which are to be treated as aggravating circumstances and mitigating circumstances. We will first deal with the aggravating circumstances.

Manner of commission of murder:

a) In the present case, it can clearly be seen that the accused no. 1 Rakesh, who was residing in the village, had previous enmity with the deceased and he in a pre-planned manner has forcibly entered into the house of the deceased. When she ran away and took shelter in her uncle's house, she has been abducted therefrom and mercilessly dragged to the field, her clothes thrown away, rape was committed on her and thereafter she has been brutally murdered. We, therefore, find that the manner of committing crime is extremely brutal, gruesome, cruel and dastardly.

Motive for commission of offence.

b) The motive for commission of the murder is to take revenge on the helpless girl of 19 years and to satisfy the lust and gratification of the sexual desire.

Magnitude of the crime c) The magnitude of the crime is enormous in as much as firstly villagers have been threatened, thereafter the accused forcibly entered in the house of the deceased, when she escaped and took rescue in the house of her uncle she has been abducted, dragged in the village, taken to the field mercilessly dragging her, thereafter committing rape on her and finally killing her. From the nature of the crime itself, it is clear that the nature of the crime is such which is likely to cause fear psychosis on the villagers at large.

Personality of the victim

d) The victim of the murder and rape is an innocent girl of 19 years, who's modesty is outraged and who has been killed, before she could start her life.

It can, thus, be seen that in the present case the aggravating circumstances are fully satisfied.

93. Now, let us consider the mitigating circumstances.

i) Insofar as the first mitigating circumstance i.e. mental and emotional disturbance or extreme provocation is concerned, it is not available to the accused. In the present case, it is not the case of the accused that they were under mental and emotional disturbance or there was provocation by the deceased.

ii) As laid down in various cases, the age of the accused is a relevant consideration but not a determinative factor by itself. As a matter of fact, the

Apex Court in the case of Dhananjay Chatterjee itself has found that though the accused was of a young age, the said cannot be said to be a mitigating circumstance in his favour.

iii) From the material on record which has come on record it can be seen that both the accused have been on earlier occasion convicted for the offences punishable under Sections 380, 454, 457, 392 of the Indian Penal Code and under MCOC ACT. We, therefore, find that the chance of the accused in not indulging in the commission of the crime and they being reformed and rehabilitated is not available in the present case.

iv) It is not the case of the accused that they were mentally defective and defect impaired their capacity to appreciate the circumstances of their criminal conduct.

v) It is not the case of the accused that there are other circumstances which in normal course of life would render the act committed by the accused as morally justified.

vi) From the perusal of the evidence on record, it also cannot be said that the act was not committed in pre-ordained manner and death has resulted in the commission of another crime.

vii) It is also not the case that it is unsafe to rely upon the testimony of sole eye witness.

In that view of the matter, we find that there are no mitigating circumstances in the present case, which would come to the rescue of the present appellants.

94. However, in view of the Judgment of the Apex Court in the case of Shankar Kisanrao Khade (supra) that even if both the tests are satisfied, still the Court will have to apply finally the rarest of the rare case test. The Apex Court in various cases has found that the rarest of rare test depends upon the perception of the society that is "society-centric" and not "Judge-centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not.

95. In the case of Machhi Sing's case the Apex Court has observed that the court has to consider whether the collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. As such, while deciding the present case, we will have to keep ourselves aloof from our personal opinion as regarding the desirability or otherwise of retaining death penalty. What is required by us, is to decide as to whether in the perception of the society at large, the present case is a case which can be considered as rarest of rare case warranting death sentence.

96. At this stage, it will be appropriate to refer to the quotation of Lord Denning which has been quoted by the Apex Court in the case of Depak Rai vs. State of Bihar (supra), which is as under:

..... the punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformatory or preventive and nothing else....The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.

We will, therefore, be called upon to consider as to whether the present crime is so outrageous that society insists on adequate penalty of death or not.

97. In the background of aforesaid, let us consider the facts in the present case. The accused no. 1 Rakesh Manohar Kamble who has already been convicted at an earlier point of time for the offences punishable under sections 380, 454, 457 of the Indian Penal Code and under the provisions of MCOC Act, was residing in the same village and working in a poultry farm. He had a quarrel with the deceased, a young girl of 19 years. Accused no. 6 Amarsing who is undisputedly also convicted in MCOC ACT with respect to the same offences for which the accused no. 1 Rakesh was convicted, comes to the village prior to few days and resides with accused no. 1 Rakesh, On the fateful night the accused threatens the villagers not to come out of their house. Accused no. 1 Rakesh enters the house of the deceased wherein deceased resides with her mother, father who is mentally retarded and brother who is also mentally not that strong. The poor mother looking at the danger to her young daughter, signals her to go out of the house. Helpless victim rushes to the house of her uncle to take shelter. The accused follow her, break open the door of her uncle's house, abduct the victim from his house and drag her from the village through the fields. They undress her, throw her clothes on the way, commit rape on her and then finally kill her. The medical evidence and plethora of injuries sustained by the deceased on her person only reveals that she was dragged on the rough terrain ruthlessly for a long distance. For no fault of her, a young girl of 19 years was given such inhumane and brutal treatment. After having done all that, the victim was left in such a condition in the open fields to meet her fate. The villagers though they were hearing hues and cries of the deceased could not dare to come out to rescue the deceased, due to fear of accused. Though the deceased was mercilessly dragged and was begging the accused to spare her, the hearts of the accused did not melt and cries of the helpless victim fell on their deaf-ears.

98. Would the society not expect the accused who have committed such terror and in extreme brutal, dastardly, gruesome, cruel manner committed rape of helpless victim and killed her for no fault of her, to be hanged. Would the society not expect, the holders of the judicial powers centre, to award proportionate sentence to the accused who have no respect for human values and have treated a young girl of 19 years in the most brutal, cruel and dastardly manner. Would the Society not expect such depraved act to be dealt with in a stern manner. We

also cannot ignore the recent amendments brought to the Indian Penal Code on account of huge public hue and cry that arose on account of dastardly act in the heinous and gruesome rape and murder of Nirbhaya. The amendment as a matter of fact echo's the sentiments of the Society at large. The sentiment of the Society is glaring explicit, that such heinous crime on hapless women are required to be dealt with an iron hand. We have, therefore, no hesitation to hold that, in the perception of the Society it would surely be a "rarest of rare" case wherein the death sentence is required to be imposed.

99. However, at the same time, we will have to segregate the case of accused no. 1 Rakesh and that of accused no. 6 Amarsing. From the evidence on record, it would reveal that previous enmity of the deceased was only with the accused no. 1 Rakesh. It is the accused no. 1 Rakesh, who was residing in the village for a pretty long time. However, the evidence on record would show that the appellant no. 2/accused no. 6 Amarsing, had come to reside in the village as guest of accused no. 1 Rakesh shortly before the incident. We, therefore, find that it will be difficult to hold that the accused no. 6 Amarsing had same intention as of accused no. 1 Rakesh. It is the accused no. 1 Rakesh, who pulled the deceased from the house of her uncle. From the evidence on record, it would further reveal that it was the accused no. 1 Rakesh, to whom the deceased was repeatedly begging to leave her. We are, therefore, of the view that the degree of depravity in the crime committed by the accused no. 1 Rakesh and accused no. 6 Amarsing would differ. We are, therefore, of the considered view, that though the death sentence of the accused no. 1 Rakesh Manohar Kamble @ Niraj Ramesh Wakekar needs to be confirmed, insofar as the accused no. 6 Amarsing S/o Kisarsing Thakur is concerned, the sentence of life imprisonment which would means 30 (thirty) years imprisonment without remission, before he can be considered for premature release, would be proportionate to the crime committed by him.

100. Before we part with the Judgment, we must place on record our appreciation for the valuable assistance rendered by Smt. B.H. Dangre, learned Public Prosecutor who was ably assisted by Shri S.S. Doifode, learned Additional Public Prosecutor. We must also appreciate the sincere and dedicated efforts taken by Shri R.P. Thote, Advocate who was appointed to appear on behalf of the appellants/accused. In the result, the Reference made by the learned Additional Sessions Judge, Nagpur in Special Criminal Case No. 25 of 2006 is partly confirmed. The death sentence awarded to the appellant no. 1/accused no. 1 Rakesh Manohar Kamble @ Niraj Ramesh Wakekar is confirmed. However, insofar as the appellant no. 2/accused no. 6 Amarsing s/o Kisarsing Thakur is concerned though the conviction as recorded by the learned trial Judge is maintained, the death sentence is commuted to life imprisonment for 30 (thirty) years imprisonment without remission, before he can be considered for premature release.

The appeal of the appellant no. 1/accused no. 1 Rakesh Manohar Kamble @ Niraj

Ramesh Wakekar is dismissed. The appeal of the appellant no. 2/accused no. 6 Amarsing s/o Kisansing Thakur is partly allowed in the aforesaid terms.

Rest of the order is maintained.

Fees payable to the learned counsel appointed to appear on behalf of the appellants/accused are quantified at Rs. 25,000/-.