
(2012) 06 BOM CK 0126

In the Bombay High Court

Case No : Confirmation Case No. 1 of 2011 and Criminal Appeal No. 481 of 2012

The State of Maharashtra

APPELLANT

Vs

Ramesh Mahipati Randiwe
 Ramesh Mahipati Randiwe
Vs The State of Maharashtra Government Pleader, High
Court, Mumbai (A.S.)

RESPONDENT

Date of Decision : 26-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 216, 313, 360, 366

Evidence Act, 1872 — Section 154

Penal Code, 1860 (IPC) — Section 302, 307, 323, 324

Citation : (2012) BomCR(Cri) 197 : (2012) 114 BOMLR 2331

Hon'ble Judges : P.D. Kode, J

Bench : Single Bench

Advocate : B.P. Jakhade, for the Appellant; Geeta Mulekar APP for the State, for the Respondent

Judgement

P.D. Kode, J.—The Confirmation Case No.1 of 2011 arise out of reference made u/s 366 of the Code of Criminal Procedure (hereinafter referred as "Code" for the sake of brevity) by learned Additional Sessions Judge, Kolhapur for confirmation of sentence of death awarded to sole accused in Sessions Case No.141 of 2008 by the judgment and order dated 18th March, 2011. The said accused in his turn has preferred abovestated Criminal Appeal No. 481 of 2012 challenging the said judgment and order of his conviction and such a sentence imposed upon him. By the said judgment and order learned Additional Sessions Judge has convicted sole accused at the said Sessions Trial for commission of offence:-

(i) punishable u/s 302 of Indian Penal Code and sentenced him to a death for committing murder of his wife Smt.Ashwini and further ordered him to pay a fine of Rs.200/- and in default to suffer R.I. for two months;

(ii) punishable u/s 307 of Indian Penal Code for attempting to commit murder of his son - Kedar and sentenced him to suffer rigorous imprisonment for three

years and to pay a fine of Rs.1,000/- and in default to suffer R.I. for one month;

(iii) punishable u/s 323 of Indian Penal Code for causing simple injury to his daughter - Shubhangi (P.W.9) and sentenced him to suffer R.I. for one month.

and ordered concurrent running of sentences awarded on second and third count.

2. Such of the facts necessary for deciding present proceedings are as under :

Dilip Tibile (P.W.12) Police Head Constable while on station house duty at Old Rajwada police station on 6th August, 2008 at about 6 am upon receiving a telephonic call that murder was committed near statue of Raj Kapoor. After making entry in station diary he deputed API Vinod Satav (P.W.14) and other staff to said spot. P.W.14 reached the spot of incident behind statue of Raj Kapoor in Shivaji Peth, 711, A ward, and found crowd gathered in front of a house of which door was closed from inside. On alarm given by him regarding arrival of the police, the appellant wearing banian and half pant with blood stains thereon opened the door. As the crowd was not in a mood to listen P.W.14 send the appellant to police station. P.W.14 also gave call to photographer ASI Bhaurao Patil P.W.11 for visiting the spot for taking the photograph. P.W.14 during the enquiry at the spot came across, one Mahadeo Shripati Mane (P.W.3) - maternal Uncle of victim Smt.Ashwini and resident of Shivaji Peth, Kolhapur.

2.1. P.W.3 lodged complaint Exhibit-17 with PW-14 against the appellant for commission of murder of his niece Ashwini, attempting to cause murder of son of Ashwini - Kedar and causing hurt to Shubhangi (P.W.9) by narrating that his niece Ashwini had married appellant, about 12 years back and since then she was residing alongwith appellant, her mother-in-law Akkatai, daughter - Shubhangi of age 10 years, son - Kedar of age 2 1/2 years and Sonali (P.W.4) daughter of her deceased, sister-in-law. Ashwini used to visit house of (P.W.3) alongwith her children and he also used to visit her house. Ashwini on 2-3 occasions had disclosed him about the quarrels ensuing with the appellant. P.W.3 pacified the appellant on one or two occasions and so also parents of Ashwini had tried to pacify him. However, none of them lodged complaint with the police regarding said affairs in between husband and wife.

2.2 He further narrated that on the said day at about 6.25 am his brother - Balwant told him that P.W.9 and P.W.4 informing about quarrel ensued in between Ashwini and appellant have returned to the house of Shubhangi and P.W.3 should go to the said place to ascertain the happenings. P.W.3 went to the house of Ashwini and found that crowd has gathered outside the house and police were also present at the said place. P.W.3 went in the house and noticed that Ashwini was lying dead in pool of blood in bed, with a wooden log used for making Thandai, smeared with the blood lying by her side.

2.3 He further narrated that after sometime P.W.9 and P.W.4 alongwith Kedar returned to the said place. Upon enquiry they told P.W.3 that on the count of household affairs the appellant started quarrelling and beating Ashwini by means

of wooden log used for preparing Thandai. They raised hue and cry and tried to intervene. The appellant pushed them away and recommenced assaulting Ashwini. The blood started oozing from her head and she fell in the bed. As Kedar started crying loudly, appellant lifted him and started drowning him in the water in the plastic drum in the house. P.W.9 went out of the house shouting. The appellant left Kedar in the water and chased her. P.W.4 took out Kedar from water in the drum. The appellant returned and snatched Kedar from P.W.4 and by uttering that he will throw him in Khani came out of the house and ran in the direction of Chowky. P.W.4 and P.W.9 followed him shouting for saving Kedar, that their father was taking Kedar for throwing him in Khani.

2.4 Ranjit Chavan P.W.-2 and people in the surrounding followed the appellant after he had taken the left turn in the chowk and caught him at kachha rasta and people took away Kedar from the appellant and handed over him to P.W.4 and P.W.9. The people enquired regarding the blood on clothes of the appellant and they told that during the quarrel with Ashwini, the appellant had firstly assaulted on her head with wooden log used for preparing Thandai and thereafter number of times upon her head while she was sitting on the bed and the blood oozed from her head and she fell in the bed.

2.5. P.W.14 treated complaint Exhibit-14 as FIR and alongwith forwarding letter Exhibit-54 forwarded same to Old Rajawada police station. P.W.12 on the basis of the same registered crime No.109 of 2008 u/s 302, 324 and 307 against the appellant and handed over the investigation to P.W.14. P.W.14 at the conclusion of the investigation on 17th October, 2008 submitted the charge sheet for commission of such offences against the appellant in the court of J.M.F.C., Kolhapur. The said Court duly committed the said case involving the offences triable by the Court of Sessions to the Sessions Court at Kolhapur for trial.

3. The appellant pleaded not guilty to the charge Exhibit-3 framed by the trial court against him on 14th January, 2009 for commission of offences u/s 302, 324 and 307 of IPC on the count of having assaulted by means of a wooden log meant for preparing Thandai and having murdered of his wife Ashwini, and having caused grievous hurt to his daughter P.W.9 and having attempted to cause murder of his son Kedar.

4. The prosecution examined in all above referred 16 witnesses at the trial i.e. seven witnesses so far referred and additionally panch Neminath - P.W.1 regarding seizure of blood stained clothes of deceased i.e. Article 8 pink colour sari, Article 9 pink colour blouse and Article 10 parrot green colour petticoat under panchnama Exhibit-12 on 16th July, 2008, Satish Balwant Salunke (P.W.5) regarding statement/extra judicial confession made by appellant regarding his intent to send Kedar at the place at which he had already sent his mother i.e. Ashwini. Dr.Mahendra Phalke (P.W.6) regarding examination of P.W.9 made by him on 6.8.2008 and certificate Exhibit-30 regarding the injuries sustained by her issued by him, Dr.Pravin Naik (P.W.7) regarding autopsy performed at C.P.R. Hospital, Kolhapur on 6.8.2008 and autopsy notes Exhibit-32 of the same

prepared by him, Panch Sachidanand Bandodkar - (P.W.8) regarding seizure of blood stained baniyan Article 11 and pink colour nicker Article 12 of the appellant under panchnama Exhibit-35, Father of deceased Ashwini, Kondiram Pavle (P.W.10), Police Constable M.A.Shaikh (P.W.13) regarding taking of 13 muddemal articles seized during investigation as mentioned in forwarding letter Exhibit-52 to Chemical Analyser as per the direction of I.O. Out of the said witnesses the prosecution was required to cross examine P.W.4 - Sonali by obtaining leave u/s 154 of the Evidence Act due to having not supported the prosecution case. The prosecution also relied upon the documentary evidence prepared/collected during the course of investigation and referred hereinabove.

5. After the closure of prosecution evidence the trial Court for the reasons recorded in the order dated 18th February, 2011 has allowed the application Exhibit-75 preferred by the prosecution u/s 216 of the Code for alteration of the charge. Accordingly, charge Exhibit-77-C was framed against the appellant for commission of offences u/s 302, 323 and 307 of Indian Penal Code on the count of on the date, time and place mentioned in the said charge having assaulted by means of wooden log meant for preparing Thandai and having caused respectively murder of his wife Ashwini and simple hurt to his daughter P.W.9 and having attempted to cause murder of his son Kedar. The appellant pleaded not guilty to the said charge. After such alteration in charge was effected neither the prosecution sought recall of any witness for further examination or sought for examination of any more witness nor the appellant sought recall of any prosecution witness for further cross examination.

6. The defence of the accused as disclosed from the answers given by him during his examination u/s 313 of the Code and from the trend of cross examination effected on his behalf was that of total denial and of false implication. Significantly, during the cross examination Dr.Naik P.W.7 was also suggested that injuries as sustained by Ashwini could be caused in event of fall of heavy objects or any article from roof on a person lying or sleeping on the floor. On the similar lines Shubhangi (P.W.9), was also suggested that centering articles kept on wooden beam had fallen on the head of Ashwini and due to which she had sustained injuries and succumbed. P.W.9 was further suggested that the people gathered at the spot prior to the arrival of police had removed said articles. Similar suggestions were given to the investigating officer P.W.14. The appellant claimed that prosecution witnesses at the behest of police had deposed against him. He had declined to examine himself on oath or to adduce any evidence in support of his defence.

7. The trial Court after due assessment of evidence came to the conclusion that prosecution has proved that the death of Ashwini was homicidal and the appellant was responsible for committing her murder; causing simple hurt to (P.W.9) and attempting to cause death of his son Kedar as claimed by the prosecution and accordingly convicted and sentenced the appellant as narrated earlier. The trial Court for the reasons stated in paragraph nos.59, 60 and 61

came to conclusion that the case was falling in the category of rarest of rare case and awarded death sentence with fine to the appellant for committing murder of his wife.

8. Mrs.B.P.Jakhade the learned appointed advocate for the appellant by meticulously taking us through the evidence of each of the prosecution witness urged that the

(i) prosecution case mainly rest upon the evidence of child witness Shubhangi (P.W.9)

(ii) evidence of P.W.9 is inherently of weak nature and no implicit reliance can be placed upon the same

(iii) unawareness claimed by P.W.9 regarding certain vital matters clearly denotes strong possibility of herself being tutored

(iv) other eye witness Sonali P.W.4 apart from not supporting the prosecution has given a counter blow by amongst other stating that appellant after preparing a tea, having bath, had left the house early in the morning at 5.00 hours by telling that he was leaving for work and then her maternal aunt was sleeping in the bed and later on when she had got up she had noticed that maternal aunt was lying dead in pool of blood on the bed.

(v) prosecution story regarding occurrence of events is inherently improbable as the same fails to reasonably explain the appellant having not committed much less even attempted to commit any act for causing harm to P.W.4 who was present in the house at the time of incident

(vi) out of the two so called eye witnesses for the incident, P.W.4 not supporting the prosecution is a circumstance indicating that tale told by P.W.9 may not be true.

(vii) P.W.9 having admitted that the appellant was doing centering work supports the defence of the appellant that Ashwini had died due to accidental fall of centering material upon her head.

(viii) P.W.9 fail to deny such suggestion given to her and only preferred to claim ignorance that centering material kept on beam had fallen and caused injuries to her mother resulting in her death being removed by the persons gathered at the spot prior to arrival of police.

(ix) thus trial Court manifestly erred in accepting evidence of P.W.9 and making the same basis alongwith other evidence to reach to the conclusion of guilt of the appellant.

(x) remaining prosecution evidence is of circumstantial nature i.e.

(1). extra judicial confession allegedly made by appellant to P.W.2 and P.W.5 when they had caught him;

(2) the appellant found running away from his house alongwith Kedar the child;

(3) the clothes on person of the appellant then containing blood stains;

(4) the appellant having motive for commission of the crime are either not established by the prosecution evidence or not of deceive nature leading to the sole inference of the guilt of the appellant nor even affording corroboration to the evidence of Shubhangi P.W.9 upon the crucial aspect of the appellant being the author behind giving the blows of wooden log to Ashwini and/or committing the other act of an assault qua P.W.9 and/or attempt to murder Kedar.

(xi) out of said circumstances theory of any such extra judicial confession was made by the appellant to the said witnesses is apparently inherently improbable as none of them can be said to be persons of closely associated with him for confiding such a matter with them and if at all the appellant was desirous of doing away with his son then it would have been unlikely that he would indulge in making such a declaration to such persons who were chasing him for snatching the said son.

(xii) second circumstance of the appellant found running away with his child and/or the same being for the purpose of killing the said son also appears improbable as he had an ample opportunity to kill him in his house. Thus considering the said circumstance in proper perspective i.e. running away from the house in which his wife was lying in injured condition due to an accident could be for altogether different purpose i.e. either for bringing some medical aid for her or for giving medical aid for the said child.

(xiii) third circumstance that blood stains were found on the person of the appellant, by itself cannot be said to be incriminating circumstance in light of the fact that accidental death had already taken place in the house denoting all possibility of clothes of the appellant getting stains due to the same.

(xiv) fourth circumstance regarding the appellant having motive to commit crime is also not at all convincing due to apparent conflict seen regarding the said aspect in the evidence of P.W.3, P.W.9 and P.W.10 inasmuch as P.W.3 claimed that Ashwini was not deciding to have third child while the appellant wanted to have third child; P.W.9 claimed that her mother was informing the appellant that she wants the child in her womb while P.W.10 claimed that Ashwini was telling her husband that she does not want the third child.

(xv) fact that appellant was found by police in his house which was not locked from outside and has not attempted to abscond runs counter to the submission that above referred circumstances lead to the conclusion of his guilt and on the contrary definitely indicates that he was not the culprit.

8.1. She further urged that P.W.9 and P.W.4 being the only eye witnesses for the alleged crime and out of them P.W.4 having not supported the prosecution and the evidence of P.W.9 being not an unimpeachable character the same cannot form the basis of conviction either alone or in conjunction with the aforesaid

circumstances emanating from the prosecution evidence. She urged that upon such character of prosecution evidence it cannot be gain said that the prosecution has either established Ashwini having met with homicidal death or appellant being responsible for the same. She urged that the possibility of Ashwini having met accidental death due to falling of centering material upon her head is not at all altogether ruled out. It was urged that the case regarding guilt of the appellant for other offences is also not different. She urged that in event of non acceptance of evidence of P.W.9 and in light of the possibility of existence of other reason for the appellant running away with Kedar also leads to the conclusion of the prosecution evidence having not established guilt of the appellant for commission of the other offences beyond pale of doubt.

8.2. She urged that such a conclusion are inevitable as the prosecution evidence, particularly that of P.W.9 and so also of other circumstances considered in proper perceptive fails to form a formidable chain leading to the sole inference of the guilt of the appellant for the offence for which he is convicted and sentenced. She further urged that upon the prosecution evidence to views being possible, the appellant deserves to be acquitted from the charges for which he is convicted and sentenced or atleast by accepting the beneficial view, benefit of doubt deserves to be given to him.

8.3. Learned counsel by placing reliance upon the decisions in the case of Machhi Singh and Others Vs. State of Punjab reported in (1983) 3 Supreme Court Cases 470 and the earlier decision in a case of Bachhan Singh Vs. State of Punjab reported in (1980) 2 SC Cases 684 referred therein; alternatively urged that the law regarding awarding of an death sentence has been well settled by said decisions. She urged that the guidelines given by the Apex Court in the said decisions reveal that such a sentence is to be awarded only in the rarest of rare case and while considering the aspect of awarding such a sentence the court has to take into consideration aggravating factors and so also mitigating circumstances. She urged that considering the case of the appellant in the light of the said guidelines the sentence of death awarded to him is wholly improper. She urged that the case of the appellant can neither be said to be case of rarest of rare type nor the mitigating circumstances has been taken into consideration. She urged that the appellant is of 45 years of age or there about and awarding him such a sentence would deprive the children who had already lost their mother the remaining parenthood. She urged that the appellant is not having any criminal antecedents. She urged that considering the manner in which the incident had taken place indicates that same must have occurred at the spur of moment probably due to appellant having lost self control due to anger. She urged that the evidence is not suggestive of a pre-planned murder being committed by the appellant. She urged that in view of the same the sentence of death awarded to the appellant without considering the case upon the guidelines given by the Apex Court, deserves to be set aside and deserves to be commuted to lesser sentence.

9. Mrs.Geeta Mulekar, the learned A.P.P. countering the aforesaid submissions for the State supported the judgment, order of conviction and sentence awarded, including that of death by the trial Court to the appellant. She urged that the evidence of Shubhangi (P.W.9) which is also found corroborated by the evidence of other witnesses such as P.W.3, P.W.2, P.W.5 and so also by the medical evidence was rightly accepted by the trial Court. She urged that the said evidence alone establishes the guilt of the appellant for the offences for which he is convicted and sentenced. She urged that cogent evidence of P.W.9 is not liable to be discarded or brushed aside merely on the count of herself being child witness and particularly in absence of any material to come to the conclusion that she was tutored witness. She urged that the defence miserably failed to establish any circumstance indicating that P.W.9 was a tutored witness. She further urged that the evidence of P.W.9 additionally considered alongwith the evidence of P.W.7 Dr.Naik in terms establish that death of Ashwini was homicidal. She urged that the defence was not able to elicit any material on record in support of defence theory of Ashwini having succumbed to death due to fall of centering material stored on the beam in the said house. She urged that in said state of affairs even alone upon evidence of PW.7 considered alongwith evidence of P.W.2 panch of scene of offence panchnama Exhibit-15 excludes the possibility of death of Ashwini having occurred due to accidental falling of centering material on her head.

9.1. She urged that evidence of P.W.9 and so also the prosecution case is well supported by several other circumstances established by the prosecution i.e. appellant having made extra judicial confession regarding causing the death of his wife and his intend to commit murder of his son as revealed from the evidence of P.W.5., who though was not of close associate but was also not a stranger, soon after death of Ashwini, there were bloodstains upon the clothes of the appellant, the appellant had initially attempted to run away from the house by taking his son for murdering him and after his son being snatched by the people he had returned to the house. She urged that the said evidence duly corroborates evidence of PW.9 and so also the prosecution case regarding guilt of the appellant. She urged that merely because one of the eye witness who happened to be the child witness had turned hostile cannot be said to be affecting either the evidence of P.W.9 or the prosecution case in general, as during the cross examination the evidence of P.W.4 has been shattered by A.P.P. She urged that the fact of P.W.4 having attempted to tell new story at the trial has been clearly brought on record by bringing the matters stated in her statement u/s 164 recorded by JMFC P.W.16.

9.2. She urged that thus considering oral account of incident given by P.W.9 alone and in light of other prosecution evidence the same clearly establishes the appellant having committed murder of his wife, attempted to committed murder of his son and having voluntarily caused injury to his daughter. She urged that finding to such effect arrived by the trial Court on the basis of the evidence cannot be faulted and no interference with the same is warranted.

9.3. With regard to the death sentence awarded to the appellant the learned A.P.P. urged that the evidence of P.W.3, P.W.9 and P.W.10 reveals that Ashwini was pregnant at the time of incident. She urged that said evidence is duly corroborated regarding the said aspect by the evidence of P.W.7. She urged that considering the motive aspect behind the said crime and with the brutality the murder of Ashwini was committed as revealed from the photographs on the record clearly denote the cruel manner in which without any reason and rhyme the appellant has done away with his wife. She urged that his said act has deprived his children, the mother. She urged that the appellant had also attempted to murder Kedar. She urged that all the said aspect reveals high degree of criminal element existing in the appellant. She urged that considering all the aspect relevant to the present case and judging the case of the appellant on the basis of the law laid by the Apex court in the case of Bachhan Singh and Machhi Singh the present case would definitely fall within the phrase "rarest of rare case" as observed in the said decisions by the Apex Court. She urged in view of the same death sentence awarded by the trial Court for the reasons recorded is without any fault and same deserves to be confirmed as punishment of imprisonment of life to the appellant would never be an adequate sentence in the said circumstances. She urged that there being no merits in appeal preferred by the appellant the same deserves to be dismissed.

9.4. Learned A.P.P. in her turn placed reliance upon the following decisions :

- (1) Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, ;
- (2) Dilip Premnarayan Tiwari and Another Vs. State of Maharashtra, ;
- (3) Haru Ghosh Vs. State of West Bengal (2009) 15 SCC 55;
- (4) Mahesh Gonnade Vs. State of Maharashtra, ;
- (5) Machhi Singh and Others Vs. State of Punjab, ;
- (6) Jagmohan Singh Vs. The State of U.P., ;

10. Thoughtful considerations were given to the submissions advanced and the record and proceedings were carefully examined for ascertaining merits from the same keeping in the mind the duty of this court of examining the entire evidence on the record due to principal proceedings being the reference made u/s 360 of the Code for confirmation of sentence of death awarded to the appellant.

11. Now firstly ascertaining the nature of death suffered by Ashwini i.e. whether it was homicidal or otherwise, the evidence of P.W.7 Dr. Naik who had performed autopsy while on duty at CPR hospital, Kolhapur on 6.8.2008 in between 11 to 12 hours, on the corpse of Ashwini, appears to be of immense importance. The scrutiny of his evidence reveals that during the examination he had noticed following external injuries on the corpse of Ashwini i.e. Following C.L.W. All red blood stained and oblique,

(A) 1. 8 X 2 c.m. on scalp left frontoparital.

2. 4 X 2 c.m. on scalp left frontoparital near injury No.1.

3. 8 X 2 c.m. on scalp left frontoparital.

4. 8 X 2 c.m. on scalp left frontoparital, near injury No.3.

(B) 1 X 1 c.m. C.L.W. over Right little finger redish, muscle deep.

(C) 1 X 0.5 c.m. IW over right hand L/3 Anterior aspect. Red Skin deep.

(D) 1 X 0.5 c.m. skin deep IW over right wrist anterior aspect, Red.

12. He deposed cause regarding said injuries at head A and B being hard and blunt object while that of at head C and D being due to sharp object. He also opined injuries in group "A" were grievous and rest of the injuries were simple and all the injuries were ante mortem.

14. The evidence of P.W.7 further discloses that during the internal examination he had noticed following internal injuries :

1. Injuries under the scalp : Extensive, red haematoma below left frontotemporal partial region.

2. Skull bones : Multiple fractures of left temporal and partial bones were present.

3. Brain : Marked oedema present. Large left frontopartial S.D.H. and evidence of multiple hemorrhagic cerebral contusions below S.D.H.

14. P.W.7 deposed that external injuries noticed by him upon the cause were corresponding to abovestated internal injuries mentioned by him in column no.17 of the post mortem notes. He also deposed of having noticed 10 to 12 weeks pregnancy with single foetus. He deposed of having noted probable cause of death as due to head injuries described in group "A" aforesaid and in column no.17 of P.M.Notes and the same being sufficient to cause death of the deceased in the ordinary course of nature. He vouched for the correctness of post mortem notes Exhibit-32 prepared by him of the said autopsy. Significantly enough he deposed that the injuries noticed to have caused death of Ashwini can be caused by muddemal Article no.1 (wooden log used for preparing Thandai). He also deposed that Exhibit-33 was final cause of death given by him.

15. The close scrutiny of the evidence of P.W.7 and particularly the answers elicited from him during the cross examination reveals that he denied the suggestion that four injuries as mentioned in group "A" i.e. head injuries could be caused if any article or a heavy object falls from the roof on a person in a lying condition. Indeed P.W.7 admitted that fall of 3 to 4 heavy objects on a person lying or sleeping on the floor of the room then such a injuries can be caused. He also agreed that counter group of injuries as noticed by him were possible in such a contingency. Significantly enough during cross examination on the basis of 200 cm semi digested food found existing in stomach of the deceased, P.W.7 deposed that death of deceased might have occur within 3 to 4 hours of taking last meal by the deceased. However, he disagreed that death

would instantaneously occur if persons suffering head injury and consequential internal bleeding taking a deep breath and because of the same air passage getting blocked. He further disagreed that reddish froth and reddish blood stains were noticed in air passage were due to internal bleeding. P.W.7 in spite of being shown passages from the books of jurisprudence remained firm of death of Ashwini having not occurred for such a reason i.e. blockage of passage for the reasons suggested to him.

16. Thus scrutiny of evidence of P.W.7 does not reveal that opinion given by him regarding cause of death of Ashwini was shattered in any manner due to any of the answer elicited during the cross examination. On the contrary his evidence considered as a whole reveals that he was firm regarding the opinion given by him and has given the reasons for denying the possibility suggested to him. Thus on the basis of evidence of P.W.7 alone the possibility of death of Ashwini being either natural or suicidal is completely ruled out. To some extent his evidence also rules out the possibility of same being accidental due to fall of heavy object from roof on the head of Ashwini. Though he admitted injuries caused to Ashwini and particularly that on head were possible in event of fall of 3 to 4 heavy objects from roof upon the head, his said opinion cannot be said to have shattered the opinion regarding cause of death given by him as the same denotes only the same being one of the possibility. At any rate his opinion of death having ensued due to head injuries sustained by her has remained unshattered even after the cross examination. Needless to add that there was no challenge to the opinion given by him that at the time of death Ashwini was pregnant of 10 to 12 weeks.

17. Having considered medical evidence adduced on behalf of the prosecution now considering the evidence regarding the reason due to which Ashwini had sustained the said injuries which has ultimately resulted in her death it will be necessary to take into consideration the evidence of daughter of deceased and appellant i.e. P.W.9 as she was present at the time of incident and had witnessed the incident. Her evidence is of immense importance as she has supported the prosecution while the other eye witness Sonali has not supported the prosecution.

18. Without reciting the evidence of P.W.9 in entirety it can be observed that during the initial part of her deposition she deposed regarding the persons present in the said house on the day of incident which had occurred on 6th August, 2008 i.e. herself, her brother Kedar and P.W.4 Sonali. Her evidence also discloses that she was studying in IVth standard in Adarsh Prashala and attending the school from 11 a.m. to 5 p.m. She has also deposed regarding the quarrel which had taken place on earlier day in between appellant and her mother and her grandmother having tried to intervene in the same but herself being pushed away by the appellant. P.W.9 having given her age of 14 years and her deposition being recorded in August 2010 reveals that she was of 12 years age at the time of incident. It will not be out of place to state that before recording her evidence the trial Court had put certain question to her and after

taking into consideration answers given by her and by observing that she had given reasonable answers oath was administered to P.W.9.

19. The most crucial part of evidence of P.W.9 reveals that in the night P.W.9 Kedar, P.W.4 and her parents had slept. As quarrel had taken place in between her mother and appellant she awoke and so also Kedar and P.W.4. At that time her mother was informing appellant that she wanted child which was in her womb and was also informing that appellant should sent her to Kadamwadi (i.e. her parents) and at that time her mother was sitting on bed and appellant was standing behind her. She further deposed that her father - appellant assaulted her mother by a wooden log on her head. The said wooden stick was like a baseball stick. Her mother had placed her hand on the head. The appellant on four occasions with the said article assaulted her mother on head and Article.1 before the court was the said wooden log. She deposed of herself and P.W.4 having tried to intervene and at that time her father having pushed her she received injury at index finger forehead. She further deposed that at that time Kedar started crying, the appellant lifted Kedar and put him in the barrel, she unlocked the door and came outside the house. P.W.4 lifted Kedar from the barrel and came outside the house. The appellant also came outside the house and carried Kedar alongwith him towards stone quarry to expose him to water. He ran away alongwith Kedar to throw him in stone quarry. P.W.9 and P.W.4 followed him. They told him not to put Kedar in stone quarry. They made hue and cry. Some persons came at the said place. They came at some distance from their house. The said persons obtained custody of Kedar from appellant and handed over Kedar to P.W.4 and assaulted the appellant. The appellant returned to home.

20. P.W.9 during further part of her deposition unrevealed of themselves being to the house of maternal uncle P.W.3 and having informed him of appellant having assaulted her mother and thereafter been to the house of paternal aunt and narrating the incident to her. Her depositions reveals that her paternal aunt had given milk to Kedar and clothes, as his clothes were wet and Rs.15/- to them and told them that her blood pressure was increased. Her deposition reveals that by using Re.1/- out of said money she had given message to the parents of her mother at Kadamwadi and thereafter herself, P.W.4 and Kedar had returned to home. Her deposition reveals that by then police and the other persons had gathered at the spot, her grand father also came and she narrated whole episode to him. P.W.9 during her evidence identified Articles 8, 9 and 10 being the clothes on the person of her mother, Article 11 and 12 being the clothes on the person of appellant at the time of incident and Article 3 being quilt from her house on which her mother was sleeping at the time of incident.

21. P.W.9 was searchingly cross examined on behalf of the appellant. However, except insignificant omission of herself having not stated to the police that her mother was pregnant at the time of incident and her father had asked for abortion and her mother was not ready for abortion hardly any significant material was brought on the record during the cross examination. P.W.9 denied

the suggestion of having deposed falsely regarding the incident which had occurred qua Kedar or having not told about such a quarrel due to not happening of any such event. She candidly admitted of having not told the police regarding number of strokes given by appellant on the head of her mother and so also after herself intervening her father had assaulted her (i.e. pushed her) due to which she had sustained injuries. She was candid enough to express her inability to tell the number of questions put to her by the police. She was questioned regarding topography qua her house and quarry.

22. P.W.9, however, admitted that since the incident she was residing at Kadamwadi in the house of her grandmother. She deposed that she was not remembering the date on which she had been to the court and when her statement was recorded and who had called her to said court. She also admitted that appellant was doing centering work. She denied that after visiting the house of maternal uncle, alongwith him she has returned to the house and by then police and persons had gathered around her house. However, she having admitted that she narrated the matters i.e. portion marked "A" from her statement recorded u/s 164 of the Code. She deposed of not remembering whether her father had kept articles of centering on the roof of their house. She was also unable to give rickshaw number by which she had returned from the house of paternal aunt. She deposed that she was not remembering as to who had accompanied her to the police station. She denied that her grandfather had narrated the incident at police station and she had not narrated the same i.e. while recording her statement. She denied that centering article kept on wooden beam had fallen down on the head of her mother and due to which she had died. However, she deposed of not knowing whether prior to arrival of police the people gathered at the spot had removed the said articles. She denied of having deposed in the court at the say of grandmother and grandfather.

23. Now considering the evidence of P.W.9 in the light of above referred answer it is difficult to accept that same had any effect upon core of her testimony of having witnessed appellant striking wooden log on head of her mother and causing her injuries, having pushed her resulting sustaining injury to her finger and attempting to cause murder of Kedar. The omissions and/or contradiction referred hereinabove from her deposition clearly are of trivial nature. Similarly considering her age, not disclosing the police regarding pregnancy of her mother or the rival stands regarding the same also cannot be said to be a significant matter when she was to narrating about incident of assault upon her mother. Similarly, number of strokes given being in the nature of details of the assault effected, non disclosing the same to the police also cannot be given any undue importance when she was firm about having narrated the court of the appellant having assaulted upon the head of her mother. Admittedly, P.W.9 having lost the mother and appellant being in custody her stay in the house of her grandmother also cannot be considered as a circumstance indicating that she had given the evidence as tutored by them. Similarly, though she admitted that appellant was doing centering work but denied that centering material from the roof had fallen

on the head of her mother causing injuries to her, the said admission cannot be said to be a factor supporting defence of occurrence of any such event of accident. Needless to add that considering her age merely because she claimed ignorance that such a material was stored at the beam and later on after the same had fallen the same was collected by the people, also cannot be said to be a factor supporting such a defence attempted to establish on behalf of the appellant. Such a conclusion is inevitable as the other evidence clearly rule out any such a possibility. The same is apparent as no such a material was found by the panch P.W.2 and the investigating officer P.W.14 while drawing scene of offence panchnama Exhibit-15 soon after the incident and furthermore the evidence of P.W.14 also reveals that the house of appellant was closed when P.W.14 had been to the spot and then appellant had opened the door. In the light of said evidence it is difficult to perceive that any other person had any reason to enter the said house prior to the visit of P.W.14 and remove such articles. So also occurrence of any such event is not at all surfaced on the record. Since the other matters narrated from cross examination regarding inability of P.W.9 to answer certain aspect are of insignificant nature, we do not propose to indulge in unnecessarily making threadbare dilation about each of the said aspect except stating that none of them can be said to be affecting the core of her evidence referred earlier.

24. Since P.W.9 is a child witness it will not be out of place to make the reference to the observations made by the Apex Court in paragraph no. 13 of the decision in the case of State of M.P. Vs. Ramesh and Another, after considering earlier decisions of Apex Court pertaining to the evidence of child witness in the case of Rameshwar Vs. The State of Rajasthan, ; Mangoo and another Vs. State of Madhya Pradesh, ; Panchhi and others Vs. State of UP, ; Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra, ; Himmat Sukhadeo Wahurwagh and Others Vs. State of Maharashtra, ; State of U.P. Vs. Krishna Master and Others, and Gagan Kanojia and Anr. v/s. State of Punjab reported in (2006) 13 SCC 516 regarding appreciation of evidence of child witness to the effect:

13. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

25. Now in light of the said observations considering the evidence of P.W.9 in entirety and particularly taking into consideration the answers given by P.W.9 to the questions asked by the trial Court before recording her evidence, thereafter trial Court administering oath to her clearly demonstrates that she was sufficient

mature to understand the questions put and give a rational answer to same. The said aspect is further exhibited from the answers given by her during the deposition. Thus, taking overall account of her evidence we are unable to accept that her testimony suffers from any infirmity either due to herself being a child witness or even otherwise for not accepting her evidence. Needless to add that none of the answers elicited during the cross examination reveals that it would be unsafe to place reliance upon the same due to any particular aspects revealed from the same. Hence we are unable to accept the submissions canvassed by the learned counsel for the appellant that the evidence of P.W.9 is either of weak nature and no reliance should be placed upon the same or she is tutored witness.

26. In addition to the aforesaid due corroboration is found from other evidence to many of the aspects deposed by P.W.9. The fact of P.W.9 having received injury is duly established by the prosecution to evidence of Dr. Mahendra. Hardly anything has surfaced on the record for not accepting the evidence of P.W.9 that on 6.8.2008 he examined P.W.9 and noticed the injuries as deposed by him and mentioned in Injury Certificate (Exhibit-30) given by him. The evidence of P.W.9 in terms reveal that three injuries noticed by him were fresh injuries and one of them was to the right index finger. The admission given by P.W.6 during the cross examination that such injuries are possible due to fall on the rough surface cannot be said to be affecting evidence of P.W.9 as it is her claim that she had sustained injuries due to appellant pushing her when she had tried to intervene in the quarrel in between the appellant and the deceased.

27. Similarly, without narrating in detail it can be further added that the prosecution through evidence of panch witness P.W.2 and I.O. P.W.14 regarding inquest panchanama (Exhibit-14) and scene of offence panchanama (Exhibit-15) drawn has brought on the record situation in which the corps was found at spot and situation prevailing at spot soon after the incident. The evidence of both the said witnesses is well supported by recitals in panchnama (Exhibit- 15) and the said matters are in consonance with evidence of P.W.9. Needless to add the said matters among others reveals that there was pool of blood near the bed on which the deceased was sleeping and the wooden log, Article.1 smeared with the blood was lying nearby the place at which deceased was lying and so also the blood was found scattered by the said place, no other material, centering or otherwise was found in the said bed, the plastic drum filled with the water was in the said room etc. The existence of a drum filled with water duly corroborates evidence of P.W.9 of appellant having attempted to murder Kedar by putting him in the said barrel/drum.

28. Now considering the evidence of P.W.4 Sonali her evidence shows the position as pointed by learned counsel for the appellant that at the time of the incident she was also in house of the appellant. The same also reveals that she has claimed that the appellant had wake up early in the morning, prepared tea and that time her maternal aunt was sleeping and P.W.4 was lying on the bed. She further claimed that appellant had a bath and after dressing he had left the

house telling her that he is leaving for work and time then was 5.00 a.m. She further claimed that thereafter when she had got up her maternal aunt was lying dead in pool of blood, she was frightened, she woke up P.W.9, both of them went out of the house, P.W.9 was frightened, she fell down and suffered injuries, it was raining, P.W.9 raise alarm for help, people assembled, police came and P.W.4 and P.W.9 were taken to the police station. She denied of any quarrel having ensued in between appellant and her maternal aunt when she had woke up.

29. However, her deposition shows that thereafter learned APP has sought the permission to cross examine P.W.4 and after such a permission was granted, he had cross examined her. The perusal of the said cross examination reveals that she had denied every facet of the prosecution case put to her by learned APP. However, during further cross examination she admitted that her statement (Exhibit- 20) was recorded in the Court of J.M.F.C, at Bawada by a lady Judge. She also claimed that facts from the said statement, read over to her were not correctly recorded. However, at the next blush she said that such facts were stated by her to the Magistrate. She volunteered that police had pressurised her to state such facts to the Magistrate and accordingly she had stated the same. However, she admitted of having not made a complaint to the Magistrate of police having pressurised her to narrate such facts. She further admitted that she had been to the Court for giving evidence at the trial along with the mother of the appellant. She denied of having deposed falsely for saving the appellant from punishment. During the cross examination made on behalf of the appellant, she claimed of having resided in the house of in-laws of the appellant for two to three months and they have told her to give the statement according to their version.

30. Thus, considering the evidence of P.W.4 in entirety in light of statement (Exhibit-20) recorded by P.W.16 Civil Judge, Junior Division, Kolhapur, it is abundantly clear that she had resiled from her earlier statement recorded u/s 164 of Cr.P.C and tried to set up a new story at a trial of appellant having left the house prior to death of the deceased. As is also clear that P.W.4 has been making different statements upon the same aspect from time to time her evidence will not deserve any credence. The new claim set up by her is duly discredited during the cross examination by bringing (Exhibit-20) on the record. The explanation given by her for stating such a matter to P.W.16 are not at all convincing and is further belied by her conduct of not making complaint to P.W.16 at the time of recording Exhibit-20. The fact of mother of the appellant accompanying P.W.4 while coming to the Court for giving an evidence is pointer to denote possibility of herself being tutored for saving the appellant. In the same context the observations from the decision in the case of Mahesh v/s. State of Maharashtra (supra) pointed by learned APP and the matter stated in paragraph no. 47 to 52 fully support the submission of the learned APP that in view of evidence of P.W.16, P.W.4 has been fully discredited of the new story tried to be set up by her at the trial. Thus, the evidence of P.W.4 cannot be said to be useful for any material purpose.

31. Hence we are unable to find any substance in the submission canvassed by learned counsel for the appellant that the said evidence of P.W.4, truly speaking discredited evidence, had an effect of giving any counter blow to the evidence of P.W.9. We may additionally add that the said evidence is also belied by the other evidence, other than that of P.W.9, adduced by the prosecution i.e. the evidence pertaining to finding of bloodstains on the clothes of appellant. It is difficult to visualise finding of such bloodstains on clothes of the appellant in absence of any other explanation forthcoming from the appellant regarding finding of such a bloodstains on the clothes of his person noticed by P.W.14 and so also other witnesses, in event of himself being not present in the house at the time of death of the deceased as claimed by P.W.4. Needless to add, in view of same further submission of learned counsel for the appellant would not survive that in view of the evidence of P.W.4 tale told by P.W.9 may not be true.

32. Now considering the evidence of P.W.2 and also that of P.W.5 and without unnecessarily reciting the same in detail, in brief it can be said that the same reveals that after hearing noise they had chased the appellant running with a small boy and was then wearing bloodstains nicker and banian. The said persons alongwith the others had accosted him and snatch away the boy. At that time the appellant was uttering that he would sent the boy to same place at which he has already sent his mother. Their evidence further reveals that they had handed over the custody of said boy to the daughter and niece of the accused. The evidence of P.W.2 additionally also unfolds the role played by him in drawing inquest and spot panchnama.

33. The close scrutiny of the evidence of both the witnesses does not reveal any material elicited therein during the cross examination for not accepting said evidence as hardly any significant material, except denials of giving false evidence has surfaced on the record. Needless to add that apparently no material is brought during the cross examination leading to the conclusion of any of them having any reason for falsely implicating the appellant or stating such a false claim. The evidence of both of them is in tune with probability factor. Due corroboration to the same is received from the evidence of P.W.9 and so also from the other circumstances established by the prosecution and particularly that of appellant wearing banian and nicker and the same containing bloodstains as established from the evidence of P.W.9, P.W.8 and P.W.14. The prosecution through the evidence of later two witnesses has duly established that appellant at the time of his arrest was wearing such a clothes i.e. article no. 11 and 12 and the same were seized by P.W.14 under panchanama (Exhibit-35). Furthermore through the evidence of P.W.13 the prosecution has established that muddemal articles including the said articles were sent to C.A. vide forwarding letter (Exhibit-55) by giving such a order (Exhibit-54) by P.W.14 to P.W.13. The C.A. report at (Exhibit-24 & 25) reveals that though C.A. was not able to determine blood group of deceased Ashwini, he had detected human blood on all the articles except the plain earth seized from the spot sent to him. Finding of an human blood upon the clothes of the appellant in absence of any explanation for

the same forthcoming from the appellant duly corroborates the evidence of P.W.2 and P.W.5 and so also finding of such blood corroborates evidence of P.W.9 and also run counter to the evidence of P.W.4.

34. It is indeed true that P.W.2 and P.W.4 as urged by learned counsel were not close associate of the appellant for himself confiding with them regarding such a matter as claimed by them. It is also true that extra-judicial confession inspires confidence due to same being made by the confessor to the persons of his confidence to disburden himself of ghastly act occurred at his hand. It is also true that it would be unnatural act of confessor/culprit confessing to the stranger. However, as pointed out by learned APP, P.W.2 and P.W.4 though were not close associates but were also not strangers to the appellant as said witnesses were hailing from the same locality at which the appellant was residing. Apart from the same, considering the evidence of both the said witnesses and about the utterances made by the appellant in proper perspective, the said declaration in our view was more so of spontaneous reaction of person prevented by the said witnesses in committing the act desired by him rather than the same being made with a view of confessing himself regarding the guilt occurred at his hands for disburdening himself. Hence we are unable to accept the submission that due to said features the evidence of P.W.2 and P.W.5 which is otherwise cogent can be said to be suffering from any infirmity. Hence we reject such a submission canvassed. Needless to add the acceptance the evidence of said witnesses not only corroborates the evidence of P.W.9 and strengthen the prosecution case but also establishes relevant facets of the prosecution case of the appellant having murdered his wife and was attempting to murder his son Kedar.

35. In the same context we are also not impressed with the other submission canvassed that appellant might have been running from his house for another reason or the stains of the blood on his clothes could have been for other reason than himself being culprit, on the backdrop of accidental death of his wife having occurred in his house. At first blush it can be said that no support is found in evidence for the theory of death of the Ashwini having occurred accidentally due to fall of centering material stored at the roof having fallen on her head. Secondly, the same is belied by the direct evidence of P.W.9. Thirdly, even the appellant on his part during his examination u/s 313 having not offered any such a explanation for any of the said facets i.e. either death being accidental, his clothes being stained with blood due to some other reason other than himself being culprit and himself running away from his house for any other reason other than throwing Kedar in khani.

36. Similarly having due regard to the fact that different persons react in different manner in the same situation, we are unable to find any substance in further submission canvassed that the evidence of P.W.2 and P.W.5 is artificial as appellant intending to cause harm to his son could have caused the same in his house rather than running away or would not have indulged in making declaration about the same. Furthermore, the evidence of P.W.9 also reveals that

P.W.9 and P.W.4 were preventing the appellant for causing harm to Kedar. For the similar reason we also do not find any substance in the submission that prosecution tale of the event is incredible as the same fails to explain no untoward act was committed by the appellant qua P.W.4 Sonali. The said submission ignores that P.W.4 Sonali was child of deceased sister of the appellant and was not his child and his acts in the episode were mainly directed against his wife and children.

37. While considering the submissions of learned counsel for appellant regarding the last circumstance of non establishment and/or inadequacy of motive canvassed by learned counsel for the appellant it appears proper to remind ourselves regarding the observations made by the Apex Court in the context of necessity of establishing motive in an episode relating in between husband and wife and/or the evidence of crime being of circumstantial nature. The Apex Court in such a regard in the case of Mulakh Raj etc. Appellants v/s Satish Kumar and Ors, Respondents reported in AIR 1992 Supreme Court 1175 in such a respect observed in paragraph no. 17 observed thus

17. The question then is, who is the author of the murder?. The contention of Sri Lalit is that the respondent had no motive and the High Court found as a fact that the evidence is not sufficient to establish motive. The case is based on circumstantial evidence and motive being absent, the prosecution failed to establish this important link in the chain of circumstances to connect the accused. We find no force in the contention. Undoubtedly, in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case.

(emphasis supplied)

Similarly in the case of Nanak Vs. State of Uttar Pradesh, at page no. 1092 the Apex Court observed thus:

In the first place it has been stated by P.W.1 Kundan that relations between husband and wife were not cordial. In a case of murder of the wife by the husband there are many consideration which have to be looked into and it is very difficult to know the exact motive in the circumstances of a given case. For these reasons, therefore, we are satisfied that the prosecution has been able to prove these beyond reasonable doubt. This is not a case in which it can be said that the view taken by the Sessions Judge is reasonably possible. The appeal is accordingly dismissed.

(emphasis supplied)

38. Now considering the submission canvassed in light of the aforesaid observations and carefully considering relevant part of the evidence of P.W.3, P.W.9 and P.W.10, it is amply clear that apparently there is variance regarding desire to have a child by Ashwini or otherwise in between claims staked by P.W.9 on one side and P.W.3 & P.W.10 on the other side. P.W.9 claimed that her mother was desirous to have the third child, while the remaining two claimed that she was not desirous to have the third child. Considering said evidence in proper perceptive and age of P.W.9 it is difficult to perceive that she would have been party for such a matter in between husband and wife. Hence, her claim to the said extent will be required to be ignored. Thus, ignoring the same apparently there would be no conflict regarding the reason behind quarrels ensued in between the said couple. At any rate even without ignoring the same it can be safely said that relationship in between husband and wife were strained on the count of the third child is duly established by the prosecution evidence. In such state of affairs it would be difficult to give any undue credence to the submission canvassed, that the prosecution has failed to established the motive behind the crime. Furthermore in light of the observations of Apex Court recited hereinabove and in view of the direct cogent and convincing evidence of P.W.9 of the acts of the appellant being available to the prosecution the said factor does not assume any significance.

39. For the discussions made hereinabove, we find that no error was committed by the trial Court in accepting the evidence of P.W.9 which after assessment is not only found cogent and convincing but is also corroborated by the evidence of P.W.2, P.W.5 regarding extrajudicial confession made by the appellant and of P.W.3 regarding natural conduct of P.W.9 and so also the other evidence discussed by us hereinabove establishing other circumstances corroborating the evidence of the said witnesses. We also do not find any substance in the submission canvassed that the evidence of P.W.4 gives counter to the prosecution case or to the evidence of P.W.9. We also do not find any substance in the submission of the circumstances referred hereinabove being not cogently established by the prosecution. We also do not find any substance in the submission that prosecution has failed to establish death of Ashwini being homicidal as the same is found duly established after acceptance of evidence of P.W.9 read with the evidence of P.W.7. Thus, acceptance of evidence of P.W.9 and other circumstantial evidence the same duly establishes the appellant having committed murder of his wife Ashwini and in said process having caused simple injury to P.W.9 and so also having attempted to commit murder of his son Kedar and thereby having committed offence punishable under Sections 302, 323 and 307 of the Indian Penal Code. Hence we are unable to find any fault with the finding to such a effect arrived by the trial Court.

40. Now considering remaining question regarding sentence awarded by the trial Court, in light of the submissions canvassed by the rival parties, we are unable to

find any fault with other sentences awarded to the appellant except sentence of death awarded to him, as the same has been awarded in accordance with the principles behind sentencing the accused i.e. the same should be in accordance with the severity of the offence committed and sufficient to remove the element of criminality in him which has led to the commission of such offence. Needless to add hence the same would not warrant any interference on our part except to sentence of death awarded to him.

41. Now considering the question of sentence of death awarded to the appellant, it appears proper to bear in the mind the principle governing awarding of such a sentence. In the same context the reference to the decisions of Hon''ble Apex Court in the case of Machhi Singh and Others Vs. State of Punjab, relied by both the parties with regard to the question of awarding the death sentence and the aspect of rarest of rare case reveals that the Apex Court in paragraph no.32 has observed to the effect:

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 antisocial or abhorrent nature of the crime, such as for instance:

- (1) 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;
- (2) Motive for commission of murder : When the murder is committed for a motive which evinces total depravity and meanness;

(3) Anti-social or socially abhorrent nature of the crime: when murder of a member of a schedule caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. This would also cover bride burning and dowry death cases;

(4) 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; and

(5) personality of victim of murder : When the victim of murder is an innocent child or a helpless person or a public figure. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court must proceed to do so.

42. In the same decision after considering earlier decision in the case of Bachan Singh.vs. State of Punjab reported in AIR 1980 SC at 898 also relied by both the parties the Apex Court about "death sentence" further observed in paragraph nos. 33 and 34 to the effect :

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 "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 has 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 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. ?

43. Now in the light of aforesaid guidelines examining all the circumstances relevant to offence of murder committed by the appellant in the light of reasoning given by the trial Court for awarding sentence of death to the appellant we are of the considered opinion that present case cannot be said to be of rarest of rare nature warranting extreme penalty of death.

44. We are unable to accept the reasoning given by the trial Court for awarding such a penalty on the count of murder committed being brutal and cold blooded and there existing no mitigating circumstances and the victim being pregnant at the time of the incident. Considering all the relevant circumstances we are unable to agree with the trial Court that the murder committed was brutal. We are also unable to agree the reasoning given that as the victim was in the custody of the appellant and she had not provoked or contributed to the incident and had no knowledge that her husband would commit the murder in the early morning and she had succumbed to the death on the spot due to the merciless attack committed being good reasons for awarding such a penalty. We do not agree with the reasoning given by the trial Court for concluding that appellant had committed pre-planned murder or that the act committed by the appellant reveals propensity of the appellant to commit the murder in future.

45. We are unable to accept the said reasoning because the Apex Court has pointed out in number of decisions that brutality by itself cannot be considered as a feature making the case of the rarest of rare nature. The trial Court failed to appreciate that considering number of injuries caused to the deceased the case cannot be said to be of appellant having given numerous blow. On the contrary, such a conclusion drawn by the trial Court runs counter to the evidence of P.W.9. The trial Court also lost sight of mitigating factors such as the appellant having not attempted to commit any untowards act either towards P.W.4 and P.W.9 except pushing her away and so also towards the persons who had accosted him. It also lost the sight of the fact that awarding such a sentence would deprive remaining parenthood to P.W.9 and Kedar who had already lost the mother. Similarly considering a motive behind the acts committed it is difficult to accept that pregnancy of the victim can be construed as and an aggravating circumstances.

46. We are of such a opinion as the facts established by the evidence though reveals that in the incident wife was killed, simple injury was caused to daughter and attempt to kill the son was made still the manner in which the incident had occurred at early hours in the morning denotes that the same was outcome of a quarrel ensued in between husband and wife regarding having or not having the third child. The evidence also denotes that in all probability in heat of anger the

appellant has lost self control and after hitting the wife he had attempted to commit murder of his son. The evidence also reveals that after occurrence of incident and precisely after being caught, the appellant had not at all indulged in any act of fleeing away for escaping from liability of the ghastly act occurred at his hands. Similarly considering the probable motive behind commission of the crime is also indicative of the appellant being not with the desire of wiping away members of his family. Similarly, no act being committed by the appellant towards P.W.4 is also indicative of the fact that the incident was not a preplanned one, planned in a manner not to leave behind any evidence regarding the misdeeds committed. On the contrary, the evidence reveals otherwise as stated aforesaid. Similarly, the weapon used being a wooden log used for preparing Thandai i.e. a household article also indicates that the available weapon was used and no calculated effort was made for arranging the weapon for achieving the object. Similarly, considering the nature of injuries caused the same is also not indicative of the appellant having acted in an unusual cruel manner. Similarly, after taking into consideration the fact that deceased was sitting in the bed and the appellant was standing, it is difficult to perceive that deliberately the head was chosen as the part to be attacked. Thus, taking over all account of the incident occurred as revealed from the evidence which is recited hereinabove, it is crystal clear that P.W.9 was assaulted due to her intervention for stopping/preventing and/or persuading appellant for not continuing to assault her mother. Without unnecessarily making reference to the number of cases it can be safely said that it has been repeatedly ruled by the Apex Court in number of cases that the number of persons being assaulted and/or killed, and/or number of injuries being caused by itself will not be a factor making the case as "rarest of rare" nature. Having regard to the same and having regard to the age of appellant, act committed by him being not for the purposes of having any material gain and the time at which the same was committed are also indicative of the same being not a pre-planned but occurred under the impulse of moment. Hence we are unable to approve and/or confirm penalty of death awarded by trial Court to appellant.

47. The aforesaid reasoning being based upon the principles led by the Apex Court in landmark decisions in the case of Bachan Singh and Macchi Singh (supra) and hardly any change having occurred in the said principles and all the further decisions being apparently based upon the same and the same being the case regarding the decisions relied by both the parties recited hereinabove upon the relevant aspects, we do not deem it necessary to make any threadbare dilation upon each of the said decisions except adding that the decision in the case of Swami Shraddhanand relied by the learned A.P.P. reveals observations made by the Apex Court in paragraph 92 with regard to grant of sentence of fixed term to the effect :

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 terms of 14 years would be grossly disproportionate and inadequate. What then should the Court do ? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purpose, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years" imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years" imprisonment would amount to no punishment at all.

The same principle is found followed in the later decision in the case of Dilip Premnarayan and Haru Ghosh also pointed out by the learned A.P.P.

48. Thus, considering the manner in which the murder of wife was committed by the appellant and attempt to commit murder of the son was made and since the same exhibits the extent of element of criminality of appellant, we are of the opinion that sentence of imprisonment of life with a direction not to release him before completing actual term of 18 years including the period already undergone in addition to the other sentences imposed by the trial Court would be an adequate punishment on the basis of principle explained by the Apex Court in the aforesaid decisions pointed by learned APP for serving ends of justice. We sentence the appellant accordingly with a direction that substantive sentences awarded to him to run concurrently.

49. In the premises aforesaid, the reference made by the trial court for confirmation of death penalty stands rejected. Criminal Appeal No.481/2012 preferred by appellant stands partly allowed to the extent of aforesaid modification.

50. The fees of Advocate B.P. Jakhade, the learned appointed counsel, are quantified at Rs.3,000/-. The Registry is directed to send the copy of this judgment to the Central Jail for furnishing the same to appellant.