

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.3 of 2014

In reference of State of Chhattisgarh Through PS Bilaigarh, Distt. Baloda Bazaar-Bhatapara (C.G.)

---- Petitioner

Versus

1. Digamber Vaishnav, S/o Tunudas Vaishnav, aged about 27 years, R/o Village Kharri (Chhote), Thana Sarangarh, Distt. Raigarh (C.G.)
2. Girdhari, S/o Bodhandas Vaishnav, aged about 20 years, R/o Barbhatha (Chikhli), Thana Sarangarh, Distt. Raigarh (C.G.)

---- Respondents

For Petitioner/State:

Mr. A.S. Kachhawaha, Additional Advocate General with Mr. Neeraj Jain, Government Advocate and Miss Pushpa Dwivedi, Panel Lawyer.

For Respondents: Mr. Janak Ram Verma, Advocate.

Criminal Appeal No.536 of 2014

Girdhari Vaishnav, S/o Bodhan Das Vaishnav, aged about 20 years, Labour worker, R/o Village Barbhata (Chikhli), PS Sarangarh, Distt. Raigarh (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through SHO, PS Bilaigarh, Distt. Baloda Bazaar-Bhatapara (C.G.)

---- Respondent

AND

Criminal Appeal No.537 of 2014

Digambar Vaishnav, S/o Tunudas Vaishnav, aged about 27 years, Labour worker, R/o Village Kharri (Chhote), PS Sarangarh, Distt. Raigarh (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through Station House Officer, PS Bilaigarh, Distt. Baloda Bazaar-Bhatapara (C.G.)

---- Respondent

For Appellants: Mr. Janak Ram Verma, Advocate.

For Respondent/State:

Mr. A.S. Kachhawaha, Additional Advocate General with Mr. Neeraj Jain, Government Advocate and Miss Pushpa Dwivedi, Panel Lawyer.

Hon'ble Mr. Justice T. P. Sharma and

Hon'ble Mr. Justice Inder Singh Uboweja

C A V Judgment

(30/04/2015)

The Judgment of the Court was delivered by T.P. Sharma, J.

1. Death reference under Section 366 (1) of the Code of Criminal Procedure, 1973 (for short 'the Code') for confirmation of death sentence imposed upon accused Digamber Vaishnav & Girdhari passed by the Sessions Judge, Sessions Division, Baloda Bazaar (C.G.), in Sessions Trial No.5/2013 vide judgment dated 14-5-2014, Cr.A. No.536/2014 filed on behalf of Girdhari Vaishnav and Cr.A.No.537/2014 filed on behalf of Digamber Vaishnav against their conviction and sentences are being disposed of by this common judgment.
2. Vide judgment of conviction and order of sentence dated 14-5-2014 passed in Sessions Trial No.5/2013, the Sessions Judge, Sessions Division, Baloda Bazaar (C.G.) after holding accused Digamber & Girdhari guilty for commission of robbery by causing injury in sharing common intention and causing homicidal death amounting to murder of Smt. Shri Bai, Smt. Subhadra, Kum. Kondi, Smt. Amrika Bai & Kum. Mala, convicted them under Sections 302 read with Section 34 (five times) & 394 read with Section 34 of the IPC and imposed death sentence (five times) and RI for ten years & fine of Rs.500/- each, in default additional RI for one month, respectively. After imposing death sentence, learned Sessions Judge has submitted proceeding under Section 366 (1) of the Code for confirmation of death sentence imposed upon the accused persons.
3. By filing Cr.A.Nos.536/2014 & 537/2014, appellants Girdhari Vaishnav & Digamber Vaishnav, respectively, have challenged legality and propriety of the aforesaid judgment of conviction and order of sentence dated 14-5-2014 passed by the Sessions Judge, Sessions Division, Baloda Bazaar in Sessions Trial No.5/2013, whereby and whereunder, learned Sessions Judge after holding the appellants guilty for committing robbery after causing injury in sharing common intention and causing homicidal death amounting to murder of Smt. Shri Bai, Smt. Subhadra, Kum. Kondi,

Smt. Amrika Bai & Kum. Mala, convicted & sentenced them in the aforesaid manner.

4. Conviction is impugned by the appellants on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellants and thereby committed an illegality.
5. As per case of the prosecution, all the deceased persons namely Shri Bai, Subhadra, Kondi, Amrika Bai and Mala were residing under same roof at Village Khapridih, Police Outpost Gidhouri, Police Station Bilaigarh, Distt. Baloda Bazaar-Bhatapara. Unfortunate deceased Shri Bai, mother of deceased Kondi, was dealing with the business of money lending. On 16-12-2012 at evening, appellants Digamber & Girdhari, uncle & nephew, came to the house of unfortunate deceased Shri Bai where mother-in-law of appellant Digamber Vaishnav namely deceased Amrika Bai and daughter of deceased Shri Bai namely deceased Kondi were also present. The appellants came to the house of Shri Bai by motorcycle Bajaj CT 100 bearing registration No.CG-13/E-5097 and gave an impression that they had come for negotiation of marriage of another unfortunate deceased Kondi @ Mantori, another daughter of deceased Shri Bai. Deceased Amrika Bai went to the house of her uncle Badridas Vaishnav (PW-1) at about 6 p.m. and informed that two guests had come for negotiation of marriage of Kondi, she also informed that she has informed her brother-in-law (*jija*) Sohandas (PW-9) by telephone about such guests and he will come on second day. Deceased Amrika Bai also telephoned to Sohandas (PW-9) and informed that appellant Digamber had come to her house to see deceased Kondi for the purpose of marriage. The appellants stayed in the house of Shri Bai at night, they took their meals and after taking meals, deceased Shri Bai, Subhadra, Kondi, Amrika Bai & Mala went for sleep in their rooms. Both the appellants stayed in one room and they also went for sleep. Deceased Kondi & Shri Bai were sleeping on one cot, at about 2 a.m., deceased Kondi came out from her room to answer the call of nature, both the appellants wakeup and caused her death by throttling, at the same time, Shri Bai came, they also caused her death by throttling, they committed robbery of Rs.5,760/- and pair of silver payal पैर पट्टी from the box of deceased Shri Bai.

Presence of the appellants has already been noticed by other deceased Amrika Bai, Mala and Subhadra, therefore they called them one by one and killed them by strangulation. Four small children were sleeping inside the room. They closed the room from outside and fled from the house of deceased Shri Bai by their motorcycle. They got filled petrol of Rs.100/- in their motorcycle, they purchased gutka of Rs.60/- and distributed money and payal. Kum. Chandni, aged about 10 years; Kum. Nandini, aged about 4 years; Noni and Govinda (twins), aged about 3 years, i.e. only four kids were present in the house whose rooms were bolted from outside. At early morning, Dan Bai (PW-10) and one Anita, their neighbours, called Kondi for work, but she did not answer, Anita went inside the house and opened the bolt of the room closed from outside where she saw aforesaid four kids present inside the room. They noticed the dead bodies of Amrika Bai, Mala, Shri Bai, Kondi and Subhadra. Kum. Chandni (PW-8) informed the incident to Badridas Vaishnav (PW-1) who came with his wife Shanti Bai (PW-3). They saw the dead bodies.

6. Badridas Vaishnav (PW-1) went to Police Outpost Gidhour, Police Station Bilaigarh and lodged morgue vide Exs.P-1 to P-5. FIR was registered at Police Outpost Gidhour vide Ex.P-6. The investigating officer left for the scene of occurrence and after summoning the witnesses vide Exs.P-8 to P-12, prepared inquest over the dead bodies of deceased Amika Bai, Kum. Mala, Kondi @ Mantori, Shri Bai and Subhadra vide Exs.P-13 to P-17. Spot map was prepared vide Ex.P-7. Finally, numbered morgues were registered at Police Station Bilaigarh vide Exs.P-29A, P-30A, P-31A, P-32A and P-33A. Numbered FIR was registered at Police Station Bilaigarh vide Ex.P-28A.
7. One bottle of golden whisky 180 ml. containing suspected finger prints and one plastic torch containing suspected finger prints were found near the place of incident. Finger prints were safely preserved and seized vide Ex.P-34A. Bloodstained soil, plain soil and one woolen shawl were seized from the spot vide Ex.P-35A. Six hairs found in the hands of deceased Kondi were seized vide Ex.P-36. Two small buttons found near the dead body of Subhadra and Shri Bai were seized vide Ex.P-37.

Finger prints upon wooden door and steel almirah were preserved.

8. Dead body of Subhadra was sent for autopsy to Community Health Centre, Bilaigarh vide Ex.P-39. Team of doctors consisting Dr. C.S. Paikara (PW-11) conducted autopsy over the dead body of deceased Subhadra vide Ex.P-34 and following injuries and symptoms were found: -

- i. Whitish patch 3 c.m. x 2 c.m. on neck, peripheral cynaosed.
- ii. Contusion 3 c.m. x 2 c.m. on chin, bleeding on nose.
- iii. Abrasion on lower lip, bleeding on nose.

Mode of death was asphyxia due to throttling and death was homicidal in nature.

9. Dead body of Amrika was also sent for autopsy to Community Health Centre, Bilaigarh vide Ex.P-41. Team of doctors consisting Dr. (Smt.) Pramila Toppo (PW-14) conducted autopsy over the dead body of deceased Amrika vide Ex.P-35 and following injuries and symptoms were found: -

- i. Abdomen slightly distorted, fingers nails cyanosed.
- ii. Ligature mark present on neck, two rounds encircled.
- iii. Neck fixed knot present, two knots left side of neck underneath ligature mark more prominent.
- iv. Ligature mark as brownish coloured irregular pattern present at anterior part of neck just below the level of thyroid cartilage, distance from chin angle of mandible, mastoid on both side respectively.
- v. Breadth of 2 marks 1.5 to 3 c.m.
- vi. Length of ligature mark 6 c.m.
- vii. Ligature mark is parchment and few spots of clotted blood present.
- viii. Ligature mark, contusion present on both sides of arm, mid arm aspect of upper 1/3rd part 5 x 2 c.m. transversely two in number.

Mode of death was asphyxia due to strangulation and death was homicidal in nature.

Cloth of deceased Amrika was sealed and seized vide Ex.P-38.

10. Dead body of Kondi @ Mantori was also sent for autopsy to Community Health Centre, Bilaigarh vide Ex.P-40. Team of doctors consisting Dr. (Smt.) Pramila Toppo (PW-14) conducted autopsy over the dead body of deceased Kondi @ Mantori vide Ex.P-40A and following injuries and symptoms were found: -

- i. Eyes closed – pupil normal.
- ii. Tongue protruded and clenched between teeth.
- iii. Watery bleeding through both nostrils.
- iv. Abrasion in front of neck right to trachea length 1.5 c.m. x 0.5 c.m..
- v. Palm & nails of both hands and legs are cyanosed.

Mode of death was asphyxia due to throttling and death was homicidal in nature.

11. Dead body of Shri Bai was also sent for autopsy to Community Health Centre, Bilaigarh vide Ex.P-42. Team of doctors consisting Dr. (Smt.) Pramila Toppo (PW-14) conducted autopsy over the dead body of deceased Shri Bai vide Ex.P-42A and following injuries and symptoms were found: -

- i. Eyes closed – pupil dilated.
- ii. Tongue protruded and clenched between teeth.
- iii. Bleeding through both nostrils.
- iv. Rigor mortis present in both lower limbs
- v. Abrasion in front of neck right side 2 c.m. x 0.5 c.m.
- vi. Palm and nails of both hands and legs are cyanosed.

Mode of death was asphyxia due to throttling and death was homicidal in nature.

12. Dead body of Kum. Mala was also sent for autopsy to Community Health Centre, Bilaigarh vide Ex.P-43. Team of doctors consisting Dr. (Smt.) Pramila Toppo (PW-14) conducted autopsy over the dead body of deceased Kum. Mala vide Ex.P-43A and following injuries and symptoms were found: -

- i. Eyes closed – pupil dilated.
- ii. Mouth semi-open, bloody froth through both nostrils.
- iii. Abrasion on left side of upper and lower lip.
- iv. In lower lip - L – from left angle to mid of lower lip W – left angle to mid point of lower lip & chin.
- v. In upper lip – in middle of lip in inner side.
- vi. Bloodstain in left palm and right palm.
- vii. Local plaster in left forearm fracture.
- viii. Abrasion present in front of neck – L – up to L of both angle of mandible and –

W – 3 c.m.

Mode of death was asphyxia due to throttling and death was homicidal in nature.

13. During the course of investigation, Patwari prepared spot map vide Ex.P-23 on 17-12-2012 i.e. on same day. Statements of Sohandas (PW-9), Badridas (PW-1), Sheetal Das, Smt. Shanti Bai, Chandni, Anita Bai and Dan Bai were recorded under Section 161 of the CrPC on 17.12.2012. On the basis of their statements recorded under Section 161 of the CrPC, appellant Digamber was taken into custody on 18-12-2012, he made disclosure statement of motorcycle, Rs.3,000/- and one payal vide Ex.P-24 and same were recovered at his instance vide Ex.P-26. Appellant Girdhari was also taken into custody on 18.12.2012, he made disclosure statement of one payal and Rs.2,600/- vide Ex.P-25 and same were recovered at his instance vide Ex.P-27. Shirt of Digamber was seized vide Ex.P-28. Clothes of Girdhari were seized vide Ex.P-29. After obtaining consent from Digamber, some hairs of head of Digamber were cut, sealed and seized vide Ex.P-30. After obtaining consent from Girdhari, some hairs of head of Girdhari were cut, sealed and seized vide Ex.P-31. Sari used for strangulating / throttling deceased Amrika Bai was sent to police after autopsy which has been seized vide Ex.P-38.

14. Seized articles were sent for chemical examination to the Forensic Science Laboratory, Raipur vide Exs.P-47 & P-48. Requisition for call details of cellphone No.9303561178 of Sohandas (PW-9) and cellphone No.8103071487 of deceased Amrika Bai relating to their talks on 16.12.2012 was sent vide Exs.P-50 & P-51, respectively. Finger prints of appellants Digamber and Girdhari were taken vide Exs.P-53 & P-54. As per report of the FSL Ex.P-59, presence of poison in the dead bodies has been denied. Finger prints found upon the wooden door, steel Almirah, bottle of Golden Goa whiskey and torch were compared with the finger prints of the appellants obtained vide Exs.P-53 & P-54 by the Government Finger Prints Expert and it was conclusively opined that finger prints found over the bottle of Golden Goa whisky Art. 'A' was the finger prints of appellant Digamber Vaishnav. White shirt with green lining with two missing buttons, which appellant Girdhari was wearing, was

seized from him vide Ex.P-29. Two buttons with thread were also found near the dead bodies of deceased Shri Bai & Subhadra which were sent for chemical examination to the FSL. As per scientific report Ex.P-61A, buttons and thread found near the dead bodies of deceased Shri Bai & Subhadra were the buttons of shirt of appellant Girdhari which he was wearing with missing two buttons. Hairs found in the hands of deceased Kondi @ Mantori were found insufficient for comparison by the FSL. Statements of the witnesses were recorded under Section 161 of the Code.

15. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Bilaigarh who in turn, committed the case to the Court of 2nd Additional Sessions Judge, Baloda Bazaar.
16. In order to prove the guilt of the appellants, the prosecution has examined as many as 14 witnesses. The accused were examined under Section 313 of the Code in which they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question.
17. After providing opportunity of hearing to the parties, learned Sessions Judge, Baloda Bazaar who received the case for trial after formation of new Sessions Division, Baloda Bazaar, convicted and sentenced the appellants in the aforesaid manner.
18. Learned Sessions Judge, Baloda Bazaar after imposing death sentence upon the appellants has submitted the proceeding for confirmation of death sentence under sub-section (1) of Section 366 of the Code under Criminal Reference No.3/2014. Appellants Digamber and Girdhari have also challenged their conviction and sentences by filing Cr.A.Nos.537/2014 & 536/2014, respectively.
19. We have heard Mr. Janak Ram Verma, learned counsel for the accused/appellants and Mr. A.S. Kachhawaha, Additional Advocate General with Mr. Neeraj Jain, Government Advocate and Miss Pushpa Dwivedi, Panel Lawyer for the State/respondent. Judgment impugned and records of the trial Court perused.
20. Mr. Janak Ram Verma, learned counsel for the accused/appellants, vehemently argued that conviction of the appellants is substantially based on the evidence of

child witness Kum. Chandni (PW-8) whose evidence is neither sufficient nor inspires confidence and is trustworthy for conviction and also for imposing capital sentence upon the appellants. Mr. Janak Ram Verma further submitted that as per her evidence, both the appellants came to her house by motorcycle (*phatphati*), all deceased persons were present in the house, the appellants came to her house at evening, they drank tea and took meals, she went inside the room for sleep, in the morning when she woke-up, she noticed that doors of room were closed from outside then she shouted, thereafter, wife of Tekram namely Anita, who normally used to come to her house for taking deceased Kondi and her mother for work in thrasher, came and opened the door. Her evidence only reveals that the appellants came to her house in the evening, they drank tea and took meals. Her age is 10 years. She was a student of Class-V, she has not deposed anything to show that after taking meals these appellants stayed in her house or had left her house. In para 6 of her evidence, she has further deposed that Govind, Sharda and Nandini were also present in her house in the aforesaid intervening night, they would have been the best witnesses to unfold the real story, but for the reasons best known to the prosecution, the prosecution has failed to examine them. Therefore, the only adverse inference would be possible that if the prosecution would have examined them, then they would have not supported the case of the prosecution, inter alia, they would have unfolded the real story of the prosecution that the appellants are not the authors of the crime. Mr. Janak Ram Verma further argued that as per para 4 of her evidence, wife of Tekram namely Anita has opened the door. Wife of Tekram has been shown as prosecution witness, but the prosecution has failed to examine her. Incident took place in the intervening night of 16.12.2012 and 17.12.2012. Dan Bai (PW-10) and Anita have noticed the factum of murder of five persons at about 3 a.m. in the morning. Residence of Badridas Vaishnav (PW-1), elder uncle of Kum. Chandni (PW-8), was in same village, but Kum. Chandni (PW-8) went to his house between 2 – 2.30 p.m., till then he was not having any knowledge of brutal murder of five persons. Even as per para 4 of the evidence of Badridas Vaishnav (PW-1), on

the date of incident at evening time, he was informed by deceased Amrika Bai that guests had come on which he directed her to provide meals to them and that he will come in the morning, but he did not go to the house of the deceased in the morning knowing the fact that guests had come for negotiation of marriage and there was no male member in the house of the deceased persons. This creates suspicion upon the evidence of Badridas Vaishnav (PW-1), Kum. Chandni (PW-8) and evidence of all prosecution witnesses. Kum. Chandni (PW-8) has specifically deposed that the appellants had come to her house in the evening. She has deposed that the appellants have killed five ladies i.e. she was knowing the fact that the appellants were present in the evening time in her house, but she did not disclose this fact to Badridas Vaishnav (PW-1) and Badridas Vaishnav (PW-1) who has lodged morgue vide Exs.P-1 to P-5 has not informed aforesaid important facts to the police which further shows suspicion upon the story of the prosecution. Five women have been killed in the small village Khapridih in the intervening night of 16th & 17th of December, 2012, but morgue has been recorded at 4 p.m. in Police Outpost Gidhour. Aforesaid delay has not been explained by the prosecution. Dan Bai (PW-10) has also admitted presence of other four persons in the house of the deceased in para 2 of her cross-examination, but the prosecution has not even cited them as witnesses. No incriminating articles of the appellants have been seized and their presence at the time of incident has not been proved by the prosecution. In absence of such evidence and such proof, the appellants are entitled for acquittal. Mr. Janak Ram Verma also argued that undoubtedly, murder of five women is a serious offence, but only on the ground that five women have been killed, liability cannot be fastened upon innocent persons. Heavy duty and greater degree of proof was required to the prosecution to prove the fact that only the appellants were authors of the crime and none else, and also to exclude the possibility of their innocence. The prosecution was also under obligation to establish that this is the case of rarest of rare and no punishment except capital sentence was adequate, but the prosecution has further failed to prove aforesaid fact.

21. Mr. Janak Ram Verma contended that as per evidence of the prosecution witnesses and disclosure statements, robbery of पैर पट्टी and currency notes has been committed which reflects in disclosure statements Exs.P-24 & P-25 and recovery Exs.P-26 & P-27. Aforesaid पैर पट्टी has not been placed for test identification or for identification during the course of evidence which is also fatal to the prosecution. Even otherwise, witness of disclosure statement and recovery Rajesh Vaishnav (PW-2) has specifically deposed that two payal have been recovered. Payal and पैर पट्टी although are ornaments of leg, but are not one and same.

22. Mr. Janak Ram Verma placed reliance in the matter of **Bharat v. State of M.P.**¹ in which the Supreme Court has held that silver ornaments (toda and khagwari) not of any particular design but as commonly available in market and worn by village ladies, and which have been shown to the person who has identified before identification makes the identification improper. Mr. Janak Ram Verma further placed reliance in the matter of **Anjlus Dungdung v. State of Jharkhand**² in which the Supreme Court has held that in case of circumstantial evidence chain of circumstances must be complete and in case there is any missing of chain, same cannot form the basis of conviction. Mr. Janak Ram Verma also placed reliance in the matter of **State of Punjab v. Ajaib Singh and others**³ in which the Supreme Court in a case of murder of five members of a family at midnight in a village, on the ground of exaggeration in evidence of alleged prosecution witnesses, inconsistencies between evidence of witnesses, absence of examination of persons present in the house at the time of incident are considered as fatal to the prosecution, delay of few hours has also been considered as fatal to the prosecution, and conviction resulted into acquittal by the High Court has been affirmed. Mr. Janak Ram Verma relied upon the matter of **State of Maharashtra v. Mangilal**⁴ in which the Supreme Court has held that the prosecution has failed to establish the complete chain of circumstances which would conclusively point to the guilt of the accused to the exclusion of any other person.

1 (2003) 3 SCC 106

2 2004(10) SBR 312

3 (2005) 9 SCC 94

4 (2009) 15 SCC 418

23.Mr. Janak Ram Verma further contended that the prosecution has utterly failed to prove the complete chain of circumstances sufficient for pointing out that the appellants are the only authors of the crime which also excludes the possibility of their innocence. The prosecution has further failed to establish that it was a case of rarest of rare and only capital sentence is adequate. Therefore, the appellants are entitled for acquittal and the death reference is liable to be rejected.

24. On the other hand, Mr. A.S. Kachhawaha, learned Additional Advocate General with Mr. Neeraj Jain, learned Government Advocate and Miss Pushpa Dwivedi, learned Panel Lawyer, appearing on behalf of the State / respondent, vehemently opposed the appeals, and submitted that this is case of rarest of rare, five unfortunate women residing under one roof have been brutally killed by the appellants who were relatives of deceased persons. Only five women and four kids were residing in the house and no male member was residing. By taking the benefit of aforesaid circumstances and with intent to commit robbery, the appellants misrepresented themselves that they had come for negotiation of marriage of Kondi, unmarried daughter, they stayed in the house of deceased persons and they killed deceased persons one by one separately. Three women namely Kondi, Shri Bai & Subhadra have tried to save their lives, they have scuffled on which few hairs of the appellants were snatched by Kondi @ Mantori which were found in her hands though same were not sufficient for comparison. Deceased Shri Bai & Subhadra have also scuffled with appellant Girdhari and two buttons of shirt of Girdhari were broken and found near their dead body which have been compared by the FSL with other buttons of shirt of appellant Girdhari seized from him and the FSL has opined that buttons found near the spot were the buttons of shirt of appellant Girdhari which he was wearing at the time of incident which conclusively prove his presence at the time of incident. The appellants have consumed liquor in the house of deceased persons. One bottle of Golden Goa whisky & torch were found near the place of incident on which finger prints have been noticed by the investigating officer which were compared with the finger prints of appellant Digamber in scientific manner by the Government Finger Prints Expert and

he has conclusively opined that finger prints found over the bottle of Golden Goa whisky were finger prints of index finger of appellant Digamber which also conclusively prove presence of the appellant at the time of incident. Both the appellants have admitted in their disclosure statements recorded vide Exs.P-24 & P-25 that deceased Shri Bai used to lend money on interest i.e. she was a money lender and she was having money. Aforesaid statements of the appellants are non-confessional part of disclosure statements Exs.P-24 & P-25 which is admissible as admission of the appellants and not hit by Sections 25, 26 & 27 of the Indian Evidence Act and which clearly prove the motive for commission of offence.

25.Mr. A.S. Kachhawaha, learned Additional Advocate General, further submitted that unchallenged evidence of Badridas Vaishnav (PW-1), uncle of Kum. Chandni (PW-8), especially para 4, reveals that in the evening time, deceased Amrika Bai came to him and informed that guests had come for negotiation of marriage of deceased Kondi, she also informed him that she had also telephoned to her brother-in-law of village Sarsiwa namely Sohandas (PW-9) and Sohandas will come next day, then he advised her to take care of the guests and he will come to her house in the morning. As per evidence of Sohandas (PW-9), on 16th at 6.30 p.m., deceased Amrika Bai informed him by telephone that appellant Digamber had come to see deceased Kondi for the purpose of marriage. This fact is also unchallenged in his cross-examination. Evidence of Badridas Vaishnav (PW-1) and Sohandas (PW-9) clearly reveal that just prior to commission of incident i.e., evening of 16.12.2012, the appellants had visited the house of deceased persons showing them as guests for negotiation of marriage of Kondi. Kum. Chandni (PW-8) has specifically deposed and identified both the appellants as guests and she has deposed in para 3 of her evidence that both the appellants had come to her house by phatphati (motorcycle), they came to her house in the evening, they drank tea, they took meals and they have killed five women. Para 4 of her evidence reveals that she along with other brother and sisters (kids) was sleeping inside the room, when she woke-up, she noticed that the room was closed from outside on which she shouted, thereafter, wife of Tekram namely Anita

came and opened the door, thereafter, they saw the dead bodies of five women Amrika, Mala, her badi amma (aunt), her mother and her sister Kondi. This evidence clearly reveals that on 16-12-2012, both the appellants came by motorcycle, they drank tea, they took meals in her house and thereafter, she went for sleep in her room. This shows presence of the appellants in her house till taking meals at night. As per evidence of Sidar Patel (PW-4) and Anand (PW-5), one black colour motorcycle of Bajaj company was standing in front of the house of Bhuneshwar i.e. deceased persons which they noticed on 17-12-2012 in the early morning between 3 and 5 a.m., after keeping the same at side, they took their tractor. Alleged house was occupied only by female members and nothing has been shown that they were having motorcycle. One black colour motorcycle of Bajaj company has been seized on the basis of disclosure statement of appellant Digamber (Ex.P-24) vide Ex.P-26. This evidence is also relevant to connect presence of the appellants in the intervening night of 16-12-2012 and 17-12-2012 when the incident took place. The prosecution has also collected scientific evidence of presence of finger prints of right index finger of appellant Digamber upon one bottle of liquor found in the house of deceased persons and presence of two buttons near the dead bodies of deceased Subhadra & Shri Bai, removed from the shirt of appellant Girdhari which he was wearing at the time of incident.

26. Mr. A.S. Kachhawaha, learned Additional Advocate General, also submitted that these circumstantial, ocular and scientific evidence are sufficient to connect both the appellants with the crime in question that they were having motive to commit robbery and in commission of robbery, they have committed brutal murder of deceased Shri Bai, Subhadra, Kondi, Amrika Bai & Mala. Virtually, they have finished all adult women members of the family. Only four kids, who were sleeping inside the room, were left alive. Defence has heavily stressed upon the fact that the prosecution has failed to examine other four persons present in the house at the time of incident, although out of other four persons, the prosecution has examined Kum. Chandni, aged about 10 years, as PW-8, but other three persons namely Govind, Sharda &

Nandini {as per para 6 of the evidence of Kum. Chandni (PW-8), para 2 of the evidence of Dan Bai (PW-10) and para 16 of the evidence of Badridas Vaishnav (PW-1)} have not been examined by the prosecution. As per para 16 of the evidence of Badridas Vaishnav (PW-1), age of Nandini was 4 years and ages of Govind and Sharda (Noni), who were twins, was 3 years. This shows that only Kum. Chandni was aged about 10 years and others were aged about 4 and 3 years at the time of incident. Thus, it can be safely inferred that three kids whose age was 4 and 3 years were not in a position to say or watch the incident committed at night. Even otherwise, they were sleeping inside the room and they were not having any vital role in the house except to play, eat and sleep. Therefore, non-examination of these kids is not fatal to the prosecution. By examining aforesaid witnesses and producing scientific evidence, the prosecution has proved commission of robbery and commission of murder of five women by the appellants beyond the shadow of doubt.

27. Mr. A.S. Kachhawaha contended that as regards the question of imposing sentence, mercilessly killing all members of family i.e. five adult female members leaving four kids who were sleeping inside the room for the purpose of robbery and committing robbery by itself is a case of rarest of rare case. There is no chance of their reformation. Therefore, imprisonment for life or other sentence is completely inadequate, only sentence of death would be appropriate and adequate punishment. In these circumstances, the trial Court has rightly imposed capital sentence of death upon the appellants.

28. Mr. A.S. Kachhawaha, learned Additional Advocate General, appearing on behalf of the State / respondent has placed reliance in the matter of **Panchhi and others v. State of U.P.**⁵ in which the Supreme Court has held that brutality in commission of offence is not the sole criterion for awarding capital punishment, Courts are required to consider entire evidence and circumstances in which the offence has been committed, and the prosecution is required to prove that it was a case of rarest of rare. It has been further held that testimony of child witness must be evaluated more

5 (1998) 7 SCC 177

carefully and with greater circumspection and should find some corroboration, but it cannot be rejected outrightly. In case of murder of four persons of a family narration of the incident by the child witness was found quite natural though he saw only some part of the occurrence, same has been considered as sufficient evidence. Learned State counsel further placed reliance in the matter of **Koli Lakhmanbhai Chanabhai v. State of Gujarat**⁶ in which the Supreme Court has held that hostile witness is also a witness and his evidence supporting the prosecution version can be relied upon. Learned State counsel also placed reliance in the matters of **Bodhraj alias Bodha and others v. State of Jammu and Kashmir**⁷ and **Kusuma Ankama Rao v. State of A.P.**⁸ in which the Supreme Court has held that circumstantial evidence of last seen together comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Mr. A.S. Kachhawaha further contended that in the present case, both the appellants were present in the house of deceased persons, offence was committed in the intervening night of 17-12-2012 and 18-12-2012 in the morning at about 3-4 a.m., the appellants were present and thereafter, they fled away from the house. Time-gap was very small.

29. Learned State counsel has also relied upon the matter of **State of U.P. v. Satish**⁹ in which the Supreme Court has held that conviction can be based solely on the basis of circumstantial evidence but it should be tested on touchstone of law relating thereto laid down by the Supreme Court and further held that rape and murder of minor aged less than 12 years is rarest of rare case and death sentence is the only adequate sentence. Learned State counsel further relied upon the matter of **Shivu and Anr. v. R.G., High Court of Karnataka & Anr.**¹⁰ in which the Supreme Court has held that the conditions precedent before conviction could be based on circumstantial

6 2000 Cri.L.J. 408

7 (2002) 8 SCC 45

8 2008 AIR SCW 4669

9 (2005) 3 SCC 114

10 2007 Cr.L.J. 1806

evidence, must be fully established. They are :

- i. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- ii. the facts so established should be consistent only with the hypo of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- iii. the circumstances should be of a conclusive nature and tendency;
- iv. they should exclude every possible hypothesis except the one to be proved; and
- v. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The Supreme Court has also held that in case of rape and murder of two girls, the case falls in the category of rarest of rare and death sentence is proper.

30. Learned State counsel also relied upon the matter of **Jai Kumar v. State of M.P.**¹¹ in which the Supreme Court has held that in case of cold blooded and brutal murder without any provocation, in absence of any extenuating and mitigating circumstances, the case is rarest of rare and death sentence is adequate. Learned State counsel placed reliance in the matter of **State of Madhya Pradesh v. Munna Choubey and another**¹² in which the Supreme Court has held that person belonging to rural area is not adequate or special reason to reduce sentence.

31. Mr. A.S. Kachhawaha also contended that the appellants came to the house of deceased persons showing themselves as guests for marriage of deceased Kondi, they were well treated and honoured by deceased persons treating them as onerous guests, they were extended all hospitality, and after taking meals they stayed in the house of deceased persons where only five adult female members and four kids were present. Their motive was commission of robbery. They took the benefit of circumstances and consumed liquor inside the house of deceased persons,

11 AIR 1999 SC 1860

12 2005 AIR SCW 443

thereafter, they brutally murdered five women including the oldest woman Shri Bai, aged about 70 years and youngest girl Kum. Mala, aged 15 years, by throttling / strangulating their neck, and after committing robbery, they fled away from the spot. They have not killed five women by one stroke or by one weapon within few minutes, but they have killed five women one by one by throttling their necks which will take sufficient time for killing five persons. This shows the brutality that even after killing one or two women, they did not think to close the chapter and flee from the spot. This further shows their act of brutality and inhumanness which also shows that they have mercilessly and brutally killed five women for the purpose of robbery. These acts show that there is no chance of their reformation or correction. The case falls within the category of rarest of rare. Only capital sentence of death would be adequate sentence to the appellants.

32. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.

33. In the present case, homicidal death as a result of strangulation / throttling of deceased persons Subhadra, aged about 55 years; Shri Bai, aged about 70 years; Kondi @ Mantori, aged about 25 years; Kum. Mala, aged about 15 years; and Amrika Bai, aged about 40 years, has not been substantially disputed on behalf of the appellants. On the other hand also, it is established by evidence of Badridas Vaishnav (PW-1), Shanti Bai (PW-3), G.R. Kurre (PW-6) – ASI, Kum. Chandni (PW-8), Sohandas (PW-9), Dan Bai (PW-10), morgues Exs.P-1 to P-5, FIR Ex.P-6, numbered FIR Ex.P-28A, numbered morgues Exs.P-29A, P-30A, P-31A, P-32A & P-33A, evidence of Dr. C.S. Paikara (PW-11), autopsy report of deceased Subhadra Ex.P-34, evidence of Dr. (Smt.) Pramila Toppo (PW-14), autopsy report of deceased Amrika Bai Ex.P-35, autopsy report of deceased Kondi @ Mantori Ex.P-40A, autopsy report of deceased Shri Bai Ex.P-42A and autopsy report of deceased Kum. Mala Ex.P-43A, that death of deceased Subhadra, Shri Bai, Kondi @ Mantori, Kum. Mala & Amrika Bai was homicidal in nature.

34. As regards complicity of the appellants in the crime in question, conviction of the

appellants is substantially based on ocular evidence to some extent, circumstantial evidence and scientific evidence.

35. As held by the Supreme Court in **Shivu** (supra), the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are: -

1. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
2. Money and पैर पट्टी (silver ornament) were missing from the house of deceased persons.
3. the facts so established should be consistent only with the hypo of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
4. the circumstances should be of a conclusive nature and tendency;
5. they should exclude every possible hypothesis except the one to be proved; and
6. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

36. In the present case, the prosecution has tried to prove the following chain of circumstances: -

1. The appellants were having knowledge that deceased Shri Bai was dealing with the business of money lending and she was having huge money.
2. The appellants came to the house of deceased persons for commission of robbery.
3. The appellants were having knowledge that no male member is residing in the house of deceased persons, only female members and kids are residing in the

house.

4. The appellants were having knowledge that considering their false pretext of marriage of Kondi they will be well accepted and welcomed by deceased persons. The appellants have shown themselves as guests for negotiation of marriage of Kondi.
5. The appellants were not unknown to the deceased persons being close relatives of deceased persons and deceased persons were having no hesitation in permitting the appellants to stay in their house at night and every possible hospitality has been extended to the appellants during their stay.
6. The appellants came by black colour motorcycle of Bajaj company which was standing in front of the house of deceased persons in the intervening night of 16-12-2012 and 17-12-2012.
7. The appellants reached to the house of deceased persons by 5-6 p.m.
8. Deceased Amrika Bai informed her brother-in-law (*jeeja*) Sohandas (PW-9) by telephone that appellant Digamber had come to her house for negotiation of marriage of Kondi.
9. Deceased Amrika Bai also went to the house of her elder uncle Badridas Vaishnav (PW-1), who is also resident of same village Khapridih, to inform the same and informed him that guests had come for negotiation of marriage of Kondi and has also informed that she had also telephoned to Sohandas (PW-9).
10. The appellants have stayed in the house of deceased persons at night, they drank tea and they took meals in the house of deceased persons.
11. In the morning after 4 a.m., they were not seen in the house of deceased persons.
12. Money and pair of पैर पट्टी have been recovered from the possession of the appellants vide their disclosure statements Exs.P-24 & P-25 and seizure memo Exs.P-26 & P-27.

13. Appellant Girdhari was wearing white shirt with green lines, two buttons of shirt were missing at the time of seizure which were seized from appellant Girdhari vide Ex.P-29.
14. Black colour motorcycle of Bajaj company used by the appellants was standing in front of the house of deceased women on 17-12-2012 and has been seen by Sidar Patel (PW-4) & Anand (PW-5) between 3-5 a.m., later-on it was not seen.
15. The appellants are present in the house of deceased women i.e. in the company of deceased women, 4 kids were sleeping inside the room but deceased women were found dead in the same night.
16. The appellants had not offered any explanation that when they left the company of deceased women.
17. In the intervening night of 16-12-2012 and 17-12-2012, 5 deceased women, 4 kids and 2 appellants were present in the house of deceased women. Offence was committed in secrecy. Out of aforesaid 11 persons, 5 have been brutally killed. Out of 4 kids, one kid Kum. Chandni (PW-8) has offered explanation that she along with other kids incapable of giving explanation, was sleeping inside the room which was closed from outside. Remaining 2 persons i.e. appellants Digamber and Girdhari were under obligation to explain in terms of Section 106 of the Indian Evidence Act that who has brutally killed 5 women. The appellants have failed to offer explanation that who has brutally killed 5 women.
18. Two buttons with thread similar to buttons and thread found on the shirt of appellant Girdhari were found near the dead bodies of Shri Bai and Subhadra which were seized vide Ex.P-37.
19. Both the buttons with thread found near the dead body, and buttons and thread found on the shirt of appellant Girdhari were examined by the FSL, and as per report Ex.P-61A, buttons with thread found on the spot and buttons with thread

found on the shirt of appellant Girdhari were one and same.

20. Bottle of Golden Goa Whisky found in the house of deceased persons seized vide Ex.P-34A containing finger prints was the finger prints of appellant Digamber as per report Ex.P-60 of the Finger Prints Expert.

37. As far as the question of money lending business of deceased Shri Bai is concerned, as per disclosure statement (Ex.P-24 recorded under Section 27 of the Evidence Act) of appellant Digamber who is son-in-law of daughter of deceased Shri Bai, Shri Bai was carrying the business of money lending and as per disclosure statement (Ex.P-25 recorded under Section 27 of the Evidence Act) of appellant Girdhari, maternal grand-mother-in-law of appellant Digamber was lending money on interest and was a rich woman. As per Sections 25, 26 & 27 of the Evidence Act, confessional part of Exs.P-24 & P-25 is not admissible in evidence, inter alia, hit by Sections 24, 25, 26 & 27 of the Evidence Act. Recording of disclosure statements Exs.P-24 & P-25 has been proved by Brijesh Kumar Tiwari (PW-13) – Inspector and Rajesh Vaishnav (PW-2). Carrying the business of money lending by deceased Shri Bai and the fact that she was a rich woman is not confessional statement, therefore same is not hit by Sections 25, 26 & 27 of the Evidence Act, and is admissible as admission of the appellants under Section 21 of the Evidence Act.

38. Kum. Chandni (PW-8) is child witness of 10 years age, her statement has been recorded by the Court after satisfying itself that she was able to answer the questions rationally and she understands the duty to speak truth. Even otherwise, as per para 1 of her evidence, at that time, she was studying in Class-V. As per para 3 of her evidence, both the appellants came to her house at evening, they drank tea and they took meals, they came by *phatphati* (motorcycle). As per para 4 of her evidence, she went for sleep in room and when she woke up at morning, she noticed that her room was closed from outside, she shouted then wife of Tekram came and opened the door on which she saw the dead bodies of aforesaid five deceased women. In para 6 of her evidence, she has admitted the presence of Govind, Sharda and Nandini, and has deposed that they were sleeping with her inside the room. She has specifically

deposed that when she woke up at 7 a.m., only herself, Nandini, Sharda and Govind were present. She has further admitted in para 7 that when she woke-up, she saw that her *daadi* i.e. Shri Bai was dead. She has also admitted that she did not inform Badridas as to who has killed her grand-mother i.e. Shri Bai. Her unchallenged evidence clearly discloses the fact that both the appellants came to her house at evening, they came by motorcycle, they drank tea, they ate meals, she went for sleep in her room along with Govind, Sharda and Nandini, and when she woke up at morning, door of her room was closed from outside which was opened by wife of Tekram, then she saw the dead bodies of five women. She has deposed in para 3 of her evidence that the appellants have killed five women. But her evidence clearly reveals that she has not witnessed the incident of killing. Her unchallenged evidence is relevant and admissible to the extent that till taking meals at night and till the time when she went to her room for sleep, the appellants who came by motorcycle were present in her house.

39. Sohandas (PW-9) has specifically deposed in para 2 of his evidence that on 16-12-2012 at about 6.30 p.m., he received telephone call from deceased Amrika Bai that appellant Digamber had come to see deceased Kondi, he was called by Amrika Bai then he directed her to make telephone call on second day, but he did not receive the telephone call on 17-12-2012 and received information that deceased persons have been killed. In para 4 of his cross-examination, he has admitted that his wife Amba Devi is sister of deceased Subhadra and daughter of deceased Shri Bai. In para 6, he has admitted that once upon a time he went to the house of appellant Digamber and as per his information, appellant Digamber is a man of good behaviour.

40. As per para 4 of the evidence of Badridas Vaishnav (PW-1), deceased Amrika Bai had come to his house between 5.55 p.m. and 6 p.m., and informed that guests had come for negotiation of marriage, she also told him that she had informed Sohandas (PW-9). This part of evidence of this witness is unchallenged.

41. As per para 1 of the evidence of Dan Bai (PW-10), she along with Anita was calling Kondi, but they did not receive any response, children were inside the room, they saw

the dead bodies of Amrika Bai, Mala, Shri Bai, Kondi and Subhadra, and door of the room of children was opened by Anita. In para 2, she has admitted the presence of four kids in the house of the deceased. Badridas Vaishnav (PW-1) has deposed in para 16 of his evidence about other three kids namely Nandini, aged about 4 years and Noni & Govinda (twins), aged about 3 years.

42. Learned counsel for the appellants has heavily stressed and submitted that the prosecution has failed to examine other three persons present in the house at the time of incident. As per aforesaid evidence, other three persons were small kids aged about 4 years and 3 years, only 4th kid namely Kum. Chandni, aged about 10 years, has been examined by the prosecution. Considering the fact that other 3 kids whose ages were 4 years & 3 years, they were too small and virtually, unable to give material evidence, their non-examination by the prosecution is not fatal to the prosecution.

43. Unchallenged part of the evidence of Badridas Vaishnav (PW-1) and Sohandas (PW-9) further reveals that on 16-12-2012 at evening appellant Digamber has visited the house of deceased persons for negotiation of marriage and he was not unknown to deceased persons. Evidence of Sidar Patel (PW-4) and Anand (PW-5) further reveals that one black colour motorcycle of Bajaj company was standing in front of the house of Bhuneshwar which they noticed between 3 and 5 a.m. at morning.

44. As per evidence of Brijesh Kumar Tiwari (PW-13) and Rajesh Vaishnav (PW-2), appellant Digamber has made disclosure statement of motorcycle, money and payal / पैर पट्टी vide Ex.P-24, and money, motorcycle and silver payal have been recovered from the house of Digamber vide Ex.P-26. As per their evidence, appellant Girdhari has made disclosure statement of money and payal vide Ex.P-25 which were discovered at the instance of Girdhari vide Ex.P-27. Colour of the motorcycle seized at the instance of appellant Digamber was black and was of Bajaj company. Presence of such motorcycle in front of the house of Bhuneshwar during the intervening night of 16th & 17th December, 2012 finds support from the evidence of Sidar Patel (PW-4) and Anand (PW-5). Ex.P-26 – seizure memo reveals the place of

seizure as veranda of Bodhan Das who is father of appellant Girdhari and brother of appellant Digamber. Vide Ex.P-26, Rs.3,000/- and one पैर पट्टी have been seized from the pocket of full pant hanging on the hanging stand (*khuti*). Currency notes were not identifiable. Identification of पैर पट्टी has not been conducted by the prosecution, but the fact remains that one silver पैर पट्टी – ornament used for wearing on foot by female, was found in the pocket of appellant Digamber which was not normal and natural, and nothing has been explained by Digamber as to why he was keeping the पैर पट्टी – ornament of ladies, in his pocket. On the basis of disclosure statement of appellant Girdhari, Rs.2,600/- and one silver पैर पट्टी have been seized from the plastic bag from appellant Girdhari. Weight of पैर पट्टी is 3 tola and पैर पट्टी found from appellant Girdhari is also 3 tola which reveals that both were part of pair of पैर पट्टी. Possession of पैर पट्टी by itself is not adverse circumstance, but in the present case, single पैर पट्टी was found in the possession of appellant Digamber and another was found in the possession of appellant Girdhari which has not been explained by the appellants that how it came in their possession. Bodhan and appellant Digamber are brothers and appellant Girdhari is son of Bodhan. As per evidence, both are residing together under same roof. Therefore, recovery from the house of Bodhan or from the house of Girdhari does not make any difference or is not fatal to the prosecution.

45. Although alleged पैर पट्टी has not been placed for test identification or dock identification and motorcycle standing in front of the house of Bhuneshwar i.e. house of deceased persons, was also not placed for identification, but specification of motorcycle has been deposed by Sidar Patel (PW-4) and Anand (PW-5), and colour of motorcycle standing in front of the house of deceased persons was black and it was of Bajaj company. As per evidence of Kum. Chandni (PW-8), the appellants came by phatphati i.e. motorcycle. Black colour motorcycle of Bajaj company possessed by appellant Digamber has been seized vide Ex.P-26 on the basis of disclosure statement of Digamber Ex.P-24. Both the appellants are male, normally

keeping one old पैर पट्टी that too in their pocket was not natural for them and it would have been well explained by them that why they were keeping one पैर पट्टी – ornament of ladies, in their pocket, however, they have failed to explain.

46. Case of the prosecution substantially rests upon the evidence of Badridas Vaishnav (PW-1), Kum. Chandni (PW-8) – child witness and Sohandas (PW-9). As per evidence of Sohandas (PW-9), he was informed by telephone by deceased Amrika Bai that appellant Digamber had come to see deceased Kondi i.e. for the purpose of marriage. As per para 4 of the evidence of Badridas Vaishnav (PW-1), deceased Amrika Bai visited his house and informed that guests had come to her house for negotiation of marriage of deceased Kondi. These parts of evidence of these witnesses are unchallenged and are sufficient to establish the fact that on 16-12-2012 at evening guests, including appellant Digamber, had visited the house of deceased persons. Presence of both the appellants in house, their visit by motorcycle and the fact that they drank tea in the house of deceased persons and also took meals at night in the house of deceased persons are also unchallenged, as per evidence of child witness Kum. Chandni (PW-8).

47. Kum. Chandni (PW-8) is child witness. Her age was 10 years at the time of her evidence. She was a student of Class-V. She was not a small kid. Before recording her evidence, the trial Court has asked questions to satisfy itself whether she was in a position to answer the questions put to her rationally and whether she understands the duty to speak truth. She has deposed in detail. Her evidence does not suffer from any contradiction, omission, infirmity or exaggeration. She has specifically deposed that the appellants came by motorcycle at evening, they drank tea, they took meals and she went for sleep in her room at night, her other sisters and brother namely Govind, Sharda and Nandini {as per para 16 of the evidence of Badridas Vaishnav (PW-1), they were aged about 4 years and 3 years} were also sleeping with her inside the room. In case of tutoring, she would have deposed that she had also seen the incident or at least she heard the sound of assault / quarrel or she heard the sound coming out from outside of her room where she was sleeping, but she has not

deposed so which clearly excludes the possibility of her tutoring. As per her evidence, she went for sleep at night, she woke up in the morning and noticed that door of her room was bolted from outside then she shouted on which neighbour woman Anita i.e. wife of Tekram, has opened the door then she saw the dead bodies. In para 5 of her evidence, she has specifically deposed that she did not know the residence of the appellants and there was no occasion for her to talk with them. She has specifically deposed that she has not seen the incident. This shows her natural unbiased and untutored statement.

48. Badridas Vaishnav (PW-1), Kum. Chandni (PW-8) and Sohandas (PW-9) are relatives of the deceased and nothing has been suggested to them that on account of any previous enmity they have deposed against the appellants. We have no ground to disbelieve the evidence of Badridas Vaishnav (PW-1), Kum. Chandni (PW-8) and Sohandas (PW-9) to the extent that both the appellants had not visited the house of deceased persons by motorcycle, they had not drank tea and had not took meals at evening in the house of deceased persons. Kum. Chandni (PW-8) has not deposed whether the appellants stayed in her house at night or not.

49. As per evidence of Badridas Vaishnav (PW-1) and Sohandas (PW-9), deceased Amrika Bai informed them that guests including appellant Digamber had come to her house for negotiation of marriage of deceased Kondi, she called them at the time of negotiation, but they were not present, they informed her that they will come in the morning at the time of negotiation and they also directed her to welcome the guests. In case the appellants would have left the house of deceased persons before the incident, certainly it could have been informed by deceased Amrika Bai to these witnesses. The appellants are relatives of deceased persons, they were knowing the fact that no male member is residing in the house of deceased persons, they had visited the house of deceased persons at evening and they took their meals in the house of deceased persons which shows that they had taken meals after sunset at night. It was not their casual visit, but as per evidence, they had come on the pretext of negotiation of marriage. These circumstances further indicate that they came to

the house of deceased persons on the pretext of negotiation of marriage and they came to the house of deceased persons with intent to stay in their house at night. There was no motorcycle in the house of deceased persons, but Sidar Patel (PW-4) and Anand (PW-5) had noticed motorcycle of Bajaj company standing in front of the house of deceased persons between 3-5 a.m. in the morning. These evidence are sufficient to infer that the appellants on 16.12.2012 came at evening by motorcycle to the house of deceased persons, they took their meals and they stayed in the house of deceased persons at night, but they were not present at morning and between 3-5 a.m., they left the house of deceased persons by their motorcycle.

50. The appellants were present in the house of deceased persons in the intervening night of 16-12-2012 and 17-12-2012. In the intervening night of 16-12-2012 and 17-12-2012, 5 elder women residing in the house have been murdered. Money of Rs.5,600/- and one पैर पट्टी (ornament) have been taken from the house of deceased persons during the course of such murder. The appellants were under obligation to offer an explanation that when they left the house of deceased persons i.e. when they parted the company of deceased persons. Incident took place in secrecy where 5 deceased women, 4 kids and 2 appellants were present. 5 women have been killed mercilessly. One kid Kum. Chandni (PW-8) has deposed in detail. Other 3 kids were incapable of giving explanation. Only 2 persons i.e. the appellants who were present in the house were under obligation to offer an explanation in terms of Section 106 of the Evidence Act, but they have failed to offer explanation that who has caused homicidal death of deceased five women.

51. The prosecution has adduced another set of evidence relating to presence of two buttons near the dead body of deceased Shri Bai and Subhadra which have been seized from the spot vide Ex.P-37 on 18-12-2012 at 8.55 a.m.. At that time, morgue and FIR Exs.P-1 to P-5 and P-6 were against unknown persons and not against the present appellants. It was the best clue for investigation of the offence. Six small hairs were also found in the hands of deceased Kondi which were seized vide Ex.P-36 on same day i.e. 18-12-2012 at about 8.29 a.m., and it was also the best clue for

investigation of the offence against unknown persons. Hairs of both the appellants from head were cut, sealed and seized, and they were sent for scientific examination to the State Forensic Science Laboratory, Raipur, but as per report Ex.P-62, they were not sufficient for comparison.

52. On the basis of statements of Badridas Vaishnav (PW-1) and Sohandas (PW-9) recorded on 18-12-2012 pointing the presence of the appellants, the investigating agency has investigated the matter, the appellants were taken into custody, their disclosure statements were recorded, shirt which appellant Digamber was wearing was seized vide Ex.P-28 on 18-12-2012 and one white shirt with small green lines with two missing buttons along with thread was seized from appellant Girdhari vide Ex.P-29 on 18.12.2012. Shirt seized from appellant Girdhari vide Ex.P-29 with two missing buttons was sent for scientific examination for comparison of two buttons and thread found on the spot seized vide Ex.P-37, vide Ex.P-48 to the State FSL, Raipur. Both were compared scientifically by the State FSL, Raipur vide Ex.P-61 and it was found that buttons and thread used for stitching buttons found in the shirt seized from appellant Girdhari and buttons and thread found on the spot were one and same. As per aforesaid evidence, two buttons of shirt which appellant Girdhari was wearing were broken from his shirt and were found near the body of Shri Bai and Subhadra.

53. The prosecution has adduced yet another set of evidence relating to finger prints. Spot was immediately examined by the investigating officer on 18-12-2012 at 6.30 a.m.. Investigating Officer Brijesh Kumar Tiwari (PW-13) noticed one bottle of Golden Goa Whisky 180 m.l. and one blue plastic torch. He also noticed some finger prints upon them. He preserved the finger prints and seized the same vide Ex.P-34A. Finger prints of both the appellants were taken. Finger prints of appellant Digamber were taken vide Ex.P-53 and appellant Girdhari were taken vide Ex.P-54, same were sent for examination to the Government Finger Prints Expert. As per Ex.P-60, finger prints found over the bottle of Golden Goa Whisky were the finger prints of right index finger of appellant Digamber. These evidence also reveal that at the time of incident both the appellants were present on the spot. Clothes of the appellants were seized,

same were sent for scientific examination and as per FSL report Ex.P-62 (second), shirt of appellant Digamber was stained with blood, though origin and blood group have not been detected.

54. Aforesaid evidence adduced on behalf of the prosecution are sufficient to prove the following chain of circumstances: -

1. The appellants were having knowledge that deceased Shri Bai was dealing with the business of money lending and she was having huge money.
2. The appellants came to the house of deceased persons for commission of robbery.
3. The appellants were having knowledge that no male member is residing in the house of deceased persons, only female members and kids are residing in the house.
4. The appellants were having knowledge that considering their false pretext of marriage of Kondi they will be well accepted and welcomed by deceased persons. The appellants have shown themselves as guests for negotiation of marriage of Kondi.
5. The appellants were not unknown to the deceased persons being close relatives of deceased persons and deceased persons were having no hesitation in permitting the appellants to stay in their house at night and every possible hospitality has been extended to the appellants during their stay.
6. The appellants came by black colour motorcycle of Bajaj company which was standing in front of the house of deceased persons in the intervening night of 16-12-2012 and 17-12-2012.
7. The appellants reached to the house of deceased persons by 5-6 p.m.
8. Deceased Amrika Bai informed her brother-in-law (*jeeja*) Sohandas (PW-9) by telephone that appellant Digamber had come to her house for negotiation of marriage of Kondi.
9. Deceased Amrika Bai also went to the house of her elder uncle Badridas Vaishnav (PW-1), who is also resident of same village Khapridih, to inform the same and informed him that guests had come for negotiation of marriage of Kondi and has also informed that she had also telephoned to Sohandas (PW-9).
10. The appellants have stayed in the house of deceased persons at night, they drank tea and they took meals in the house of deceased persons.
11. In the morning after 4 a.m., they were not seen in the house of deceased

persons.

12. Money and पैर पट्टी (silver ornament) were missing from the house of deceased persons.
13. Money and pair of पैर पट्टी have been recovered from the possession of the appellants vide their disclosure statements Exs.P-24 & P-25 and seizure memo Exs.P-26 & P-27.
14. Appellant Girdhari was wearing white shirt with green lines, two buttons of shirt were missing at the time of seizure which were seized from appellant Girdhari vide Ex.P-29.
15. Black colour motorcycle of Bajaj company used by the appellants was standing in front of the house of deceased women on 17-12-2012 and has been seen by Sidar Patel (PW-4) & Anand (PW-5) between 3-5 a.m., later-on it was not seen.
16. The appellants are present in the house of deceased women i.e. in the company of deceased women, 4 kids were sleeping inside the room but deceased women were found dead in the same night.
17. The appellants had not offered any explanation that when they left the company of deceased women.
18. In the intervening night of 16-12-2012 and 17-12-2012, 5 deceased women, 4 kids and 2 appellants were present in the house of deceased women. Offence was committed in secrecy. Out of aforesaid 11 persons, 5 have been brutally killed. Out of 4 kids, one kid Kum. Chandni (PW-8) has offered explanation that she along with other kids incapable of giving explanation, was sleeping inside the room which was closed from outside. Remaining 2 persons i.e. appellants Digamber and Girdhari were under obligation to explain in terms of Section 106 of the Indian Evidence Act that who has brutally killed 5 women. The appellants have failed to offer explanation that who has brutally killed 5 women.
19. Two buttons with thread similar to buttons and thread found on the shirt of appellant Girdhari were found near the dead bodies of Shri Bai and Subhadra which were seized vide Ex.P-37.
20. Both the buttons with thread found near the dead body, and buttons and thread found on the shirt of appellant Girdhari were examined by the FSL, and as per report Ex.P-61A, buttons with thread found on the spot and buttons with thread found on the shirt of appellant Girdhari were one and same.
21. Bottle of Golden Goa Whisky found in the house of deceased persons seized vide Ex.P-34A containing finger prints was the finger prints of appellant

Digamber as per report Ex.P-60 of the Finger Prints Expert.

55.As held by the Supreme Court in **Ajaib Singh's** case (supra), in the present case, there are no inconsistencies in the evidence of witnesses, although three persons present in the house at the time of incident were not examined by the prosecution, but it is not fatal to the prosecution especially on the ground that they were kids aged about 3 years and 4 years, and elder kid Kum. Chandni (PW-8), aged about 10 years, has been examined by the Court. Evidence adduced on behalf of the prosecution, in the present case, is of sterling character. **Ajaib Singh's** case (supra) is distinguishable on facts to that of the present case.

56.As held by the Supreme Court in **Anjlus Dungdung** (supra), in the present case, the prosecution has proved the complete chain of circumstances. Consequently, the case of **Anjlus Dungdung** (supra) is also distinguishable on facts to that of the present case.

57.As held by the Supreme Court in **Mangilal's** case (supra), this is not the case in which the prosecution has failed to prove the complete chain of circumstances. As held by the Supreme Court in **Bharat** (supra), in the present case, ornament पैर पट्टी was the ornament commonly available in market and worn by ladies. Undisputedly, it was not subjected for identification. Although the alleged single पैर पट्टी seized from the appellants was not subjected for identification, but the fact remains that both the appellants were in possession of single पैर पट्टी of same leg worn by ladies which they are keeping in their pocket and which was not natural, at least explanation would have been offered by them that why they are keeping the single पैर पट्टी, a lady ornament, but they have not offered any explanation. This is also adverse circumstance against the appellants.

58.As held by the Supreme Court in **Radhey Shyam v. State of Rajasthan**¹³, in the present case, the prosecution has examined child witness Kum. Chandni (PW-8), aged about 10 years, nothing has been asked to this witness to suggest that she was a tutored witness. Even otherwise, she was a student of Class-V. Her evidence

13 (2014) 5 SCC 389

clearly reveals that she has deposed the fact what she has seen. She has not deposed even one line more than what she has seen. We do not find any ground to disbelieve her evidence.

59. As held by the Supreme Court in **Panchhi** (supra), in the present case, evidence of child witness has been scrutinized with great caution and her evidence further finds corroboration from the evidence of Badridas Vaishnav (PW-1), Sohandas (PW-9) and other scientific evidence. As held by the Supreme Court in **Koli Lakhmanbhai** (supra), in the present case, Anand (PW-5) is hostile witness, but his part of evidence relating to standing of black colour motorcycle of Bajaj company in front of the house of deceased persons, is unchallenged and is acceptable in evidence.

60. In the present case, as per evidence of Kum. Chandni (PW-8), both the appellants came to her house, they drank tea, they took meals at evening i.e. at night, she went for sleep in her room and till that moment, the appellants were present in her house i.e. where deceased persons were residing. This shows that the appellants were present in the house of five deceased persons i.e. adult women members of the family, at least till taking dinner. Motorcycle has been seen by Sidar Patel (PW-4) and Anand (PW-5) between 3-5 a.m.. This further shows that the appellants were present in the intervening night and deceased were present along with the appellants when they were alive, and at morning, deceased were found dead.

61. Time gap between the last seen theory where deceased persons were present in the company of the appellants alive and notice of death of deceased persons in the present case, is too small and there cannot be any possibility of third person between them. Therefore, as held by the Supreme Court in **Bodhraj alias Bodha** (supra), **Kusuma Ankama Rao** (supra), **Satish's** case (supra) and **Shivu** (supra), last seen theory to prove the chain of circumstances would also be applicable, in the present case.

62. In the present case, conviction of the appellants is based on ocular evidence of Kum. Chandni (PW-8), and circumstantial and scientific evidence adduced on behalf of the

prosecution. In case of conviction based on circumstantial evidence, principles for accepting circumstantial evidence are no more *res integra* after placing reliance in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**¹⁴. In the matter of **Vasanta Sampat Dupare v. State of Maharashtra**¹⁵ the Supreme Court has observed in para 35 as follows: -

“35. In Sharad Birdhichand Sarda v. State of Maharashtra, the five golden principles which have been stated to constitute the “panchsheel” of the proof of the case based on circumstantial evidence are:

1. that the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely “may be” fully established;
2. that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. that the circumstances should be of a conclusive nature and tendency;
4. that they should exclude every possible hypothesis except the one to be proved; and
5. that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

After placing reliance upon the matter of **Dharam Deo Yadav v. State of U.P.**¹⁶, the Supreme Court has further held in para 20 that in case of last seen theory, “if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company”.

63. While dealing with same question, the Supreme Court in the matter of **Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai**¹⁷ has held that in case of last seen theory, the accused is required to explain when he parted the company of the deceased and if same is not explained then the same may be the strongest circumstance against the accused.

64. Admittedly, offence has been committed in secrecy where only five deceased women,

14 (1984) 4 SCC 116 : 1984 SCC (Cri) 487

15 (2015) 1 SCC 253

16 (2014) 5 SCC 509 : (2014) 2 SCC (Cri) 626

17 (2003) 1 SCC 534

four kids and two appellants were present, which is a special circumstance, and commission of offence was within the knowledge of the accused persons, therefore, in accordance with Section 106 of the Indian Evidence Act, the appellants were under obligation to offer explanation that how 5 persons received injuries and how they died. While dealing with the same question in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra**¹⁸ the Supreme Court has held that if the offence was committed in the dwelling house, where the husband also resided and if the accused husband did not offer any explanation as to the injuries received by his wife or if the explanation is false, then there is strong circumstance which indicates that he committed the crime. Paragraphs 14 and 15 are relevant and read as follows:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the appellants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 --- quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

65. While dealing with the same question in the matter of **Dhananjay Chatterjee v. State**

18 (2006) 10 SCC 681

of **W.B.**¹⁹, the Supreme Court has held that in case of offence committed in secrecy, the person who was present in such place is under obligation to offer explanation that how the offence has been committed by him.

66. As per evidence of prosecution witnesses, especially the evidence of Kum. Chandni (PW-8), admittedly, the appellants were present at evening on 16-12-2012, they also ate dinner, but at morning, they were not present. As per evidence of Sidar Patel (PW-4) and Anand (PW-5), they have noticed presence of black colour motorcycle of Bajaj company standing in front of the house of deceased persons between 3-5 a.m.. The appellants had come to the house of deceased persons by motorcycle of black colour of Bajaj company which has been recovered at the instance of appellant Digamber vide Ex.P-26. These evidence also prove the fact that the appellants were present at the time of commission of incident, inside the house of deceased persons where five persons died, though other four persons namely Kum. Chandni (PW-8), minor kids Govinda, Sharda and Nandini – aged about 3 years and 4 years, were present. Kum. Chandni (PW-8) has deposed that she went for sleep along with other three kids, they were sleeping inside the room which was bolted from outside. Remaining two persons namely present appellants Digamber and Girdhari were also under obligation to offer explanation that how five persons sustained fatal injuries, how they died, who have committed robbery of पैर पट्टी and currency notes from the house of deceased persons and who has caused murder of five persons, but no such explanation has been offered by the appellants.

67. Substantially, in the present case, conviction of the appellants is based on circumstantial evidence. As held by the Supreme Court in catena of cases, in case of conviction based on circumstantial evidence, the circumstances should be of such conclusive nature as to exclude every other possibility except the accused being guilty of the charge of the offence and the circumstances proved should be of conclusive in nature only consistent with the hypothesis of guilt and inconsistent with the innocence of guilt also to exclude the possibility of guilt by any person other than

19 (1994) 2 SCC 220: 1994 SCC (Cri.) 358

the accused. The prosecution has established chain of circumstances against the appellants as mentioned in Para-54 of this judgment.

68. Aforesaid chain of circumstances proved by the prosecution are sufficient for drawing inference that both the appellants showing themselves as relatives (in fact, they are relatives of deceased persons) came to the house of deceased persons on 16-12-2012 by black colour motorcycle of Bajaj company. The appellants were not strangers to deceased persons. As per para 2 of the evidence of Sohandas (PW-9), appellant Digamber is son-in-law of deceased Amrika Bai and appellant Girdhari is brother of Digamber. They stayed in the house of deceased persons, they drank tea, they ate dinner, they stayed till 3-5 a.m. of 17-12-2012. Appellant Digamber has touched the bottle of Golden Goa Whisky and has left the bottle in the house of deceased persons. Appellant Girdhari was wearing white shirt with green small lining, two buttons of shirt were broken and found near the dead body of Shri Bai & Subhadra, with thread. Rs.5,600/- and one pair of पैर पट्टी of deceased persons were found in possession of both the appellants i.e. one पैर पट्टी and Rs.2,600/- were found in possession of Girdhari, and one पैर पट्टी and Rs.3,000/- were found in possession of Digamber. During the aforesaid intervening night of 16-12-2012 and 17-12-2012, elder women members of the house namely Subhadra – aged about 55 years, Shri Bai – aged about 70 years, Kondi – aged about 25 years, minor girl Kum. Mala – aged about 15 years and Amrika Bai – aged about 40 years, were found dead in their house. Death of aforesaid women was homicidal in nature. Dead bodies of deceased persons were found at different places of the house. Four children were sleeping inside the room and their room was bolted from outside. These complete chain of circumstances only establish the fact that the appellants are the only persons who had committed murder of five elder women members of the family and that they have committed robbery of Rs.5,600/- and one pair of पैर पट्टी. Their motive was to commit robbery and in connection with commission of robbery, they have committed murder of five elder women members leaving only four kids aged about 3 years, 4

years and 10 years. Evidence adduced on behalf of the prosecution is conclusive in nature. Evidence are sufficient to exclude the possibility of innocence of the appellants and do not leave any reasonable ground for the conclusion consistent with the innocence of the accused. Aforesaid circumstances proved by the prosecution against the appellants are sufficient to prove the fact that both the appellants have committed homicidal death amounting to murder of five women namely Shri Bai, Subhadra, Kum. Kondi @ Mantori, Amrika Bai and Kum. Mala in sharing common intention and also committed robbery in sharing common intention punishable under Sections 302 read with Section 34 (five times) and 394 read with Section 34 of the IPC.

69.As per the autopsy reports, evidence of Dr. (Smt.) Pramila Toppo (PW-14) and Dr. C.S. Paikara (PW-11), aforesaid five women have been murdered by strangulation / throttling.

70.After considering the manner of the commission of offence, the circumstances in which the offence has been committed, motive for commission of offence, chances of reformation of the appellants, brutality of the act committed by the appellants and murder of five members i.e. almost all members of the family i.e. elder women of the family when they were helpless, the trial Court has arrived at a finding that only imposition of death penalty would be the adequate punishment.

71.Now, next question before us for consideration is imposition of appropriate sentence upon the appellants. Death penalty or imprisonment for life for the commission of murder under Section 302 of the IPC has been provided. In case of conviction under Section 302 of the IPC or any conviction for an offence punishable with death or in the alternative the imprisonment for life, the Court is required to assign reason for awarding such penalty and the special reason for awarding death sentence in accordance with sub-section (3) of Section 354 of the Code. Section 354 sub-section (3) of the Code reads as under:-

S.354 (3): When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or

imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”

72. The question of imposition of death penalty is still academic issue. The language of Section 354 (3) of the Code demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, 'in the case of sentence of death, the special reasons for such sentence' unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence i.e. the Court is required to hold that it was case of rarest of rare.

73. While dealing with the question of imposing death penalty, in the case of **Sushil Murmu v. State of Jharkhand**²⁰, the Supreme Court after relying **Bachan Singh v. State of Punjab**²¹ case, has summarized the law with regard to imposition of death sentence on the basis of guidelines emerges from the case of **Bachan Singh** (supra). Brutal, grotesque, diabolical, revolting or dastardly manner in which murder committed in extremely has been considered as rarest of rare case for imposition of death penalty. Multiple murders of almost all the members of a family or a member of particular caste, community or locality has also been considered as rarest of rare case for imposing death penalty. While dealing with the imposition of death penalty in the aforesaid cases, the Supreme Court has also considered it to be a rarest of rare case in case of murder of a innocent child or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure general loved and respected by the community and for such commission of murders, death penalty can be imposed.

74. While dealing with the question of imposition of death penalty for commission of murder, the Supreme Court in the case of **Bachan Singh** (supra) held that provision of death penalty as an alternative punishment for murder is not violative of Article 19 of the Constitution of India. Paragraph 132 is relevant and reads as under:

“**132.** To sum up, the question whether or not death penalty

20 2003 AIR SCW 6782

21 AIR 1980 SC 898

serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter or the ethos of Article 19."

75. While dealing with the circumstances in which the death sentence may be imposed, the Supreme Court has summarized the circumstances and following guidelines have been issued for imposition of death sentence. Para-178 of which reads thus:-

"178. Soon after the decision in *Furman*, the Georgia Legislature amended its statutory scheme. The amended statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of

which may justify the imposition of the extreme penalty of death, as provided in that statute, are:

(1) The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions).

(2) The offence of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offences of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offences of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offence of murder was committed by a person in, or who has escaped from, the lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

The Supreme Court has further considered the mitigating circumstances in Para 206 of the said judgment as under:

“206. Dr Chitale has suggested these mitigating factors:

Mitigating circumstances. In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

1. That the offence was committed under the influence of extreme mental or emotional disturbance.
2. The age of the accused. If the accused is young or old, he shall not be sentenced to death.
3. The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
4. The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
5. That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
6. That the accused acted under the duress or domination of another person.
7. That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”

76. After considering the case of **Bachhan Singh** (supra), in the matter of **Machhi Singh v. State of Punjab**²² the Supreme Court has summarized the stances of imposition of death sentence in Para-33 which reads thus:

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

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- (iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of

22 (1983) 3 SCC 470

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.”

77. As held in **Panchhi** (supra), **Munna Choubey's** case (supra), **Jai Kumar** (supra) and **Satish's** case (supra), imposition of life imprisonment is normal and imposition of death sentence is exception. In case of imposing death sentence, the prosecution is required to prove that it was a case of rarest of rare and no other sentence except death sentence was adequate.

78. While dealing with the question of imposition of death penalty, the Supreme Court has held that in case of imposing death penalty, capital punishment provided by law is proper award in rarest of the rare cases and not as a normal rule and in the case of **Sushil Murmu** (supra) the Supreme Court has summarized the law with regard to imposition of death sentence. Paragraphs 15 and 16 read as under:

“**15.** The following guidelines which emerge from *Bachan Singh* case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38)

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.
- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

16. In rarest of rare cases when the collective conscience of the community 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, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

- (1) 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) When the murder is committed for a motive which evinces total depravity and meanness e.g. murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.
- (3) When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of “bride-burning” or “dowry deaths” or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
- (4) 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.
- (5) When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.”

79. While dealing with the question of brutality in the matter of **Ashrafi Lal and Sons v.**

State of U.P.²³, the Supreme Court has held that it is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. In case of gruesome murder of two innocent girls to wreak their personal vengeance over the dispute, the death sentence awarded to the appellants was confirmed. Paragraph 3 reads as under:

“3. We have heard learned counsel for the appellants mainly on the question of sentence but we are not impressed with his submission. The two appellants Ashrafi Lal and Babu were guilty of a heinous crime out of greed and personal vengeance and deserve the extreme penalty. This case falls within the test ‘rarest of rare cases’ as laid down by this Court in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 : (AIR 1980 SC 898) as elaborated in the later case of *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 : (AIR 1983 SC 957). The

punishment must fit the crime. These were cold-blooded brutal murders in which two innocent girls lost their lives. The extreme brutality with which the appellants acted shocks the judicial conscience. 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 S. 302 of the Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellants deserve for having committed the reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother Smt. Bulakan is nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders the sentence of death on the two appellants Asharfi Lal and Babu is confirmed.”

80. While dealing with the question of brutality, in the case of **Subhash Ramkumar Bind**

@ Vakil and another vs. State of Maharashtra²⁴, the Supreme Court has held that in every incident of murder brutality is involved but that brutality by itself will not bring it within the ambit of rarest of rare cases for imposition of death penalty. The requirement to prove the fact that brutality in the present case was exceptional and rarest of rare also to show that there is something uncommon about the crime which renders the sentence of imprisonment of life inadequate and called for death sentence.

81. In the case of **Dhananjay Chatterjee** (supra), the Supreme Court while dealing with the question of penology for imposing death penalty, has held that Courts are required to impose proper punishment in the manner in which the Courts respond to the society’s cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. Paragraphs 14 and 15 are relevant and read as under:

“**14.** In recent years, the rising crime rate – particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system’s credibility. Of course, it is not possible to lay down any cut

and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

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

82. While dealing with the question of imposition of death sentence affirmed by the Supreme Court, the Supreme Court in the matter of **Sonu Sardar v. State of Chhattisgarh**²⁵, in which case death sentence upon young male has been imposed, has held that the appellant though young but having no consideration for human lives and his criminal propensities being beyond reform, is a menace to the society, death sentence is proper being a case of rarest of rare, and observed in paras 18 to 22 as follows: -

"18. As against these aggravating circumstances, the trial court did not find any mitigating circumstance in favour of the appellant to avoid the death penalty. This is, therefore, not one of those cases in which the trial court has not recorded elaborate reasons for awarding death sentence to the appellant as contended by the learned counsel for the appellant.

19. Regarding the role of the appellant in the commission of the offence of dacoity and murder, we have already found that the turban and T-shirt of the appellant, which were seized and sent for examination to the Forensic Science Laboratory, had presence of human blood. We have also found that the axe and the iron rod, which were recovered pursuant to the statement of the appellant, had also bloodstains. We have also found from the evidence of PW-1 that when her mother was cooking food and came out on hearing the commotion, the appellant was demanding money from her father and her father gave to the appellant all the money which he was having in his pocket.

20. There is, therefore, clear and definite evidence in this case to show

that the appellant not only participated in the crime, but also played the lead role in the offence under Section 396 IPC. This is, therefore, not a case where it can be held that the role of the appellant was not such as to warrant death sentence under Section 396 IPC.

21. In a recent judgment in [Sunder Singh v. State of Uttaranchal](#)²⁶ this Court found that the accused had poured petrol in the room and set it to fire and closed the door of the room when all the members of the family were having their food inside the room and, as a result, five members of the family lost their lives and the sixth member of the family, a helpless lady, survived. This Court held that the accused had committed the crime with premeditation and in a cold-blooded manner without any immediate provocation from the deceased and all this was done on account of enmity going on in respect of the family lands and this was one of those rarest of rare cases in which death sentence should be imposed.

22. The facts in the present case are no different. Five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron rod and with the help of four others. The crime was obviously committed after premeditation with absolutely no consideration for human lives and for money. Even though the appellant is young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court were therefore right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment.

83. While dealing with serious consideration relating to imposing of death sentence, the

Supreme Court in the matter of **Santosh Kumar Satishbhusan Bariyar v. State of**

Maharashtra²⁷, in para 135, has observed as follows: -

“135. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realise the absolute nature of this right, in the sense that is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away, all other rights cease to exist.”

84. On the basis of law annunciated by the Supreme Court on the subject i.e. for

imposition of death sentence, the Supreme Court in the matter of **Ramnaresh and**

others v. State of Chhattisgarh²⁸ has summarized the instances for imposition of

death sentence in which the sentence other than death sentence would not be

adequate or meaningful, and has observed in para 76 as follows: -

26 (2010) 10 SCC 611

27 (2009) 6 SCC 498

28 (2012) 4 SCC 257

“76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh (supra) and thereafter, in Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments—one being the “aggravating circumstances” while the other being the “mitigating circumstances”. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) CrPC.

Aggravating Circumstances:

- (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
- (2) The offence was committed while the offender was engaged in the commission of another serious offence.
- (3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
- (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
- (5) Hired killings.
- (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
- (7) The offence was committed by a person while in lawful custody.
- (8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.
- (9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
- (10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
- (11) When murder is committed for a motive which evidences total depravity and meanness.
- (12) When there is a cold-blooded murder without provocation.
- (13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

- (1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance

or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.”

The Supreme Court has summarized following principles for consideration for imposition of capital sentence: -

(1) The Court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

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

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

85. In order to decide whether death sentence would be the only meaningful and adequate sentence, the courts are required to draw a balance sheet of aggravating and mitigating circumstances. The Supreme Court in **Ramnaresh** (supra) has further observed in para 79 as follows: -

“The Court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the

two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of “just deserts” that serves as the foundation of every criminal sentence that is justifiable. In other words, the “doctrine of proportionality” has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.”

86. In the light of aforesaid proposition of law, we are required to scrutinize the case in hand minutely in the light of aggravating circumstances and mitigating circumstances of the present case and to draw a balance-sheet to decide whether present case falls within the category of rarest of rare, whether there is no chance of reformation of the appellants, whether imprisonment for life which is the rule would not be adequate and would not meet the ends of justice and whether imposition of death penalty would be the only appropriate and meaningful sentence.

87. In case of imposing of capital sentence, the law requires the court to record special reasons for awarding such sentence. Therefore, we have to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attending circumstances, though these factors may not be similar or identical in all cases.

88. In the present case, appellant / accused Digamber Vaishnav is son-in-law of deceased Amrika Bai and co-accused Girdhari Vaishnav is nephew of accused Digamber, they are not unknown to the deceased family. Appellant Girdhari was unmarried and unfortunate deceased Kondi @ Mantori, aged about 25 years, was also unmarried. The appellants were having knowledge that deceased Shri Bai, the oldest deceased aged about 70 years, was running the business of money lending and she was financial sound. No adult male member was residing in the family of deceased persons. The appellants visited the house of deceased persons under the pretext of marriage of deceased Kondi. They were well honoured by deceased

persons and deceased persons extended best hospitality to them.

89. As per undisputed facts of the case, five women including Kum. Mala, aged about 15 years, have been murdered by strangulation / throttling by the appellants. As per spot maps Exs.P-23 & P-7, bodies of aforesaid five deceased women were lying in different places i.e. two bodies were lying in verandah and three bodies were lying in second room at different places. Two broken buttons of shirt of appellant Girdhari, which he was wearing at the time of incident, along with thread were found near the body of Shri Bai & Subhadra and same were seized vide Ex.P-37. Six hairs were found in the hand of deceased Kondi @ Mantori which have been seized vide Ex.P-36. These facts clearly reveal that at least these three women have resisted and scuffled with the appellants for saving their lives, but they could not succeed. Bottle of Golden Goa Whisky liquor was found in the house of deceased persons which was handled by appellant Digamber which has been seized vide Ex.P-34A which clearly reveals that these appellants had not only stayed in the house of deceased persons but they have enjoyed and consumed liquor / whisky. They have finished four adult women members and one young girl Kum. Mala, aged about 15 years, and thereby finished mostly all members of the family leaving only four kids who were confined inside a room. All the victims were innocent and helpless women, they were having faith and trust upon the appellants. The appellants have committed murder of five women for commission of robbery and they have committed robbery of ornaments and money (currency notes). It was a cold-blooded murder without provocation shocking to the judicial conscience and also the conscience of the society. Killing most of the members of the family for robbery by itself is a heinous crime with clear, unambiguous and grave motive. In the present case, murder is committed for a motive which evinces total depravity and meanness. As held by the Supreme Court in **Ramnaresh** (supra), aforesaid aggravating circumstances fall within the category of clauses 1, 4, 9, 10, 11, 12 and 13.

90. As regards mitigating circumstances, case of appellant Girdhari falls within the ambit of clause 2 that at the time of commission of offence, his age was only 20 years, but

recovery of two broken buttons with thread of shirt which he was wearing at the time of incident found near the body of Shri Bai and Subhadra clearly reveals that they have scuffled with this appellant for saving their lives, but they could not succeed and ultimately, the appellants succeeded in committing murder.

91.As held by the Supreme Court in **Ramdeo Chauhan alias Rajnath Chauhan v. State of Assam**²⁹, every murder is a brutal act and age of the accused is relevant consideration for mitigating circumstances, but same is not a determinative factor by itself. While dealing with the question of age in **Ramdeo Chauhan** (supra) and **Sonu Sardar** (supra), the Supreme Court has held that only age is not the determinative criteria for mitigating circumstances, the accused may be young but having no consideration for human lives and his criminal propensities being beyond reform, is a menace to the society.

92.Considering the aggravating circumstances and solitary mitigating circumstances which by itself is not determinative factor, on close examination and drawing a balance-sheet of aggravating and mitigating circumstances, it shows that the appellants have committed brutal murder of five elder women of the family one by one i.e. almost all elder members of the family including 70 years' aged helpless woman Shri Bai and 15 years' aged young girl Kum. Mala for commission of robbery after enjoying the hospitality extended by deceased persons and after enjoying in the house of deceased persons by drinking liquor show that this is complete depravity and meanness and they have no value for human lives. There is no chance for their reformation. The case in hand is rarest of rare.

93.All aforesaid aggravating circumstances without mitigating circumstances lead to the only inference that the appellants have committed brutal murder of five helpless women and out of five, one was old and infirm, they have almost finished all adult members of the family one by one for robbery which is uncommon. It was planned act of the appellants shocking not only to the judicial conscience, but even the conscience of the society. Case of the appellants squarely falls within the ambit of

29 (2000) 7 SCC 455

rarest of rare. There is no chance of reformation of these appellants.

94. On close scrutiny and considering all aggravating and mitigating circumstances, after long and minute discussion, we do not find any ground for disagreeing with the finding of the trial Court relating to imposition of death penalty.

95. Consequently, Cr.Ref.No.3/2014 made by the Sessions Judge, Baloda Bazaar for confirmation of imposition of death sentence to appellants – Digamber Vaishnav, S/o Tunudas Vaishnav and Girdhari Vaishnav, S/o Bodhan Das Vaishnav, under Section 302 read with Section 34 of the IPC (five times), is hereby affirmed in terms of Sections 366 and 368 (a) of the Code. Conviction of appellants Digamber Vaishnav, S/o Tunudas Vaishnav and Girdhari Vaishnav, S/o Bodhan Das Vaishnav, under Section 394 read with Section 34 of the IPC and their sentences of RI for 10 years & fine of Rs.500/- each, in default additional RI for one month are also hereby affirmed.

96. Cr.A.Nos.536/2014 and 537/2014 filed on behalf of Girdhari Vaishnav and Digamber Vaishnav, respectively, are liable to be dismissed and are hereby dismissed.

97. Imposition of death sentence upon appellants Girdhari Vaishnav and Digamber Vaishnav shall not be executed for a further period of four months to enable them to avail the remedy of special leave to appeal before the Supreme Court of India. Concerned jail authorities are directed to ensure aforesaid direction.

98. Copy of the judgment be supplied to both the appellants namely Girdhari Vaishnav and Digamber Vaishnav, who are in custody, free of cost immediately. They shall be intimated through the Superintendent, Central Jail relating to the opportunity of filing special leave to appeal before the Supreme Court of India within 60 days from today in accordance with Article 133 of the Limitation Act, 1963.

JUDGE
30-4-2015

JUDGE
30-4-2015

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.3 of 2014

In reference of State of Chhattisgarh

- Versus -

Digamber Vaishnav and another

Criminal Appeal No.536 of 2014

Girdhari Vaishnav

- Versus -

State of Chhattisgarh

AND

Criminal Appeal No.537 of 2014

Digambar Vaishnav

- Versus -

State of Chhattisgarh

HEAD NOTE

- A) Act of committing murder of 5 adult female, almost all adult members of the family, falls within the category of rarest of rare case.
5 व्यस्क महिलाओं की हत्या करने का कृत्य, परिवार के लगभग सभी व्यस्क सदस्य, विरल से विरलता मामले की श्रेणी में आता है।
- B) Murder of 5 members of a family for commission of robbery is rarest of rare case.
लूट कारित करने के लिए एक परिवार के 5 सदस्यों की हत्या विरल से विरलतम मामला है।
- C) Committing murder of 5 women in their house one by one by strangulation is brutal act and total depravity of meanness.
5 महिलाओं की उनके ही घर में एक-एक कर गला घोटकर हत्या किया जाना एक पाश्विक कृत्य एवं पूर्ण रूप से अधमता की पराकाष्ठा है।