

(1998) 02 BOM CK 0011

In the Bombay High Court

Case No : Confirmation Case No. 3 of 1997 with Criminal Appeal No. 681 of 1997

The State of Maharashtra

APPELLANT

Vs

Suryakant Dattatraya Bhabal

RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:

Constitution of India, 1950 — Article 11, 12, 13, 25, 26

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

Penal Code, 1860 (IPC) — Section 292, 300, 302, 34, 376

Citation : (1999) 101 BOMLR 106

Hon'ble Judges : S.S. Parkar, J;A.P. Shah, J

Bench : Division Bench

Judgement

S.S. Parkar, J.—The appellant in the above appeal along with his wife-original Accused No. 2 were prosecuted in Sessions Case No. 695 of 1993 for offences u/s 376 and u/s 302 read with Section 34 of IPC. The learned Additional Sessions Judge, Greater Bombay who tried the above Sessions Case had convicted the appellant, original accused No. 1 for offence of rape u/s 376 of IPC committed on a girl by name Soni, the daughter of P.W. 1, hardly 11 years of age and sentenced him to undergo RI for 10 years. The said accused was also convicted u/s 302 of IPC for the murder of the said girl after committing rape on her and was sentenced to death by her Judgment and Order dated 3rd September, 1997. The said sentence of death has been submitted to this Court for the purpose of confirmation as per the provisions of Section 366 of Cr.P.C. The accused No. 2, wife of accused No. 1 was convicted u/s 302 of IPC and sentenced to undergo life imprisonment and to pay a fine of Rs. 500/- in default to undergo RI for 10 days. The accused No. 2 has not filed appeal against the order of her conviction and sentence. However, the accused No. 1 who was sentenced to capital punishment has filed the appeal challenging the order of conviction as well as the sentence recorded against him by the Trial Court. Accordingly both the confirmation case as well as appeal preferred by the original accused No. 1 (hereinafter called "the accused") have been heard by us together and are being disposed of by a

common judgment.

2. The facts leading to the aforesaid conviction and sentence of the Accused are as follows :

The victim girl deceased Soni, aged about 11 years, was residing with her parents, both of whom were working, and her elder brother by name Shobhi aged about 13 years, examined as P.W. 6, in CGS Colony, Building No. 60, flat No. 2580, Antop hill, Bombay. The said flat is situated on the second floor of the said building along with three more flats. The accused along with his wife, original accused No. 2 and their children was also residing In the same flat but in the front portion of the said flat i.e. the hall. The family of the victim girl was residing in the rear portion of the said flat which is a kitchen room. The entrance to the said flat is only from the hall in occupation of the accused and his family. The date of the incident is 3rd April, 1993 between 11 a.m. to about 12.30 in the noon. On the date of the incident the parents of the victim girl had, as usual, left for their place of work. Her father John Thomas (P.W. 1) left his house for work at 8.30 a.m. as usual while his wife i.e. the mother of the victim girl left at about 10.30 a.m. The said tenement consisted only of two rooms i.e. hall at the entrance of the said tenement and kitchen which was situated on the rear side. In between these two rooms occupied by these two families lay a bathroom and a toilet. In order to go to the kitchen i. e. the room occupied by the family of the deceased one had to enter the hall occupied by the accused and pass through the rear door and passage in front of the toilet and bathroom to reach the kitchen room. The rear door of the hall and the door of the kitchen were opening in the common passage in front of the toilet and the bathroom and were in the opposite direction. As there was holiday for school on that day, the deceased and her brother by name Shobhi (P.W. 6) were in the house. The brother of the deceased, Shobhi who was studying in 7th standard left the house leaving Soni alone in the house and went to the house of his friend by name Rakesh who was residing in nearby area for the purpose of study in order to prepare for annual examination. He returned home at about 1 p.m. when the front door of the said tenement was closed and, therefore, he knocked the Main door which was opened by the accused No.2 i.e. the wife of the present accused. Accused No. 2 after opening the door gave Shobhi Rs. 2/- and asked him to bring chilly powder. Shobhi purchased the chilly powder from the shop in the vicinity and came back and handed over the same to the accused No. 2. When he was proceeding towards their room, which was on the rear side, accused No. 2 told him that Soni was sleeping and he should not disturb her. He saw the door of the room in their occupation was closed. He, therefore, went and sat on the staircase of their building. After some time maid servant of neighbour P.W. 5 Mrs. Bindar by name Sahira saw him sitting on the staircase and, therefore, enquired of him as to why he was sitting outside his house. Shobhi told her that accused No. 2, informed him that Soni was sleeping and, therefore, he was sitting there. When P.W. 5, Mrs. Bindar came from outside along with her husband she also enquired of him as to why he was sitting on the staircase to which he replied that as Soni was

sleeping he was sitting there. After some time accused came from outside. That must be around 2.30 p.m. Shobhi asked accused, whom he called Suryakant uncle, to open the door. But he refused to open the door and asked him to call his aunty by name Yelsamma who resided in the nearby building No. 137 but as Shobhi knew that his aunt was not at home he did not go to call her. He, therefore, again went and sat on the staircase when Sahirabanu, the maid servant of P.W. 5 came and told him that she would try to open the door. When Shobhi went towards their room along with Sahirabanu accused No. 2 warned Sahirabanu that if police arrived and anything happened she would be answerable. Shobhi climbed the stool near the door of their room and threw his compass box in the room through the small opening above the door. Yet there was no response. The maid servant Sahirabanu called out "Soni" by name but there was no response. Sahirabanu also peeped into the kitchen standing on the stool but she too could not see Soni in that room. When Sahirabanu said that she is not visible in the kitchen, accused No. 1 told her that Soni must be in the mori. When the maid servant asked accused as to how he knew that Soni was in mori, accused No. 2 stated that they knew about it. That time P.W. 5 also came there and climbed on the stool and peeped into the kitchen and found that Soni was not visible in the kitchen room. At about 4.30 p.m. P.W. 5 told Shobhi to call his aunty by name Yelsamma, P.W. 9, Shobhi then went to his aunt's house when aunt Yelsamma and her husband Bosspaul were at home whom he told about Soni sleeping in the room and not opening the door and about accused not assisting him in opening the door. Bosspaul and Yelsamma thereafter followed Shobhi. At that time it was about 5.30 p.m. when P.W. 1, father of the victim girl also returned from his work. P.W. 1 opened the door of the kitchen by pushing it by force and on entering the room they noticed that Soni was tied with Dupatta to the rods of the kitchen window above mori and was in standing position. One end of the Dupatta was tied around her neck and the other end was tied to the window. P.W. 1 removed the Dupatta and laid the victim girl on the cot in their room. There were injuries on the person of the victim girl and blood near her mouth and also on her clothes. P.W. 1 changed the clothes of the deceased and asked Bosspaul to call the doctor. When doctor Nair P.W. 11 arrived he declared the girl dead and, therefore, P.W. 1 asked Bosspaul to inform the police. The police arrived and the spot panchanama Exhibit 13 and Inquest Panchnama were drawn by PSI P.W. 13. The deceased was then taken to Rajawadi Hospital for postmortem. On 4.4.1993 clothes of the victim girl were attached vide panchanama (Ex. 20). The Police, inspite of obvious injuries and marks of violence and the marks of rape on the body of the victim girl, did not register the offence, until 6.4.1993 after the statement of Sahirabanu was recorded.

3. It appears that the incident has created sensation in the locality and the residents of the locality had demanded immediate action for registering the offence and commencement of investigation. It was thereafter that the statement of the maid servant Sahirabanu was recorded on 6.4.1993 and the offence was registered under C.R. No. 122/93 by P.W. 13 against both the

accused under Sections 376 and 302 read with Section 34 of the IPC. Both the accused were then arrested. The investigation was then handed over to PI Shinge P.W. 14 and both the accused were produced for remand on 7.4.93. On 9th April, 1993, the father of the deceased, P.W. 1 produced two bed sheets stained with blood which were attached vide panchanama (Ex. 41). On the same day the accused was interrogated by the police and he volunteered to produce his lungi and underwear which was recovered at his instance from his house kept near the TV. The Memorandum and Recovery panchanamas are Exhibits 33 and 33-A. The statements of other witnesses were recorded on 12.4.1993. Father of the girl produced one white colour petticoat and one towel which were attached vide panchanama Exhibit 22.

4. The investigation was taken over thereafter by D.C.B., C.I.D. on 14.4.93 and the statements of other witnesses came to be recorded. On 26.5.93, the accused No. 1 was again interrogated and he volunteered to produce the cassettes of blue film and magazine which were recovered at his instance from his house and produced as Articles 25 and 26 which were attached under the panchanama. The clothes of the deceased and the accused were sent to the Chemical Analyser. The reports of the Chemical Analyser are Exhibits 26 to 30. After completion of the investigation the charge-sheet came to be submitted on 16.6.93 in the Metropolitan Magistrate's 19th Court at Esplanade, Bombay and thereafter the case was committed to sessions Court on 19.7.93.

5. The Sessions Court had framed three charges against both the accused on 14th February, 1997 which appear at Exhibit 3, on page 27 of the paper book. The first charge is u/s 376 against both the accused, the accused No. 1 having committed an offence of rape u/s 376 of IPC with the help of accused No. 2 on 3rd April, 1993 in the house which was occupied by the family of the deceased and the accused. The second charge is u/s 302 against both the accused read with Section 34 of IPC and the third charge is u/s 292(2)(a) of IPC for possessing pornographic magazine and two video cassettes of blue film.

6. The present accused being accused No. 1 was convicted u/s 376 of IPC and sentenced to RI for ten years. He was also convicted u/s 302 of IPC and sentenced to death subject to confirmation by the High Court for murder of Soni, daughter of John Thomas (P.W. 1). It is this order of death penalty which is submitted before this Court for confirmation u/s 366 of Cr.P.C. The original Accused No. 2, the wife of the present accused by name Sunita Suryakant Bhabal, not before us, was convicted u/s 302 of the IPC and sentenced to life imprisonment and to pay a fine of Rs. 500/- in default to undergo RI for 10 days. As stated earlier, she has not preferred appeal against the order of her conviction and sentence. Hence in the present proceedings we are concerned only with the conviction and sentence of the appellant in Criminal Appeal No. 681 of 1997 preferred by the original accused No. 1.

7. After framing of the charges the accused pleaded not guilty. His defence was of total denial. His defence appears to be that he was not in his house at the

relevant time. At the time of trial the prosecution examined 15 witnesses. P.W. 1 is John Thomas, father of the deceased victim girl by name Soni. P.W. 2 Tukaram Bansode was examined for having prepared the map of the scene of offence. P.W. 3 Bosspaul is the brother-in-law of P.W. 1 and was residing in the vicinity in the same colony. P.W. 4 Dr. Vijay Tasgaonkar is the Medical Officer who conducted the post-mortem on the deceased. P.W. 5 Mrs. Rashpal Bindar is the neighbour residing in the same building on the same floor as the deceased and the accused. P.W. 6 is the main witnesses Shobhi Thomas, the elder brother of the deceased. P.W. 7, Parasnath Ghodake is the watchman working in BMRDA where the accused was working as Supervisor. P.W. 8, Mrs. Jyoti Khatri is another neighbour of the deceased and the accused and was on visiting terms with the family of the accused. P.W. 9 is Vikrant Singh Bhinder, the minor son of P.W. 5 who resided on the same floor. P.W. 10, Mahendrakumar Koram Babu is panch witness for the recovery of clothes of accused No. 1. P.W. 11 is Dr. Nair, who was summoned immediately after the arrival of P.W. 1 at the place of offence, and who declared the deceased dead. P.W. 12 Iran Narnbikonar is the panch for recovery of pornographic magazine and two blue film video cassettes. P.W. 13 Chandrakant Balu Katkar is the PS 1 attached to Antop Mill Police Station at, the relevant time who went to the scene of offence same evening after he was approached by Bosspaul P.W. 3 It was he who drew the inquest panchanama. spot panchanama, attached the clothes of the victim girl and referred the dead body to Rajawadi Coroner's Court for postmortem. P.W. 14 is PI Bhaskar Shinge attached to the said Police Station who took over investigation on 6.4.93. P.W. 15 is Kirshna Jadhav who was attached to D.C.B., C.I.D., Crime Branch, Unit No. II as API who carried on the investigation from 14.4.93.

8. Apart from the oral testimony of the aforesaid witnesses, the prosecution has relied on the map of the scene of offence (Ex. 11) prepared by P.W. 2, and inquest panchanama (Ex. 13), post-mortem notes (Ex. 15) and the other panchanamas for the recovery, seizure and attachment of the clothes of the deceased as well as that of the accused being Exhibits 20, 21, 22, 23 and 24 drawn on various dates from 4.4.93 to 23.4.93. The prosecution has also relied on the letter (Ex. 2ES) forwarding the clothes to the Chemical Analyser and the C.A. Reports being Exhibits 26, 27, 28 and 29 and the memorandum panchanamas (Exhibits 33 and 33A) dated 9th April, 1993 for the recovery of the clothes of the accused and the memorandum panchanamas (Exs. 36 and 36A) dated 26th April, 1993 for the seizure of video cassettes and pornographic magazine from the house of the accused recovered at. his instance.

9. We heard the learned Public Prosecutor Mrs. Tahilramani at length who took us through the evidence on record and made her submissions and rendered valuable assistance to us both on facts and on law, and we must add, very ably and fairly. Similarly, we also heard Mr. Patel, the learned Counsel on behalf of the accused.

10. The case is entirely based on circumstantial evidence which has been

summarised by the Trial Court in paragraph 55 of the Judgment. After coming to the conclusion that the chain of circumstances unmistakably and undoubtedly pointed to the guilt of the accused, the Trial Court has enumerated aggravating circumstances in paragraph 87 of the judgment. The learned trial Judge, in para 88 of the judgment, has observed that there were no mitigating circumstances and, therefore, proceeded to award the capital punishment against the accused.

11. In the first place medical evidence, in our view, leaves no manner of doubt about the *factum delicti* i. e. the deceased girl Soni aged about 11 years was first subjected to rape and was thereafter killed. The inquest panchanama (Ex. 13) indicates that there was ligature mark on the neck of the deceased and her tongue was protruding. The said inquest panchanama was prepared on the same evening soon after PSI Katkare (P.W. 13) came to the place of offence. The inquest panchanama shows that both the lips of the deceased were bloody and the chin was stained with blood. There were scratches on stomach, chest and waist. Bleeding injuries were also noticed on the private part of the victim girl. Her feet were twisted. There were injuries on the shoulder and fickle matter was seen coming out of the anus. There were number of injuries noticed on the body of the deceased during her post-mortem examination by Dr. Tasgaonkar (P.W. 4). Those injuries are as follows :

- (1) Contusion mark over neck anteriorly which extends posteriorly on both side of neck. On anterior aspect the contusion is over, thyroid cartilage, Posteriorly on (Lt) side it extends upto (Lt) mastoid process white on (Rt.) side upto hair line below (Rt) mastoid prominence size 23 cm. x 1 cm.
- (2) Contusion over (Rt) cheek 7 cm. x 5 cm.
- (3) Abrasion over (Lt) cheek 2.5 cm. antero-interior to lower pole of (Lt) pinna size 1 cm. x 1/2 cm.
- (4) Contusion over (Lt) side efface from temporal region to (Lt) angle of mandible size 10 cm. x 4 cm.
- (5) Abrasion over chin anteriorly 3.5. cm. x 1.5 cm.
- (6) Abrasion over chest ant. 4 cm. x 1 cm.
- (7) Abrasion vertical over (Lt) side of abdomen 15 cm. x 1 /2 cm.
- (8) Abrasion over (Rt) iliac region posteriorly 1 1/2 cm. x 1/2 cm.
- (9) Abrasion horizontal above pubic region 12 cm. x 1 cm.
- (10) Abrasion over (Lt) thigh medi- interiorly oblique size 19 cm. x 4 cm.
- (11) Abrasion over (Lt) labia majora 9 cm. x 2 cm.
- (12) Abrasion over (Rt) labia majora 11 cm. x 1 cm. upto perineum .
- (13) Abrasion over (Lt) leg ant. below knee 15 cm. x 1 cm.

(14) Abrasion over (Lt) foot at anterior-laterally 7x1/2 cm. with ankle joint fracture.

(15) Abrasion over (Rt) foot ant. L at size 19 cm. x 1 cm. with fracture (Rt) ankle and (Lt) ankle.

(16) Circular abrasion over (Lt) knee joint posteriorly perimeter 25 cm. x breadth 3 cm.

(17) Abrasion over (Rt) shoulder post-near neck 6x1 cm.

(18) Small abrasion multiple in number on (Lt) side back in the lumbar region size 19 x 2 cm.

There were three internal injuries noticed on the body of the deceased which are as follows :

(1) Haematoma on post occipital region size 4 cm. x cm. with sub cut haemorrhage upto bone.

(2) Contusion with subcut, haemorrhage over sternum size 3 cm. x 2 cm.

(3) Constriction marks noted over larynx and trachea with hemorrhagic patches.

12. Besides the above injuries, multiple injuries were noted on the body. Blood was oozing from vaginal region. The face of the victim girl was cyanosis ,congested, tongue between the teeth, mouth, partly open, nose blood stained, left ear-bleeding and there was haemorrhage in the right eye.

13. The aforesaid injuries found on the person of the deceased indicate that the girl was subjected to forcible, carnal as well as sexual, intercourse which she appears to have resisted. It also appears from the injuries of the deceased that force was used against the girl for satiation of his lust by the criminal. The girl appears to have been mercilessly assaulted while being molested. Her both eyes were smashed. There were bleeding injuries all over her body, face, chest, chin. There were abrasions over chest, abdomen and her both ankles were fractured. She appears to have been assaulted on her eyes, ears and nose due to which she had received injuries on her eyes, ears and nose which were bleeding. She had received injuries on her lips. There were lacerations to her anus which indicates that she was subjected to carnal intercourse. Neither in the Trial Court nor before us the fact of rape having been committed on the deceased or she having been subjected to carnal intercourse nor the fact that the victim had received homicidal death was challenged on behalf of the accused. Therefore, as pointed out earlier, the medical evidence and the inquest panchanama prepared about the condition of the person of the deceased leaves no manner of doubt that the girl had been subjected to forcible rape and carnal intercourse and received homicidal death.

14. As per the evidence of the Medical Officer (P.W. 4) the cause of death was unphysical due to the constriction of the neck. According to the Medical Officer

injury No. 1 in Column No. 17 was possible if a person is forcibly pulled by or strangled by a piece of cloth. The evidence of the witnesses shows that when the door was forcibly opened by P.W. 1, the father of the deceased, the victim girl was found tied to the grills of the window by a Dupatta just above the mori. Dupatta was tied around her neck and she was kept in a standing position.

15. After being satisfied from the injuries on the person of the deceased and the medical evidence that the deceased was subjected to rape and thereafter killed the question to be decided is as to who was responsible to commit these crimes of rape and murder on the deceased. In the absence of the eye witnesses, the prosecution has relied on the circumstantial evidence. The circumstances mainly relied on behalf of the prosecution to bring home the guilt of the accused are as follows :

Firstly both the accused who are husband and wife, were sharing the same tenement on the second floor of the building in CGS Colony along with the deceased and her parents and brother. The tenement consisted of two rooms, front room being hall was in occupation of the family of the accused while the rear room which was kitchen room was being occupied by the family of the deceased. There was only one entrance to the tenement by a door which opened in the hall in the occupation of the accused. Even the family of the deceased had to pass through this hall in occupation of the accused in order to go to the room in their occupation which was on the rear side of the hall. Hall and the kitchen were separated by a common WC and a bathroom in front of which there was a narrow passage of 3'3" wide to go to the kitchen. The family of the deceased had to enter the room in their occupation through this hall so also they had to pass from the hall in occupation of the accused in order to go out. This position is not disputed on behalf of the accused. In this respect there is evidence of P.W. 2 who had prepared the map of the place of offence and the evidence of P.W. 1, the father of the deceased which was not challenged in his cross-examination and was in fact admitted by the accused in his 313 statement.

The second circumstance is that there is only one entrance to the tenement No. 2580 which was in the occupation of the family of the accused as well as the deceased and no one could enter in the kitchen room in the occupation of the deceased family without the knowledge of the accused Nos. 1 and 2. This also is not disputed on behalf of the accused.

The third circumstance is that on the date of the incident all throughout the relevant time i. e. the morning of 3rd April, 1993 the wife of the accused i.e. original accused No. 2 was present in her house i. e. the hall which is the front portion of the said tenement.

Fourthly, both the parents of the deceased had left for their work in the morning, the father P.W. 1 having left at 8.30 a.m. as usual and the mother of the deceased having left at 10.30 a.m.

Fifthly, P.W. 6 Shobhi, the brother of the deceased and the deceased, having"

holiday, were at home on the day of incident. The deceased Soni had not left the house and her dead body was found in the kitchen which was in the occupation of her family.

Sixthly, when P.W. 6 Shobhi left at 11.00 o'clock to go to his friend's house both the accused were present in the house as per the evidence given by P.W. 6 Shobhi which has not been challenged in his cross-examination. Even in 313 statement in answer to question No. 19 put to the accused, he admitted that P.W. 6 and his sister, the victim girl, were having holiday and were at home and their parents had left for work and that they were studying in 7th and 5th standard respectively and that at about 11 a.m. P.W. 6 Shobhi left for study to the house of his friend Rakesh and Soni was at home. This was admitted to be correct by the accused. What was disputed by the accused was his own presence as he said in answer to the said question, "but I was not at home". However, the Accused No. 2 wife did admit the presence of accused No. 1 in the house at 11 a.m. in her 313 statement in answer to Question No. 19.

The seventh circumstance is that the offences of rape and murder on the deceased were committed inside the kitchen room. This fact has been amply proved by the evidence on record and this position has not been contested on behalf of the accused.

The eighth circumstance Is that the accused had access to the said room as the two rooms in the respective occupation of the family of the deceased and the accused were part of the same one common tenement having one common entrance from outside for the exit as well as for entry.

The ninth circumstance is the conduct of the accused that even after his admitted arrival at his house at 2.30 p.m. from his place of work, he did not assist Shobhi in opening the door as in the past, inspite of the request made by the witness. This fact is admitted by the accused in his 313 statement, in answer to Question No. 22.

The tenth circumstance is the recovery of the blood stained clothes being underwear at the instance of the accused No. 1 on 9th April, 1993 from the house of the accused. As per the CA Report the underwear was stained with blood of Group "O" which is that of the deceased and was also found to be stained with human semen. The said underwear and his shirt were wrapped in the lungi belonging to the accused and hidden in his house.

The eleventh circumstance is about the recovery of two video cassettes of blue film and a pornographic magazine from the house of the accused recovered at, his instance.

16. In order to appreciate the involvement of the accused in the crime due to the existence of the aforesaid circumstances, it would be necessary to prove the existence of the aforesaid circumstances beyond reasonable doubt and exclude the possibility of any third person entering into the tenement during the relevant

period.

17. Firstly, it is not in dispute that there is common entrance to the two rooms in the respective occupation of the family of the deceased and the accused. The entrance is through the door of the hall which was occupied by the family of the accused. The tenement belongs to a third person and both the families had come to stay there under leave and licence agreement in respect of the room in their occupation. There is only one entrance to the kitchen through the hall which was in occupation of the deceased and there is no other access to that room except to go from the hall in the occupation of the accused. Secondly, the tenement in question is situated on the second floor and there are, as per the map and evidence of P.W. 2, two windows to the kitchen room, one with the grills just above the mori to which Soni was found tied after her murder. As the said window was having grills there was no question of anybody entering into the kitchen room through that window after climbing through the pipeline. There is another small window to the said kitchen which is without grills. However, it is not disputed on behalf of the accused that there is no pipeline through which one can climb up to that window. On the contrary it has come in the evidence of Mrs. Jyoti Khatri (P.W. 8) who was occupying Room No. 2582 on the same floor as the tenement where the offence was committed, and who was on visiting terms with the family of the accused and was on the relevant date sitting, chitchatting with the accused No. 2 until arrival of accused No. 1 that the drain pipes are on the back side of bathroom which cannot be used for climbing up to the window on the other side of the kitchen, having no grills. Accused No. 2, the wife of this accused was undisputedly and admittedly present throughout in the room in their occupation at the relevant time and if any outsider had entered the place of offence either through the hall or through window, she would have noticed about the arrival of the intruder as the trespass by any stranger in that room would have created some "noise and commotion due to the shouting of the victim girl Soni. If the possibility of any other person or outsider entering into the room where the offence was committed is excluded without the knowledge of the accused and/or his wife original accused No. 2, then we have to find out the possibility of Accused No. 1 being responsible for commission of the offence. Although as per the evidence led on record the accused appears to have attended his duties at BMRD where he was Supervisor over the watchmen and his duty hours were between 7 a.m. to 3 p.m. on the relevant day, his absence from his duty and his presence in the tenement in question cannot be excluded for few hours between 11 a.m. to 12.20 p.m. P.W. 6, the brother of the deceased in his deposition states that, as if was holiday at 11 a.m., after his parents having left for work, he went to the house of his friend Rakesh for studies and at that time both the accused were in the hall of the tenement. This part of the evidence has not been shattered in the cross-examination of the witness. In fact no attempt has been made to show that the accused was not present at 11 o'clock on the relevant date when P.W. 6 Shobhi left to go to his friend's house. If it is not put to the witness that Accused No. 1 was not present at 11 o'clock on

that day when P.W. 6 Shobhi left the house or that the Accused was attending his duty at the relevant time. Secondly, although there is evidence that accused had signed the muster of BMRD on the relevant day and his duty hours were between 7 a.m. to 3 a.m. on that day there is no evidence to show that he was present at the place of his duty through out that period. This is not the case put up on behalf of the accused in the cross-examination to any of the witnesses nor even stated by the accused when he was examined u/s 313 of Cr.P.C. Even in answer to the last question put to the accused in 313 statement whether he wanted to say anything more, his answer was that he had nothing to say. In answer to the question as to why the witnesses were deposing against him he replied that he did not know. It would mean that the witnesses had no animus to implicate the accused falsely. In fact none of the witnesses have directly implicated the accused for his involvement in the said offence. They have stated only what they had observed on the day of the incident about the presence of the accused. Even P.W. 6 Shobhi states about the presence of the accused at two times one at 11 o'clock when he left his house leaving his sister alone in the kitchen room and secondly when accused No. 1 admittedly arrived or returned to his house at about 2.30 p.m. in the afternoon. The other witnesses, who are the neighbours who had not seen the accused in his house, have also not tried to falsely state in their deposition that the accused was present in the morning in his house. P.W. 8 Jyoti Khatri has said that she was sitting in the house of the accused chitchatting with the accused No. 2, wife of this accused. According to her she was there between 12.30 to 2 p.m. and left when accused No. 1 returned to his house. The duties of the accused at his office were that of supervision over the watchmen and P.W. 7, one of the watchman examined on behalf of the prosecution, stated that he had seen the accused on that day for the first time at about 12.35 p.m. in the afternoon at the place of his work. The duty of the accused as Supervisor was not to remain at the place of work through out the period as he had to only supervise whether the watchmen were on duty or not which could be done by taking periodical rounds through the chokiest at different gates, as pointed out by P.W. 7. It is not disputed that the distance between the place of offence or the house of the accused and the place of his work i. e. office of BMRD can be covered by 15 minutes walk and the accused was using bicycle which would take hardly five minutes to reach the place of work from his place of residence. Considering the kind of duties the accused had to perform at his place of work and the distance between the place of residence and the place of work which could be covered within a period of five minutes on a bicycle, which was being used by the accused, the presence of the accused for some hours during the relevant period at his residence cannot be excluded. This would support the uncontroverted testimony of P.W. 6 Shobhi that he had seen the accused No. 1 at 11 o'clock at his residence when he left for his friend's residence. His presence at 11 o'clock in his house and for some time more also is not inconsistent with the performance of his duties at the place of his work. No evidence has been led on behalf of the accused to show that he was attending his duties through out the hours of his duties between 7 a.m. to 3 p.m. Although his duty hours are up

to 3 p.m. it was not disputed, as stated by various witnesses, that he returned from his work at about 2 or 2.30 p.m. This has been deposed by P.W. 6 Shobhi, P.W. 5 Mrs. Binder and P.W. 8 Mrs. Jyoti Khatri. If the testimony of P.W. 6 is accepted and there is no reason to discard the said testimony that accused No. 1 was present in his house at about 11 a.m. and was not seen when he returned from his friend's house at about 1 p.m., in that case the deceased was last seen in the company of accused Nos. 1 and 2 i.e. the husband and wife. Incidentally it may be mentioned that the wife Accused No. 2 has admitted in answer to question No. 19 of her 313 statement that this Accused was at home when P.W. 6 Shobhi left the house at 11 a.m. though this Accused had stated that he was not at home in answer to Question No. 19.

18. In our view if anything had happened to the deceased during 11 a. m. to 1 p.m. it was within the exclusive knowledge of the accused Nos. 1 and 2 who were inmates of the same tenement. The onus is, therefore, on the accused to explain. Not only the accused have not offered any explanation as to how the deceased met the unfortunate fate but the conduct of the accused is inculpatory. It has come in the evidence of P.W. 6 Shobhi that the entrance door of the kitchen, which was the only door, used to get stuck up very often when it was closed while coming out and it required some force to be used for opening the said door. When Shobhi returned from the house of his friend at about 1p.m. the door could not be opened by him but before he could attempt to open the door, the wife of the accused asked him not to disturb Soni who was according to her sleeping then, we have no reason to doubt the testimony of P.W. 6 Shobhi when he deposed that accused No. 2 told him not to disturb Soni. That time the accused No. 1 had already disappeared and the crime, if at all, must have been committed within the short span of time when Shobhi was away from his house between 11 a.m. to 1 p.m. when accused returned from his work at about 2.30 p.m., Shobhi requested him to help him to open the door as he used to do in the past. The deposition of P.W. 6 Shobhi that in the past he used to request the accused in the absence of his own parents to help him open the door whenever it got stuck up and accused used to oblige him has not been denied either in the cross-examination of this witness or in 313 statement of the accused. It is further significant to point out that when P.W. 6 Shobhi requested the accused, on the date of the incident, to help him to open the door, the accused refused to oblige and asked him to call his aunt Yelsamma. This fact has also not only been not controverted in the cross-examination of this witness but has been admitted by the accused in his 313 statement while replying to Question No. 22. The natural conduct on the part of the accused, as in the past, ought to have been to help the boy to open the door. Any person in those circumstances would have suspected something wrong when Soni, the victim girl, was not opening the door for long hours as it was not the time for going to fast asleep. The normal conduct on the part of a person like accused, who was immediate neighbour and addressed as uncle by the victim girl as well by P.W. 6 Shobhi, would have been to show concern for the girl as it was unusual for the girl to have remained

sleeping inside the room at the odd hours and not responding to any call by her brother and other neighbours, as is admitted by the accused in his 313 examination. This conduct of the accused was possible only if the accused was knowing or was himself responsible for the crime which was committed against the deceased girl. Even the conduct of the wife of this accused i. e. accused No. 2 was suspicious and was unusual as it is not disputed on behalf of the accused that even the wife of the accused was not in favour of the opening the door except in the presence of the elder relatives of the deceased. This conduct of the accused, in our view, is a strong circumstance indicating the involvement of the accused in the crime. Neither in the cross-examination nor in his examination u/s 313 when the opportunity was afforded to him, accused tried to explain his conduct which was per se that of guilty mind.

19. The learned Public Prosecutor placed reliance in this connection on the decision of the Supreme Court in the case of Jagjil Singh v. State of H.P. 1994 SCC 176 : 1993 (5) Scale 31 : 1994 Cri. L.J. 233 wherein the dead body with fatal injuries was found in the room of the accused. The Apex Court held that the accused was bound to give an explanation which should at least look probable. In this case the accused and the deceased were inmates of the same tenement. The accused No. 2 was admittedly present through out in their portion of the tenement and it has been, as pointed out earlier, sufficiently established by the prosecution that even this accused was present at the place of offence during the relevant hours. Yet no effort was made to give any explanation for his unusual conduct by the accused in the situation where the girl was remaining inside the room for long hours without opening the door.

20. Another case relied on by the learned Public Prosecutor is the decision of the Supreme Court in the case of Deonandan Mishra Vs. The State of Bihar, . In that case also where the offence of murder was being proved on the basis of circumstantial evidence, the Apex Court observed as follows :

...It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offer no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.

21. In this case also the circumstances narrated above point to the guilt of the accused and, therefore, the accused ought to have offered explanation which is wanting. Besides, the manner in which offence was committed and the injuries which were inflicted on the person of the minor girl, would not have escaped the attention of the accused who were present in the tenement, if the same had

been committed by an outsider getting access to the kitchen through the solitary door of the hall in the occupation of the accused. It is clear that unless the outsider passes through the hall in occupation of the accused he could not have had access to the kitchen room where the dead body was found. Prosecution has amply established that there was no other access to the said flat on the second floor and the entrance through the window without grills was not possible as there was no pipeline or other way through which one could have climbed up to that window on the second floor of the building. In these circumstances, when the presence of the accused No. 2, wife of this accused throughout the relevant period was not denied, and in fact admitted and the presence of accused No. 1 at 11 a.m. when Shobhi left the house leaving Soni alone in the rear portion of that tenement which was in their occupation, has been established, the only persons who could have committed these crimes are the accused and in these circumstances the accused ought to have offered some explanation which is totally absent, in this case which, if accepted though not proved, would offer reasonable basis for conclusion on the entire case consistent with his innocence as aptly put by the Supreme Court in Deonandan Mishra's case (supra).

22. The next circumstance which requires consideration in the chain of circumstances pointing to the guilt of the accused is the recovery of the blood stained clothes mainly the underwear at the instance of the accused from his own house on 9th April, 1993. Due to the arrest of both the husband and wife, and the parents of the deceased having left that place and gone to stay with P.W. 3, who was staying in the same colony, the tenement in question was locked. On the statement made by the accused during his custody on 9th April, 1993 for producing his clothes which he had concealed in his house, in the presence of P.W. 10 Mahendrakumar, lungi, underwear and shirt, being Articles 11, 12 and 13 respectively were recovered under the memorandum panchanama (Ex. 33) and the seizure panchanama (Ex. 33A). The said clothes were sent, to the Chemical Analyser for analysis and the report of the Chemical Analyser dated 17th May, 1993 (Ex. 26) shows that the underwear of the accused was having few blood stains ranging from about 0.5 to 3 cms. and also was having moderate number of semen stains ranging from 0.5 cm. to 3 cm. near waist band portion on the front. The blood found on the same was human blood of blood group "O" which is that of the deceased. The semen found on the said underwear also was of human of "O" group. The prosecution has led evidence to show that the blood stained clothes of the deceased were stained with blood of group "O" which must be that of the deceased. The blood of the accused was also sent for analysis which was also of blood group "O". Merely because the blood group of the deceased and the accused were the same it would not render the circumstance of the underwear of the deceased recovered at his instance stained with human blood of Group "O" unreliable as a piece of evidence. The fact that blood group "O" which is that of the deceased was on the underwear of the accused is consistent with the prosecution case and is a circumstance which goes against the accused who ought to have explained the same. Even though the blood

group of the accused was of the same group unless the accused had explained as to how his underwear came to be stained with his own blood, the finding of the underwear of the accused with blood group "O" is a circumstance which forms another link in the chain of circumstances which are established against the accused. Neither the accused was having any injuries nor he has tried to explain as to why there was blood on his underwear. Serenity because the underwear was attached six days after the date of the incident and three days after the date of his arrest would not belie the prosecution theory or render the circumstance unworthy for consideration. The furor which the incident had created in the locality must have prevented the accused from washing the underwear in the presence of the parents of the deceased and other relatives who must have gathered due to the death of the girl in the same tenement having common bathroom.

23. Although the victim girl was found with several injuries on her person which left no doubt that she had met with homicidal death. P.W. 3 PSI Katkare did not register the crime though on the evening of the date of incident he had visited the scene of offence, drawn the spot panchanama and the inquest panchanama of the body of the person and sent the body of the victim for post-mortem examination. Even from the inquest panchanama itself the commission of the crime of rape on the person of the deceased was manifest. In spite of these two crimes appeared to have been committed on the person of the deceased one fails to understand why the crime was not registered on that very day simply because the accused was not known. It is true that, on the date of the incident even the close relations of the deceased i. e. the parents and the brother did not suspect the involvement of the accused who was like uncle to the deceased and her own brother P.W. 6 Shobhi. It was only when the statement of Sahirabanu was recorded which disclosed that Accused was at home on that day that the suspicion arose against the accused and, therefore, he came to be arrested. The investigation in this case was apparently lacunary as neither the crime was registered on the first day nor statements of the relations and the neighbours were recorded immediately. Surprisingly even the clothes of the deceased came to be seized and attached under panchanama on the following day although the body of the deceased was sent for post-mortem on the same evening. The investigation, therefore, had to change hands from PSI Katkare (P.W. 13) to PI Shinge (P.W. 14) on 7th April, 1993 and ultimately to API Jadhav (P.W. 15), D.C.B., C.I.D. on 14th April, 1993. This explains the delay on the part of the investigating machinery to proceed in the matter with desired speed.

24. It was on 26th April, 1993 that two blue film video cassettes and a pornographic magazine came to be seized and attached from the house of the accused at his instance under the panchanamas. The pornographic magazine attached from the house of the accused, as pointed out by the Trial Court, contained obscene naked pictures showing not only the sexual intercourse but also the carnal intercourse being performed. The finding of these pornographic pictures, and blue film video cassettes does show the mentality of the accused.

This probably would explain the involvement of the wife of the accused in the crime of rape and carnal intercourse which was committed on the deceased. It is one of the chain of circumstances which shows the involvement of the accused in the crimes in question.

25. In this case we have found that there was no possibility of the outsider coming to the place of offence and committing the offence of rape and murder without the knowledge of the accused, in which case the accused either would have prevented the said offence being committed on the deceased or would have been the witness against the criminal. The presence of the accused at the place of offence and his conduct, which was not only strange but unusual on that day, goes a long way to indicate the involvement of the accused in the offence in question. We have absolutely no doubt in our mind that the aforesaid facts establish chain of circumstances which point finger only at the accused. We, therefore, have absolutely no hesitation to confirm the conviction of the accused for both the offences of rape u/s 376 of IPC as well as the offence of murder u/s 300 punishable u/s 302 of IPC.

26. We, therefore, now have to deal with the question of punishment or the sentence to be imposed on the accused. The Trial Court has awarded the sentence of RI for 10 years for the offence of rape u/s 376 and we are in respectful agreement with the said sentence.

27. As far as the sentence for the offence of murder u/s 302 of IPC is concerned, the Trial Court no doubt, after considering and balancing the aggravating circumstances and finding no mitigating circumstances, has awarded the death sentence to the accused which is submitted for our confirmation. The aggravating circumstances are mentioned by the Trial Court in para 87 of the judgment which are 11 in number. The Trial Court has observed that there are no mitigating circumstances which can be taken into account.

28. On behalf of the prosecution, the learned Public Prosecutor pressed for confirmation of the capital punishment on the ground that the crimes which are committed by the accused on a minor helpless girl are, to say the least, very brutal in nature and the accused does not deserve any sympathy. According to the learned Public Prosecutor the sentence in this case should be deterrent to the others who would venture to commit such offence. According to her the accused in order to satiate his lust has behaved in a very beastly manner and, therefore, the death sentence awarded by the Trial Court should be confirmed by this Court. In support of her contention, the learned Public Prosecutor has cited number of decisions of the Supreme Court some of which, being relevant, deserve our consideration.

29. Firstly in the judgment of the Supreme Court in the case of Balwant Singh Vs. State of Punjab, it was observed, "...It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But to indicate just a few, such as, the crime has been

committed by a professional or a hardened criminal or it has been committed in a very brutal manner or on a helpless child or a woman or the like...." Death sentence was, however, held not warranted in the facts of the case. Next is the decision of the Supreme Court in the case of *Jumman Khan Vs. State of U.P.*, where the Supreme Court observed as follows : "Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by Section 302 of IPC."

30. The learned Public Prosecutor then relied on the decision of the Supreme Court in the case of *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, . It was a case of rape and murder of a school going girl by a security guard in retaliation for his transfer on the complaint of the deceased girl who used to be teased by him. It was a case of circumstantial evidence and after holding that the circumstances pointed out unmistakably the guilt of the accused. Supreme Court confirmed the capital punishment awarded to the accused. Reliance was also placed on the decision of the Supreme Court in case of *Laxman Naik Vs. State of Orissa*, . It was a case of rape and murder of 7 years old girl based on circumstantial evidence and the accused was none other than the uncle of the deceased who was held to be both in fiduciary as well as the position of trust vis-a-vis the victim girl. The Apex Court, considering that it was preplanned dastardly act, held to be rarest of rare cases deserving the death penalty. The learned Public Prosecutor also placed reliance on the decision of the Supreme Court in the case of *Kamta Tiwari v. State of M.P.* It was again a case of rape and murder committed on seven year old girl who was after the commission of rape strangulated to death and her body came to be thrown in a well in order to cause disappearance of the evidence and the Supreme Court held that it was a case falling within the rarest of rare cases and deserved capital punishment. In that case the accused was a friend of the family of the girl and was stated to be in a position of trust and, therefore, his culpability according to the Supreme Court assumed the proportion of extreme depravity and aroused a sense of revulsion in the mind of the common man and, therefore, the death sentence was confirmed.

31. As against this Mr. Patel, the learned Counsel appearing on behalf of the accused contended that the accused is a person having his family i.e. his wife who was accused No. 2 in this case and was convicted and sentenced to life term u/s 302 of the IPC and has children. In our view the existence of the family of the accused is not a factor which is an extenuating circumstance for awarding the lesser punishment under the law. The learned Public Prosecutor has rightly brought to our notice in that respect the decision of the Supreme Court in the case of *Sewa Kaur Vs. State of Punjab*,

32. So far as the sentence is concerned u/s 354 of Sub-section (3) of Cr.P.C. it is clear that in ease of conviction for offence punishable with death or alternately with imprisonment for life, the life imprisonment is the rule while the capital punishment is an exception. In case of death sentence, the Court has to record

special reasons while for awarding life imprisonment, the Court is required only to give its reasons and not special reasons. In Bachan Singh's case AIR 1980 SC 898 the Constitution Bench of the Supreme Court has laid down the categories of cases in which the death penalty could be imposed and laid down the broad guidelines without attempting to formulate rigid standards as in that case it would put fetters on the judicial discretion. In the subsequent decision of the Supreme Court in the case of Machhi Singh and Others Vs. State of Punjab, the Supreme Court indicated the type of cases which would fall within the exceptional clause without introducing any rigidity in order to avoid any attempt to fetter judicial discretion. The cases cited by the learned Public Prosecutor no doubt concern the cases where the offence of rape and murder were committed on minor helpless girls. In Jumman Khan's case (supra) the Supreme Court had found that the accused had committed premeditated rape on helpless child aged about 6 years and thereafter he had strangled her to death and, therefore, the Supreme Court held that it was a case fit for awarding the extreme penalty of death. Similarly in Dhananjay Chatterjee's case (supra) the accused was a security guard who had committed a rape and then murdered an 18 years old girl in retaliation for his transfer on the complaint by the deceased girl who used to be teased by the accused who was security guard in the residential society. In Laxman Naik's case (supra) there was rape and murder of seven years old girl by none other than the real uncle of deceased who stood in fiduciary position vis - a-vis the deceased. It was held that for such pre-planned dastardly act the death penalty was warranted. Similarly in Kamta Tiwari's case (supra) where the rape was committed on seven years old girl and then strangled to death, the Supreme Court felt that the accused who was close to the family of the girl had taken away the child on the pretext of giving her biscuits which she demanded from him while her father was in a saloon for hair-cutting.

33. Normally, following the precedents which are placed before us by the learned Public Prosecutor as mentioned above, we would have been inclined to confirm the death sentence awarded by the Trial Court but after considering the circumstances, which according to us are sufficient to record the finding of guilt against the accused, what we feel is that there are certain mitigating factors, if we can call them so, which deter us from resorting to the extreme penalty of death against this accused. These factors are, firstly the investigation in this case had commenced late for the reasons best known to the police machinery. Although the information was given to the Police Station on the same evening pursuant to which PS1 Katkare (p.w. 13) came on the scene and drew the inquest and spot panchanama and also sent the body for post-mortem examination, yet one fails to understand for what reason the crime was not registered and the investigation had not commenced. If the investigation had commenced the same evening by recording the statements of the relations of the deceased and the neighbours the suspicion which was raised against the accused on the 6th April, 1993 after recording the statement of Sahirabanu would have been aroused on that very day. If the investigation had begun on the same date

the other circumstance of recovery of blood stained and semen stained underwear of the accused which was recovered at the instance of the accused from his own house on 9th April, 1993 would have been recovered much earlier. This is not to say that we have not got any lurking doubt with regard to the involvement of the accused in this crime by the circumstantial evidence which we have discussed earlier. If we had any reasonable doubt with regard to the involvement of this accused in this crime in question we would not have hesitated to give him benefit of doubt and acquitted him. As laid down in the Supreme Court decision brought to our notice in the case of *Sevaka Perumal, etc. Vs. State of Tamil Nadu*, "If there is any reasonable doubt, not the doubt of vacillating mind of a Judge, the accused is entitled to that benefit and be acquitted. The benefit of doubt again does not enter in the area of consideration of imposing sentence."

34. But as laid down by the Supreme Court in *Bachan Singh's* case and reiterated in *Machhi Singh's* case, the Court has to consider, try and balance the aggravating circumstances as against the extenuating circumstances before awarding the death penalty. In the recent decision of the Supreme Court in the case of *Raja Ram Yadav and others Vs. State of Bihar*, the Supreme Court observed that the extreme penalty of death must be given only in rarest of rare cases where the aggravating circumstances are such that the extreme penalty meets the ends of justice. It was further observed that the guidelines indicated by the Supreme Court in *Bachan Singh's* case will have to be applied in the facts and circumstances of the individual case where the question imposing death sentence may arise. In that case reliance was placed on the decision of that Court in the case of *Suresh Vs. State of U.P.*, , Though that was not a case of rape and murder based on circumstantial evidence, it was based on sole testimony of child eye witness who was the son of the deceased and although the Court had accepted the evidence of the 5 years old son of the deceased for purpose of recording the conviction against the accused, the Apex Court was hesitant to resort to extreme sentence of death on the basis of child witness as it felt that it would not be safe to act upon such deposition, even if true, for putting out a life. Applying the said ratio the Supreme Court in *Raja Ram Yadav's* case (*supra*), where the conviction was based on sole eye witness, felt it was not proper to award the extreme sentence of death on the accused and, therefore, proceeded to commute the sentence of death to that of life imprisonment with addition of imposition of fine.

35. In the aforesaid case Supreme Court has emphasised that in the judgment of the Constitution Bench of the Supreme Court in *Bachan Singh's* case reiterated in *Machhi Singh's* case, the Apex Court ha-- not placed fetters on the judicial discretion to be exercised by the Court while considering the sentence to be imposed u/s 302.

36. In the case of *Allauddin Mian v. State of Bihar* after considering the earlier decisions of the Supreme Court including the decision of the Supreme Court in

Machhi Singh's case, it was observed that the choice of sentence is left to the judiciary with the rider that the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. In the face of the four judgments of the Apex Court cited by the learned Public Prosecutor, we would have been ordinarily inclined to follow the same precedent and confirm the death penalty awarded to the accused but for the mitigating circumstances as pointed out herein we are not inclined to confirm the sentence of death. Apart from the delay in the investigation of the case what had puzzled us throughout the hearing of this confirmation case is the involvement of the wife of the accused No. 2 along with her husband for the commission of the offence of rape. No earthly reason has been shown as to how the wife would allow or tolerate the offence of rape being committed by her husband in her presence except the seizure of the two blue film video cassettes and the pornographic magazine which might have made the wife so depraved as to share or to condone the commission of such an offence by her husband. In this case for the presence of this accused in the house on the day of the incident we have relied on the sole testimony of Shobhi a minor boy of 15 years. In the circumstance we do not confirm the death sentence awarded by the Trial Court, in this case.

37. We, therefore, confirm the conviction of accused No. 1 both for the offence of rape u/s 376 of IPC and offence of murder u/s 302 of IPC. While we confirm the sentence of 10 years RI recorded by the Trial Court for offence u/s 376, we commute the death sentence to life imprisonment for the offence u/s 302 and in addition impose a fine of Rs. 10,000/- in default to suffer RI for one year. We accordingly dismiss the Confirmation Case No. 3 of 1997 and partly allow the Appeal No. 681 of 1987 in the manner indicated above.