

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
Death Sentence Ref. No.01 of 2021

1. The Sessions Judge, North Tripura Judicial District, Dharmanagar.

.....Appellant

-VERSUS-

1. The State of Tripura.
2. Mst. Najmina Begam, wife of late Ajir Uddin, of Kurti Madhya Rajnagar, P.S. Kadamtala, North Tripura District.
3. Md. Faijal Jalal, son of Md. Aiyaj Uddin, of Kurti Madhya Rajnagar, P.S. Kadamtala, North Tripura District.

..... Respondents.

Crl.A(J). No. 09 of 2021

1. Mst. Najmina Begam, wife of late Ajir Uddin, of Kurti Madhya Rajnagar, P.S. Kadamtala, District: North Tripura.
2. Md. Faijal Jalal, son of Md. Aiyaj Uddin, of Kurti Madhya Rajnagar, P.S. Kadamtala, District: North Tripura.

.....Convict-appellants

-VERSUS-

1. The State of Tripura.

..... Respondent.

B_E_F_O_R_E
HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE ARINDAM LODH

For Appellant(s)	:	Mr. S. Sarkar, Sr. Advocate. Ms. V. Poddar, Advocate.
For Respondent(s)	:	Mr. Ratan Datta, Public Prosecutor.
Date of hearing	:	11.05.2023
Date of delivery of judgment and order	:	17.05.2023
Whether fit for reporting	:	YES

JUDGMENT & ORDER

[T. Amarnath Goud, J]

Heard Subrata Sarkar, learned senior counsel assisted by Ms. V. Podar, learned counsel appearing for the convict-appellant. Also heard Mr. Ratan Datta, learned Public Prosecutor, appearing for the respondent-State.

[2] This appeal has been filed under Section-374 of Code of Criminal Procedure, 1973 against the judgment and order of conviction and sentence dated 25.03.2021 passed by the learned Sessions Judge, Dharmanagar, North Tripura, in connection with S.T. (Type-1) 25 of 2017 convicting the appellants to be hanged by neck till death for commission of offence punishable under Section-302 read with Section-34 of IPC and under custody in Kendriya Sansodhanagar, Bishalgar. The convict-appellants have been sentenced to death for the offence punishable under Section-302 read with Section-34 of Indian Penal Code and it was directed that the convicts will be hanged by neck till their death. The death sentence, however, is subject to confirmation by this Court as provided under Section-366 of the Code of Criminal Procedure, 1973. The conviction and sentence are challenged by the accused-persons. In view of the capital punishment, reference for confirmation of death sentence under Section-366 of Cr. P.C. is also placed for our consideration.

[3] The factual backdrop of the case, in a nutshell, is that one Md. Suraj Ali (PW 1) son of Late Surman Ali of Kurti Madhya Rajnagar, PS- Kadamtala, North Tripura District lodged an Information (Exhibit-2/2) with the Officer-in-Charge, Kadamtala Police Station to the effect that on 17-07-2016 at about 1230 hours at night his daughter-in-law, Najmina Begam suddenly knocked the door of the dwelling hut of the complainant (PW1) and called him and hearing her call the complainant came out and his other sons also came out. His daughter-in-law Najmina Begam told him to see her hut and the complainant rushed to the house of Ajir Uddin (now deceased) and through the hole of the wall of the hut, he saw the flame of fire and when he reached to the door of the hut situated at southern side, he saw that the door of the northern side of the hut was closed and he also saw that his son Ajir Uddin (now deceased) was ablaze on his bed. Seeing the same, the complainant raised

alarm and his other children also came there and started pouring water and at that time the complainant (PW 1) lost his sense.

[4] It is also stated that before 18 years his son Ajir Uddin (now deceased) married Najmina Begam and they have four children. His son, Ajir Uddin (now deceased) was a driver by profession and there was dispute between his deceased son and his daughter-in-law. It is further stated that on 16-07-2016 at night knowing about the illicit relationship between the accused persons namely Faijul Jalal and Najmina Begam, his son Ajir Uddin (now deceased) assaulted them. Later, the complainant came to know that both the accused persons Faijul Jalal and Najmina Begam together hatched up a conspiracy to commit murder of Ajir Uddin and to execute their plan they first committed murder of Ajir Uddin by way of strangulation and then set fire so the dead body of Ajir Uddin and they also spread rumour that Ajir Uddin committed suicide. It is further stated that as the complainant was busy with the last rituals of his deceased son, delay was caused in lodging the Ejhar.

[5] On the basis of the aforesaid complaint, Officer-in-Charge, Kadamtala Police Stations registered Kadamtala Police Station case no. 2016 KDL 037 for the of offences punishable under section 302/201/120B/34 of the Indian Penal Code against accused persons Mst. Najmina Begam and Md. Faijul Jalal and endorsed the case to Sri Pijush Kanti Saha, Sub-Inspector of police for investigation.

[6] That the Investigating Officer, Sub-Inspector of Police, Sri Pijush Kanti Saha in course of investigation perused the written Ejhar, visited the place of occurrence, prepared the hand sketch map with index in separate sheets of paper and seized one yellow plastic jericane of petrol, half burnt cotton of quilt (Tusak), some burnt soil, burnt piece of mosquito net, violet colour gas lighter, burn piece of a printed lungi and he also seized the viscera of the deceased. He recovered one but nylon rope about 6 meter 30 cm length and ½ cm diameter from the hut of the deceased which was allegedly used in the murder.

[7] On receipt of the charge sheet, the learned Sessions Judge, North Tripura, Dharmanagar, perused the same and being satisfied took cognizance of the offence and after completion of all legal formalities, framed charge against the present convict appellants under Section-302 read with Section-34 of IPC to which they pleaded not guilty.

[8] To substantiate the charges, prosecution had examined as many as 13 witnesses and exhibited certain documents and the defence did not adduce any evidence. On closure of prosecution evidence, the accused-persons were examined separately under Section-313 of Cr.P.C. for having their response in respect of the incriminating materials surfaced in the evidence, as adduced by the prosecution, wherein, the accused-persons declined to adduce any evidence in support of their defence. Thereafter, on appreciation of the evidence and materials on record, the learned Sessions Judge, has passed the judgment dated 25.03.2021 and convicted the appellants as aforementioned. The judgment and sentence of the trial Court is as under:

“Upon consideration of the facts and circumstances of the present case, the answer I find to the aforesaid two questions is a bold ‘Yes’. The murder of the husband by making conspiracy to a person to whom the convict has an illicit relationship is a distinct class of offences and cannot be equated to cases involving only murder. It is combination of two distinct heinous offences of making conspiracy and murder calling for the capital punishment. The perpetrators of crimes like such type of murder forfeit their right to live. The life imprisonment is highly inadequate in these cases and there is no alternative but to impose death sentence. These criminals are menace to the society and they don’t deserve to be kept alive.

The aggravating factors appearing in the present case outweigh the mitigating factors such as age of the convicts and their clean past record. The act of murder of husband by making conspiracy with another person falls in the category of “rarest of rare” cases warranting capital punishment.

For the aforesaid reasons the convicts are sentenced as under:

To death for the offence punishable under Section-302 read with Section-34 of the Indian Penal Code, and

It is directed that the convicts will be hanged by neck till their death.

The death sentence, however, is subject of confirmation by the Hon'ble High court of Tripura as provided under Section-366 of the Code of Criminal Procedure, 1973.

Copies of judgment dated 23.03.2021 and of today's order on sentence be supplied to the convicts free of cost.

Thus, the case is disposed of on contest and on conviction.

Make the relevant entry in the trial register.”

[9] Being aggrieved by and dis-satisfied with the said judgment and order of conviction dated 25.03.2021 passed by the learned Sessions Judge, Dharmanagar, North Tripura in connection with S.T (Type-1) 25 of 2017, the appellants herein have preferred this appeal before this Court.

[10] Mr. Subrata Sarkar, learned senior counsel assisted by Ms. V. Poddar, learned counsel appearing for the convict appellant has submitted that the judgment and order of conviction and sentence passed by the learned Court below suffers from illegality and as such the conviction and sentence is required to be set aside. The learned Court below failed to appreciate the law, facts evidence and circumstances and as such the order of conviction and sentence is liable to be set aside. The examination of the appellants under Section-313 of Cr. P.C. was not done in accordance with law.

[11] The learned Court below has convicted the appellants on the basis of interested witnesses. The facts elicited in cross-examination were not at all considered by the Court below. There are material discrepancies between the statements of the witnesses, yet this fact was not at all considered by the learned Court below. It is a cardinal rule of criminal jurisprudence that burden of proof lies on the prosecution to prove its story beyond reasonable doubt but, in the present case the learned Court below most illegally shifted the burden of proof on the defence and hence, the order of conviction is not sustainable in law.

[12] He has further contended that there is a delay of almost 30 hours for lodging the FIR, police came to the place of occurrence within short time at that time also the complainant did not make any complaint. While police made the inquest report he put his signature but did not make any complaint and even

did not give any valid reason for the delay which puts the present FIR in question. In the deposition of PW-6 it has been stated that that on the day of the incident, came to know from his younger brother and sister that their mother Najmina Begam has mixed some medicine in the dinner of their father prior to the incident which was baseless and concocted as in the deposition Of PW-13, Dr. Mriganga Datta Biswas who conducted the autopsy of the deceased clearly mentioned in his deposition that the death was due to mechanical asphyxia followed by mechanical strangulation or homicidal hanging and on perusal of the forensic analysis report it is revealed that in viscera there is no presence of any common poison, pesticides nor any barbiturates groups of drugs and ethyl alcohol. From this it gets clear tht the convicted appellant Najmina Begam has been falsely implicated in this case by her father in law i.e. PW-1 by indulging their minor children.

[13] The deposition made by PW-1 mentioned that his house is just 75 meters away from his son Ajir Uddin's hut and his brother and his other sons have their respective huts adjacent to each other and the hut of his deceased son was made up of bricks without plaster and there are certain holes, now if the convicted appellants had forcefully strangled Ajir Uddin he ought to have raised alarm to save himself but most surprisingly nobody heard anything. The learned Court below did not consider this aspect and as such the impugned judgment and order of conviction and sentence is liable to be set aside.

[14] PW-1 in his examination in chief has deposed that when he reached the spot of occurrence he found that his son was sleeping in the bed and was in flame and at that time the other two children of the deceased namely Sharuf and Anzum were present in the house in separate portion f the partition hut. If it is so, most surprisingly at the time of the incident the two children of the deceased did not raised any alarm or make any hue and cry to save their father. Most surprisingly in his cross examination i.e. the father of the deceased deposed that in between his hut and the hut of his deceased son there were two houses of his brother having separate premises but nobody could hear anything at the time of the incident which creates a gross doubt in the prosecution story. Thus, from the version of the aforesaid deposition it is

crystal clear that the statement made by the victim before the learned Court below is totally false and concocted story implicating the name of the convicted accused persons but, the learned Court below did not consider this aspect and as such the impugned judgment and order of conviction is liable to be set aside.

[15] In the deposition of PW-7 it has been stated that the I.O. has seized one disk. He was informed that the disk contained postmortem, but the same was not shown to him by any means and neither he has noticed any special marking in the CD disk while putting signature in the seizure list. Unfortunately, those vital facts were not at all considered by the learned Court below and hence, the sentence of conviction dated 25.03.2021 liable to be set aside.

[16] There are material discrepancies in the deposition of PWs that from the deposition of PW-5 it reveals that his house is situated about 60 cubits away from the house of Ajir Uddin he also stated that seeing the incident he did not suspect anything he had no knowledge regarding any dispute between Ajir Uddin and his wife which is totally different from the deposition made by PW Suraj Ali yet this fact was not at all considered by the learned Court below.

[17] Learned senior counsel Mr. Sarkar, has further contended that most of the witnesses are the relatives of the deceased and naturally they are interested witnesses in the prosecution case. So, their evidence needs to be scrutinized very carefully and without having any cogent and material corroboration, this Court should not reach to any conclusion which may cause serious miscarriage of justice.

[18] It has been further submitted that at the very inception of the hearing took us to the judgment of the Constitution Bench of the Hon'ble Apex Court in "Bachan Singh and Others v. The State of Punjab, reported in (1980) 2 SCC 684 where the Court has noticed the aggravating circumstances considering the question of sentence, relative weight must be given to them.

[19] He also relied upon various judgments of the Apex Court and submitted that public perception is extraneous to conviction as also sentencing.

He also submitted that the age of the convicts is also a relevant consideration coupled with other attending factors. The present case does not fall within the category of “rarest of rare” case. The convicts have no criminal background and are not professional killers. Furthermore, if the convicts are severely punished, it will adversely affect the interest of the convicts and their families as well.

[20] In support of his case, has placed reliance upon a decision of the Apex Court in *Sharad Birdhichand Sarda v. State of Maharashtra*, reported in (1984) 4 SCC 116, wherein, the Court has held thus:

“It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra*(¹) where the following observations were made:

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

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to

leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

[21] The Hon’ble Apex Court in *Satye Singh and Another v. State of Uttarakhand*, reported in (2022) 5 SCC 438, wherein, the Court has observed as under:

“6. However, the learned Advocate Mr. Krishnam Mishra appearing for the respondent-State of Uttarakhand submitted that there being concurrent findings of the facts recorded by the two courts, this Court exercising limited jurisdiction under Article 136 of the Constitution of India may not re-appreciate the evidence and come to a different conclusion. Mr. Mishra further submitted that the prosecution had examined the witnesses to prove that there was a harassment to the deceased by the accused and on the previous day of the incident also a quarrel had taken place between the deceased and the accused, which had resulted into the deceased Shashi leaving the house. According to him, the accused had tried to mislead the Investigating Officer by propounding the story that Shashi had committed suicide, however, from the evidence of the doctor viz. Sanjay Kavdwal (PW-9) and the injuries mentioned in the post-mortem report, it was duly proved that the injuries found on the dead body of Shashi were ante-mortem, and her death was caused due to Haemorrhage and shock on account of ante-mortem injuries. He, pressing into service Section 106 of the Evidence Act, submitted that there was no explanation given by the accused in their further statement as to why did Shashi leave their home the previous day and what they did they do for the whole night, when Shashi was not found.”

On the point of burden of proving plea specially put forward by accused to escape criminal liability. Section-231 speaks failure of prosecution to produce material witness presumption under illustration (g) to Section-114 of Evidence Act, prosecution case weakened. Mr. Sarkar, learned senior counsel has further placed his reliance on a decision of Apex Court in *Satye Singh and Another v. State of Uttarakhand*, reported in (2022) 5 SCC 438, wherein, the Court has observed as under:

“We think that the burden of proving the plea that Smt. Chanda Devi died in the manner alleged by the appellant lay upon the appellant. This is clear from the provisions of Sections 103 and 106 of the Indian Evidence Act. Both the Trial Court and the High Court had rightly pointed out that the appellant had miserably failed to give credible or substantial evidence of any facts or circumstances which 'Could support the plea that Smt. Chanda Devi met her death because her Nylon Saree had accidentally caught fire from a kerosene stove. The Trial Court had rightly observed that the mere fact that some witnesses had seen some smoke emerging from the room, with a kitchen nearby at a time when food was likely to be cooked, could not indicate that Smt. Chanda Devi's saree had caught fire. Neither the murdered woman nor the appellant nor any member of his family was shown to have run about or called for help against a fire.

Learned Counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in *Gurcharan Singh v. State of Punjab*(1), that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstance absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is : as the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

Perhaps the Trial Court had adopted a more logical course upon facts and circumstances indicating that the appellant was one of the three persons whose conjoint actions had, on the morning of 28-5-1965, resulted in the death of Smt. Chanda Devi. It may be that the appellant was the primary or the main actor in the actual commission of the murder after his step-mother had sought his aid in what appeared to be an appeal to him by her to teach his wife a lesson so that she may not be troubled by her any more. But, the effect of the finding that the appellant went into the room from which the cries of the murdered woman, to save her from being killed, came immediately afterwards, is diluted by the evidence that Jamuna Prasad and Smt. Kalawati had followed him. The High Court's view could perhaps find some support from the fact that Jamuna Prasad was seen pacifying and rebuking the children outside while the appellant may have been dealing with his wife in a manner which brought about her death. But ' all this is a matter of conjecture. Lurking but not unreasonable doubts and suspicions seem to, us to envelope and assail the prosecution case atleast after Jamuna Prasad and Smt. Kalawati have been acquitted. As the learned counsel for the appellant has rightly pointed out, after the acquittal of Kalawati and Jamuna Prasad for murder, by the use of Section 34 Indian Penal Code, the individual and not the conjoint liability of the appellant has to be established by the prosecution before the appellant could be convicted under (1) A.I.R. 1956 S.C. 460.”

[22] Major discrepancies in prosecution evidence, the conviction can be reversed. Murder weapon never produced before the Court and necessary

witnessed not examined. In this regard, the Apex Court in *Niranjan Panja v. State of West Bengal*, reported in (2010) 6 SCC 525, wherein, the Court has held thus:

“10. On this backdrop, we will first go to the question of motive which has not been considered by the High Court at all. The so- called motive as deposed by, PW-1, Tapan Kumar was that the accused Niranjan Panja used to speak against his father after his father stopped looking after his litigation. It appears that the deceased used to look after the litigation of number of persons and that was probably his profession. We do not think that merely because the deceased had stopped looking after the litigation of the accused, the accused had any strong motive much less to commit murder of the deceased. Motive is an important circumstance in the prosecution which is based on circumstantial evidence. However, we do not see any such strong motive on the part of the appellant. We, therefore, reject the theory that there was any motive much less any strong motive on the part of the accused so as to commit the murder of the deceased.

11. In his evidence, PW-1, Tapan Kumar had suggested that on the fateful day in the evening he saw his father at the tea stall of one Gautam Manna along with Niranjan Panja (accused), Narayan Adhikari, Sudhir Maity and Nirode Kanta Bera etc. Most of these witnesses, barring Narayan Adhikari, have not been examined in this case. Again, it will be very inconsequential even if the accused was in the company of the deceased as there were number of other persons also who were having tea. Tapan Kumar Samanta (PW-1) then said that he learnt from Narayan Adhikari that, thereafter, all of them went to the liquor shop and took liquor. We do not know as to how this evidence was allowed to be recorded because it is clearly inadmissible. The claim of Tapan Kumar Samanta that accused Niranjan Panja had come to his house, and advised him to lodge a complaint against Haripada Panja and Abinash Panja was also extremely suspicious as there was hardly any corroboration to this claim. This witness also identified the blood stained dhoti and gangi baniyan.

12. The second witness was Ram Chand Bar (PW-2) who was a gate keeper in the Gram Panchayat. There is hardly anything in his evidence which is incriminating except that he had seized clothes from the dead body. PW-3, Naryan Das Adhikari spoke about the deceased, himself and the accused being there and their consuming liquor at Bholanath Pal's liquor shop. He, however, claimed that at about 9 p.m. he parted way and proceeded towards left and Haripada and Niranjan proceeded towards right i.e. towards Sarberia. It means that he was also in the company of the deceased till 9 p.m. He had not stated about their taking liquor in his police statement which he had accepted. He admitted that he and Haripada got down from the bus at Mahisadal on return from Midnapore. He also admitted that nobody had witnessed that he had parted company from Haripada and Niranjan at 9 p.m. on 12.12.1988. He could not even tell as to how far Haripada and Niranjan went together. He admitted that he parted way at a spot in Ghagra Mouza. He further stated that the house of the deceased was barely five minutes walk away from that spot while the

accused's house was about half a mile. It was also in the vicinity of the village itself. The evidence of this witness would be of no consequence, particularly, because the prosecution in this case has not fixed the time of death and there is no evidence led to that effect. Where the prosecution depends upon the theory of 'last seen together', it is always necessary that the prosecution should establish the time of death, which the prosecution has failed to do in this case. The evidence of Ranjit Samanta (PW-4) also is of no consequence.

16. In short, there is hardly any evidence in this case much less a clinching one to believe the theory that the accused had committed the murder.

17. We are convinced that both the judgments of the Trial Court as well as the Appellate Court are incorrect judgments. In this case, the prosecution has utterly failed to prove that the accused had committed the murder of the deceased, Haripada Samanta. We, therefore, allow this appeal and set aside the conviction of the accused. The accused shall be released forthwith unless required in any other offence."

[23] Learned senior counsel argued that the prosecution must prove every link of the chain and complete chain-Infirmity or lacuna in the prosecution cannot be cured by false defence or plea. A person cannot be convicted on pure moral conviction. False explanation can be used as additional link to fortify the prosecution case, subject to satisfaction of certain conditions and in this regard he has relied upon a decision of the Apex Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in (1984) 4 SCC 116, wherein, the Court has observed as under:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra* [(1973) 2 SCC 793] where the following observations were made:

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

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

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

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

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

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

155. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in *The King v. Horry*, thus:

“Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for.”

[24] On the point of Circumstantial evidence, the duty of courts to safeguard themselves against basing decision suspicions, confession, must be accepted or rejected as a whole. Self-exculpatory statement containing admission of incriminating facts and admission of incriminating portion as true rejecting exculpatory portion as false, he has relied on a decision of the Apex Court in *Palvinder Kaur v. State of Punjab*, reported in (1953) Cr. LJ 154, where the Court has observed thus:

“It is true that strictly speaking exculpatory statements in which the prisoner denies her guilt cannot be regarded as confessions, but these statements are often used as circumstantial evidence of guilty consciousness by showing them to be false and fabricated.

It was also found that though Palvinder might have desired to continue her illicit intrigue with Mohinderpal she may not have desired to sacrifice her wealth and- position at the altar of love. She may have had' a motive to kill her husband but a stronger motive to preserve her own position as the wife of a prospective chief of Bhareli and that in this situation it was by no means impossible that the murder was committed by Mohinderpal alone without the consent and knowledge of Palvinder, and that though a

strong suspicion attached to Palvinder, it was impossible to state with confidence that poison was administered by her. Therefore, it was not possible to convict her under Section-302, Indian Penal Code.”

The result, therefore, is that we are constrained to hold that there is no material, direct or indirect, for the finding reached by the High Court that the death of Jaspal was caused by the administration of potassium cyanide. If we believe the defence version his death was the result of an accident. If that version is disbelieved, then there is no proof as to the cause of his death. The method and manner in which the dead body of Jaspal was dealt with and disposed of raise some suspicion but from these, facts a positive conclusion cannot be reached that he died an unnatural death necessarily, Cases are not unknown where death- is accidental and the accused has acted in a peculiar manner regarding the disposal of the dead body for reasons best known to himself. One of them might well be that he was afraid of a false case being started against him. Life and liberty of persons cannot be put in jeopardy mere suspicions, howsoever strong, and they can only be deprived of these the basis of definite proof. In this case, as found by the High Court, not only were the Sub- Inspector of police and police constables and other witnesses guilty of telling deliberate lies but the prosecution was blameworthy in introducing witnesses in the case to support their lies and that being so, we feel that it would be unsafe to convict the appellant the material that is left after eliminating the perjured,, false and inadmissible evidence.”

[25] In view of above submissions and reference placed by Mr. Sarkar, learned senior counsel, at the fag end, he has submitted that there were many lacunas or laches in the process of investigation and in the judgment of the trial Court as well as in the development of the chain of events during the trial and as such, the order of conviction and sentence is erroneous. More particularly, the present case does not fall under the category of rarest of the rare case warranting a death sentence and, is liable to be set aside and needs strapping interference of this Court and prayed for allowing the appeal.

[26] In cases depending largely upon circumstantial evidence there is always a danger that conjecture or suspicion may take the place of legal proof and in this regard he has placed his reliance on a decision of the Apex Court in *Jaharlal Das v. State of Orissa*, reported in (1991) 3 SCC 27, wherein the Court has observed infra:

“4. No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Invariable in such cases a person last seen with the victim, unless otherwise there are

circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, howsoever strong, cannot be allowed to take the place of proof. With that caution in mind we shall now proceed to examine the facts and circumstances as put forward and the various arguments advanced.

8. As already mentioned this case rests purely on circumstantial evidence. It is well-settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions:

1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

In the leading case *Hanumant and Another v. The State of Madhya Pradesh*, [1952] SCR 1090 it is also cautioned thus: "In dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof. It is therefore right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Mahajan, J., as he then was, has also aptly referred to a passage containing the warning addressed by Baron Alderson to the Jury in *Reg v. Hodge*, [1838] 2 Lew 227 which is stated as under:

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matter, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

In *Dharam Das Wadhvani v. State of Uttar Pradesh*, [1974] SCR 607 it was held that "unlike direct evidence the indirect light circumstances may throw may vary from suspicion to certitude and care must be taken to

avoid subjective pitfalls of exaggerating a conjecture into a conviction. " In *Jagta v. State of Haryana*, [1975] 1 SCR 165 it was held that "The circumstances that the accused could not give trustworthy explanation about the injuries on his person and about his being present on the scene of occurrence are hardly sufficient to warrant conviction.

[27] On the point of leading to the recovery, the Apex Court in *Dattatraya Datta Ambo Rokade v. State of Maharashtra*, reported in (2020) 14 SCC 290, wherein, the Apex Court observed inter alia:

"89. The question is, whether death sentence imposed on the accused-appellant for offences under Section 302 should be confirmed or be commuted to life sentence, as argued on behalf of the accused-appellant.

9. In *Rajesh Kumar* (supra), the accused was convicted of assault and murder of two helpless children in the most gruesome manner. This Court held that death sentence could not be inflicted, reiterating that life imprisonment was the rule and death sentence an exception only to be imposed in the "rarest of rare cases" and for "special reasons" when there were no mitigating circumstances.

95. Section 235 (2) of the CrPC is not a mere formality. It is obligatory on the part of the learned trial Judge to hear the accused on the question of sentence and deal with it. To quote Bhagwati J. in *Santa Singh vs. State of Punjab* (SCC pp. 194-96, paras-2-4):

"2. This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the court can proceed to pass the sentence.

3. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the argumentss concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that it is only when the accused is 3 (1976) 4 SCC 190 convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of

guilt-and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.

.....The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.”

96. In Santa Singh (supra), Bhagwati, J. set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the petitioner in the aforesaid case of being heard with regard to the question of sentence, in accordance with the provisions of Section 235(2) CrPC.

97. In Dagdu and Others v. State of Maharashtra 4, a three- Judge Bench of this Court referred to Santa Singh (supra) and held that the mandate of Section 235(2) CrPC had to be obeyed in letter and spirit. Chandrachud, J. held:

“79. ... The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

98. In Machhi Singh & Others v. State of Punjab 5, this Court held:-

“38. ... (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.”

100. In *Ajay Pandit and Another v. State of Maharashtra* 7, this Court held:-

“47. Awarding death sentence is an exception, not the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC.”

In *Mohinder Singh v. State of Punjab* 8, this Court held:-

“22. The doctrine of “rarest of rare” confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

23. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. The “rarest of rare” dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme”.

102. In *Panchhi and Others v. State of U.P.* 9, this Court observed:-

“20. ... No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the

manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings.

106. Similarly, in *Surendra Pal Shivbalakpal v. State* : the absence of any involvement in any previous criminal case was considered to be a factor to be taken into consideration for the purposes of awarding the sentence to the appellant therein. This Court held:

“13. The next question that arises for consideration is whether this is a “rarest of rare case”; we do not think that this is a “rarest of rare case” in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment.”

107. In *Mukesh and Another v. State (NCT of Delhi) and Others*¹⁴, a three-Judge Bench of this Court considered the earlier judgments of this Court referred to above and deemed it appropriate to give opportunity to the accused to file affidavits to bring on record mitigating circumstances for reduction of the sentence.

108. The accused-appellant was produced before the Trial court for hearing under Section 235(2) of the Code of Criminal Procedure the day after the judgment and order of his conviction was passed. The accused-appellant, it appears, did not make any submission on the point of sentence. This is recorded by the Trial Court. The 13 (2005) 3 SCC 127 14 (2017) 3 SCC 717 accused-appellant only pleaded ‘not guilty’ submitting that there was no eye witness to the crime. The Trial Court has recorded that Advocate Waghachadu, the learned Advocate appearing for the accused-appellant submitted that “considering the fact that accused is 53 years old leniency be shown to accused” in awarding death sentence.

109. The Trial Court has accepted the submission of the learned Special Public Prosecutor that there were no mitigating circumstances to award life imprisonment instead of death sentence. The Special Public Prosecutor submitted that the offences had been committed with extreme depravity.

110. It may be pertinent to note that in awarding death sentence, the trial court referred to and relied upon two judgments of this Court of affirmation of death sentence, that is, *Rajendra Prahladrao Wasnik v. State of Maharashtra* ¹⁵ and *Mohd. Manan @ Abdul Mannan v. State of Bihar* ¹⁶. On review of both the judgments, death sentence has been commuted to imprisonment for life.

111. In *Haru Ghosh vs. State of West Bengal* ¹⁷, this Court commuted death sentence to life imprisonment in the case of a dastardly murder of

two helpless persons for no fault of theirs. This Court, however, in commuting death sentence took into consideration the following factors:-

“i. There was no pre-meditation on the part of the accused;

ii. The act was on the spur of the moment;

iii. The accused was not armed with any weapon;

iv. It was unknown under what circumstances the accused had entered the house of the deceased and what prompted him to assault the boy; and v. The cruel manner in which the murder was committed could not be the guiding factor and the accused himself had two minor children.”

112. In Haru Ghosh (supra), this Court observed, “....the cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body of the deceased, do not by themselves become the guiding factor in favour of death sentence.”

115. Under the Indian Penal Code and, in particular, Section 299 thereof, whoever causes death by doing an act either with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely, by such act, to cause death, commits the offence of culpable homicide.

119. The death of the deceased victim was not caused under any provocation, not to speak of sudden provocation. No such defence has been taken by the accused-appellant. Nor is it anybody's case that the death was caused in legitimate exercise in good faith of any right of the accused-appellant, whether of private defence or otherwise. The death has been caused without any provocation.

122. Considering the totality of the evidence before us, we uphold the conviction of the accused-appellant. However, in view of the evidence of the post mortem report of Dr. Bhusan Jain, we deem it appropriate to modify the sentence by reducing the same to imprisonment for life.

126. Counsel for the accused-appellant submitted that the brutality of the crime and age of the victim was not ground enough to inflict death sentence. Learned counsel submitted that the petitioner had been convicted on circumstantial evidence, based on faulty investigation.

130. Considering the nature of the crime against a five year old child, the Trial Court imposed the extreme penalty of death without deciding the question of whether there was no alternative to imposing death sentence on the accused-appellant. There is no finding that in the absence of death sentence, the accused-appellant would continue to be a threat to the society. The question of whether the accused-appellant could be reformed, had not at all been considered.

132. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make

an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The Trial Court made no attempt to elicit relevant facts, nor did the Trial Court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.”

[28] It has been argued that registration of FIR is mandatory under Section-154 of Cr. P.C. If the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation and this is the general rule and must be strictly complied with. In this circumstances, learned senior counsel has placed reliance on a decision of the Apex Court in *Lalita Kumari v. Government of Uttar Pradesh*, reported in (2014) 2 SCC 1, wherein, the Court has observed thus:

“Significance and Compelling reasons for registration of FIR at the earliest:

93. The object sought to be achieved by registering the earliest information as FIR is inter alia twofold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later.

96. The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure ‘judicial oversight’. Section 157(1) deploys the word ‘forthwith’. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

119. Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information

given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

[29] On the point of examination under Section-313 of Cr. P.C. that long series of facts cannot be asked and in this regard the Gauhati High Court in *Gopal Goraik v. State of Assam*, reported in 2011 (2) GLT 425, wherein, the Court has observed as under:

“19. The basic purpose of Section-313 Cr. P.C. as it stands today is to give an opportunity to the accused to “personally explain the circumstances appearing against him in the evidence and that is why the word “personally” has now found a place in the present Section-313 Cr. PC. This is significant because his statement can be taken into consideration in judging his innocence or guilt.

20. In *Tara Singh v. State of Punjab*, reported in AIR 1951 SC 441, in the context Court had stated that it cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section-342 of the Code and it is not sufficient compliance to string together a long series of facts and ask the accused what he had to say about them. Bearing in mind the aim and object of the section, which is to afford a fair and proper opportunity of explaining the circumstances which appeared against him, logically and rationally, the questioning must be done in such manner and in such a form which even an ignorant and illiterate person can appreciate and understand. Even otherwise, an accused would be somewhat perturbed when he is facing charge and, therefore, fairness demands that each material fact would be put simply and separately. The Apex Court also noted that every error or omission to record the statement in that behalf would not necessarily vitiate a trial because errors of this type fall within the domain of curable irregularities. The fall out of such omission or errors in each case depends upon the degree of error and whether prejudice had been occasioned or is likely to have occasioned.

23. In *Ajay Singh (supra)*, the Supreme Court, in paragraphs 13 and 14 stated thus:

“13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word “generally” in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature of the general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object

of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section-313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

26. In view of what has been stated herein above, we are of the opinion that the examination of the accused appellant under Section-313 Cr. P.C., in the facts and circumstances of the case, do not satisfy the requirement of the section. Accordingly, conviction recorded and sentence awarded are hereby quashed. The matter is remanded to the learned trial Court with a direction that the learned trial Court in accordance with the underlying principles of Section-313 Cr. P.C., shall put all the circumstances appearing against the accused appellant to him to enable him to explain all opportunity to adduce evidence, if he wishes, in his defence. The learned trial Court is directed to complete the trial of the case within a period of 2 months from today. We also quash the statements of the accused appellant recorded earlier under Section-313 Cr. P.C. The learned trial Court would dispose of the case after hearing the parties.

[30] Regarding parameters set for awarding death sentence the Apex Court in *Bachan Singh v. State of Punjab*, reported in (1980) 2 SCC 684, wherein, the Court has held thus:

“15. The principal questions that fall to be considered in this case are:

- (i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.
- (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Sec, 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and un-trammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

[31] The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In this regard, the Apex Court in *Machhi Singh & Ors v. State of Tamil Nadu*, reported in 1983 (3) SCC 470, wherein, the Court has held thus:

“32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are

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

I. Manner of Commission of Murder

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

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

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

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

II. II Motive for Commission of murder

When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

III Anti Social or Socially abhorrent nature of the crime:

35. (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse

social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.

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

IV. Magnitude of Crime:

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

V Personality of Victim of murder:

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

38. 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 sentences 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 alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

39. In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”

[32] In view of the submissions made, Mr. Sarkar, learned senior counsel finally contended that the prosecution has not made out a case beyond reasonable doubt and the trial Court judgment stands with negative mind and the doubts upon investigation and laches committed more so, prosecution not made out a rarest of rare case for death sentence and prayed to set aside the judgment and sentence and allow the appeal.

[33] On the other hand, Mr. Ratan Datta, learned Public Prosecutor appearing for the respondent-State has submitted that the prosecution has successfully proved the charges against the accused persons to the hilt and there is no iota of doubt about the commission of the crime by the accused persons. He has submitted that the convicts were in an illicit relationship and the deceased husband of the convict Mst. Majmina Begam was the only obstruction in their relationship and so they entered into an agreement and hatched up a conspiracy to remove the said Ajir Uddin from their way and ultimately committed a heinous crime just to gratify their carnal pleasure and murdered Ajir Uddin so brutally for which they deserve no leniency rather they deserve deterrent and exemplary punishment, so that before committing such an act everyone should think twice and thinking about the consequence of such an act, dare to do any such act at any point of time and the crime committed by the convicts is well established and they should not be spared, rather the offence committed comes under the “rarest of the rare” offence and thereby they deserve capital punishment only.

[34] He has further submitted that all the PWs have been sufficiently cross examined by the defence but, no material infirmity has come out in the cross examination so as to disbelieve their evidence. Further, the medical evidence is also clear about the death of the deceased being homicidal in nature.

[35] He has further contended that deceased Ajir Uddin and his wife Najmina Begam, the accused herein, were living in the said dwelling hut with their four children but on that day two children were inside the dwelling hut and they woke up upon hearing the cry of others and two others had outside the State. From the evidence of PW-6 it could be seen that his brothers and sister were present on the date of incident with their parents in their dwelling hut and accused Najmina Begam mixed some medicine in the dinner of her husband and threatened her children i.e. Mousin Alam and Lesuar Anjum not to divulge the same to anybody else. From the evidence of PW-1 it could be seen that they entered into the room through another door of the dwelling hut which was open and raised alarm and also sought for help of others and also asked to bring water.

[36] From the evidence of PW-4 it reveals that two years back one day in the midnight at about 1230 hours while he woke up upon hearing the cries of PW-1 by saying 'Bachao Bachao' and while PW-4 rushed out of his dwelling hut PW-1 stated to him that fire caught in the dwelling hut of his son Ajir Uddin, now deceased. At the material time of the incident accused Najmina Begam was found outside the building and found to have been crying laying on the ground of her dwelling house. The accused Najmina Begam and accused Faijul Jalal, nephew of PW-1 were arrested by police in connection with this case.

[37] Mr. Datta, learned P.P. appearing for the respondent-State has argued on the point of burden of proving fact especially within occupied only by both of them. The facts relevant to cause of death being only known to accused persons. In this respect he has relied upon a decision of the Apex Court in *State of Rajasthan v. Thakur Singh*, reported in (2014) 12 SCC 211, wherein the Court has held thus:

“The question for consideration is whether the facts and circumstances of the case require the application of Section 106 of the Evidence Act, 1872 and if so, whether the respondent/accused is guilty of the murder of his wife Dhapu Kunwar. In our opinion, both questions need to be answered in the affirmative and the High Court rendered a decision, perverse in law, in acquitting Thakur Singh and reversing the decision of the Trial Court.

10. The Trial Judge held, on the basis of the evidence on record, that no one except Thakur Singh could have caused the death of Dhapu Kunwar. He had confined her and their daughter inside a room and although no one saw him killing his wife, since the room was bolted from inside, he had not opened it for the whole day and the door had to be forced open, no one else could have caused her death. The Trial Judge found that there was nothing to suggest that any other person had entered Thakur Singh’s room and there was no possibility of anybody else having caused Dhapu Kunwar’s death by strangulation. It was also noted that Thakur Singh gave absolutely no explanation in his statement under Section 313 of the Code of Criminal Procedure as to how Dhapu Kunwar had died of asphyxiation inside their room.

This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

17. In a specific instance in *Trimukh Maroti Kirkan v. State of Maharashtra*[3] this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: “Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

21. More recently, in *Gian Chand v. State of Haryana*[7] a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in *Shambhu Nath Mehra* was reiterated. One of the decisions cited in *Gian Chand* is that of *State of West Bengal v. Mir Mohammad Omar*[8] which gives a rather telling

example explaining the principle behind Section 106 of the Evidence Act in the following words: “During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar’s death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.

27. The High Court expressed the view that since the prosecution did not produce Gotu Singh as its witness, its case ought to fail. In our opinion, Gotu Singh could not have added to the case of the prosecution. He had arrived on the fateful day after Thakur Singh had locked himself, Dhapu Kunwar and their child in their room. He did not even meet them on the fateful day and was oblivious of the events that had taken place that day. Therefore, producing him in the witness box would not have been of any consequence.

28. On a consideration of the facts of the case we are of the opinion that the approach arrived at by the Trial Court was the correct approach under the law and the High Court was completely in error in relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of Thakur Singh) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106 of the Evidence Act was completely overlooked by the High Court making it arrive at a perverse conclusion in law.”

[38] Mr. Datta, learned P.P. has submitted that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate Court can interfere with the order of the acquittal. The appellant Court should bear in mind the presumption of innocence of the accused and further that the trial Courts acquittal bolsters the

presumption of innocence. In this regard he has relied upon a decision of the Apex Court in **Ramesh Harijan v. State of U.P.** reported in (2012) CRI. L. J. 2914, wherein the Court has held thus:

“24. In *Sucha Singh v. State of Punjab*, AIR 2003 SC 3617, this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus* has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

25. In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra*, AIR 1973 SC 2622, this Court held :

“...Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analyzing the evidence and appraising the soundness of the contrary conclusions reached by the courts below.

26. Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

27. In view of the above, we are of the considered opinion that the acquittal in the instant case by the trial court was totally illegal, unwarranted and based on mis-appreciation of evidence for the reason that the court had given undue weight-age to unimportant discrepancies and inconsistencies which resulted in miscarriage of justice. Thus, the High Court was fully justified in reversing the order of acquittal.”

[39] Mr. Datta, learned P.P. on the point of conspiracy has drawn attention of this Court to Section-10 of the Evidence Act. Section-10 of the Evidence Act speaks that *“Things said or done by conspirator in reference to common design- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”*

[40] In the given case, accused persons were in illicit relationship. Accused Najmina Begam is the wife of deceased and at the time of her marriage accused Faijul Jalal was a minor boy of tender age i.e. $\frac{3}{4}$ years and he is the nephew of PW-1. Since, marriage, Najmina Begam and deceased have been blessed with four children and in the meantime accused Fauijul Jalal has grown up and now hje has become a yond man of 25 years. They were having illicit relationship for quite something before the death of Ajir Uddin. From the circumstances of the evidence of the witness it reveals that accused Najmina Begam had no attachment either with her deceased husband or with her children whereas accused Faijul Jalal is the cousin brother of the deceased. it also reveals from the evidence of the witnesses that accrued Najmina Begam administered some medicine in the diner of her husband and of her children as well as the fateful date of the incident and accused Faijul Jalal made an arrangement of inflammable substance i.e. petrol. There is no doubt about the fact that the accused persons had the intention ot wipe out Ajir Uddin from this world, and accordingly both of them executed their plan on the fateful night which clearly suggests that there might have been the meeting of minds of the accused persons to cause murder of Ajir Uddin and finally the matter was executed.

[41] If prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in

favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefits thereof where none reasonably exists. Delay in lodging the FIR also cannot be used as a ritualistic formula for doubting the prosecution case. In this context he has relied upon a decision of the Apex Court in *State of Punjab v. Ramdev Singh*, reported in (2004) 1 SCC 421, where, the Court has observed thus:

“7. Merely because of doctor's hypothetical and opinionative evidence that the victim was accustomed to sexual intercourse, prosecution version of rape was not to be discarded.

8. In response, learned counsel for the accused supported the judgment submitting that reasonings indicated by the High Court are on terra firma, more particularly when the victim's testimony is completely unreliable because it is at great variance with the medical evidence. Residually, it is submitted that the judgment is one of acquittal and after a long lapse of time the jurisdiction under Article 136 should not be exercised.

9. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, same cannot by itself be a ground for disbelieving and discarding the entire prosecution version, as done by the High Court in the present case.”

[42] Regarding laches on the part of the investigating officer, he has submitted that in this issue, no question has been put to the defence for their reply. On the same pretext he has relied upon a decision of the Apex Court in *Mahabir Singh v. State of Haryana*, reported in 2001 7 SCC 148 wherein, the Court has held thus:

“It would have been desirable that the High Court did not make such strong remarks castigating the police and the subordinate judiciary, when the situation did not warrant such castigation. Judicial restraint should have dissuaded the High Court from making such unnecessary castigation. That apart the legal proposition propounded by the High Court regarding the use of Section 172 of the Code is erroneous. The whole exercise made by the High Court on that aspect was in the wake of what PW-1 said that he was questioned by the Investigating Officer on 12.10.1991. That might be so but the defence counsel used the statement as recorded on

14.10.1991 under Section 161 of the Code for the purpose of contradicting PW-1. The said portion of the evidence of PW-1 is extracted below:

I had also stated before the police that all the accused had further started beating Anand (Confronted with statement Ex.DA wherein except for the knife blow wielded by Ranbir there is no other role attributed to the remaining accused).

The omission in Ext.DA (the statement ascribed under Section 161 of the Code by PW-1 dated 14.10.1991) regarding the role attributed to A-2 to A-4 relates to a very material aspect and hence it amounted to contradiction. When any part of such statement is used for contradicting the witness during cross-examination the Public Prosecutor had the right to use any other part of the statement, during re-examination, for the purpose of explaining it. The said right of the Public Prosecutor is explicitly delineated in the last part of the proviso to Section 162(1) of the Code. The first limb of the proviso says that any part of the statement (recorded by the Investigating Officer) may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act. The next limb of the proviso reads thus: And when any part of such statement is so used, any part thereof may also be used in the re-examination of any witness but for the purpose only of explaining any matter referred to in cross-examination.”

[43] He vehemently argued on the point of discrepancies and minor contradictions in appreciation of evidence and placed his reliance on a judgment of Apex Court in ***Mukesh & Another v. State (NCT of Delhi) and Another***, reported in ***AIR 2017 SC 2161***, wherein, the Court has held thus:

“383. At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of the prosecutrix in view of settled legal principles. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination, etc. if the same is found natural and trustworthy.

430. Further, as discussed infra, pursuant to the disclosure statement of the accused, clothes of the accused, some of which were bloodstained and other incriminating articles were recovered. PW-45 Dr. B. K. Mohapatra matched the DNA profiles of the blood detected on the clothes of the accused with that of the complainant and the victim. One set of DNA profile generated from jeans-pants of the accused Akshay (A-3) matched the DNA profile of PW-1. Likewise, one set of DNA profile generated from the sports jacket of accused Vinay (A-4) was found consistent with the DNA profile of PW-1. Also, one set of DNA profile generated from

black-coloured sweater of accused Pawan Gupta (A-5) was found consistent with the DNA profile of PW-1. The result of DNA analysis further corroborates the version of PW-1 and strengthens the prosecution case. DNA analysis report, as provided by PW-45 is a vital piece of evidence connecting the accused with the crime.

436. PW-81 Dinesh Yadav is the owner of the bus bearing Registration No.DL-0PC-0149 (Ext.P-1). PW-81 runs buses under the name and style "Yadav Travels". On interrogation, PW-81 Dinesh Yadav stated that A-1 Ram Singh was the driver of Bus No. DL-0PC-0149 in December 2012 and A-3 Akshay Kumar Singh was his helper in the bus. PW-81 also informed the police that the bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students to the school in the morning and that it was also engaged by a company named M/s Net Ambit in Noida, to take its employees from Delhi to Noida. PW-81 also informed the police that after daily routine trip, A-1 Ram SSingh used to park the bus at Ravidas Camp, R. K. Puram, near his residence. PW-81 further informed that on 17.12.2012, the bus as usual went from Delhi to Noida to take the staff of M/s Net Ambit to their office. The recovery of the bus (Ext.P-1) and evidence of PW-81 led to a breakthrough in the investigation that A-1 Ram Singh was the driver of the bus and A-3 Akshay was the cleaner of the bus."

[44] We are in respectful agreement with the above exposition of law. In the present case our careful analysis of the statements of the prosecution has created an impression on our minds that to some extent there are some corroboration as well as discrepancies in the statement of the PWs. Insofar as the appellants are concerned, the evidence of all the witnesses have been accepted and acted upon by the Sessions Court. The conviction and sentence are challenged by the accused-persons. In view of the capital punishment, reference for confirmation of death penalty is also placed for our consideration. For the purpose of consideration, let us delve into the evidences of the PWs as a whole.

[45] PW-1, father of the deceased and father-in-law of the convict-appellant No.1 in his deposition has deposed that about 1 and ½ year back during summer days at about 12.00 hours at night the incident took place. At that time he was sleeping at his house. At that time, Nazmina Begam, the accused-appellant No.1 wife of the deceased knocked the door as she lived in a separate house with his deceased son situated about 75 meters away from his house. She asked me to go with her and see their hut on the ground that their hut was in flame. On that date Faizul, was at his hut saying that the ceiling fan

of his hut became damaged. Faizul, the convict-appellant No.2 only came for stay for that night. Besides his wife, the wife of PW-1 four daughters were present. Receiving that information of burning of the hut of his daughter in law without informing anybody he left towards her hut. The hut of Nazmina Begam was made up of bricks without plaster and there are certain holes which remain there at the time of construction of building in outside. He did not see any flame of fire from outside. From the holes of bricks which left for the purpose of making platform for the purpose of making plaster, he peeped inside and noticed fire then through another hole nearby another door he again peeped and saw that his son who was sleeping in the bed, was in flame, but, there was no flame in the other portion of the building. The second door remained opened and accordingly, he entered into the room and raised alarm and sought help for bringing water.

[46] His other sons Jain Uddin and many others came with water. His brother Riaz Ali and Faiaz Ali also came. He found his son already expired. Riaz Ali, my brother telephoned police, Police came at the place of occurrence. Police came and after observing other formalities had taken the dead body. Police prepared inquest in my presence and he put his signature in the inquest marked as Exhibit-1. Thereafter, FIR has been lodged on the following day because, the day when he was found dead he first suffered at shock, and then after Postmortem for making arrangement of his Cremation already dusk prevailed. He got the ejahar drafted through his brother who arranged recording of ejahar by somebody on the basis of facts supplied by him and after it was drafted it was read over and explained to him, and put his signature on it. He made responsible to Nazmina Begam and his nephew, Faizul Jalal for causing murder of his son. On identification the signature of the witness in the ejahar is marked as Exhibit-2.

[47] Azir married Nazmina for about 20 years. He left behind three sons and one daughter. Their names are Maruf, Sharuf, Bishal and Nachyuana Anzum. Bishal and Maruf was absent in the house of my son on that very date, but Sharuf and Anzum were present in the house in separate portion of the partition hut. His deceased son had dispute with his daughter- in-law Nazmina

Begam. In his absence Faizul Jalal used to maintain an illicit connection with Nazmina Begam and regarding that matter Panchayet also discussed. Panchayet also scheduled to sit, but prior to that scheduled date the incident took place.

[48] On 18.07.2016 the convict-appellant No.1 has filed a complaint to the Officer-in-charge, Kadamtala P.S., Dharmanagar, North Tripura stating that on 18-07-2016 Ad, Monday, few moments before 12:30 am cantering the domestic dispute between them, her husband Ajir Uddin locked her and her daughter and son from outside in one room of the hut located on the west side of the dwelling hut and he committed suicide inside the room by pouring petrol on his body. Getting the smell of petrol and hint of fire she along with her son and daughter got out of the room by pushing the door and seeing her husband ablaze on the bed she screamed out and came outside. People came there and doused the fire by pouring water. In this way her husband committed suicide. It may be noted that previously he had tried to commit suicide by pouring petrol over him. She has no doubt about anyone behind her husband's death.

[49] PW-2, Sharif Uddin who sold the petrol in his deposition has stated that he has a business of betle leaf and besides this he also used to sell Mobil and car parts. His shop is situated at the backside of Kadamtala-Kurti auto stand. He also owned an auto vehicle. He used to ply on road through driver. He knew Ajir Uddin, who was previously an auto driver and subsequently, he used to drive DI vehicle. He also knew Faizul Jalal, and he used to take beetle leaf from his shop. One day in the month of July 2016 during evening time Faizul Jalal came to his shop and inquired for petrol. He used to keep 15 to 20 ltr. of petrol in his house for use of his vehicle. He brought one empty bottle of Sprite. He gave me Rs. 65/- as a price of petrol and one bottle of petrol he handed over to him pouring it into the Sprite bottle. He took the petrol expressing his urgent need subsequently; came to know that by means of the petrol which he purchased from him caused death of Ajir Uddin.

[50] PW-6, Maruf Sultan, son of the convict appellant No.1 and the deceased who has deposed that the incident took place in the night 17:18 July

2016 at that time his younger brother Tan Suhel and himself on that date was not present at his home. They went to their masi's house situated at Kaliganj, Assam. His mother had sent them there for staying some days forcefully. His father was against it. Still due to desire of his mother they had to go there. On the following day of the incident on information a, returned home in the morning along with Tanvil Suhel. When they came, by that time his father already taken to hospital in a dead condition. He had knowledge that his mother was maintaining a illicit connection with Faizul Jalal, whom he used to address Chacha and in that regard his mother had dispute with his father. Once his father noticed conversation of Faizul Jalal with his mother he took the mobile from her and damaged it and thereafter his mother had obtained a mobile and that was not given by his father. Before three four days of the incident his father solicited a village shalish regarding relationship of his mother with the accused appellant No.2. His mother and Faizul Jalal did not accept the meeting. When he came to know from his sister and younger brother that during dinner time his mother had mixed some medicine and administered it to his father. When the incident took place at that time his sister and brother was sleeping as they told him. His brother and sister narrated the facts to other members of their house.

[51] But in his cross examination he has stated that he could not recollect whether he stated to the police that his mother compelled him to go to his masi's house. On being drawn attention to his 161 statement witness admits absence of such specific statement that his mother compelled them to go to Kaliganj at his masi's hose. It is not a fact that he stated those facts falsely.

[52] PW-9, who is the doctor posted at SFSL, as Sr. Scientific Officer she deposed that on that on 03-08-2016 Director of our Institute received exhibits of this case and then endorsed to her for examination. The exhibits were in c/w case no. 2016/KDL/037. The exhibits were packed in two packets and in one packet there were six exhibits and in second packet there were two exhibits. Out of 8 exhibits we sent one exhibit to Bio/Sero Division and the remaining 7 exhibits were examined by her. She examined all the exhibits observing proper formalities and my opinion are as follows:-

"The exhibits were suitably extracted and analyzed by colour tests and chromatographic method. TOX/248/16 (G and H)- negative for the presence of common organophosphorous, organochloro, carbamates, pyrethroids group of pesticides, benzodiazepines, barbiturates group of drugs and ethyl alcohol. TOX/248/16 (B, C and E)- Negative for the presence of residues of inflammable substances. TOX/248/16 (D)- Presence of inflammable substance. TOX/248/16 (A)- Positive for the presence of petrol. The reports and remnants from Bio/Sero Division will be sent separately. The remnants of the exhibits are returned separately under sealed cover." Thereafter, she prepared the report in details and signed with seal which is marked as Exhibit-5 as a whole".

[53] PW-12, Pijush Kanti Saha, the investigating officer who has deposed that during investigation he perused the written ejhar of Najmina Begam and visited the place of occurrence prepared the hand sketch map with index in separate sheet of paper which bears his signature. Marked as Exbt.7 and the signature of the witness on the hand sketch map marked as Exbt.7/1. On identification of the index of the hand sketch map it was marked as Exbt.8. On 18.07.2016, he seized on yellow plastic Jericane of petrol, half burnt cotton quilt, some burnt soil, burnt piece of mosquito net a violet gas lighter, burnt piece of printed lungi in presence of the witnesses. It reveals from the evidence of PW-12 that on 23.07.2016 he seized one nylon rope about 6 meter 30 cm length and half cm diameter from the hut of the deceased which was used in the murder and the rope was recovered at the instance of the accused Faijul Jalal. On 18.07.2016 on the basis of complaint of accused Najmina Begam a case of unnatural death under Section-174 of Cr. P.C. vide GD entry No.08 of 18.07.2016 was registered. After completion of the investigation, finding prima facie case, he submitted charge sheet against the accused persons for the commission of offences punishable under Sections-302/201/120B of the IPC.

[54] It has been revealed from the evidence of PW-13, Dr. Mriganka Dutta Biswas that on 18.07.2016 he conducted autopsy over the dead body of the deceased Ajir Uddin and during post mortem he found ligature mark present on anterior part of neck as other side of the body was deeply burnt. He also found that there was profuse bleeding from nose and mouth, protrude tongue was bitten by teeth and also found petechial hemorrhage present over face and forehead and whole body was deeply burnt except buttock and backside. It also reveals from the evidence that few blisters were also found

present over the body of the deceased which were pale yellow in colour with dry base and no line of redness was seen due to post-mortem burn. The legs were flexed at hip joint and extended at knee joints, arms were also found with flexed elbow due to post mortem construction of muscles. The body was burnt after his death and autopsy was conducted after 24 hours of death and there was rigor mortis in the body of the deceased and the report was prepared by PW-13 in his own handwriting. In the final opinion of the doctor it was stated as under *“in my opinion, the cause of death in this case was due to mechanical asphyxia following homicidal strangulation or homicidal hanging. Body was burnt after the act. Rigor mortis present. Time since death within 24 hours viscera were preserved and handed over to kadamtala P.S. staff.”*

[55] Now, we may notice the cases which were relied upon the respondent wherein, this Court had declined to confirm imposition of capital punishment treating them not to be the rarest of rare cases. ***In Ronny. v. State of Maharashtra***, the Court while relying upon the judgment, has held thus: *“45.....the choice of the death sentence has to be made only in the rarest of rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society.”*

[56] Description of seizure articles Exbt.9.9/1 was 1. One yellow coloured plastic container of weighing 5 ltrs. in volume, in which little amount of petrol like liquid substance is present. It is found on the ground beside the bed of Ajir Uddin(now deceased). 2. Little amount of burnt cotton of bed which is recovered from the bed of the deceased Ajir Uddin. 3. Little amount of burnt mud. 4.Little portion of bunt mosquito net and burnt cotton. 5. One pair of black coloured plastic footwear with white strips (plastic). 6. One purple coloured gas light. 7. One little portion of yellowish coloured lungi which is recovered from the dead body of the deceased. One blue and green coloured nylon rope measuring around 6 meter and 30 cm in length and having circumference of ½ centimetres. It is stated by the arrested accused person Faijul Jalal that Ajir Uddin was

murdered by strangulating him with this rope. The said rope is seized from the possession of the accused person in presence of the witnesses.

[58] For the purpose of reference, the statement of Nachuar Anjum recorded under Section-164 (5) of Cr. P.C. has been quoted herein below:

"On last Thursday night, I and my brother when sat to have meal, my mother Najmina Begam was telling that she would kill my father by administering him with sleeping medicine. After a while I saw that my mother was bringing petrol by filling it in one bucket and in bottle of spirit. At that time my father was not present at home. Then we fell asleep. At night we came to know that my father's room caught fire. Mother woke us up. I ran fast to my grandfather and brought him. The night before this incident my father severely assaulted my mother as on that day she had gone to uncle Faijul Jalal's house and cooked food for him. It is my assumption that my mother and my uncle had jointly committed murder of my father. My uncle himself brought and gave petrol and medicine to my mother. This is my statement."

[59] For the purpose of reference, the statement of Moushin Alam recorded under Section-164 (5) of Cr. P.C. has been quoted herein below:

"On the night of 17" of this month, i.e. 4 days before, when I sat for have my meal at home, I saw my mother Najima Begam was taking out one medicine by tearing one medicine strip. I asked my mother, "What is the medicine for?" Then mother told that it is sleeping pill. I will give it to your father. My sister Nachuar Anjum told me that she had seen my mother mixing that medicine in my father's vegetable curry. We had our meal and then we slept. Suddenly at night mother woke us up and told that our father's dwelling hut had caught fire, Mother told us to call our grandfather. On our call grandfather and other persons came over there and put off the fire. My mother on asking further told me that Faijul Jalal gave that medicine to her. The night before the incident took place my father had severely assaulted my mother. As my mother went to the marriage of younger brother of Faijul Jalal, my father was unhappy with that. I presume that my mother only had killed my father. This is my statement."

[60] After all these discussions and thorough analysis, we are of the considered opinion there is some discrepancies and contradictions in the evidences of the relevant witnesses. At the very outset it is seen that two complaints have been filed one by the father of the deceased and

another by the convict-appellant No.1 marked as Exbts.2, 2/1. The convict-appellant No.1 has stated that she has no complicity in the murder of her husband. Furthermore, she has been falsely implicated in the present case by her father in law. She also submits that two of her elder children aged about 18 years and 17 years respectively are presently living in Dimapur, Nagaland and one of them is pursuing his study in Class-VII and another is working in the shop of his maternal uncle and two other minor children aged about 16 years and 10 years respectively are living with her and they are pursuing their studies in Class-X and another in Class-V respectively. She further submits that she married Ajir Uddin, now deceased followed by their love affairs, but her father in law never accepted her as his daughter in law and she has been somehow surviving with her two children at the charity of her brother and she has not been getting help from her father in law though she has been living in the house of her deceased husband. She also submits that if she is severely punished it will adversely affect the interest of her minor children.

[61] She has submitted that her husband committed suicide inside the room by pouring petrol on his body. Getting the smell of petrol and hint of fire she along with her son and daughter got out of the room by pushing the door and seeing her husband ablaze on the bed she screamed out and came outside. People came there and doused the fire by pouring water. In this way her husband committed suicide. It may be noted that previously he had tried to commit suicide by pouring petrol over him. She has no doubt about anyone behind her husband's death.

[62] PW-1, the father of the deceased has stated that on that date Faizul, was at his hut saying that the ceiling fan of his hut became damaged and he came for stay for that night. Besides his wife, the wife of PW-1 four daughters was present. The hut of Nazmina Begam was made up of bricks without plaster and there are certain holes which remain there at the time of construction of building in outside. He did not see any flame of fire from

outside. From the holes of bricks which left for the purpose of making platform for the purpose of making plaster, he peeped inside and noticed fire then though another hole nearby another door he again peeped and saw that his son who was sleeping in the bed, was in flame, but, there was no flame in the other portion of the building. Police came and after observing other formalities had taken the dead body. Police prepared inquest in my presence and he put his signature in the inquest marked as Exhibit-1. Thereafter, FIR has been lodged on the following day because, the day when he was found dead he first suffered at shock, and then after Postmortem for making arrangement of his Cremation already dusk prevailed. He made responsible to Najmina Begam and his nephew, Faizul Jalal for causing murder of his son.

[63] In his statement it has been uttered that subsequently after the incident he came to know that there was illicit relationship between the daughter-in-law and the convict appellant No.2 which cannot be believed. In the said complaint he did not express any suspicion for the cause of death of his son or there was conspiracy behind the death of his son. He has stated that his daughter in law aged about 30 years and was in a illicit relationship with the accused No.2 who happens to be his nephew aged about 22 years. Having suspicion about their relation there was always altercation between them and on the fateful day the accused No.2 was permitted by PW-1 to sleep in his house on that particular night. It is pertinent to mention herein that day before the incident there was on Panchayet shalishi which was scheduled for deciding the above issue regarding the illicit relationship between the accused persons.

[64] This Court is not in a position to understand that when PW-1 is aware that the Accused No.2 is the culprit to destroy the family life of his deceased son by having illicit relationship with his daughter-in-law, as to how he allowed him to stay in his house on the fateful night. It is not either mentioned by PW-1 nor in the investigation that on night the accused No.2 has went out of his house for some time and returned back and slept, since it is not the case of the PW-1 that the accused No.2 has not gone out and since there was no whisper about the same, it cannot be believed that the accused appellant

No.2 involved in a conspiracy with accused appellant No.1 to kill the deceased on the fateful day.

[65] PW-1 has not taken any steps for examining Panchayet witnesses to establish the motive for killing the deceased by accused appellant No.1 and appellant No.2 in reference to their allegation of illicit relationship. As per version of PW-1 he did not say anything neither in the complaint nor in the evidence but it has been stated that later on he came to know that there was illicit relationship between the accused persons. This aspect of the matter has not been dealt with by the investigating officer that from whom he knows or how he knows about this issue. PW-2 from whom accused appellant No.2 purchased petrol, did not through any light to link the chain for framing charge under the circumstantial evidence as the deceased and the appellant No.2 are drivers and have auto rickshaw. They purchased huge quantity of petrol from the beetle leaf vendor. This Court finds that the evidence of PW-2 is a weak piece of evidence and nothing has been elucidated to establish the charge against the accused-appellants.

[66] In view of the above reason, the evidence of PW-1 is weak piece of evidence to entangle the accused appellant Nos.1 and 2 as guilty. PW-4 is the son of the deceased and the appellant No.1 of 17 years who is not the eye witness and also he was in a different place later on he came to the place of occurrence after hearing that his father died due to burn injuries. Though, he deposed that there was illicit relationship between his mother and the accused appellant No.2 and they might have killed his father, which cannot have any weight-age in this allegation of offence of illicit relationship and the motive for killing the deceased needs to be established and mere having any illicit relationship cannot establish motive for killing. In this context the allegation of having illicit relationship, was not established and the motive to the said incident also not been established/prove and accordingly. PW-4 was not the eye witness and he deposed on the mere presumption he is just a hearsay witness and thus, no weight-age can be given.

[67] In the medical report, who has conducted the post mortem examination has given the opinion and reason for death in this case was due to

mechanical asphyxia following homicidal strangulation or homicidal hanging. Body was burnt after the act. Rigor mortis present. The investigating officer has deposed that he seized one yellow plastic Jericane of petrol, half burnt cotton quilt, some burnt soil, burnt piece of mosquito net a violet gas lighter, burnt piece of printed lungi in presence of the witnesses. It reveals from the evidence of PW-12 that on 23.07.2016 he seized one nylon rope about 6 meter 30 cm length and half cm diameter from the hut of the deceased which was used in the murder and the rope was recovered at the instance of the accused Faijul Jalal, but that has not been produced before the Court. On 18.07.2016, on the basis of complaint of accused Najmina Begam a case of unnatural death under Section-174 of Cr. P.C. vide GD entry No.08 of 18.07.2016 was registered. After completion of the investigation, finding prima facie case, he submitted charge sheet against the accused persons for the commission of offences punishable under Sections-302/201/120B of the IPC.

[68] From the evidence of the IO and also perusal of the record it appears that in-order to give more credence to the complaint 19.07.2016 lodged by PW-1 the I.O. has not given much importance to the complaint dated 18.07.2016 made by the accused-appellant No.1 though the contents of the complaint 18.07.2016 is cognizable as the content says that her husband locked her in the room from outside and in his room he committed suicide by pouring petrol. It is become necessary to examine that whey they were locked by the husband and when he committed suicide being cognizable offence from that point and when the accused appellant No.1 opened the door and they came out from the room to save her husband saw him in ablaze and in this regard the prosecution has not examined whether the door was locked from outside or inside, whether she could be able to push the door in force and opened the door forcefully and whether there was any possibility of suicide. So the I.O. has not been properly conducted the investigation for assailing the facts.

[69] There are some serious discrepancies in the versions of two children. Nachuar Anum has deposed that *"....at night we came to know that my father's room caught fire. Mother woke up us. I ran fast to my grandfather and brought him* and Moushin Alam has stated that *"....Mother told us to call*

our grandfather. On our call grandfather and other persons came over there and put off the fire. Btu as per PW-1 his daughter in law, the accused No.1 knocked his door and informed him about the deceased. With this contradicted versions, it should not be apposite to come to a definite conclusion. If this version is believed then from the medical evidence it could easily be found some foreign particles from the viscera of the deceased but there was no such substance like that.

[70] As per evidence of the IO who has conducted the inquest at the scene of crime of offence even he has found ligature mark on the neck of the deceased and to say that the deceased was strangled which is supported by the statement of the doctor in his post mortem report and thereafter the body of the deceased was burnt. If this version of strangulation is believed, the rope which was used for the crime was found after a week and that too was not recovered from the place of occurrence. The said rope which has been seized was also not produced before the Court and has not been attached as material object.

[71] There were two sets of complaints first from the accused-appellant No.1 wherein she has categorically stated that her husband has committed suicide by pouring petrol and another is lodged by PW-1, the father of the deceased. But, the I.O. has only dealt with the second complaint lodged by PW-1. So we can say that the first one is just an empty formality. In this regard, this Court is of the view that the I.O. has not investigated the matter the manner in which he suppose to conduct.

[72] This Court after noticing the above stated principle on imposing death sentence the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. Most of the heinous crimes under IPC are punishable by death penalty or life imprisonment that by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition that in such cases awarding of life imprisonment would be a rule, while death would

be the exception. The term rarest of rare case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

[73] The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and therefore, Special reasons in contradistinction to reasons, simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons. Since the later judgments have been added to the principles in Bachan Singh and Machhi Singh, it will be useful to restate the stated principles while also bringing them in consonance, with the recent judgments. 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.

[74] While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death 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.”

[75] Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

[76] Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of rarest of rare cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the rarest of rare cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence.

[77] Having dealt with these contentions at some length in the earlier part of the judgment, we do not consider it necessary to again deliberate on these questions. Suffices it to note that if the accused are guilty of the offences for which they were charged, it is correct that the possibility of their being reformed cannot be ruled out. The Court has to consider various parameters afore-stated and balance the mitigating circumstances against the need for imposition of capital punishment. The

factors to be considered could be different than the mitigating circumstances.

[78] While we cumulatively examine in the death sentence matter, various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidentally and the possibility of the accused reforming themselves, they cannot be termed as social menace. But it cannot be held with certainty that this case falls in the rarest of rare cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

[79] The doctrine of “rarest of rare” confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

[80] In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. The “rarest of rare” dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable.

Therefore, for satisfying the second aspect to the “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.

SENTENCE

[81] In the present case, the prosecution having failed to prove the basic facts as alleged against the accused, the burden could not be shifted on the accused by pressing into service the provisions contained in Section-106 of the Evidence Act. There being no cogent evidence adduced by the prosecution to prove the entire chain of circumstances which may compel the court to arrive at the conclusion that the accused only had committed the alleged crime, the court has no hesitation in holding that the Trial Court had committed gross error of law in convicting the accused-appellants for the alleged crime, merely on the basis of the suspicion, conjectures and surmises.

[82] Eminently or exceptionally within his knowledge, if the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried.

[83] It has been submitted that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in *Gurcharan Singh v. State of Punjab*(1), that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may

succeed in discharging his burden of creating a reasonable belief, that circumstance absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

[84] Learned counsel laid stress on the observation of the Hon'ble Apex Court that apart from the mitigating circumstances noted, there are numerous other circumstances justifying the passing of the lighter sentence; that the mitigating factors in the area of death penalty must receive a liberal and expensive construction by the Court and that judges should not be bloodthirsty. It is not the question of taking of an eye for an eye, rather it is the question of doing justice to the deceased and the convicts as well. Justice does not require us to punish murder by death. It only requires that the gravest crimes receive the severest punishment that our moral principles would allow us to impose.

[85] The five golden principles as stated supra, if we may say so, constitute the panchasheel of the proof of a case based on circumstantial evidence. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in *The King v. Horry*,⁽¹⁾ thus: *"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."*

[86] Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is as the prosecution

discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

[87] On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

[88] The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or varies with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a final of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.

[89] For affecting a discovery, a statement has to be recorded on the part of the accused persons showing their readiness to produce the material object and it is only the part of the statement which is not incriminating and leads to discovery which becomes admissible. The evidence of the witness does not inspire confidence and it is of no use, more particularly, because the so called rope seized by the investigating officer was not produced before the Court. Thus the statement of the investigating officer is a weak piece of evidence to show light upon the prosecution’s case.

[90] The way the prosecution has projected the case and being found serious contradictions and inconsistencies in the statements in course of trial, it

would be very difficult for this Court to believe the projected case of the prosecution. It is settled proposition of law that the charge framed against the accused person has to be established and proved beyond any shadow of doubt. Suspicions, however, grave in nature, should not amount to prove. The discrepancies which are found in this case as analyzed above, appeared to be abnormal in nature which is not expected from a normal person. After cautious scrutiny of the evidence and considering the entire chain of circumstances, we find it difficult to arrive at a finding to draw the hypothesis of guilt against the accused-appellant.

[91] Insofar as the accused-appellant No.2 is concerned, the learned P.P. has contended that he has conspired with accused-appellant No.1 to kill the deceased and accordingly he brought petrol from PW-2. It is not the case of the prosecution that PW-2 has informed the police that the accused-appellant No.2 purchased petrol to kill the deceased or he has purchased petrol to kill someone. Since the FIR and charge of punishment are only under Section-302, it was not a case before the Court to deal with conspiracy against the accused-appellant No.2 and thus, this Court has no hesitation to say that the prosecution has utterly failed to prove the case beyond reasonable doubt against both the accused-appellants. Thus, we are of the view that both the accused-appellants are not guilty and therefore, the finding as returned by the learned Court below giving death sentence is hereby set aside.

[92] Counsel for the appellants urged that in the present case, crucial circumstances are out there and the narration and deposition of the witnesses are inconsistent relating to the recovery of rope, as well as the expert reports on finger print on the rope, lead to grave doubts. It was submitted that in cases based on circumstantial evidence, the five “golden principles” enunciated by this court in *Sharad Birdichand Sarda v. State of Maharashtra* have to be fully established and that the court should be convinced that the accused “must be” guilty and not “may be” guilty. Further, 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. The circumstances should be of a conclusive nature and tendency.

The circumstances should exclude every possible hypothesis except the one to be proved and 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.

[93] The conclusion recorded by this court in **Sarda** is listed in Para 152 which is characterized in Para 153 as “five golden principles” and they are extracted below:

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr v State of Maharashtra* where the following observations were made:

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

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

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

[94] During examination of accused No.2 under Section-313 Cr.P.C. he was asked “it further reveals from the evidence of PW1(Suraj Ali), PW-4(Riaz Ali) and PW-5 (Fayaj Ali) that the witnesses peeping through the another hole of the hut of Ajir Uddin that the said Ajir Uddin was sleeping on the bed and he was in ablaze and Ajir uddin was not having any movement, whereas there was no flame in other part of the dwelling hut. Do you have anything to say in this regard? Ans: Totally false statement stated.” But in the deposition of PW-1 he has stated that he was peeping through the hole and saw the incident. In question No.8, when he was asked about mixing medicine in

the dinner of the husband of accused appellant No.1 and threatened Mousin Alam and Lesure Anjum not to divulge the same he answered that I am not suppose to know". In question of 45 he was asked about the complaint lodged by accused appellant No.1 before the police to which he answered that 'police did not conduct proper investigation'. In question No.46 his answer was 'false investigation report has been filed against me'.

[95] During examination of accused No.1 under Section-313 Cr.P.C. in question No.5 she was asked that Riaz Ali noticed the room of Ajir Uddin was locked from inside but the door of the partition of his dwelling hut was remained open accordingly, PWs-1 and 4 and others entered into the room through the door of the partition to which her answer was *"There is no door in the partition and I don't know whether the door of the room where by husband was lying was locked from inside.* It has been further asked in question No.7 that from the evidence of PWs.1, 4, 5 and 6 that deceased and accused appellant No.1 were living in the said dwelling hut with their four children but, on that day two children namely, Mousin Alam and Lesuar Anjum were inside the dwelling hut and they woke up upon hearing the cry of others and two others remained outside to this his answer was *"Yes, we all stayed in that dwelling hut, but on that night I along with children stayed in the kitchen."* When she was asked to say anything regarding illicit relationship with appellant No.2 she answered that *"after marriage I found Faijal at his younger stage. False stigma about me and him was put into circulation with evil intention."*

[96] It reveals from the record that at the time of marriage between the appellant No.1 and the deceased, the accused-appellant No.2 was aged about 6-7 years of age. Regarding complaint filed by the appellant No.1, it is crystal clear that the investigation has not been properly done by the investigating authority which needs to be considered at the very outset. There was also a whisper about the rope which was recovered from the house of the appellant No.2, but that has also not been produced before the Court or the finger print was also not obtained from this rope. Had it been the deceased

strangled earlier and thereafter burnt by pouring kerosene, finger print must be existed in the rope, but this aspect of the matter has not been dealt with.

[97] This Court in *Sharad Birdhichand Sarda vs. State of Maharashtra* reported in *1984 (4) SCC 116* while drawing the distinction between “must be” and “may be” observed as under:

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

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

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrLJ 1783]* where the observations weremade.

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

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

(3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

[98] The said principles have been restated in catena of decisions. In *State of U.P. vs. Ashok Kumar Srivastava (1992) 2 SCC 86*, it has been observed in para 9 that:

“This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused

must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

[99] This court having found the material relied upon by the prosecution inconsistent and the infirmities in the case of the prosecution, considered number of earlier decisions, and held that the conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to the circumstantial evidence that all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else. Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned Public Prosecutor for the State on Section-106 of the Evidence Act is also misplaced, inasmuch as Section-106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused. This court had aptly explained the scope of Section-106 of the Evidence Act in criminal trial.

[100] In *Shambu Nath Mehra vs. State of Ajmer*, AIR (1956) SC 404, it has been held thus:

“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the

burden lies on an accused person to show that he did not commit the crime for which he is tried.”

[101] In the case on hand, the prosecution having failed to prove the basic facts as alleged against the accused, the burden could not be shifted on the accused by pressing into service the provisions contained in section 106 of the Evidence Act. There being no cogent evidence adduced by the prosecution to prove the entire chain of circumstances which may compel the court to arrive at the conclusion that the accused only had committed the alleged crime, the court has no hesitation in holding that the learned Court below had committed gross error of law in convicting the accused for the alleged crime, merely on the basis of the suspicion, conjectures and surmises.

[102] The accused-appellants neither sought nor was given the opportunity to file any affidavit placing on record relevant mitigating circumstances. The legal assistance availed by the accused-appellants was patently not satisfactory and was not accompanied by a social worker. No attempt was made to place on record mitigating circumstances. In the absence of any arguments, the trial Court did not consider the question of whether the accused-appellants could be reformed.

[103] This Court has time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negative on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is being reasonable capable to two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.

[104] Now, in view of above discussions and observations from various High Courts and the Hon'ble Apex Court, what should be adequate punishment for the above crime? Let us reiterate the laches done by the prosecution in proving the case against the appellants viz.

i. The statements of the PWs, there are several discrepancies and contradiction and also in the statement recorded under Section-164 of Cr. P.C.

ii. The judgments as relied by the Public Prosecutor drawing our attention under Section-106 is not acceptable and the reasons has been given supra.

iii. Convicting the accused for the alleged crime, merely on the basis of the suspicion, conjectures and surmises are not permissible under the law as they have no previous antecedents or they are threat to the society.

iv. The medical evidence has not been appreciated by the Court below especially their version regarding mixing of poison or ligature marks on the neck of the deceased, according to the medical expert opinion, in the post mortem examination there was no such sign of poison in the viscera/stomach of the deceased.

v. It has been stated that the deceased was first strangled and thereafter burnt by way of pouring kerosene, if that being so, then why the rope has not been produced before the Court below or sent for forensic analysis.

vi. Two complaints have been filed in this case one by the father of the deceased and another by the appellant No.1 i.e. the wife of the deceased, but the complaint filed by the appellant No.1, has not been investigated by the police wherein, it has been clearly stated that her husband committed suicide.

vii. Regarding illicit relationship between the appellant No.1 and 2, but it reveals from the record that at the time of marriage of appellant No.1, the appellant No.2 was 6/7 years of age. The second aspect if the family peace is destroyed for this reason, they whey PW-1 on the fateful day allowed the appellant to sleep in his house, that aspect of the matter has also been appreciated by the Court below.

viii. Finally, the prosecution has utterly failed to establish the guilt of the appellants as they chain of circumstance has not been linked properly. Conviction can be imposed upon the circumstantial evidence but, in the present case the chain has not been linked with the alleged crime of the appellants.

ix. Even otherwise the fact remains that the father is dead and if the mother is also sentenced to death or imposed for life imprisonment, the minor children more particularly the girl child, all will become orphans. This fact of the case also cannot be ignored.

[105] In that view of the matter, we are convinced that the judgment of the trial Court is incorrect. The crime of the appellants ‘must be’ proved not ‘may be’. In this case, the prosecution has utterly failed to prove that the accused appellants had committed the murder of the deceased. Consequently, the impugned judgment deserves to be quashed and set aside and is hereby set aside accordingly. The accused-appellants are acquitted from the charges levelled against them and are directed to be set free forthwith.

[106] Send down the LCRs forthwith.

JUDGE

JUDGE

A.Ghash

HIGH COURT OF TRIPURA



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