

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CONFIRMATION CASE NO.7 OF 2013**

(Reference made by S. A. A. R. Auti,
Additional Sessions Judge-4, Solapur)

IN**SESSIONS CASE NO.145 OF 2013**

The State of Maharashtra]
Through the Karmala Police Station]
Tal. Karmala, Dist. Solapur] ...Complainant.

versus

Sunil Vishnu Ombase]
Occ: Painter, Age : 28 years,]
R/o. Jinti, Tal. Karmala,]
Dist. Solapur]
(At present lodged in]
Yerawada Central Prison, Pune)] ...Accused.

.....

Mrs. M.H. Mhatre, A.P.P. for the State.

Mr. P.G. Karande with Mr. Akshay M. Gosavi for the Accused.

WITH**CRIMINAL APPEAL NO.168 OF 2014****WITH****CRIMINAL APPLICATION NO.1318 OF 2014**

Sunil Vishnu Ombase]
Occ: Painter, Age : 28 years,]
R/o. Jinti, Tal. Karmala,]
Dist. Solapur]
(At present lodged in]
Yerawada Central Prison, Pune)] ...Appellant.

versus

The State of Maharashtra]
Through the Karmala Police Station]
Tal. Karmala, Dist. Solapur] ...Respondent.

.....

Mr. P.G. Karande with Mr. Akshay M. Gosavi for the Accused.
Mrs. M.H. Mhatre, A.P.P. for the State.

....

**CORAM : SMT. V.K.TAHILRAMANI &
A.S. GADKARI, JJ.**

**Judgment reserved on : 12th August 2014.
Judgment pronounced on : 27th January 2015**

ORAL JUDGMENT (PER A.S. GADKARI, J.) :

1. Confirmation Case No.7 of 2013 arises out of the reference made by the Learned Additional Sessions Judge - 4, Solapur in Sessions Case No.145 of 2013 for confirmation of the death sentence awarded to the accused Sunil Vishnu Ombase. By its judgment and order dated 16th August 2013 passed in Sessions Case No.145 of 2013, the learned Additional Sessions Judge-4, Solapur convicted the accused for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to capital punishment of death. He is further sentenced to pay a fine of Rs.500/- as per Section 235(2) of the Code of Criminal Procedure. By the same judgment and order, the learned Additional Sessions Judge-4, Solapur is further pleased to convict the accused for the offence punishable under Section 307 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment of ten years and to pay a fine of Rs.500/-, in default of payment of fine, to undergo rigorous imprisonment for six months. As far as charge under Sections 504 and 506 is

concerned, the learned Trial Court was pleased to acquit the accused from the said charges. As the sentence of death penalty is imposed on the accused, the Learned Additional Sessions Judge-4, Solapur made a reference as contemplated under Section 366 of the Code of Criminal Procedure to this Court for confirmation of death sentence. The accused being aggrieved by the very same judgment and order dated 16th August 2013 has preferred Criminal Appeal No.168 of 2014. As both the Confirmation Case and the Appeal against confirmation are directed against the very same judgment and order dated 16th August 2013, both these matters were heard and are decided together. (The Appellant Sunil Vishnu Ombase will be referred to as the accused hereinafter for the sake of brevity).

2. The prosecution case as has been enumerated from the record can briefly be stated as under :

(i) P.W. 4 the victim Sanjivani Sunil Ombase, the wife of the accused lodged a First Information Report when she was in hospital, with the Karmala Police Station, District Solapur on 1st January, 2013. In her First Information Report to the police she has stated that the incident in question occurred on 31st December, 2012 at about 1.00 a.m. in the midnight (i.e. in the intervening night of 31st December, 2012 and 1st January, 2013).

On the said day, her husband had returned from Mumbai at about 8 to 8.30 p.m. with snacks (junk food). He enquired with her as to whether she had cooked the food, on which P.W.4 - Sanjivani Ombase requested him to get fresh and she would prepare the food. P.W.4 - Sanjivani served the food, however, the accused did not dine. The accused removed the photographs hanged on the wall, packed his bags with the photos and clothings and the identity card of his work place. The accused thereafter asked her as to whether she would live with him properly or whether she prefers the accused or the son, to which P.W.4 - Sanjivani responded that she wanted both the husband and the son. She thereafter went to bed (cot) along with her son Swapnil and her sister Pallavi. The accused thereafter asked her to wake up and further asked her to give him water. The accused removed knife from his waist and thrust the knife into the stomach of P.W.4 - Sanjivani. He thereafter gave one more stab blow on her right thigh. P.W.4 - Sanjivani sustained injuries. The son of P.W.4 - Sanjivani and the accused namely Swapnil was about to wake up. At that time the accused inflicted blows of knife into his stomach. He thereafter pierced the knife in the chest of Pallavi, the sister of P.W.4 - Sanjivani when Pallavi was fast asleep. That accused ran away from the spot. She has further stated that P.W.1 - Santosh Ombase and P.W.2 -

Harishchandra Garje came on the spot. They enquired with her about the injuries and removed P.W.4 - Sanjivani, her son and her sister to the Cottage Hospital, Karmala from the vehicle of Lala Denge. They were admitted to the Hospital at about 6.00 a.m. That the Medical Officer declared her son Swapnil and sister Pallavi to be dead. The police recorded her complaint. She has further stated that the police recorded her additional statement on 2nd January, 2013. That she produced her wearing apparels stained with blood before the police and the police seized it under the Panchanama. The said First Information Report was numbered as Crime No.1 of 2013. The said First Information Report was recorded by Police Head Constable Gade.

(ii) P.W.7 - Laxman Mahadeo Borate, the Investigating Officer was attached to Karmala Police Station as Police Inspector since 2011. On 1st January, 2013, he was handed over with the investigation of Crime No.1 of 2013 i.e. the present crime. After taking over the investigation, he first visited to the Cottage Hospital, Karmala and recorded the inquest Panchanama of deceased Swapnil and deceased Pallavi vide Exhibits 11 and 12. He referred the dead bodies for postmortem. He prepared the spot Panchanama which is at Exhibit 11 on 1st January, 2013 and seized the sample of soil and cow dung mixed with blood from

inside and outside the house of the accused. That ASI Attar seized the clothes of the deceased Swapnil and Pallavi by effecting a Panchanama which is at Exhibit 13. On the same day, the Investigating Officer recorded the statement of witnesses, P.W.1 - Santosh Ombase and P.W.2 - Harishchandra Garje. He then directed Police Head Constable Patil to record the supplementary statement of the injured P.W.4 - Sanjivani, the complainant who was then admitted to the Civil Hospital, Solapur. Police Head Constable Patil recorded her statement and seized the saree, odhni and pettycoat with bloodstains by effecting a Panchanama which is at Exhibit 10.

(iii) That on 20th February, 2013, the Investigating Officer (P.W.7) arrested the accused. When the accused was in police custody, on 22nd February, 2013 made a disclosure statement, vide Exhibit 15, in presence of pancha witnesses. He recorded the memorandum as per the version of the accused. The accused informed the Investigating Officer and pancha witnesses that he wanted to produce the knife used in the commission of the offence and the clothes which he was wearing. The accused informed him that he has concealed the said clothes and the weapon in a tin shed near his house. In pursuance of the memorandum statement, the accused led the police personnel

and the pancha witnesses to his house situated at village Jinti and produced the knife and clothes from a niche in a tin shed adjacent to his house. The said articles came to be seized under the Panchanama at Exhibit 16 in presence of pancha witnesses. He then sent the incriminating articles to the Chemical Analyzer by a forwarding letter which is at Exhibit 20 through a carrier Shri N.T. Wakitol (P.W.3). During the course of investigation he collected the postmortem reports of deceased Swapnil and Pallavi and the medical certificate of P.W.4 - Sanjivani which are at Exhibits 24, 25 and 27 respectively. He also issued a letter to the Tahsildar to draw a map of the scene of occurrence. The said map is at Exhibit 30.

(iv) During the course of investigation, the Investigating Officer collected all the necessary documents from the respective agencies and also recorded the statements of other witnesses and after completion of the investigation submitted charge-sheet against the accused in the Court of Judicial Magistrate, First Class, Karmala, District Solapur.

(v) The learned Judicial Magistrate, First Class, Karmala, Solapur committed the case to the Court of Sessions at Solapur as the offences under Sections 302 and 307 of the Indian Penal Code were exclusively triable by the Court of Sessions. After

committal of the present case to the Court of Sessions, the Learned Trial Court framed charge below Exhibit 2 under Sections 302, 307, 504 and 506 of the Indian Penal Code. The said charge was read over and explained to the accused in vernacular Marathi language, to which he denied and claimed to be tried. The defence of the accused as can be discerned from his 313 statement is of grave and sudden provocation following the utterances of words about his impotency and sexual incapacity by his wife (P.W.4) and on the spur of the moment he dealt with blows of knife to his wife, son and sister-in-law. The learned Trial Court after recording the evidence of the witnesses and after hearing the parties to the said trial i.e. the learned APP and the learned advocate appearing for the Accused, has passed the judgment and order dated 16th August, 2013 which is impugned by the accused in the present Appeal No.168 of 2014. As the sentence of death penalty has been imposed on the accused by the learned Trial Court, the Trial Court has made a reference under Section 366 of the Code of Criminal Procedure for the confirmation of the death sentence as stated herein above.

3. Heard Mr. P.G. Karande with Mr. Akshay M. Gosavi, the learned counsel for the Appellant and Smt. M.H. Mhatre, the learned APP appearing for the State. With the able assistance of

Mr. P.G. Karande and Smt. M.H. Mhatre, we have also perused the entire record minutely.

4. Before we proceed to scrutinize the evidence on record coupled with the submissions made by the respective counsel, we would like to mention the broad submissions of Mr. P.G. Karande, learned counsel for the accused. Mr. Karande submitted before us that the testimony of P.W.4 - Sanjivani is not trustworthy. He further submitted that in view of the ratio laid down by the Hon'ble Supreme Court in the case of **Sunil Kumar v. State Govt. of NCT of Delhi** reported in AIR 2004 SC 552, wherein the Hon'ble Supreme Court in paragraph 8 has relied upon the judgment in the case of Vadivelu Thevar. v. State of Madras reported in 1957 SC 614 and has classified the oral testimony of a witness in three categories. He submitted that in view of the said judgment reported in the case of **Sunil Kumar** (supra) the testimony of P.W.4 - Sanjivani falls in the third category viz. 'Neither wholly reliable Nor wholly unreliable'. He further submitted that the prosecution has failed to prove its case beyond reasonable doubt and the prosecution case is neither established nor proved. He submitted that in the present case there was no premeditation on the part of the accused to commit the crime and the offence has occurred due to grave and

sudden provocation given by P.W.4 – Sanjivani thereby castigating the accused on his sexual incapacity. He, therefore, submitted that the present case at the most would fall within the purview of Section 304(1) and certainly would not attract Section 302 of the IPC. He further submitted that this is a case of culpable homicide not amounting to murder, as the present case falls within the purview of the exception to Section 300(1) of the IPC.

He submitted that as the prosecution has failed to produce the muddemal articles at the time of trial, such as the prosecution witnesses including P.W.4 – Sanjivani were not shown the knife which is the weapon in the present crime, the prosecution has failed to inspire confidence in the mind of the Court. As far as conviction of the accused is concerned, he submitted that it is contrary to the well established principles of law laid down by the Supreme Court and the High Court. He lastly contended that the impugned judgment is not well reasoned and not well considered and therefore, deserves to be set aside. He finally urged before this Court that taking into consideration the extremely weak nature of evidence adduced by the prosecution, the accused deserves for an acquittal and in the alternative, the conviction of the accused be converted from Section 302 of the IPC to Section 304(1) of the IPC.

5. Per contra, the learned APP Smt. Mhatre supported the impugned judgment and order and submitted that the learned Trial Court has rightly appreciated the evidence on record and has correctly convicted the accused. She further submitted that in the present case the accused has murdered two innocent children and has also attempted to commit murder of P.W.4 - Sanjivani. She submitted that the two deceased children did not give any provocation to the accused and they were helpless innocent victims. She, therefore, urged before the Court that taking into consideration the entire evidence on record, there is no need to interfere with the impugned judgment and order and the conviction and sentence awarded by the learned Trial Court be upheld.

6. With a view to effectively deal with the submissions advanced before us by Shri P.G. Karande, the learned counsel appearing for the accused and Smt. Mhatre, the learned Additional PP for the State, it would be useful to refer to the evidence in detail, of the prosecution witnesses.

7. P.W.1 - Santosh Murlidhar Ombase in his testimony has stated that the complainant Sanjivani is his niece. She is his next door neighbour. Her house is located to backward of his house.

That P.W.2 - Harishchandra Garje is also his neighbour. He knows the accused. The accused had a son viz. Swapnil. He knew the deceased Pallavi, the sister of the complainant Sanjivani. He has further stated that the accused is a building painter. He was working at Mumbai. His wife the complainant Sanjivani (P.W.4) had been living in village Jinti along with her deceased son Swapnil and deceased sister Pallavi. The accused intermittently used to visit to his village Jinti and used to pick up a quarrel on her chastity. He has further stated that on one occasion the accused quarreled with his wife suspecting her fidelity. That he himself, his parents and the parents of the complainant Sanjivani had pacified the said quarrel.

That the incident occurred on 31st December, 2012 at about 1.00 a.m in the midnight (1st December, 2012). On that day he was at his home. He heard commotion. His neighbour P.W.2 - Harishchandra Garje came to his house and called him. He and Harishchandra Garje went to the house of the accused. At the relevant time the complainant Sanjivani came out of the house. She has sustained stab injuries on her stomach and right thigh. Blood was oozing from the injuries. He enquired with the complainant Sanjivani about the injuries. She disclosed that the accused inflicted knife blows on her stomach and right thigh on the ground of quarrel of suspension of her

character. She further disclosed that the accused had inflicted the blows of knife to his son Swapnil and Pallavi, the sister of the complainant. He saw both the injured children inside the house of the complainant. That P.W.1 - Santosh Ombase and his parents removed the complainant Sanjivani and her son Swapnil to the Cottage Hospital, Karmala from the vehicle of Lala Denge. On the way Swapnil passed away. Pallavi died on the spot at home itself. They reached the hospital at about 6.00 a.m. and admitted P.W.4 - Sanjivani in the said hospital. The police and Tahsildar came and recorded the statement of P.W.4 - Sanjivani.

That on 22nd February, 2013, the police called him to act as a pancha witness. He went to the police station at about 10.00 a.m. The accused was present in the police station. The accused made disclosure statement that he had hidden the clothes stained with blood which were on his person at the time of commission of the offence and the knife in front of his house in a niche of fodder shed. The police recorded the memorandum statement of the accused as per his narration. He admitted the contents of the said memorandum as true and correct which is at Exhibit 15. That P.W.1 - Santosh Ombase, another pancha witness, police personnel and accused went to the house of the accused in police jail. The accused took them to his home. The accused produced his pant, shirt and knife smeared with

bloodstains from the niche of the fodder shed. The police seized these articles under the Panchanama in his presence. He identified the signature on the said Panchanama and stated the contents therein to be true and correct. The said Panchanama is at Exhibit 16.

8. This witness was cross examined by the learned counsel appearing for the accused. In the cross examination, this witness has denied the suggestion that he has deposed falsely that on the date of occurrence at night his neighbour Harishchandra Garje came to call him after hearing commotion from the house of the accused. He further denied the suggestion that he deposed falsely that he had seen the complainant Sanjivani received stab injuries on the stomach and right thigh and he disclosed that the accused assaulted her son Swapnil and sister Pallavi. This witness has denied other suggestions put to him and has stuck to his version given in the examination in chief.

9. P.W.2 - Harishchandra Shivaji Garje who is the neighbour of the accused and P.W.4 - Sanjivani, in his testimony has stated that he knew accused Sunil and his wife Sanjivani (P.W.4), the complainant herein. They are his neighbours. The complainant Sanjivani had a son by name Swapnil. Her sister was also living with the complainant. The accused was working as a building

painter in Mumbai. His wife, son and the sister of the complainant used to live in village Jinti. The accused used to intermittently come to his native place. The accused used to had a quarrel with his wife.

That the incident occurred on 31st December, 2012. On that day, P.W. 2 - Harishchandra Garje was at his home. In the midnight he heard commotion from the house of the accused. He came out of the house and saw the light was on. He saw the stab injuries on the right thigh and stomach of the complainant Sanjivani. He gave a call to P.W.1 - Santosh. He enquired with P.W.4 - Sanjivani about the injuries. P.W.4 - Sanjivani told that the accused assaulted her, her son Swapnil and sister Pallavi. He has further stated that at that relevant time Sanjivani sat in front of her house. Her son and sister were inside the house. That her son had sustained injuries on his stomach. The small girl had injury on her body. All injured were removed to the Cottage Hospital, Karmala in an Omni car of Lala Popat Denge. That P.W. 1- Santosh and his parents accompanied the injured to the hospital.

That the police called him to act a pancha on 1st January, 2013. The police seized the soil mixed with cow dung from inside and outside of the house of the accused in his presence and another pancha witness. The police prepared

Panchanama as per the fact situation. This witness identified his signature and the signature of another pancha witness and police personnel on the said Panchanama. He also admitted the contents of the said Panchanama. The Panchanama is at Exhibit 18.

P.W.2 - Harishchandra Garje was cross examined at length by the advocate for the accused. The cross examination of this witness proceeds by putting to him the general suggestions and no material which would be helpful to the accused has been extracted from the cross examination. In short, the testimony of this witness in examination-in-chief has not been disturbed at all which would lead to create a doubt in the mind of this Court about the truthfulness of his evidence.

10. P.W.3 is Police Constable Nagnath Tipanna Wakitol. This witness in his testimony has stated that he was attached to the Karmala Police Station since last five years as Police Constable. That on 28th February, 2013, he received muddemal articles in C.R. No.1 of 2013 in sealed and packed condition with a forwarding letter addressed to the Chemical Analyzer, Pune. On the same day, he submitted muddemal articles to Chemical Analyzer's Office, Pune and received the acknowledgement in that behalf. He identified the office copy of the said letter and

the signatures of Police Inspector Borate and concerned official from the office of the Chemical Analyzer, Pune. He also admitted the contents thereof as true and correct. The said letter is at Exhibit 20.

11. In the cross examination this witness has denied the suggestion that he was deposing falsely to say that he received the muddemal articles in sealed and packed condition and submitted to the Chemical Analyzer as it is. He further denied the suggestion that he did not receive acknowledgement from the Chemical Analyzer accordingly.

12. P.W.4 – Sanjivani Sunil Ombase is the injured eyewitness in the present case. P.W.4 – Sanjivani is the wife of the accused Sunil. It is important to note here that P.W.4 – Sanjivani is also a victim in the present case and has survived the assault of accused Sunil.

P.W.4 – Sanjivani in her testimony has stated that accused Sunil is her husband. She married to him before four years. She had a son Swapnil, who was 3 years old. Pallavi was her sister who was 12 years old. The deceased Pallavi was residing with her. That her husband, accused was a building painter working at Mumbai. P.W.4 Sanjivani, her son Swapnil and

deceased sister Pallavi were living at Village Jinti, Taluka Karmala. Her husband used to come over to her native place twice a month. That on the day of occurrence, the grandmother of the accused had gone to the field house (farmhouse).

That her husband used to suspect her fidelity and threaten her with dire consequences. She knew P.W.1 - Santosh Ombase and P.W.2 - Harishchandra Garje who are her neighbours. The incident occurred on 31st December, 2012 at about 1.00 a.m. in the midnight (i.e . 1.00 a.m. of 1st January, 2013). On the said day, her husband had returned from Mumbai at about 8 to 8.30 p.m. with Vada Pav (junk food). He enquired with her as to whether she had cooked food. She requested him to get fresh and she would prepare the food. She served the food. However, the accused did not dine. That the accused removed the photographs which were hanged on the wall and packed his bag with the photos, his clothings, mobile and identity card of his work place. The accused asked her as to whether she would live with him properly or either she should prefer to himself (accused) or the son. She responded that she wanted both, the husband and the son. She went to sleep on the cot along with her son Swapnil and sister Pallavi. The accused asked her to wake up and later on asked for water. The accused removed knife from his waist. He held the knife in his hand. She

enquired with him as to why he brought the knife to which the accused replied that he wanted to kill her. She tried to give understanding to him that she did not commit any mistake. At the same moment, the accused thrust knife into her stomach. He removed the knife from her stomach and stabbed in her right thigh. She sustained bleeding injuries. Her son was about to wake up. At the same time, the accused inflicted blows of knife into his stomach. The inner organs viz. intestine of the son came out. Thereafter the accused pierced the knife in the chest of her sister Pallavi. At the relevant time, her sister Pallavi was asleep. Her husband ran away from the spot. She came out of the house. The accused left the knife and ran away.

That P.W.1 - Santosh Ombase and P.W.2 Harishchandra Garje came on the spot. They enquired with her about the injuries on her person, son and sister and the assailant. She herself and her son were removed to the Cottage Hospital, Karmala in the vehicle of Lala Denge. There were admitted to the hospital at about 6.00 a.m. The Medical Officer declared her son Swapnil and sister Pallavi to be dead. The police recorded her complaint. She identified the complaint which bears her signature. She also stated that the contents of the said complaint are true and correct. The said complaint (First Information Report) is at Exhibit 22. That later on she was

referred to Civil Hospital, Solapur for further treatment. The police recorded her supplementary statement on 2nd January, 2013. She produced her wearing apparels (clothes) stained with blood before the police and the police seized it under the Panchanama.

P.W.4 – Sanjivani was cross examined at length by the advocate for the accused. In her cross examination, she has admitted that she has passed out IXth standard. Her husband had passed out matriculation. She has further admitted that her parents married off the accused in view of his earning capacity. She has denied the suggestion that the accused used to nicely behave with her since the marriage till the allege occurrence. She has denied the suggestion that the said accused could not come over to native place frequently following his work in Mumbai. She has admitted that the accused used to intermittently visit to her native place twice in a month. That the accused did not talk with her smoothly despite his good conversation with his other family members. She has further admitted that she did not disclose to anybody else about the skeptic nature of her husband, either to her family or relatives of the accused. She has also admitted that there are three rooms in her house. That there are houses adjacent to the house of the accused. She has further admitted that a road passes in front of

her house. She has further admitted that on the date of alleged occurrence, the villagers used to explode the fireworks. She has denied the suggestion put by the accused that, her husband went out of the house after giving the junk food to her and her son, to celebrate 31st December and his friends administered him liquor.

P.W.4 - Sanjivaji has categorically denied the suggestion put to her by the accused that, at the time of last visit of the accused from Mumbai, from the alleged occurrence, she told him that he was impotent and could not satisfy her sexual desire. She has further denied the suggestion that, on 31st December, 2012 she reiterated similar words to the accused. She has further denied that, after hearing those words, the accused got provoked and lost his temper. She has further categorically denied that, the accused lost control and inflicted blows of knife in her stomach and later on to her son Swapnil and sister Pallavi. She has also denied the suggestion that the accused had no intention to assault or kill her son and sister.

This witness has further admitted that she narrated in her complaint (Exhibit 22) that the accused had come to home at about 8.30 to 9.00 p.m. She has admitted that she did not state in her complaint about the number of persons gathered on the spot after the occurrence. She has lastly denied

the suggestion by stating that "It is not true to say that the accused did not have intention to assault me or to kill my son and sister, following my unwarranted comments." (underline emphasised). The cross examination of this witness ended with the aforesaid alleged denial.

13. At this stage, it is necessary to record the submissions made by learned counsel appearing for the accused with respect to the recording of the evidence by the learned Trial Court. Learned counsel appearing for the accused has tendered in this Court a chart showing the incorrect translation made by the learned Trial Court while recording the evidence of various witnesses including P.W.4 - Sanjivani. After perusing the said chart, we are of the opinion that other mistakes which have crept in while recording the evidence of other witnesses are insignificant and inconsequential. However, we must observe and record here that as far as the translation of the last sentence in the cross examination of P.W.4 - Sanjivani which was originally recorded in Marathi vernacular language is concerned, it has been absolutely wrongly translated by the learned Trial Court which gives a concrete impression about the intention of the accused in commission of the present crime. In the cross examination of P.W.4 - Sanjivani in the last sentence has given an

admission detrimental to the prosecution case, which goes to the root of the matter and which according to us dilutes the case of the prosecution with respect to the “intention” of the accused. The said admission given by P.W.4 – Sanjivani in Marathi vernacular language has been reproduced hereinbelow for preciseness in the matter :

"आरोपीला मी टोचून बोलल्याने आरोपीने मला, माझ्या मुलाला व बहिणीला मारले. आम्हाला मारण्याचा त्याचा हेतू नव्हता."

As stated herein above, while narrating the cross examination of P.W.4 – Sanjivani, we have already underlined the word “not” herein above. As per the translation made by the learned Trial Court with respect to the aforesaid two Marathi vernacular sentences, the learned Trial Court has translated the same as under :

“It is not true to say that, the accused did not have intention to assault me or to kill my son and sister, following my unwarranted comments.”

14. Thus, it is clear from the above that the word “not” has not been mentioned by P.W.4 – Sanjivani in her cross examination. According to us, the correct translation of the version of P.W.4 –

Sanjivani in her cross examination, would be

“As I provoked the accused, he assaulted me, my son and my sister. He had no intention to kill us.”

The learned counsel appearing for the accused after criticising the aforesaid incorrect translation made by the learned Trial Court, mainly on the basis of which the accused has been convicted under Section 302 and has been sentenced to capital punishment, further criticized the casual approach of the Trial Court and submitted that when the State invokes Article 21 of the Constitution of India thereby depriving a person of his life, procedure adopted by law should be very meticulous. He submitted that as P.W.4 – Sanjivani has given a clear admission to the effect that the accused did not have any intention to kill them, his case would fall within the purview of exception (1) of Section 300 of the IPC and the accused is entitled for firstly the benefit of doubt and if not, in the alternative the conviction of the accused under Section 302 may be altered into one under Section 304(1) of the IPC.

15. P.W.5 is Dr. Saroj Dattatray Khot, the Medical Officer then attached to Municipal Dispensary, Taluka Karmala, District Solapur. P.W.5 – Dr. Saroj in her testimony has stated that on 1st January, 2013 Police Constable Gade of Karmala Police Station

brought the dead body of Swapnil Ombase to the hospital. She commenced the postmortem at about 12.30 p.m. and ended the same at about 1.30 p.m. on the same day. The child was of three years. She saw blood marks on the skin of the deceased child.

On external examination of the dead body of Master Swapnil, she found the injuries as have been noted in Clause 17 of the Postmortem Report. The said injury was :

CLW size 4 c.m. x 3 c.m. x 2 c.m. on left side of abdomen.

Some part of intestine comes out with lacerated injury with bleeding ++.

She opined that the said injury was ante mortem. She mentioned the corresponding internal injury in column No.21 of the Postmortem Notes as :

'Whole large intestine and small intestine lacerated with hemorrhage'.

P.W.5 - Dr. Saroj has further stated in her testimony that she had taken out the blood sample of deceased child. She opined that the probable cause of death was by shock and hemorrhage due to whole intestinal injury. She identified the Postmortem Report shown to her which is in her handwriting. She also proved the contents thereof. The Postmortem Report is at Exhibit 24. It is to be noted here that the Postmortem Report of Master Swapnil has been admitted by the defence, as has

been stated in the said deposition at paragraph No.5. P.W.5 – Dr. Saroj has further stated that the injuries mentioned in column Nos.17 and 21 of Postmortem Notes which are at Exhibit 24 are corresponding to each other. The injury noted in column No.17 of Postmortem Report is sufficient in ordinary course of nature to cause the death of child Swapnil. She has further categorically deposed that the injury was possible by a sharp weapon like knife.

16. P.W.5 – Dr. Saroj in her testimony has further stated that the dead body of Pallavi Bhagwant Khade, aged about 11 years, female, was brought by Police Constable Gade of Karmala Police Station for performing the postmortem on 1st January, 2013. P.W.5 – Dr. Saroj has stated that she started the autopsy of dead body at about 11.30 a.m. and completed the same at about 12.30 noon. She found blood marks on the skin of the deceased. On external examination of the dead body of Pallavi, she found the injuries which are mentioned in paragraph No.17 of the Postmortem Report, which are as under :

“Stab injury size 4” x 1” x up to chest cavity, clean cut margin on right axillary region obliquely with bleeding ++. Shape of injury is elliptical injury.”

17. P.W.5 - Dr. Saroj had opined that the age of injury was within 24 hours. That the injury mentioned in column No.17 of the Postmortem Report was ante mortem injury.

P.W.5 - Dr. Saroj has further deposed that on internal examination of body of deceased Pallavi, she noticed the injury which has been mentioned in column No.20 of the Postmortem Report as under :

“Right lungs having punctured wound (wound) 3 c.m. x 1 c.m. x 2 c.m. on right middle part of lung with lacerating of membrane with bleeding ++. Punctured wound of heart at right lateral side size about 2 c.m. x 1 c.m. x 1 c.m. with paler.”

P.W.5 - Dr. Saroj has stated that she took out blood samples of deceased Pallavi. She opined that the probable cause of death was by shock and hemorrhage due to stab wound of lung and heart. P.W.5 - Dr. Saroj has identified and proved the Postmortem Report / Note which was in her handwriting. The said Postmortem Report is at Exhibit 25.

P.W.5 - Dr. Saroj has further opined that the injuries noted in column Nos.17 and 20 are corresponding to each other. She has further deposed that the injury mentioned in column No.17 of the Postmortem Report is sufficient in ordinary course of nature to cause death. She has further

categorically stated that the injuries are possible by sharp weapon like knife.

P.W.5 - Dr. Saroj was cross examined by the accused. P.W.5 has denied the suggestion that, on the spur of moment, if a man loses his control, may cause such type of injuries.

18. P.W.6 is Dr. Prashant Parshuram Karanjkar. He was then working as Medical Officer to the Sub-District Hospital, Karmala, Taluka Karmala, District Solapur. P.W.6 - Dr. Prashant Karanjkar in his testimony has stated that he had been officiated as Medical Officer in Sub-District Hospital, Karmala since 2005 till the date of his deposition in Court. That on 1st January, 2013 he was on duty. The patient by name Sanjivani Sunil Ombase, aged 21 years, was brought by her relatives at about 6.00 a.m. to the hospital. He had clinically examined the patient and found the following injuries on her person :

“(i) CLW size 8 x 3 c.m. over the centre of anterior abdominal wall just below xiphisternum.

(ii) CLW 4 x 2 x bone deep, over lateral aspect of right thigh.”

P.W.6 - Dr. Prashat Karanjkar opined that the age of injury was less than 24 hours. He has further opined that the

injuries may be possible by sharp and incised object. He has further stated that the patient gave the history of assault at about 1.00 a.m. on 1st January, 2013. That he issued the medical certificate which is at Exhibit 27. (The defence has admitted the said medical certificate.) P.W.6 - Dr. Prashant Karanjkar has identified the contents and the signature on the said medical certificate and has proved the same. P.W.6 - Dr. Prashant Karanjkar has further stated that patient Sanjivani was thereafter referred to Civil Hospital, Solapur for further treatment.

In the cross-examination this witness has denied the suggestion that on spur of moment, if a man loses his control, may cause such type of injuries.

19. P.W.7 is Laxman Mahadeo Borate, Police Inspector then attached to Karmala Police Station. P.W.7 - Police Inspector Borate in his testimony has stated that on 1st January, 2013 Police Head Constable Bokad handed over the investigation of Crime No.1 of 2013 to him along with First Information Report recorded by Police Head Constable Gade.

He has further stated that he firstly visited the Cottage Hospital, Karmala and recorded the inquest Panchanamas of deceased Swapnil and deceased Pallavi which are at Exhibits 11 and 12 respectively. He referred the dead

bodies for postmortem. On 1st January, 2013 itself he prepared the spot panchanama which is at Exhibit 18 and seized sample of soil and cow dung mixed with blood from inside and outside of the house of the accused. He has proved the said spot panchanama which is at Exhibit 18. He has further stated that the then PSO, ASI Attar seized the wearing apparels of deceased Swapnil and Pallavi vide panchanama below Exhibit 13. That on the same day he recorded the statements of witnesses including Santosh Ombase and Harishchandra Garje. P.W.7 - Police Inspector Borate has further deposed that he directed Police Head Constable Patil to record the supplementary statement of injured Sanjivani, the complainant who was then admitted in Civil Hospital at Solapur. That Police Head Constable Patil recorded her statement and seized saree, odhani and petticoat which were having bloodstains by effecting a panchanama which is at Exhibit 10.

He has deposed that on 20th February, 2013 he arrested the accused. That on 22nd February, 2013 when the accused was in police custody, the accused made a disclosure statement which is at Exhibit 15, in presence of pancha witnesses and P.W.7 - Police Inspector Borate. He recorded the memorandum statement as per the version of the accused. In the memorandum statement the accused expressed his desire

and disclosed that he wanted to produce the knife used for commission of offence and his clothes concealed in a tin shed, near his house. That the accused thereafter led the police personnel and pancha witnesses in a jeep to his house situated at village Jinti. The accused produced the knife and clothes from a niche in the tin shed located near his house. That P.W. 7 - Police Inspector Borate seized these articles under a panchanama which is at Exhibit 16 in presence of pancha witnesses. P.W. 7 - Police Inspector Borate has proved the said panchanama which is at Exhibit 16. That P.W.7 - Police Inspector Borate referred the incriminating articles to Chemical Analyzer, Pune vide letter dated 28th February, 2013 through a carrier, i.e. Police Constable Nagnath Wakitol. The said forwarding letter is at Exhibit 20. P.W.7 - Police Inspector Borate has proved the said Exhibit 20.

P.W.7 - Police Inspector Borate has stated that he collected Postmortem Reports which are at Exhibits 24 and 25 of deceased Swapnil and Pallavi respectively and also the medical certificate of P.W.4 - Sanjivani which is at Exhibit 27. P.W.7 - Police Inspector Borate issued a letter to Tahsildar to draw a map of the scene of occurrence. The said letter is at Exhibit 29. The map drawn by the office of the Tahsildar is at Exhibit 30. P.W.7 - Police Inspector Borate has further stated that during the course

of investigation, it was revealed to him that, the accused committed murder of his son Swapnil, aged 3 years and his sister-in-law Pallavi, aged 11 years and attempted to commit murder of his wife Sanjivani by means of a knife on the suspicion of her fidelity. He has further stated that he issued a letter to the Chemical Analyzer, Pune to remit the muddemal articles. That on the day of recording of his evidence i.e. on 2nd August, 2013 he has stated that, the muddemal articles are still not received.

It is to be noted here that though the muddemal articles were not produced before the Court on the date of examination of P.W.7, Police Inspector Borate, the defence i.e. the accused had filed a pursis below Exhibit 31 thereby stating that, the defence is not disputing the muddemal property. The said Exhibit 31 is at page No.75 of the paper book.

20. P.W.7 – Police Inspector Borate has been cross-examined at length by the accused. In his cross-examination he has stated that, it is not mandatory to make entry in the station diary while proceeding to the place of offence. He has admitted that the spot of incident is about 30 km away from Police Station, Karmala. He has further admitted that there are number of houses surrounded by the house of the accused with road in front

thereof. He has denied the suggestion that there is variance in the signature of complainant Sanjivani on her complaint and the statement. He has further denied that the complainant narrated the time of alleged occurrence of offence at about 8.00 to 8.30 p.m. He has stated that the complainant disclosed before Police Head Constable Patil that the incident occurred at about 1.00 a.m. on 1st January, 2013. P.W.7 - Police Inspector Borate has denied the suggestion that, it was transpired from the investigation that the complainant Sanjivani uttered the words of sexual incapacity of her husband accused. P.W. 7 has further denied that he had prepared all panchanamas in the police station. He has further denied that he did not record the statements of witnesses as per their narration. He has further denied that the accused did not produce the knife. He has further denied that the accused killed his son Swapnil and sister-in-law Pallavi and caused injuries to his wife Sanjivani as the latter i.e. Sanjivani instigated him by saying that he had no sexual capacity to satisfy her desire and that he lost his control due to sudden and grave provocation. Lastly, he denied the suggestion that he submitted a false charge-sheet against the accused.

21. Thus, it is clear from the evidence of P.W.5 - Dr. Saroj Khot

that the death of Master Swapnil and Pallavi is a homicidal death. The evidence of P.W. 5 in unequivocal terms establishes that the death of Master Swapnil, aged about 3 years and Pallavi, aged about 11 years, is a homicidal death caused by means of a sharp edge weapon like knife. The evidence of P.W. 6 - Dr. Prashant Karanjkar further establishes that the injuries caused to P.W.4, victim Sanjivani were grievous in nature and the injury No.(i) was caused on the vital part of the body. It is further established by P.W.6 - Dr. Prashat Karanjkar that the said injuries which were caused to P.W.4 - Sanjivani were possible by a sharp and incised object. Thus, it is clear that Master Swapnil Sunil Ombase and Pallavi Bhagwant Khade have died because of homicidal death which attracts Section 302 of the I.P.C. and P.W. 4 - Sanjivani has received grievous injuries on vital organ which attracts Section 307 of the I.P.C.

22. The learned counsel appearing for the accused submitted that the prosecution did not produce the weapon used by the accused in the present crime and therefore, P.W. 1 - Santosh Ombase had no occasion to identify the same. He further submitted that P.W.4 - Sanjivani i.e. the wife of the accused and victim in the present case, in her testimony has stated that after the assault her husband ran away from the spot. She came out

of the house. The accused left the knife and ran away. He, therefore, contended that the knife which was used in the present crime by the accused though was lying on the spot, the investigating agency did not seize it while effecting the spot Panchanama immediately after the incident on 1st January, 2013. He further contended that the prosecution has also failed to seize the bed-sheet on which the two victim children were sleeping. He urged before us that as the spot Panchanama which is at Exhibit 18 is silent about the said seizure of the bed-sheet which according to him is a vital circumstance, creates a doubt about the prosecution case in the mind of the Court. The impugned judgment in the present case was passed on 16th August 2013 and as per the record the Chemical Analyser's report was received in the registry of the Trial Court on 20th September, 2013 and therefore, the witnesses did not have any opportunity to see the articles which were seized by the investigating agency in the present case. In response to the said contention, the learned APP submitted that as per the record, the learned Trial Court sent a letter to the Investigating Officer on 26th July, 2013 for production of the articles which includes the knife in question, which were sent to the Chemical Analyser. She submitted that on 29th July, 2013 the Investigating Officer went to the Chemical Analyser, Pune and the Chemical Analyser called

him after fifteen days. The Investigating Officer, therefore, submitted a letter dated 1st August, 2013 to the Sessions Court that the muddemal property i.e. the articles which were sent to the Chemical Analyser for examination would be produced after fifteen days. She urged before us that vide Exhibit 31 the accused submitted a pursis before the Trial Court thereby stating that, the defence is not disputing the muddemal property. The said pursis is dated 1st August, 2013. She further submitted that as the defence did not dispute about the identity of the muddemal property, the entire evidence of P.W.4 - Sanjivani and other witnesses is silent about the identification of the articles. She pointed out to us the Roznama dated 2nd August, 2013 wherein it has been specifically mentioned about the pursis at Exhibit 31 by the defence stating that, it is not disputing the identity of the articles. We may note here that though the weapon used in the present crime i.e. the knife is not shown to either P.W.4 - Sanjivani or any other witness in the present case, the said lacuna is not fatal to the prosecution case. The description of the said knife which was sent to the Chemical Analyser for analysis finds place at Sr. No.11 in the list of articles which is at page No.43 of the paperbook, which was sent to the Chemical Analyser on 28th February, 2013. The said list of articles has been proved by P.W.3 - Police Constable N.T. Wakitol,

carrier of the articles to the Chemical Analyser.

23. Mr. Karande, learned counsel appearing for the accused further contended that the non-production of the knife and other muddemal property is fatal to the prosecution. He submitted that P.W.4 - Sanjivani - the injured eyewitness in her testimony has categorically stated that the accused left the knife and ran away. In view of the same, he contended that the meaning of the said sentence that the accused left the knife on the spot and ran away. He submitted that the spot Panchanama which was effected immediately after commission of the offence on 1st January, 2013 is absolutely silent about the said aspect. To say that the presence of knife is not mentioned in the said spot Panchanama. He further contended that the discovery of knife at the instance of the accused after effecting the discovery Panchanama at Exhibit 16 on 22nd February, 2013 in pursuance of the memorandum statement of the accused and the discovery of knife therefore creates a doubt and the said discovery cannot be believed at all. He submitted that therefore the evidence of P.W.1 - Santosh Ombase, the pancha witness to the said discovery Panchanama which is at Exhibit 16 is not trustworthy. In support of his contention, he relied upon a decision of the Supreme Court in the **case of Sunil Kumar v. State Govt of NCT, Delhi**

reported in **2004 AIR (SC) 552**. He placed reliance on paragraph Nos.8 and 9 of the said decision. Paragraph Nos.8 and 9 of the said decision read as under :

8. In *Vadivelu Thevar vs. The State of Madras* (AIR 1957 SC 614) this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly neither wholly reliable nor wholly unreliable. In the case of first two categories this Court said that they pose little difficulty but in the case of third category of witness corroboration would be required. The relevant portion is quoted as under:

"...Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking oral testimony in this context may be classified into three categories, namely:

- 1) Wholly reliable.
- 2) Wholly unreliable.
- 3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or

circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses..."

9. Vadivelu Thevar's case (supra) was referred to with approval in the case of Jagdish Prasad and others vs. State of M.P. (AIR 1994 SC 1251). This Court held that as a general rule to court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). But, if there are doubts about the testimony the courts will insist for corroboration. It is for the Court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

24. In the aforesaid decision the Supreme Court has after relying upon the decision in the case of **Vadivelu Thevar v. The State of Madras** reported in **AIR 1957 SC 614** has classified the oral testimony of a witness into three categories as stated above. Mr. Karande, therefore, submitted that the testimony of

P.W.1 - Santosh Ombase falls in category as "wholly unreliable". He further contended that the testimony of P.W.4 - Sanjivani i.e. the injured eyewitness falls in category No.3 i.e. "Neither wholly reliable Nor wholly unreliable". He contended that P.W.4 - Sanjivani has not given a detailed account of the events which occurred on the particular fateful night. He contended that P.W.4 - Sanjivani is not narrating the true facts of the incident and therefore, the evidence of P.W.4 - Sanjivani can safely be said to be neither wholly reliable nor wholly unreliable. He submitted that therefore, benefit of doubt has to be given to the accused for the same. We may note here that a close scrutiny of the entire evidence of P.W.4 - Sanjivani who is an injured eyewitness and the wife of the accused demonstrates that her evidence is cogent, convincing, trustworthy and wholly reliable. Her evidence can safely be relied upon because of the fact that she is not only the injured eyewitness in the present case, but is also the wife of the accused and the mother of deceased Swapnil. She has no reason to give false evidence against the accused or to implicate him in such a serious offence. At the first instance, we may observe that she has not only lost her son in the assault by the accused, but has also lost her younger sister. She has also been severely assaulted by the accused which attracts Section 307 of the Indian Penal Code. We, therefore, hold that

there is no substance in the argument of the learned counsel for the accused that the testimony of P.W.4 - Sanjivani read with the testimony of P.W.1 - Santosh Ombase cannot be relied upon. We are of the confirm opinion that the testimony of P.W.4 - Sanjivani is undoubtedly trustworthy and reliable. Mr. Karande thereafter by relying on the decision of the Supreme Court in the case of **Sujit Biswas v. State of Assam** reported in **(2013) 12 SCC 406** submitted that the prosecution has failed to establish the case on the basis of the criteria (proved beyond reasonable doubt) and therefore, a benefit of doubt is to be given to the accused. He relied upon paragraph No.13 of the said decision. The said paragraph No.13 reads as under :

“13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that ‘may be’ proved, and something that ‘will be proved’. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between ‘may be’ and ‘must be’ is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between ‘may be’ true and ‘must be’ true, must be covered by way of clear, cogent and unimpeachable evidence produced by the

prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979)."

25. There cannot be any dispute about the law laid down by the Hon'ble Supreme Court in the aforesaid decision. However, in the case in hand, there is a distinction i.e. P.W.4 - Sanjivani is the injured eyewitness in the present case. The present case is based on ocular evidence and not on circumstantial evidence. Therefore, according to us the said decision is of no help to the Appellant/ accused. As we have observed earlier, the evidence of P.W.4 - Sanjivani, the injured eyewitness is wholly reliable and

trustworthy.

26. Mr. Karande, learned counsel appearing for the accused urged before us that the evidence of P.W.4 - Sanjivani even if considered in its entirety, shows that the surrounding circumstances with the narration of facts are incomplete. He has further contended that in view of the fatal admission given by P.W.4 - Sanjivani in her cross examination, thereby admitting that the accused did not have intention to commit the murder of herself and the children, the present case will not attract Section 302, but would fall within the purview Section 304 (Part I or Part II) of the Indian Penal Code. We may observe here that though P.W.4 - Sanjivani has admitted in her testimony that the accused did not have any intention to assault her or to kill her son and sister, it is apparent that the accused was aware of the fact that the bodily injury which he caused to the two innocent children who were sleeping were helpless and at the same time did not give any provocation to the accused for committing their murder. The provocation which was given was by P.W.4 - Sanjivani herself. In support of his contention that the present case would fall within the purview of Section 304 Part I or Part II, the learned counsel appearing for the accused relied upon the decision in the case of **Rajinder v. State of Haryana** reported in (2006) 5

SCC 425. By relying on paragraph Nos.17, 18 and 19, he contended that the present case would not fall within the purview of Section 302.

It is pertinent to note here that in the said decision of **Rajinder v. State of Haryana** (supra) itself, the Supreme Court in paragraph Nos.23, 24 and 26 has held as under:

“23. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Vira Singh's case¹ for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

24. Thus, according to the rule laid down in Vira Singh's case, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the

1 1958 SCR 1495.

intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.”

“26. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.”

27. In view of the observations of the Supreme Court in paragraph No.24 above, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not have intention of causing death, the offence would be causing murder. In the present case also even if the accused was not having intention to commit murder of the children, he inflicted the knife blows on the two innocent helpless children thereby causing a bodily injury, sufficient to cause death in the ordinary course of nature and therefore, the offence committed by the accused with respect to the said two children falls undoubtedly within the purview of Section 302 of the Indian Penal Code. The learned counsel appearing for the accused further relied upon decision of the Supreme Court in the case of **Sellappan v. State of Tamil**

Nadu reported in **(2007) 15 SCC 327**. In support of its contention the prosecution has failed to prove the Chemical Analyser's report in respect of muddemal property and therefore, the accused is entitled for acquittal. The decision in the case of **Sellappan** (supra) enumerates the similar and/or same principles as have been expounded by the Supreme Court in the case of **Rajinder v. State of Haryana** (supra). The Supreme Court in the case of **Sellappan** (supra) after relying on the excerpts from **Vira Sing**'s case reported in **AIR 1958 SC 465** reproduced paragraph Nos.21 and 22 on page No.336 where it has been observed as under :

“21. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

22. The above are only broad guidelines and not cast-iron

imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.”

28. In the present case, if the entire evidence of P.W.4 - Sanjivani is taken into consideration, the chronology of events given by her undoubtedly establishes the fact that the accused with intention to commit murder of P.W.4 - Sanjivani and the two children was equipped with a knife and after getting an opportunity, he committed the present crime in question. In our view, the decision in the case of **Sellapan** (supra) is of no help to the accused and the contention of the learned counsel for the accused, therefore, does not hold any substance in it.

There is another facet to the present case. It is not disputed by the accused that at the time of incident i.e. at about 1.00 a.m. in the intervening night of 31st December, 2012 and 1st January, 2013, the Appellant / accused himself, his wife i.e. P.W.4 - Sanjivani, the injured eyewitness, his son - Swapnil (deceased) and the younger sister of P.W.4 namely Pallavi (deceased) were only present in the house of the accused. As per the testimony of P.W.4 - Sanjivani, Swapnil and Pallavi were asleep. As per the testimony of P.W.1 - Santosh Ombase and

P.W.2 – Harishchandra Garje between 1.00 a.m. to 1.30 a.m. they have heard the commotion in the house of the accused and they saw P.W.4 – Sanjivani coming out of her house in an injured condition. At that relevant time they did not see the accused there. Thus, it is clear that the accused was present in the house at the time when the incident took place. The accused while answering the question put to him in the examination conducted under Section 313 of the Criminal Procedure Code to a question which is at Sr. No.53 has categorically stated that, the remark of his wife about his sexual incapacity, led him to assault her and the children in the fit of rage. Thus, the accused has not disputed his presence at the scene of offence on the day, date and time. Section 106 of the Indian Evidence Act casts a burden of proving a fact especially within the knowledge of the person with whom the said knowledge was. In view of the provisions of Section 106 of the Indian Evidence Act it is clear that burden to prove the fact that the accused was not present on the spot lies on him and contrary thereto, adverse inference has to be drawn against the accused only. Thus, it is clear that the accused was present at the scene of offence at that relevant time and in view of the reliable and trustworthy evidence led by P.W.4 – Sanjivani, it is established that it is the accused and accused only who has committed the present crime in question.

29. Mr. Karande, learned counsel appearing for the Appellant / accused then contended that the intention of the accused has to be gathered from the nature of injuries which have been caused to P.W.4 - Sanjivani and the deceased. He submitted that both the deceased children have suffered a single injury. He contended that in view of the nature of injury i.e. a single injury, it can safely be inferred that the accused has inflicted the said injuries in a fit of rage and due to provocation given by P.W.4 - Sanjivani. In support of his contention the learned counsel appearing for the Appellant / accused relied on three judgments of the Supreme Court.

The first judgment relied upon by the learned counsel for the Appellant /accused is in the case of **Vijay Ramkrishan Gaikwad v. State of Maharashtra** reported in **(2012) 11 SCC 592**. In the said decision the Supreme Court has observed about the facts that, the occurrence in question in the said case has the features of an incident in which an injury was inflicted in a sudden fight without premeditation in the heat of passion upon a sudden quarrel within the contemplation of exception 4 to Section 300 of the Indian Penal Code, which takes the case out of the purview of murder as defined in the said Section. It is further observed that, it is true that only one injury

was caused to the deceased, but the same is not conclusive by itself, but even a single injury can be in a given case constitute murder, having regard to the weapon used and the part of the body chosen for inflicting the injury. The said decision is of no avail to the accused as in the present case the Appellant / accused had inflicted a blow of knife on the stomach of his son, because of which not only a deep cut wound was caused to deceased Swapnil but his intestines were also oozed out from the abdomen. As far as deceased Pallavi is concerned, the accused had inflicted a blow on her chest, which undoubtedly is a vital part of a body of a human being. The evidence of P.W.5 – Dr. Saroj Khot in that behalf is important. As stated in the foregoing paragraphs, P.W. 5- Dr. Saroj Khot in her testimony has categorically mentioned about the injuries caused to deceased Swapnil and Pallavi and the repercussions of the said injuries. Thus, taking into consideration the injuries caused by the accused to the deceased and the injured eyewitness P.W.4 – Sanjivani, the reliance of the accused on the said judgment is misplaced.

The learned counsel appearing for the Appellant then relied on the judgment in the case of **Swarn Kaur v. Gurmukh Singh** reported in **AIR 2013 SC 3356**. The learned counsel for the Appellant / accused in particular placed his

reliance on paragraph No.39 of the said judgment. Paragraph No. 39 of the said judgment reads as under :

“39. It is well settled that intention is always lodged in the mind of the accused but, to gather the intention one of the relevant factors which the court looks into is the nature of injury inflicted on the deceased. In our opinion, from the nature of injuries found on the person of the deceased it cannot safely be said that the accused assaulted the deceased with intention to cause such injury so as to cause death. It appears to us that the accused persons were upset by the poor quality of food cooked by the deceased and, therefore, assaulted him. The nature of injury or the weapon used do not suggest that the accused assaulted him with the intention of causing death. However, we are of the opinion that the accused knew that the injury inflicted by them is likely to cause death. Hence, in our opinion, the accused shall be liable to be convicted for offence under Section 304 Part II of the Indian Penal Code. In the facts and circumstances of the case, we are of the opinion that sentence of 7 years' rigorous imprisonment each and fine of Rs.50,000/- each shall meet the ends of justice. Each of the accused shall deposit the fine amount within three months failing which they shall suffer imprisonment for a further period of one year. Out of the fine amount the appellants shall be paid a sum of Rs.2 lakhs.”

30. It is to be noted here that a close scrutiny of the said judgment discloses that it proceeds on the basis of a particular

set of facts and in view of the facts mentioned in the body of the said judgment, the Hon'ble Supreme Court has reached to the opinion as has been expressed in paragraph No.39 of the said judgment. In view of the same, we are of the opinion that the said judgment in the case of **Swarn Kaur** (supra) is of no avail to the Appellant /accused.

The learned counsel appearing for the Appellant /accused thereafter relied on a judgment in the case of **Johny v. State of Kerala** reported in **(2011) 14 SCC 158**. In the said case, the incident in question had happened on 22nd September, 1988. The deceased, Mary was the wife of Varghese, who died prior to the occurrence of the incident. Thereafter the deceased Mary was staying with the brother of Varghese, viz. the second accused. The deceased Mary had a daughter by Varghese and on her marriage Louis, the second accused, had advanced a sum of Rs.60,000/- as loan. The second accused, on the date of the incident, demanded the amount so advanced from the deceased Mary and it appears that there ensued a quarrel between the second accused and the deceased Mary. The deceased Mary said that she was not prepared to talk to him as he was drunk and there was also evidence to show that Johny, the first accused was also standing behind her. When the second accused demanded the amount from the deceased Mary, the first

accused Johny, who was standing behind her, stabbed her on her back and this caused the death of Mary. In the said case the learned counsel appearing for the accused therein had argued before the Supreme Court that the crime committed by the appellant / petitioner can come only under Section 304 Part 1 of the Indian Penal Code as there was no intention on the part of the petitioner to cause the death though he had the requisite knowledge. The Supreme Court has observed that, it is true that there was only one stab injury on the deceased, it was also not clear as to what was the origin and genesis of the whole incident leading to the crime and apparently there was no reason for the petitioner to cause the injury to the deceased. In view of the facts of the said case, the Supreme Court, after taking the overall facts and circumstances of the case into consideration, came to the conclusion that, it did not think that the offence committed by accused No.1 would come under Section 302 of the Indian Penal Code and therefore, the Supreme Court set aside the conviction of the Petitioner for the offence under Section 302 and found him guilty for the offence under Section 304 Part 1 of the Indian Penal Code and altered the sentence accordingly.

Here in the present case in hand, the accused had not only the intention to commit the murder of P.W.4 - Sanjivani, who fortunately survived the attack from the accused,

but the accused had also the requisite knowledge about the fact that if a blow of knife with great force is inflicted on the vital part of a body of a helpless child who is asleep, the said bodily injury shall undoubtedly led to death of the said victim. Therefore, it cannot be held that the accused had no intention to cause the said injuries to the deceased and to the injured victim. In view of the facts of the present case which differs from the facts in the case of **Johny** (supra), we hold that the reliance on the said judgment by the accused is of no use to him.

31. The learned counsel appearing for the Appellant / accused thereafter contended that as no material i.e. the muddemal articles were produced before the Trial Court for identification of the witnesses and the witnesses did not have an opportunity to identify the muddemal articles such as the knife and the clothes of the deceased, the answers given to the said questions by the accused in his statement recorded under Section 313 of the Criminal Procedure Code cannot be taken into consideration. In support of his contention, he relied upon a judgment of the Apex Court in the case of **Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan** reported in **(2013) 5 SCC 722** and in particular paragraph Nos.25, 30, 32, 35 and 41 of the said judgment which read as under :

“25. In *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200, this Court held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.”

“30. In a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice i.e. *audi alterum partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and have to be excluded from consideration.”

“32. In Mohan Singh v. Prem Singh & Anr., AIR 2002 SC 3582, this Court held:

“30. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution.if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction.”

“35. In Rafiq Ahmad @ Rafi v. State of U.P., AIR 2011 SC 3114, this Court observed as under:

“67. It is true that the statement under Section 313 CrPC cannot be the sole basis for conviction of the accused but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of events.”

“41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the

questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself.”

There cannot be any quarrel about the legal proposition enunciated in the said judgment by the Supreme Court. However, the basic point of distinction with reference to the said judgment and the present case is that in the case of **Raj Kumar Singh** (supra), the evidence which was adduced by the

prosecution was of circumstantial evidence, however, in the present case in hand, the prosecution has mainly relied on the ocular evidence of the injured eyewitness viz. P.W.4 - Sanjivani. It is pertinent to note here that in response to the question put to the accused at the end of his statement recorded under Section 313 of the Criminal Procedure Code, when the Court asked him that, whether the accused wants to say anything else about his case, the accused has voluntarily gave explanation that, due to the remark of his wife about his sexual incapacity led him to assault her and the children in the fit of rage. It appears to us that the answer to the said question has been given by the accused after taking into consideration the fact that P.W.4 - Sanjivani is the injured eyewitness in the present case and has survived the assault of the accused. As stated in the earlier paragraphs, in view of the provisions of Section 106 of the Indian Evidence Act, it was the accused who was present within the four walls of the said house where the incident had occurred and is the only person apart from the eyewitness to have knowledge about the events which occurred in the fateful intervening night. In view of the said fact, we find that the judgment in the case of **Raj Kumar Singh** (supra) is of no help to the accused.

32. The learned counsel appearing for the Appellant / accused

further contended that P.W.4 – Sanjivani, the eyewitness in the present case in her testimony at paragraph No.5 has stated that the accused left the knife and ran away. The learned counsel contended that at the first instance the said knife was not shown to the said witness or to any other witness as, the same weapon of assault, by which the injuries were inflicted. He further contended that the date of offence is 1st January, 2013 and the recovery Panchanama which is at Exhibit 16 is dated 22nd February, 2013. He further contended that there is substantial gap between the occurrence of the incident and the recovery of the weapon and other articles. He submitted that it is approximately after one and half month, the said recovery was effected. He contended that the Investigating Agency has failed to take finger prints from the said weapon. He lastly contended that in view of the aforesaid facts the identity of the weapon becomes doubtful. It is to be noted here that the accused was arrested on 20th February, 2013 and when he was in custody, he gave the memorandum statement which is at Exhibit 15 thereby expressing his desire to point out the place where he had concealed the weapon used in the present crime. It is thus clear that in pursuance of the said memorandum statement, the accused produced the said knife from a niche in the tin shed which was adjacent to his house. It is to be noted here that it is

the accused and accused only who was aware about the concealment of the said weapon. The said place was not accessible to the public at large and therefore, in our opinion, it was not necessary for the Investigating Agency to take finger prints from the said weapon as neither the weapon was found on the spot or nearby the spot, nor it was found from a place which was easily accessible to the people at large. In view of the same, we find that there is no substance in the contentions raised by the learned counsel for the Appellant.

33. The learned counsel appearing for the Appellant thereafter at the cost of repetition again contended that the learned Trial Court has incorrectly translated the original Marathi version of the deposition of P.W.4 – Sanjivani and other witnesses. There is material irregularity while recording the same which has led in miscarriage of justice. As far as this point is concerned, we may note here that we have in detail discussed and recorded our finding to the same at paragraph No.13 herein above. We have already held that the Trial Court has incorrectly translated the admission given by P.W.4 – Sanjivani and the admission given by P.W.4 is fatal to the prosecution case. The said admission goes to the root of the matter. P.W.4 – Sanjivani has in unequivocal terms admitted that the Appellant / accused did not have an intention

to kill either her, or her son and sister. In view of the said admission, it appears that the accused in fact did not had intention to kill the two innocent minor children and to commit murder of P.W.4 – Sanjivani. At this stage, we may, however, record that in view of the facts of the present case and after giving due weightage to the answer given by the accused to question No.53 in his statement recorded under Section 313 of the Criminal Procedure Code, the witness i.e. P.W.4 – Sanjivani had given provocation (assuming so) to the accused, the two children who were asleep at that relevant time, did not give any provocation to the accused which would result in causing grievous bodily injuries to them which has caused their death. Therefore, in our opinion, the Appellant / accused is not entitled for exception I of Section 300 of the Indian penal Code. We are of the considered opinion that the Appellant / accused has committed the offence under Section 302 of the Indian Penal Code which has resulted into the death of master Swapnil and miss Pallavi in the present case. It is also to be noted here that part of the body on which the accused had given blows of knife with such a great force and by use of a sharp edge weapon which has resulted into their death. The evidence of P.W. 5 – Dr. Saroj Khot is very elaborate on the said point. P.W.5 in unequivocal terms has stated that the injuries which were caused to the

deceased children were possible by a sharp weapon like knife. P.W.5 has clearly opined that the probable cause of death of Pallavi was by shock and hemorrhage due to stab wound of lung and heart. She had also opined that the probable cause of death of Swapnil was by shock and hemorrhage due to whole intestinal injury. As stated above, P.W.5 – Dr. Saroj Khot had stated in her testimony that some part of the intestine of Swapnil had come out with lacerated injury from the abdomen. The injuries which were mentioned by P.W.5 – Dr. Saroj Khot clearly demonstrate that the accused had dealt the blows on the said two minor children with great force and with an intention to commit such a bodily injury which would result into their death.

34. The learned counsel appearing for the Appellant further contended that the Appellant was arrested on 20th February, 2013 and the recovery of knife was effected at the instance of the Appellant on 22nd February, 2013 from the cattle shed which was approximately after 53 days from the date of incident. He again contended that no finger prints from the knife were taken and therefore, doubt about the fact that the same knife was used by the accused has been created by the Investigating Agency in the mind of the Court. He has further contended that the recovery of the said weapon is not proved. In support of his

contention he relied upon the decision of the Supreme Court in the case of **Allarakha K. Mansuri v. State of Gujarat** reported in **(2002) 3 SCC 57** and in particular paragraph No.7 of the said judgment. Paragraph No.7 of the said judgment reads as under :

“7. The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view based upon conjectures and hypothesis and not on the legal evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether the accused has committed any offence or not.

Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. Only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding.”

35. There cannot be any dispute about the ratio laid down by the Supreme Court in the said case. However, a fact of distinction with reference to the said case is that the case of **Allarakha K. Mansuri** (supra) was in the case of an appeal against acquittal and the scope of High Court's power of interference with the order of acquittal was basically in detail discussed in the said judgment. We find that reliance by the

accused on the said judgment is of no use to him. The learned counsel for the Appellant also contended that the said knife was not shown to the eyewitness i.e. P.W.4 - Sanjivani and other witnesses and therefore, the prosecution has failed to prove that it was the same weapon which was used by the Appellant / accused in commission of the said offence. He, therefore, submitted that taking into consideration the said fact, benefit of doubt be given to the accused in view of the lapse committed by the prosecution while conducting the trial.

36. The learned counsel appearing for the Appellant / accused also submitted that the prosecution case does not inspire confidence because of the variance in the evidence of P.W.1 - Santosh Ombase, a neighbour and pancha witness to the discovery of knife at the instance of the accused and P.W.4 - Sanjivani, the injured eyewitness. He submitted that as there is material variance between the evidence of P.W.1 - Santosh Ombase and P.W.4 - Sanjivaji, the evidence of P.W.4 - Sanjivani does not inspire confidence. In support of his contention, he relied upon a judgment of the Supreme Court in the case of **Gulam Sarbar v. State of Bihar (Now Jharkhand)** reported in **(2014) 3 SCC 401** and in particular paragraph No.19 of the said judgment which reads as under :

“19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide: Vadivelu Thevar & Anr. v. State of Madras; AIR 1957 SC 614; Kunju @ Balachandran v. State of Tamil Nadu, AIR 2008 SC 1381; Bipin Kumar Mondal v. State of West Bengal, AIR 2010 SC 3638; Mahesh & Anr. v. State of Madhya Pradesh, (2011) 9 SCC 626; Prithipal Singh & Ors. v. State of Punjab & Anr., (2012) 1 SCC 10; and Kishan Chand v. State of Haryana, JT 2013(1) SC 222.”

If we read paragraph No.19 of the said judgment carefully, it appears to us that in fact the ratio laid down by the Supreme Court in the said paragraph goes against the contention

of the accused. The Supreme Court has held that it is not the number of witnesses which are examined by the prosecution, but it is quality of the evidence which is important for determining a criminal case. The Supreme Court has held that the conviction can even be based on the testimony of a sole witness if the same inspires confidence. In the present case, as we have already stated herein above, the evidence of P.W.4 – Sanjivani, the injured eyewitness not only inspires confidence in the mind of this Court, but we also find that her evidence is fully reliable and trustworthy.

37. The learned counsel appearing for the Appellant lastly contended that that the prosecution has not adduced reliable evidence in support of its case which can be termed as “beyond reasonable doubt”. He submitted that the prosecution has failed to prove its case beyond reasonable doubt and therefore, the benefit of doubt has to go in favour of the accused. He, therefore, contended that in view of the facts and circumstances of the present case, Section 302 of the Indian Penal Code is not applicable. In support of his contention, he relied upon three judgments of the Supreme Court. The first judgment is in the case of **Yomeshbhai Pranshankar Bhatt v. State of Gujarat** reported in **AIR 2011 SC 2328**. The learned counsel relied on

paragraph Nos.23 and 30 of the said judgment which reads as under :

“23. This Court has held in *State of U.P. vs. Chetram and others*, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548].”

“30. We have considered the relevant submission. We are of the view that in a case relating to circumstantial evidence, the Court should see the circumstances very carefully before arriving at a finding of guilt of the person concerned and yet if there is any doubt which is inconsistent with the innocence of the accused, the benefit should go to the accused.”

A careful perusal of the said judgment shows that in the said case of **Yomeshbhai Bhatt** (supra) the Supreme Court has observed that the Appellant had no premeditation to kill the deceased or cause any bodily harm or injury to the deceased and everything had happened on the spur of the moment. It further appears that the said case was based on circumstantial evidence. After taking into consideration the facts and circumstances of the said case, the Supreme Court has held that the said case falls under Section 304 Part II and not under Section 302 of the Indian Penal Code. In our opinion, the reliance

on the said case is of no help to the Appellant /accused.

The learned counsel appearing for the Appellant next placed reliance on a judgment in the case of **Chinnathaman v. State represented by Inspector of Police** reported in **AIR 2008 SC 784** and in particular paragraph Nos.7 and 10 of the said case which read as under :

“7. The testimony of eye-witness Senthil Kumar would indicate that on the day of the incident the deceased in his company had gone to the field of the appellant and had demanded bitter guard. According to the said witness because of the elopement of Punitha with her teacher, the appellant was annoyed and had, therefore, refused to give bitter guard saying that they had defamed his family. What is stated by the said witness is that the deceased had thereupon asked the appellant to talk in a decent manner and had hardly turned his back to leave the field of the appellant when the appellant had delivered a blow with sickle on the neck of the deceased. Though this witness was cross-examined at length nothing substantial could be brought on record which would cast a doubt on his assertion that the appellant was the author of the injuries sustained by the deceased. Similarly, another witness Thiru Ramasami has also deposed that on the day of incident he had seen the deceased going towards the field of the appellant in the company of Senthil Kumar and had asked the deceased as to where he was going. According to this witness thereupon the deceased had informed the witness that he was going to the field of the appellant to get bitter guard. What is asserted by the witness is that he

had advised the deceased not to go to the field of the appellant as the appellant was nurturing a feeling that they had helped Punitha to elope with her teacher. The witness has further stated that the deceased had stated that they would come back if the appellant was not inclined to give bitter guard. The witness has also stated that he had heard altercation taking place between the appellant and the deceased but was not able to follow the same as he was at a little distance. What is claimed by the witness is that he had seen the appellant delivering blow to the deceased and that he had gone to the field of the appellant to help his injured son who was bleeding profusely. The witness has mentioned that the people who were in the nearby fields, had gathered and thereafter he had gone to the police station where he had learnt that the appellant had already lodged a complaint against himself.”

“10. On the facts and in the circumstances of the case, this Court is of the opinion that Exception 1 to Section 300 IPC would apply to the facts of the case and the offence committed by the appellant would be one punishable under Section 304 IPC. There is nothing on record to indicate that the appellant had committed culpable homicide amounting to murder by causing death of the deceased with the intention of causing death of the deceased or of causing such bodily injury as was likely to cause his death. Therefore, the provisions of Part II of Section 304 IPC would apply to the facts of the case on hand. Thus, the appeal will have to be allowed by converting the conviction of the appellant under Section 302 IPC to one punishable under Section 304 Part II IPC. This Court has considered the

submissions advanced at the bar for the purpose of imposition of sentence on the appellant for commission of offence punishable under Section 304 Part II IPC. As held earlier there was no pre-meditation or pre plan on the part of the appellant to cause death of the deceased, and the occurrence had taken place when the deceased, with another had entered the field of the appellant and engaged himself in an altercation with the appellant when the appellant had refused to part with bitter guard. Having regard to the attending circumstances in which the incident had taken place, this Court is of the opinion that the interest of justice would be served if the appellant is sentenced to rigorous imprisonment for five years for commission of offence punishable under Section 304 Part II IPC."

It is to be noted here that the plain reading of paragraph 10 of the said judgment clearly demonstrates that in view of the facts and circumstances of the said case, the Supreme Court was of the opinion that Exception 1 to Section 300 of the Indian Penal Code would apply to the said case and the offence committed by the appellant therein would be one punishable under Section 304 of the Indian Penal Code and the said offence would not fall within the purview of Section 302 of the Indian Penal Code. We are of the opinion that even placing reliance on the said judgment is of no avail to the Appellant / accused.

The learned counsel appearing for the Appellant lastly placed reliance in the case of **Budhi Singh v. State of Himachal Pradesh** reported in **(2012) 13 SCC 663** in support of the aforesaid contention and in particular paragraph No.14 of the said judgment. Paragraph No.14 of the said judgment reads as under:

“14. Now, we may discuss the legal aspect of this submission. Section 299 IPC defines a culpable homicide. Section 299 covers classes of cases where an act is done with the intention of causing death and/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 of the other person. In all these situations, it will amount to a culpable homicide. A culpable homicide would be murder, unless it falls in any of the general Exceptions (1) to (5) to Section 300 which would bring the offence outside the purview of Section 300 and make it culpable homicide not amounting to murder. Once it falls in that class of cases, then it is permissible for the court to impose milder punishment in terms of Section 304 Part I or Part II, as the case may be. The punishment under Section 302 on the one hand, and Section 304 on the other is divided by a fine line of distinction as to when a culpable homicide would or would not be murder. The provisions of Section 304 itself form a kind of exception to the applicability of Section 302 IPC, in other words, provisions of Section part II only if it is not a murder.”

The facts as narrated in paragraph No.3 of the said judgment demonstrate that the appellant therein committed the said offence on the spur of moment and that a weapon was available to him on the spot. It was not done after premeditation. It is to be noted here that the Supreme Court in paragraph No.18 of the said judgment has dealt with the doctrine of sudden and grave provocation. Paragraph 18 of the said judgment reads as under :

“18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.”

In the present case, in view of the testimony of P.W.4 – Sanjivani, it is clear that the Appellant / accused had

premeditated for commission of the present crime as he was equipped with knife which he had concealed to his waist and after the alleged provocation given by P.W.4 - Sanjivani, he removed the knife from his waist, held the same in his hand and inflicted the blows of the same firstly to P.W.4 - Sanjivani and then in series to deceased Swapnil and Pallavi. A bare perusal of the evidence of P.W.4 - Sanjivani and particularly paragraph 4 of her deposition, the series of events narrated by P.W.4 - Sanjivani, would reveal that the accused had some time to gain self control and it appears to us that the said alleged provocation given by P.W.4 - Sanjivani cannot be termed as a grave and sudden provocation caused by P.W.4 - Sanjivani to the Appellant / accused because of which he could have lost his self control. The fact that the accused removed the knife which was concealed at his waist and then after brandishing it, gave blows of the same to P.W.4 - Sanjivani and the deceased children, itself demonstrates that the accused had premeditated about the commission of the said offence. In our considered opinion, reliance of the Appellant / accused on the case of **Budhi Singh** (supra) in support of his contention is totally misplaced.

38. On the other hand the learned APP submitted that the present case is based on the ocular evidence of the injured eye-

witness i.e. P.W.4 -Sanjivani, who is the wife of the accused. She further submitted that the Appellant-accused in fact has admitted his presence at the spot. That the presence of the Appellant-accused has been admitted by himself in the answer in response to the question i.e. Question No.53 under Section 313 of the Criminal Procedure Code. She, therefore, submitted that taking into consideration the detailed account given by P.W.4 - Sanjivani in her testimony, it is crystal clear that the Appellant-accused, with premeditation, committed the present crime wherein he has attempted to commit the murder of P.W.4 - Sanjivani, and has committed the murder of Swapnil and Pallavi. She further stated that it is the quality of evidence and not the quantity which is relevant for appreciating the same. In support of her contention, she relied on three judgments of the Hon'ble Supreme Court. The first judgment is in the case of **Veer Singh v. State of Uttar Pradesh** reported in **(2014) 2 SCC 455**. She specifically relied on paragraphs-21 and 22 of the said judgment, which reads as under:

“21. The legal system has laid emphasis on value weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and

not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. (Vide *Vadivelu Thevar v. State of Madras* AIR 1957 SC 614; *Kunju vs. State of Tamil Nadu* AIR 2008 SC 1381; *Bipin Kumar Mondal vs. State of West Bengal* AIR 2010 SC 3638; *Mahesh vs. State of Madhya Pradesh* (2011) 9 SCC 626; *Prithipal Singh vs. State of Punjab* (2012) 1 SCC 10; *Kishan Chand vs. State of Haryana* JT 2013 (1) SC 222 and *Gulam Sarbar vs. State of Jharkhand* - 2013 (12) SCALE 504).

22. In the present case we are left with the sole testimony of the injured eyewitness PW 4 Harbans Kaur. She has lost all the members of her family in the attack during the occurrence. There is no reason for her to falsely implicate any of the accused in the case. On the contrary she would only point out the correct assailants who are responsible for killing her family members. We are of the considered view that the testimony of PW 4 Harbans Kaur is cogent, credible and trustworthy and has a ring of truth and deserves acceptance. All the twelve victims of the occurrence died of homicidal violence is established by the oral testimony of the doctors who conducted autopsies on their bodies and the certificates issued by them to that effect."

The second judgment relied upon by the learned APP is in the case of **Gulam Sarbar Vs. State of Bihar (Now Jharkhand)** reported in (2014) 3 SCC 401 and particularly

paragraph-19 of the said judgment. Paragraph 19 of the said judgment has already been reproduced by us in paragraph No.36 of this judgment while dealing with the submissions of the accused. In view of the observations of the Supreme Court in the said paragraph, the learned APP contended that it is the quality of evidence and not the quantity of it which is material for evaluating the same. No doubt, it is the trite position of law that, the evidence must be weighed and not counted.

The learned APP, therefore, contended that the evidence of P.W.4 - Sanjivani, injured eyewitness is self-eloquent and needs no corroboration. She further contended that though the prosecution has put forth the circumstances thereby corroborating the evidence of P.W.4, the evidence of the said solitary eyewitness i.e. injured, P.W.4 - Sanjivani is sufficient to base conviction of the Appellant.

39. The learned APP thereafter submitted that though it is contended by the learned counsel appearing for the Appellant that the knife which was used in the commission of the present crime was not produced by the prosecuting agency at the time of trial, the said aspect is in not fatal to the prosecution case. She also submitted that though P.W.4 - Sanjivani in her testimony at paragraph-5 has stated that, 'accused left the knife and ran

away', meaning thereof need not be taken in verbatim. She further submitted that P.W.1 - Santosh Ombase in the testimony has stated that the Appellant-accused produced the said knife from niche of fodder shed which was adjacent to his house, and therefore, she submitted that leaving the knife by the accused would mean that he concealed knife in the house and left the spot. She submitted that the recovery of the said knife at the instance of the Appellant-accused has been proved by P.W.1- Santosh Ombase. The discovery of the said knife was effected by drawing a detailed recovery panchanama which is at Exhibit-16 and the same cannot be faulted upon.

40. The learned APP further submitted that though it has been contended by the learned counsel for the Appellant that the knife and the other muddemal articles with Chemical Analyzer's report were not produced for identification of the witnesses during the course of trial, the same is not fatal to the prosecution. She relied on the judgment of the learned Single Judge of the Delhi High Court in the case of **Angrej Singh v. State** downloaded from the website namely Indian Kanoon (indiankanoon.org/doc/105681361) in support of her contention. The Delhi High Court after taking into consideration the law laid down by the Hon'ble Supreme Court has held that though the weapon of the offence

was not shown to the Doctor for his opinion as to whether the injuries could have been caused on the complainant with the weapon which was produced and the weapon of offence was also not put to the eyewitness for identification as to whether the same was used in the commission of offence along with other circumstances such as the weapon of offence was not sent to CFSL for its opinion, the Delhi High Court has held that the said factors alone cannot be a ground for acquittal of the Appellant for the reason that it has been repeatedly held by the Apex Court that faulty investigation by itself cannot be a ground for acquittal. The learned Single of the Delhi High Court, after relying on the judgment in the case of **Ganga Singh Vs. State of M.P.** reported in **(2013) 7 SCC 278**, has held that the Appellant cannot gain any advantage of the shoddy manner in which the investigation was carried out. The learned APP also relied on the judgment in the case of **Allarakha K. Mansuri v. State of Gujarat** reported in **(2002) 3 SCC 57** wherein the Supreme Court in paragraph No.8 has observed as under:

““The defects in the investigation holding it to be shaky and creating doubts also appears to be the result of the imaginative thought of the trial court. Otherwise also, defective investigation by itself cannot be made a ground for acquitting the accused. The trial court was also not justified in holding that the statements of the witnesses under Section 161 Cr.P.C. were recorded late by the police

and that there was any chance of manipulation.”

41. The learned APP thereafter contended that as the Appellant-accused did not give any satisfactory explanation in his statement recorded under Section 313 of the Cr.P.C., adverse inference has to be drawn against him. In support of her contention, she relied on the judgment in the case of **Gulam Sarbar v. State of Bihar (Now Jharkhand)** reported in **(2014) 3 SCC 401**, and particularly on paragraph-21 of the said judgment which reads as under:

“The prosecution has successfully established the involvement of the appellants in the crime and the manner in which the crime has been committed establishes the conspiracy. The appellants in their statement under Section 313 CrPC did not furnish any satisfactory explanation of the circumstances under which they were present at the place of occurrence. More so, the manner in which they fled away after the commission of the crime clearly indicates their involvement in the offence to conduct a conspiracy. Gopal Prasad Sinha (PW 7) has no enmity with either of the appellants and there was no reason for him to involve them falsely in such a heinous crime.”

The learned APP submitted that as the Appellant-accused has accepted his presence at the spot on the day of incident, in response to answer to Question 53, has further failed to give any satisfactory explanation. She also contended that in

view of the provisions of Section 106 of the Indian Evidence Act, it is the accused and accused alone who can give a detail account of the events occurred within the four-corners of the said house. It may be noted here that P.W.4 - Sanjivani injured eyewitness has in detail given the chronology of the events which occurred on the fateful night and as we have already held in the forgoing paragraphs, according to us the evidence of P.W.4 is cogent, reliable and trustworthy.

42. The learned APP thereafter submitted that assuming that there are certain lapses on the part of the prosecution, the same should not lead to unmerited acquittal. In support of her case, she relied on paragraph-10 of the judgment in the case of **Hem Raj s/o Moti Ram Vs. State of Haryana** reported in (2014) 2 SCC 395. The Supreme Court in the said judgment of **Hem Raj** (supra) in paragraph No.10 has observed that:

“We are aware that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however, subject to the rider that in such a situation the evidence on record must be clinching so that the lapses of the prosecution could be condoned.”

The learned APP further submitted that, assuming even if there are some defects in the investigation, they are not at all fatal to the prosecution case and only because

there were certain defects at the hands of the Investigating Agency, the same should not lead to acquittal of meritorious case, particularly when there is direct ocular evidence of an injured eyewitness. In support of her contention, she relied on the judgment in the case of **Karan Singh Vs. State of Haryana & Anr** reported in **AIR 2013 SC 2348**. The learned APP in particular relied upon the paragraphs 13 and 14 of the judgment in the case of **Karan Singh** (supra) which read as under :

“13. In *Ram Bihari Yadav v. State of Bihar & Ors.*, AIR 1998 SC 1850, this Court observed, that if primacy is given to a designed or negligent investigation, or to the omissions or lapses created as a result of a faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice.

A similar view has been re-iterated by this Court in *Amar Singh v. Balwinder Singh & Ors.*, AIR 2003 SC 1164: (2003 AIR SCW 717)

Furthermore, in *Ram Bali v. State of Uttar Pradesh*, AIR 2004 SC 2329: (2004 AIR SCW 2748), it was held by this Court that the court must ensure that the defective investigation purposely carried out by the Investigating Officer, does not affect the credibility of the version of events given by the prosecution.

14. Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses,

would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as “a dishonest or guided investigation”, which will exonerate the accused. (See: [Sonali Mukherjee v. Union of India](#), (2010) 15 SCC 25 : (AIR 2010 SC (Supp) 415): (2010 AIR SCW 499); Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192 : (2011 AIR SCW 6821); Sheo Shankar Singh v. State of Jharkhand & Anr. AIR 2011 SC 1403 : (2011 AIR SCW 1845); Gajoo v. State of Uttarakhand (2012) 9 SCC 532 : (2012 AIR SCW 5598); Shyamal Ghosh v. State of West Bengal, AIR 2012 SC 3539 : (2012 AIR SCW 4162); and Hiralal Pandey & Ors. v. State of U.P., AIR 2012 SC 2541 : (2012 AIR SCW 2503).

Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation.”

43. The learned APP further submitted that even if the muddemal articles including weapon which was used in the commission of the offence shown to the witnesses, it is not fatal to the prosecution case. She further submitted that the Supreme Court in the case of **Gurucharan Singh & Anr. Vs. State of**

Punjab reported in **AIR 1963 SC 340** has held that failure to examine an expert may be a serious infirmity, however, the prosecution case can succeed in proving the charge on the basis of the evidence of the eyewitness. She further contended that in the present case, the ocular evidence of P.W.4 - Sanjivani is the direct evidence and there is no reason to doubt the said direct evidence. In support of her contention, she relied on paragraph-41 of the said judgment which reads as under:

“41. It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in *Mohinder Singh V. State*¹. In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an

1 (1950) SCR 821.

expert would be a serious infirmity in the prosecution case. It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by postmortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case. Therefore, we do not think that Mr. Purushottam is right in contending as a general proposition that in every case where a firearm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."

There is no dispute or quarrel about the legal proposition enunciated by the Hon'ble Supreme Court in the aforesaid landmark judgment and as we have held in the forgoing paragraphs, we are of the considered opinion that the evidence of P.W.4 – Sanjivani is cogent, convincing, reliable and trustworthy.

44. The learned APP further submitted that the contention of the Appellant-accused that as the Chemical Analyzer's reports were not produced by the prosecution at the time of examination of the witnesses and the said lacuna is fatal to the prosecution's case which would lead to acquittal of the Appellant-accused, is not legally correct. She further submitted that the absence of Chemical Analyzer's reports at the time of conducting the trial is not at all fatal to the prosecution case. In support of her contention, she relied upon the judgment in the case of **Promode Dey Vs. State of West Bengal** reported in **(2012) 4 SCC 559**. In the said case, it was the contention of the learned counsel appearing for the Appellant that the Forensic Science Laboratory's report was not produced before the Court and therefore the prosecution was not able to prove that the Appellant therein had committed the murder of the deceased

beyond reasonable doubt. It was contended on behalf of the Respondent therein that the fact that the CFSL's report was not collected from the laboratory may be a defect in the investigation, but the defect in the investigation cannot result in acquittal of an accused against whom enough evidence is available for conviction. A reliance was placed on the judgment in the case of **Ramappa Halappa Pujar Vs. State of Karnataka** reported in **(2007) 13 SCC 31**. In the said case, the Hon'ble Supreme Court after evaluating the evidence of other witnesses came to the conclusion that the guilt of the Appellant therein was established beyond reasonable doubt through the evidence of other witness and it did not find any merit in the contention of the Appellant that the CFSL's report which was not collected by the prosecuting agency gives any benefit to the Appellant-accused.

45. The learned APP, in response to the contention of the learned Counsel for the Appellant that as the weapon used in the commission of the present crime was seized after a period of one and half months is not the same weapon and the said aspect creates doubt about the genuineness of the same, replied that after the arrest of the accused on 20th February 2013, when he was in police custody, expressed his desire to show the place

where he had concealed the said weapon and the knife which was used in the present crime was discovered at the instance of the Appellant-accused by effecting memorandum panchanama which is at Exhibit 16 dated 22nd February 2013. She further submitted that the knife was discovered from the niche of fodder shed which is adjacent to the house of the Appellant. She further submitted that the evidence of P.W.1 – Santosh Ombase is not at all disturbed in the cross-examination at the hands of the accused and therefore the recovery of the weapon used in the present crime cannot be faulted at all. In support of her contention, she relied on the judgment in the case of **Gulam Sarbar** (supra) and particularly paragraphs 16 to 19 of the said judgment. It may be noted here that the Hon'ble Supreme Court in view of the facts of the said case [i.e. in the case of **Gulam Sarbar** (supra)] has held that in the absence of any specific cross-examination of a witness or investigating officer, the Appellant-accused cannot seek any benefit of an omission or error by the prosecution in conducting the trial. It appears to us that the reliance placed by the learned APP in support of her contention on the present point is wholly misplaced.

46. The learned APP further contended that the answer given by the Appellant-accused to the question no.53 in his statement

recorded under Section 313 of Cr. P.C., wherein the Appellant has accepted his presence on the spot and in defence has stated that because of the derogative remarks passed by P.W.4 - Sanjivani against him, in the fit of rage he committed the said crime is a corroborative piece of evidence against the accused. In support of her contention, she relied on the judgment of the Hon'ble Supreme Court in the case of **Brajendrasingh Vs. State of Madhya Pradesh** reported in **(2012) 4 SCC 289**. She particularly relied on the paragraphs-15 and 16 in support of her contention which read as under:

“**15.** It is a settled principle of law that the statement of an accused under Section 313 Cr.P.C. can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under Section 313 Cr.P.C. simpliciter normally cannot be made the basis for conviction of the accused. But where the statement of the accused under Section 313 Cr.P.C. is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced.

16. We may refer to a recent judgment of this Court in Ramnaresh v. State of Chhattisgarh¹, (being pronounced today) wherein this Court held as under : (SCC pp.274-75, paras 49-52)

“49. In terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during the

1 (2012) 4 SCC 257.

investigation as well as before the Court. The accused may choose to maintain silence or complete denial even when his statement under Section 313 Cr.P.C. is being recorded, of course, the Court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law.

50. Right to fair trial, presumption of innocence unless proven guilty and proof by the prosecution of its case beyond any reasonable doubt are the fundamentals of our criminal jurisprudence. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in relation to any of these protections substantially. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused.

51. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. [Ref. Rafiq Ahmed v. State of Uttar Pradesh [(2011) 8 SCC 300].

52. It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 Cr.P.C., in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law."

47. The learned APP then further contended that even if

the weapon used in the commission of the offence is not shown to P.W.5 – Dr.Saroj Khot and P.W.6 – Dr. Prashant Karanjkar i.e. the Doctors who conducted the autopsy and examined P.W.4 respectively, it is not fatal to the case of the prosecution. In support of her contention, she relied on the judgment of the Division Bench of Patna High Court in the case of **Kashinath Lal Sinha & Lal Babu Vs. The State of Bihar** reported in **1992 (1) BLJR 77**, a copy of which has been downloaded from the website namely Indian Kanoon (indiankanoon.org/doc/119706). The Division Bench of Patna High Court in paragraph-13 of the said judgment has observed that it is the duty of the prosecution and no less of the Court to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion is invited as to whether all or any of the injuries on the victim could be caused with that weapon. The Patna High Court, however, has held that non production of bhala (in that case) before the medical witness for seeking his opinion is of no consequence if the nature of the injuries found on the person of the victim can well, in normal course, be attributed to the use of bhala (spear). In the present case also P.W.5 and P.W.6 who are the experts in the field, have categorically given their opinion that the injuries found on the body of the deceased and P.W.4 - Sanjivani are possible by a sharp weapon like knife.

The learned APP then relied upon the judgment in the case of **Pradumansinh Kalubha Vs. State of Gujarat** reported in **1992 Supp (2) SCC 62**, wherein the Hon'ble Supreme Court in paragraph-19 of the said judgment has held that in a case where there is direct evidence, even the seizure of the weapon is not very material.

It is to be noted here that as we have observed earlier, in view of the provisions of Section 106 of the Indian Evidence Act, the burden was on the Appellant-accused to explain the circumstances due to which injuries were caused on the victims as the Appellant was in his house between 1 to 1.30 a.m and he only had the knowledge about what had happened within the four-walls of the house. As stated above, the Appellant in response to the Question No.53 put to him during recording of his statement under Section 313 of the Cr. P.C. has accepted his presence and has given his explanation thereto. In view of the above, we are of the opinion that non-production of knife at the time of trial is not fatal to the prosecution case.

48. The learned APP lastly relied on two judgments of the Supreme Court while concluding her arguments. First one is in the case of **Rahimbux Vs. State of Madhya Pradesh** reported in **(2009) 1 SCC (Cri) 422**. She submitted that the facts

involved in the case of **Rahimbux** (supra) are similar to the present case and the Supreme Court after taking into consideration the facts of the said case has turned down the contention of the Appellant therein to convert the offence from Section 302 of the Indian Penal Code to Section 304-I or 304-II of the Indian Penal Code.

The learned APP contended that when there is contradiction between ocular evidence and medical evidence, the ocular evidence has to be given preference where it is found that the account given by the said witness is credible and trustworthy. In support of her contention, she relied upon a judgment in the case of **State of Madhya Pradesh v. Dharkole alias Govind Singh** reported in 2005 Cri.L.J. 108, and in particular paragraph 8 of the judgment which reads as under :

“8. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the 'variable' keeping in the medical evidence as the “constant”.

The last judgment which was relied upon by the learned APP is the celebrated judgment of the Hon'ble Supreme Court in the case of **Vadivelu Thevar Vs. The State of**

Madras reported in **AIR 1957 SC 614**. The learned APP relied upon paragraphs-10, 11 and 12 of the said judgment which reads as under:

“**10.** The decision of this Court in the case of Vemireddy Satyanarayan Reddy v. State of Hyderabad 1956 S.C.R. 247: (S) AIR 1956 SC 379 (B) was also relied upon in support of the contention that in a murder case the court insists on corroboration of the testimony of a single witness. In the said reported decision of this Court, P.W. 14 has been described as " a dhobi boy named Gopai. " He was the only person who had witnessed the murder and his testimony had been assailed on the ground that he was an accomplice. Though this Court repelled the contention that he was an accomplice, it held that his position was analogous to that of an accomplice. This Court insisted on corroboration of the testimony of the single witness not on the ground that his was the only evidence on which the conviction could be based, but on the ground that though he was not an accomplice, his evidence was analogous to that of an accomplice in the peculiar circumstances of that case as would be clear from the following observations at p. 252 (of S C R): (at P.381 of AIR):

“..... Though he was not an accomplice, we would still want corroboration on material particulars in this particular case, as he is the only witness to the crime and as it would be unsafe to hang four people on his sole testimony unless we feel convinced that he is speaking the truth. Such corroboration need not, however, be on the question of the actual commission of the offence; if this was the requirement, then we

would have independent testimony on which to act and there would be no need to rely on the evidence of one whose position may, in this particular case, be said to be somewhat analogous to that of an accomplice, though not exactly the same."

It is not necessary specifically to notice the other decisions of the different High Courts in India in which the court insisted on corroboration of the testimony of a single witness, not as a proposition of law, but in view of the circumstances of those cases. On a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions may be safely stated as firmly established:

- (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
- (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
- (3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case

comes.

11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence -9th Edition, at pages 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in s. 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the

presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or

circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

It is to be noted here that the learned Counsel for the accused while relying on the judgment in the case of **Sunil Kumar**'s case (supra) had already brought to our notice the ratio laid down by the Hon'ble Supreme Court in the case of **Vadivelu Thevar** (supra) as has been observed by the Supreme court in

paragraph-8 of the **Sunil Kumar's** case (supra). There cannot be any quarrel about the law laid down by the Hon'ble Supreme Court in the case of **Vadivelu Thevar** (supra).

49. Thus, after taking into consideration the entire evidence led by the prosecution, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt. The evidence of P.W.4 - Sanjivani, the injured eyewitness is undoubtedly cogent, convincing, reliable and trustworthy. The evidence of P.W.4 - Sanjivani falls within the purview of the category "wholly reliable" as has been held by the Hon'ble Supreme Court in the case of **Vadivelu Thevar** (supra). The said evidence of P.W.4 is further corroborated by the evidence of PW -1 and PW-2, who are the neighbours of PW and who had rushed to the spot of the incident immediately after hearing the commotion. The said two witnesses have duly proved the relevant panchanamas. The opinion given by the medical experts i.e. P.W.5 and P.W.6 further corroborates the evidence of PW-4.

50. After going through the entire evidence adduced by the prosecution which is available on record minutely, we are of the

considered opinion that the same is more than sufficient to sustain the conviction under 302 of the Indian Penal Code and Section 307 of the Indian Penal Code of the accused.

51. This leads us to deal with the important question i.e. whether the death sentence should be confirmed. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material that leads to determination of the sentence after taking into consideration all the aggravating and mitigating circumstances.

52. At this juncture a useful reliance can be placed on two

celebrated judgments of the Supreme Court in the case of **Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 and Machhi Singh and Ors. v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681**, the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category for awarding death sentence were indicated.

In **Machhi Singh's** case (supra) it was observed:

" The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:

(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?

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

(i) The extreme penalty of death need not be inflicted

except in gravest cases of extreme culpability.

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

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

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

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

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

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis--vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

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

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis—vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and

taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so”.

It is the settled position of law that, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. Showing undue sympathy and imposing inadequate sentence would do more harm to the justice system and undermine the public confidence in the efficacy of law and society would not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed and the circumstances of the offender.

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

54. It is the trite position of law that Justice is Supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to subserve the basic requirement of the society. It is a requirement of the society and the law must respond by being adaptable, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present day society, such crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the

punishment is concerned.

55. The learned APP submitted that taking into consideration the facts of the present case, it is a fit case to confirm the death sentence. She submitted that looking to the fact that the accused has brutally murdered two innocent children and has also attempted to commit the murder of P.W.4 – Sanjivani, the wife of the Appellant, it calls only for the death penalty. On the point of death sentence, the learned APP placed reliance on the decision of the Supreme Court in the case of **Laxman Naik v. State of Orissa** reported in **(1994) 3 SCC 381**. In the said case, the accused had committed rape on a seven years old girl and thereafter murdered her and threw her body in the jungle. By placing reliance on the said decision the learned APP urged before this Court that this Court may confirm the death sentence awarded by the Trial Court to the accused. She further submitted that the present case falls within the purview of “rarest of rare” category and further prayed to this Court that the death sentence awarded to the Appellant-accused be confirmed.

56. At this stage, a useful reference can be made to the case of **Rajendra Wasnik v. State of Maharashtra** reported in **(2012) 4 SCC 37**. In the said decision, after considering the earlier

decisions relating to the sentencing policy in the cases of death sentence it was observed that, the Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale / balance of justice tilts. It was also so observed in the landmark decision by the Constitution Bench of the Supreme Court in the case of **Bachan Singh v. State of Punjab** reported in **(1980) 2 SCC 684**. In the case of **Bachan Singh** (supra) the Supreme Court observed that death sentence ought to be given in the rarest of rare cases and only after drawing a balance-sheet of aggravating and mitigating circumstances.

57. In reply to the contention with respect to the confirmation of the death sentence of the Appellant-accused, Mr. Karande the learned counsel appearing for the Accused submitted that the present case in hand, cannot be said to be a case which would fall in the rarest of rare category, wherein the sentence of death can be awarded or confirmed. He placed reliance on three decisions of the Supreme Court and one decision of this Court wherein according to him under similar circumstances, the Supreme Court and this Court commuted the death sentence to

life imprisonment. The decisions of the Supreme Court are as under :

- (1) **Shankar Kisanrao Khade v. State of Maharashtra** reported in **2013 DGLS (Soft) 323**.
- (2) **Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra** reported in **2009 DGLS (Soft) 796**.
- (3) **Bantu @ Naresh Giri v. State of M.P.** reported in **2001 DGLS (Soft) 1301**.

Mr. Karande, the learned counsel appearing for the Appellant-accused also placed reliance on one of the decisions of this Court in the case of **The State of Maharashtra v. Sadashiv Jetappa Kamble** in Cri. Confirmation Case No.1 of 2013 to which one of us (Smt. V.K. Tahilramani, J.) is a member.

58. The first decision on which reliance was placed is the case of **Shankar Khade** (supra). Mr. Karande, the learned counsel appearing for the Appellant-accused pointed out that in the said case the accused had committed the murder of a minor girl of about 11 years with intellectual disability (moderate) after subjecting her to series of acts of rape. Accused No.1 therein was convicted under Section 302 with death sentence and was also awarded other sentences under different Sections of the

Indian Penal Code.

It is to be noted here that the Supreme Court in the said case has commuted the sentence of death penalty to life imprisonment and further directed that the sentence awarded to the accused therein to run concurrently. In the said decision, the Hon'ble Supreme Court after taking into consideration the catena of decisions delivered by the Supreme Court and after analyzing the same had reached to the conclusion that the death sentence be commuted in life imprisonment. The Supreme Court in paragraph No.71 of the said decision has observed as under :

“71. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.”

59. The next decision on which Mr. Karande, the learned counsel appearing for the Appellant-accused relied upon is in the case of **Santosh Kumar** (supra). In the said decision, the Supreme Court after taking into consideration the entire law with respect to the category of “rarest or rare” case and commutation of death sentence to life imprisonment, commuted the death penalty to rigorous imprisonment for life. The third decision on which Mr. Karande placed reliance is in the case of **Bantu @ Naresh Giri** (supra). In the said case, the Hon'ble Supreme Court confirmed the conviction of the Appellant under Section 302 of the Indian Penal Code, but modified the sentence by commuting the sentence of death to imprisonment for life and for the offence punishable under Section 376 of the Indian Penal Code, the appellant was sentenced to undergo rigorous imprisonment for ten years.

60. Mr. Karande, the learned counsel appearing for the Appellant-accused lastly relied upon the decision in the case of **The State of Maharashtra v. Sadashiv Jetappa Kamble** in Cri. Confirmation Case No.1 of 2013 wherein a Division Bench of this Court after taking into consideration the plethora of judgments of the Supreme Court and the High Court commuted the sentence under Section 302 of the Indian Penal Code of death

to life imprisonment. However, the High Court ordered that the sentence under Section 376(2)(f) of the Indian Penal Code shall run consecutive after serving the life imprisonment under Section 302 of the Indian Penal Code.

61. The Constitution Bench of the Supreme Court in the case of **Bachan Singh** (supra) has observed that before the death sentence is imposed a balance-sheet of aggravating and mitigating circumstances should be drawn and thereafter the decision whether or not the death sentence is to be imposed should be taken. Similar view is taken in a catena of decisions by the Supreme Court including in the case of **Rajendra Wasnik** (supra). In this view of the matter, we have proceeded to examine the aggravating and mitigating factors in the present case. The aggravating factors in this case are that the accused has attempted to commit murder of his wife i.e. P.W.4 – Sanjivani and thereafter committed murder of Master Swapnil and Miss Pallavi by inflicting blows of knife. The said two deceased children were innocent, helpless and defenceless. Though the alleged provocation was given by P.W.4 – Sanjivaji, the said two children did not give any provocation to the accused for committing their murder. After the incident on 1st January, 2013 the accused was not traceable and was arrested only on 20th

February, 2013 by the police.

62. The mitigating factors are that, on the date of commission of the offence the accused was approximately 27 years of age. The admission given by P.W.4 - Sanjivani in her cross-examination that "As I provoked the accused, he assaulted me, my son and my sister. He had no intention to kill us." is fatal to the prosecution case as already held by us in the foregoing paragraphs. The accused has taken specific defence while recording his statement under Section 313, to the answer at question No.53 that "the remark of my wife about my sexual incapacity, led me to assault her and the children in the fit of rage". According to us, the admission given by P.W.4 - Sanjivani read with the defence of the Appellant-accused reduces the grade of culpability of the Appellant-accused. The death of the children was caused due to single blow and there is no diabolic or dastardiness in the said act. The Appellant-accused has no criminal background or any antecedents at his discredit.

63. Considering the entire evidence on record including the admission given by P.W.4 - Sanjivani in her cross-examination as stated herein above, we are of the considered view that it is not a case which falls in the category of "rarest or rare" case where

imposition of death sentence is imperative. It is also not a case where imposing any other sentence would not serve the ends of justice or would be inadequate.

64. Once we draw the balance-sheet of aggravating and mitigating circumstances and examined them in the light of the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where the Court ought to have imposed extreme penalty of death upon the accused. In view of the same, we are also unable to uphold the confirmation of the death sentence of the Appellant-accused. Therefore, while partially allowing the Appeals only with regard to the quantum of sentence, we commute the death sentence awarded to the accused to one of life imprisonment under Section 302 of the Indian penal Code. At the same time, we uphold the sentence awarded to the Appellant-accused under Section 307 of the Indian Penal Code. In our considered opinion, the ends of justice would subserve the purpose of sentencing if both the sentences are directed to run consecutively i.e. after the Appellant-accused completes his sentence under Section 302 of the Indian Penal Code, sentence under Section 307 of the Indian Penal Code would start and the Appellant-accused to undergo the said sentence. While making this, we refer to a decision of the

Supreme Court in the case of **Swamy Shraddananda v. State of Karnataka** reported in **2008(13) SCC 767**. In the said case also the accused had been sentenced to death. The Supreme Court felt that it was not a fit case to award a death sentence but the Supreme Court observed that a sentence of life imprisonment which, subject to remission, normally works out to a term of 14 years would be grossly disproportionate and inadequate. The Supreme Court further observed that in such case, the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, in which case the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e. the vast hiatus between 14 years' imprisonment and death. The Court, therefore, can substitute a death sentence by life imprisonment for rest of life of convict or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual terms as specified in the order, as the case may be. Observing thus, the Supreme Court substituted the death sentence by imprisonment for life and directed the accused shall not be

released from prison till the rest of his life.

65. We may also make useful reference to two decisions of the Supreme court i.e **Ronny Vs State of Maharashtra** reported in **(1998) 3 SCC 625** and **Ravindra Trimbak Chouthmal Vs State of Maharashtra** reported in **(1996) 4 SCC 148**. In the case of **Ronny** (Supra), the accused persons had committed gang rape on a lady and murder during the course of the same incident. In this case, the Supreme Court felt it appropriate that the sentence under section 376(2)(g) of I.P.C. for gang rape shall run consecutively after serving the sentence for offence of murder i.e the Supreme Court directed that the sentence of imprisonment under section 376(2)(g) of 10 years RI shall be served after the sentence of life imprisonment is over. So also, in the case of **Ravindra Chouthmal** (Supra), the Supreme Court directed that the sentence of seven years RI for the offence under section 201 of the I.P.C. be directed to run consecutively after the sentence of life imprisonment had run its course. In the case of Ravindra Chouthmal, the accused had murdered his wife and thereafter to cause the evidence of the crime to disappear, he had cut the body and thrown the head in the creek.

66. In the decision of this Court in the case of **State of Maharashtra Vs Kamlakar Tanaji Shinde** reported in **2010 All MR (Cri) 3415**, the Division Bench of this Court directed that sentence of imprisonment under Section 364 of IPC shall be served after serving sentence of imprisonment under Section 302 of IPC. Similar view was taken by this Court in the decision in the case of **Sunil Anandrao. Sawant Vs Government of Maharashtra** reported in **2010 All MR (Cri) 1723** wherein this Court directed the sentence of three years RI under Sections 307 shall run consecutively after serving the sentence for the offence of murder.

67. There can be no doubt that the offence committed by the Appellant-accused deserves severe condemnation and is a heinous crime, but after taking into consideration the cumulative effect of the facts and on balancing the aggravating and mitigating circumstances of the case, we do not think that the case falls in the category of rarest of rare cases. Hence, we are not inclined to confirm the sentence of death as stated above. However, as stated earlier by us, we are inclined to make the sentence of imprisonment under Sections 302 and 307 of the Indian Penal Code consecutive.

68. It is to be noted here that after the present reference for confirmation was heard and the matter was closed for judgment, the Appellant-accused sent a letter through jail which was numbered as Cri. Application No.1318 of 2014. Though the said Application was sent through jail on 28th July, 2014, it was received by the registry on 26th August, 2014 and the same was placed before us on 21st November, 2014 and 27th November, 2014. We have heard the learned advocate for the Appellant-accused in pursuance of the said Application filed by the Appellant-accused through jail. The Appellant-accused has narrated the facts which are already on record in the said Application and has tried to justify his acquittal from the case. During the course of arguments, the learned counsel appearing for the Appellant-accused with utmost fairness at his command submitted that the Appellant has been heard at length by this Court and some of the facts mentioned in the said Application are either not brought on record during the cross-examination or the said facts have not been revealed during the course of investigation. After the advocate for the Appellant-accused has been heard at length, we are of the opinion that the said Application has no merit. As we have already dealt with the present case in detail, we refrain ourselves from reproducing the

facts of the said Application here and we dispose of the same along with the present Confirmation Reference and the Appeal preferred by the Appellant.

69. Having regard to the totality of the circumstances, and after taking into consideration the entire evidence available on record, we pass the following order :

ORDER

- (i) The conviction of the accused under Sections 302 and 307 of the Indian Penal Code is maintained.
- (ii) The sentence of death awarded under Section 302 of the Indian Penal Code is commuted to life imprisonment, and the fine imposed thereof i.e. of Rs.500/- is maintained. In default of payment of fine, the accused to undergo simple imprisonment for one month.
- (iii) The sentence of imprisonment and fine and in default sentence under Section 307 of the Indian penal Code is maintained.
- (iv) The sentence of ten years rigorous imprisonment under Section 307 of the Indian Penal Code shall run after serving the life sentence under Section 302 of the Indian Penal Code by the Appellant-accused.
- (v) The reference is answered accordingly and the Appeal

preferred by the Appellant-accused is partly allowed.

(Smt. V.K.Tahilramani, J.)

(A.S. Gadkari, J.)