

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27-01-2016

CORAM

**THE HONOURABLE MR.JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR.JUSTICE P.N.PRAKASH**

**REFERRED TRIAL NO.1 OF 2013
AND
CRL. A. NO. 801 OF 2013**

R.T. NO.1 OF 2013

The III Additional Sessions Judge
Tiruvallur @ Poonamallee.

.. Referring Officer

- Vs -

Muthuselvam

.. Respondent

C.A. NO. 801 OF 2013

V. Muthuselvam

.. Appellant

- Vs -

State, represented by
Inspector of Police,
Maduravoyal Police Station,
(Crime No.137 of 2011)

.. Respondent

Reference made under Section 366 of Cr.P.C. to go into the question of confirmation of the death sentence awarded by the learned III Additional Sessions Judge, Poonamallee in S.C.No.286 of 2011

dated 13.11.2013.

Criminal Appeal has been filed under Section 374 of the Code of Criminal Procedure, against the conviction and sentence passed by the learned III Additional Sessions Judge, Poonamallee in S.C.No.286 of 2011 dated 13.11.2013.

For Appellant	: Mr.V.Gopinath, Senior Counsel for Mr.S.Suresh
For Respondent	: Mr.Shanmugavelayutham, Public Prosecutor, assisted by Mr.V.M.R.Rajendran, APP

<i>Reserved on</i>	<i>Pronounced on</i>
23-11-2015	-01-2016

COMMON JUDGMENT

R.SUDHAKAR, J.

The Reference, R.T. No.1 of 2013 is made by the learned III Addl. Sessions Judge, Poonamallee, seeking confirmation of the death sentence, while C.A. No.801 of 2013 is filed by the accused/appellant in S.C. No.286 of 2011. The reference as well as the appeal are disposed of by the following common judgment.

2. The accused was tried before the learned Sessions Judge on the allegation that on 22.2.2011, at about 9.30 a.m., the accused,

under the guise of giving the deceased rupee notes for the coins/change given by her, slit the throat of the deceased and while the deceased fell down, he pressed the neck of the deceased so as to prevent the deceased from breathing and during the course of the said heinous act, removed 4 ¼ sovereigns of gold jewels from the body of the deceased and in the course of the very same transaction, hid the body in a gunny bag in a freezer box in his shop. On being found guilty, the accused was sentenced to rigorous imprisonment for a period of 3 years and 7 years u/s 380 and 201 IPC and for the offence u/s 302 IPC the accused was sentenced to death. The sentence imposed on the accused u/s 380 and 201 IPC were directed to run concurrently. While the appeal is against the conviction and sentence, the reference by the trial Judge is for the confirmation of the death sentence.

3. The facts, shorn of unnecessary details, could be briefly summarised as follows :-

P.W.s 1 and 2 are the sons of the deceased, while P.W.3 is the nephew of P.W.s 1 and 2. P.W.4 is the owner of the premises in which the accused was running a grocery shop. With regard to the disappearance of the deceased since the morning of 22.2.2011, P.W.1, after searching in all the places usually frequented by the deceased, lodged a complaint, Ex.P-1, with the Maduravoyal Police Station on

23.2.2011, which was registered as Crime No.137/2011 for 'Woman Missing'.

4. It is the case of the prosecution that the accused was running a grocery shop under the name and style of 'Muthumariamman Store' at No.47 Patel Road, Nerkundram, in the premises belonging to P.W.4. It is the further case of the prosecution that the accused was arrested by the Maduravoyal Police in connection with Crime No.200 of 2011 on 11.3.2011 for the offence under Section 379 IPC and was remanded to judicial custody on the complaint of one Bhuvana alleging that the accused, while trying to snatch her chain had caused grievous injury to the said complainant.

5. While the accused was in judicial custody in connection with Crime No.200 of 2011, P.W.6, the owner of the shop adjacent to the shop run by the accused, made a request to the owner of the premises, P.W.4, to clean the shop run by the accused, as foul smell was emanating from the shop. On 29.3.2011, P.W.4, the owner of the premises, obtained the keys from Veerapathiran, the father of the accused and went to the shop for the purpose of cleaning, accompanied by P.W.5. On opening the shop, P.W.4 noticed that the foul smell was coming from the freezer box and when P.W.4 opened the freezer box, he found a gunny bag inside the freezer box. P.W.4,

along with P.W.5, lifted the gunny bag and on opening the same a leg protruded from inside the gunny bag. Immediately, people started gathering in front of the shop. As the news started spreading that a body was found in the shop of the accused, P.W.s 1 and 2, came to the shop of the accused and on seeing the body, P.W.1 identified the same as that of his mother. Immediately P.W.1 left for the police station to lodge the subsequent complaint.

6. P.W.1 went to Maduravoyal Police Station and lodged a complaint, Ex.P-2 narrating the events. On receipt of the complaint from P.W.1, P.W.23, the Inspector of Police, Maduravoyal Police Station, registered the said case and took up investigation.

7. P.W.23, on taking up investigation, went to the scene of occurrence around 3.30 p.m. on 29.3.2011 and in the presence of P.W.9 and another, prepared Observation Mahazar, Ex.P-3 and drew a rough sketch, Ex.P-22. P.W.23 caused photographs to be taken of the body of the deceased. P.W.23 requisitioned the services of the Forensic Department for assisting him in gathering scientific clues from the scene of occurrence. Accordingly, P.W.15, the Assistant Director, Mobile Forensic Laboratory, assisted P.W.23 in collecting scientific evidence from the scene of occurrence under the cover of mahazar,

Ex.P-5. After collecting the scientific evidence, P.W.23 examined the witnesses and recorded their statements. The body of the deceased was sent to the mortuary. Thereafter, P.W.23 altered the offence from Woman Missing to one under Sections 302 and 201 IPC and prepared the altered FIR, Ex.P-23, which was sent to the jurisdictional Magistrate Court on 30.3.2011.

8. P.W.23, continuing with the investigation, went to the mortuary and in the presence of witnesses and panchayatadars, conducted inquest over the dead body of the deceased and prepared inquest report, Ex.P-24. After inquest, the dead body was handed over to the police constable, P.W.11, along with a requisition to the doctor for conducting autopsy on the body of the deceased.

9. P.W.11 accompanied the dead body of the deceased to the Kilpauk Medical College Hospital, Chennai, where it was examined by P.W.21 at 7.00 p.m. on 29.3.2011, who made necessary entries in the Accident Register, copy of which is marked as Ex.P-19.

10. On receipt of the requisition given by P.W.23, Dr.Anbuselvam, the Tutor in Forensic Medicine, Kilpauk Medical College Hospital, conducted post-mortem on the dead body of the deceased

and found the following injuries :-

"The body was first seen by the undersigned at 1.00 p.m. on 30.3.2011. Its condition then was Rigor Mortis Present in all the limbs. Post-mortem commenced at 1.00 p.m. on 30.3.2011. Appearance found at the Post-mortem: Moderately nourished female body. Decomposition changes all over the body.

Injuries: Horizontally oblique cut throat injury of 5 cm x 3 cm x 5-3 cm on middle part of neck. O/D: subcutaneous soft tissues of the neck were cut along the plane of external injury. Wound ends as a cut wound of 2 cm x 1-0.5 cm x cavity deep at the level of 3rd and 4th tracheal rings. Dark red blood clots found inside the lumen of the trachea.

There were no other external or internal injuries made out.

SCALP, SKULL BONES, MEMBRANES: Intact.

BRAIN: liquefied

HYOID BONE: Intact

LARYNX: normal

HEART: Normal in size. c/s: All chambers contained clotted blood. Coronary vessels: Patent.

LUNGS: Both the lungs were adherent to the chest wall, multiple subpleural petechial hemorrhages present on the surface of both lungs, c/s: pale

STOMACH: empty

INTESTINE: distended with gas.

LIVER, SPLEEN and KIDNEYS: Normal in size c/s: pale. decomposing.

BLADDER: Empty.

UTERUS: normal in size C/s: empty

PELVIS and SPINAL COLUMN: Intact."

Dr.Anbuselvam issued Ex.P-21, post-mortem certificate, reserving his opinion pending report of visceral analysis and after receipt of visceral analysis report, Ex.P-20 dated 21.4.2011, revealing that no poison was found, opined that the deceased appear to have died of cut injury to the throat. However, at the time of trial, Dr.Anbuselvam was not examined and his Assistant, Dr.Selvakumar, who was conversant with the handwriting and signature of Dr.Anbuselvam was examined as P.W.22.

11. After post-mortem, the clothes worn by the deceased, viz., M.O.s 15 to 17 were seized by P.W.11, who handed over the same to P.W.23 and the body was handed over to the relatives.

12. P.W.23, continuing with investigation, suspecting the involvement of the accused in the commission of the crime, came to know that the accused had already been remanded to judicial custody since 12.3.2011 in connection with Crime No.200/2011, on the file of Maduravoyal Police Station. P.W.23 went to Central Prison, Puzhal, and in the presence of the prison authorities, formally arrested the accused. P.W.23 filed application before the concerned jurisdictional Magistrate for police custody of the accused and on the orders of the

Court, took police custody of the accused. On examining the accused, the accused came forward and gave a voluntary confession statement, which was recorded in the presence of one Velmurugan and P.W.16. Based on the admissible portion of the confession statement, Ex.P-12, the accused took the police to his shop and from underneath the asbestos sheet, produced M.O.18, a blood stained shirt, alleged to have been worn by him at the time of commission of the offence, M.O.19, a blood stained knife and M.O.20, a blood stained freezer and the objects were seized under the cover of Mahazar, Ex.P-13 in the presence of P.W.16 and one Velmurugan.

13. On the same day, i.e., 6.4.2011, at about 12.15 p.m., the accused took the police to Muthoot Finance Corporation along with P.W.18. At Muthoot Finance Corporation a gold chain – M.O.1, gold bangles – M.O.2 and another gold bangle – M.O.3, the receipt, Ex.P-6, dated 22.2.2011 for pledging M.O.s 1 to 3, Ex.P-8, copy of the driving licence of P.W.18, Ex.P-9, copy of the RBI licence issued to Muthoot Finance Corporation to do non-banking business and Ex.P-10, the visitors' register maintained by Muthoot Finance Corporation were seized under the cover of mahazar - Ex.P-14 in the presence of P.W.16 and one Velmurugan.

14. On the same day, at about 2.30 p.m., the accused took the police to the pawn shop run by P.W.14 from where the investigation officer seized one pair of gold ear rings – M.O.4, a gold ring containing elephant hair – M.O.5, another gold ring – M.O.6 and gold nose stud (without screw) – M.O.7 under the cover of mahazar, Ex.P-15 in the presence of P.W.16 and one Velmurugan.

15. On the same day at about 3.40 p.m., the accused took the police to the pawn shop of P.W.17 from where the investigation officer seized Ex.P-16 – the receipt issued to the accused by the said shop for pawning of gold chain belonging to P.W.18 under the cover of mahazar – Ex.P-27 in the presence of P.W.16 and one Velmurugan. Thereafter, the accused was sent for judicial remand on 7.4.2011. P.W.23 sent requisition, Ex.P-25, to the jurisdictional Magistrate to send the material objects for chemical analysis.

16. Since the investigating officer, P.W.23 was of the opinion that the case is one of murder for gain, the case was handed over to P.W.24, the Inspector of Police (Crimes).

17. P.W.24, on taking over the investigation from P.W.23, verified the investigation already done by P.W.23. P.W.24 examined

the witnesses already examined by P.W.23 and, thereafter, filed the final report against the accused before the jurisdictional Magistrate Court for the offence under Sections 302 and 201 r/w 379 IPC.

18. The Court of Judicial Magistrate No.2, Poonamallee, on filing of the final report, issued summons to the accused and furnished him copies u/s 207 Cr.P.C. Since the case was exclusively triable by the Sessions Court, the court of Judicial Magistrate committed the case to the Principal Sessions Court, Tiruvallur and the case was made over to the III Addl. Sessions Judge, Poonamallee.

19. The trial court, on committal, issued summons to the accused and on his appearance, framed charges under Sections 302, 379 and 201 IPC for murder, theft of jewels and concealing evidence and questioned him and the accused pleaded not guilty of the charges framed against him.

20. The prosecution, in order to sustain their case, examined P.W.s 1 to 24, marked Exs.P-1 to P-27 and also marked M.O.s 1 to 23. The accused was, thereafter, questioned under Section 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution witnesses and

he denied it as false. On behalf of the accused, no witness was examined or documents marked.

21. The trial court, on a consideration of oral and documentary evidence and other materials, found the accused guilty under Sections 302, 201 and 380 IPC. While under Sections 380 and 201 IPC, the accused was sentenced to rigorous imprisonment for a period of 3 years and 7 years respectively, for the offence under Section 302 IPC, the trial court imposed the sentence of death on the accused. Challenging the legality of the conviction and sentence, passed by the trial court, while the accused has preferred C.A. 801 of 2013, the reference has been made by the learned III Addl. Sessions Judge, Poonamallee, to this Court under Section 366 Cr.P.C. for confirmation of the death sentence.

22. Mr.V.Gopinath, learned senior counsel appearing for the appellant/accused contended that the prosecution having chosen to rely upon circumstantial evidence has miserably failed to establish all the links in the chain of circumstance. It is the submission of the learned senior counsel for the appellant that though it is the evidence of the witnesses that the appellant was running the shop till he was arrested 11.3.2011 in connection with another case, no identifiable

fingerprints were found in the shop of the appellant, which casts a serious doubt in the prosecution version as to whether the offence could have happened in the manner as suggested by the prosecution. It is further submitted by the learned senior counsel for the appellant that though the prosecution has contended that the jewels were pledged by the appellant, no documentary proof supporting the said plea has been adduced by the prosecution. It is contended that the above stand of the accused is further fortified by the fact that there is no proof of redemption of the jewels by P.W.18 by repaying the amount. Learned senior counsel for the appellant further submitted that in the earliest complaint, Ex.P-1, which was registered for woman missing, there was no mention about the jewels worn by the deceased. However, it is the evidence of P.W.1 that he had interaction with the accused during the time when the deceased was found missing. However, in the later complaint, Ex.P-2, given by P.W.1, which was registered after the body of the deceased was found, mention is made about the jewels and that the accused has been fastened with the commission of the crime. This clearly establishes the fact that the prosecution wanted to implicate the accused in the commission of the crime and to further the said object, Ex.P-2 was prepared by P.W.1 to the dictates of the police authorities and, therefore, no reliance can be placed on Ex.P-2. Learned senior counsel for the appellant submitted

that the statements made by P.W.s 1 to 3 contradict each other and, therefore, no reliance can be placed on the said evidence. It is the further submission of the learned senior counsel for the appellant that though P.W.23, the investigating officer in chief examination has deposed that the accused took the police to his shop on 6.4.2011 and produced a bloodstained shirt, M.O.18, a bloodstained knife with red handle, M.O.19 and a freezer box, M.O.20 and those objects were sent for chemical analysis, yet the chemical analysis report, Ex.P-20 reveals that no blood was detected on the knife, M.O.19, which is fatal to the prosecution case.

23. It is further contention of the learned senior counsel for the appellant that P.W.4 in his evidence in chief has categorically deposed that the freezer box was switched off when he went to clean the shop of the accused. It is the case of the prosecution that the freezer box was used to store milk and ice cream and if that be so, it is for the prosecution to prove as to who had switched off the freezer box, as no prudent person would switch off the freezer box which is used to store milk and ice cream. It is the further submission of the learned senior counsel for the respondent that there are very many contradictions in the evidence of the witnesses and, therefore, it would be wholly unsafe to rely upon those evidence to bring home a verdict of guilty on the

appellant.

24. On the question of sentence of death awarded by the trial court, it is the submission of the learned senior counsel for the appellant that there was no proper questioning on sentence as contemplated u/s 235 (2) Cr.P.C., and the accused was not given proper opportunity to put forth his side of the case, which is a mandatory condition as has been laid by the Supreme Court in a catena of decisions. Therefore, on the question of sentence of death imposed on the appellant, the matter has to be remitted back to the trial court for fresh consideration in accordance with Section 235 (2) Cr.P.C.

25. Lastly it is contended by the learned senior counsel for the appellant that even if this Court accepts the evidence adduced by the prosecution and finds the appellant guilty, the sentence of death awarded to the appellant is not sustainable, as the present case does not fall within the ambit of "*rarest of rare cases*" as propounded by the Supreme Court in ***Bachan Singh – Vs – State of Punjab (1980 (2) SCC 684)*** and ***Machhi Singh – Vs – State of Punjab (1983 (3) SCC 470)*** and the sentence of death should necessarily be interfered with.

26. Per contra, Mr. Shanmugavelayutham, learned Public Prosecutor appearing for the State, in order to sustain the case as well as the sentence of death awarded to the appellant, submitted that the trial court, after giving careful consideration to all the materials on record and also going through the evidence of the witnesses has held that the prosecution has proved all the links in the chain of circumstance and that the tests as enunciated by the Supreme Court in a case of circumstantial evidence are fully satisfied and, therefore, had found the appellant guilty of the offence and, therefore, no interference is called for with the well considered findings of the trial court. On the question of sentence, learned Public Prosecutor submits that the trial court, carefully analyzing the dictum laid down by the Supreme Court in categorizing the case under the *rarest of rare* category, taking into account the subsequent similar crime committed by the appellant, wherein the appellant was convicted under Section 394 r/w 397 IPC and sentenced to imprisonment for a period of seven years, has held that the appellant indulging himself in such recursive activities would only go to show that there is no chance for reforming the appellant and, therefore, awarded the sentence of death after giving due opportunity to the appellant to put forth his case and, therefore, no interference is warranted on the question of sentence as

well. He relied upon the judgment of the Supreme Court in ***Union of India – Vs – V.Sriharan@ Murugan & Ors. (2015 (13) SCALE 165)***.

27. This Court gave its anxious consideration to the submissions made by Mr.V.Gopinath, learned senior counsel appearing for the appellant and Mr.Shanmugavelayutham, learned Public Prosecutor and also perused the evidence of the witnesses, the exhibits and the material objects relied on by the prosecution. This Court has also taken into consideration the dictum laid down by the Supreme Court in categorizing the case under the rarest of rare category as also on the question of opportunity that is required to be granted to the accused before sentence is pronounced.

28. The cause of death of the deceased stands established through the evidence of the doctor, P.W.22, who gave evidence on behalf of Dr.Anbu Selvam, who conducted autopsy on the dead body and issued the post-mortem certificate, Ex.P-21 and after receipt of visceral analysis report, Ex.P-20, opined that the deceased appears to have died on account of cut injury to the throat. The death of the deceased on account of homicidal violence was not disputed by the accused before the trial court nor disputed before this Court. On the

medical evidence we hold that the deceased died on account of homicidal violence.

29. To prove the case, the prosecution before the trial court relied upon circumstantial evidence. Before this Court proceeds to appreciate the circumstantial evidence, it would be apt to refer to the salutary principles enunciated by the Supreme Court in a case of circumstantial evidence.

30. In ***Deonandan Mishra - Vs – State of Bihar (AIR 1955 SC 801)***, the Supreme Court held that if the prosecution had to rely upon circumstantial evidence, it must establish all the links in the chain of circumstance and even if one link in the chain of circumstance is found missing, then the prosecution case has to be thrown overboard. The Supreme Court further held that where there is no eyewitness to the murder and the case against the accused depends entirely on circumstantial evidence, the standard of proof required to convict the accused on such evidence is that the circumstances relied upon must be fully established and the chain of evidence furnished by these circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. For better clarity, the relevant portion of the order is

extracted hereinbelow :-

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

31. Keeping the above legal principles laid down by the Supreme Court in mind as regards the appreciation of evidence in a case of circumstantial evidence, we will proceed to consider the evidence available on record to find out whether the prosecution has succeeded in establishing all the links in the chain of circumstance to prove the guilt of the accused and whether the sentence of death awarded by the trial court based on the evidence adduced by the prosecution is sustainable.

32. The prosecution has projected the inability of the accused to pay the persons, who were depositors in the chit run by him, as the motive for the commission of the offence. The evidence regarding the existence of a motive which operates in the mind of the accused is very often very limited, and may not be within the reach of others. The motive driving the accused to commit an offence may be known only to him and to no other. In a case of circumstantial evidence, motive may be a very relevant factor. However, it is the perpetrator of the crime alone who is aware of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggests adequately, the existence of the necessary motive required to commit a crime, it may be conceived that the accused has in fact, committed the same. (*Vide Rohtash Kumar – Vs – State of Haryana - 2013 (14) SCC 434*).

33. P.W.18, in chief examination has deposed that the accused had borrowed the jewels of his wife and raised money by pledging the same a month prior to the date of occurrence. The accused had also assured P.W.18 that he will return the amount for redeeming the jewels within a month. However, since the appellant did not return the amount, P.W.18 had threatened the appellant with dire consequences if he did not make any arrangements for redeeming the jewels. It is

the further evidence of P.W.18 that he had asked the accused for return of the amount on the morning of 22.2.2011 and the accused had asked him to return after sometime. When P.W.18 returned after some time, the accused showed him the jewels stating that he had got the same from his uncle. The above evidence of P.W.18 shows that the accused was in dire need of money for repaying P.W.18 lest he would be facing penal consequences.

34. P.W.7 in chief examination has deposed that the accused was running a chit business and in the year 2010, the accused was finding it difficult to pay back the chit amounts and, therefore, the depositors were swarming his place asking him to return the amount. The evidence of P.W.s 7 and 16 shows that the accused was carrying on chit business and was finding it difficult to repay the money. The above evidence of P.W.s 7 and 16 as to the accused running chit business is corroborated by the evidence of P.W.18 in his cross examination. In view of the above evidence, the case of the prosecution that the case is one of murder for gain stands established by the above fact that the accused was finding it difficult to pay back his debts and was hard pressed for money. The defense has not made any inroads into the evidence of the prosecution witnesses with regard to the motive aspect. Therefore, the motive for the commission of the

offence, as put forth by the prosecution, stands established.

35. It was contended by the learned senior counsel appearing for the accused that in the earliest complaint, Ex.P-1, P.W.1 has not spoken anything about the jewels worn by the deceased. However, in the later complaint, Ex.P-2, which was given after P.W.1 identified the body of the deceased, P.W.1 had stated that the jewels worn by the deceased were not found on the body and has implicated the accused with the commission of the crime for the purpose of taking away the jewels. It is contention of the learned senior counsel for the appellant that a reading of both Exs.P-1 and P-2 shows that Ex.P-2 has been improved by P.W.1 to the dictates of the police by implicating the accused with the commission of the crime and, therefore, no reliance can be placed on Ex.P-2.

36. A perusal of Ex.P-1, the earliest complaint given by P.W.1 to the police shows that at 10.30 a.m. on 22.2.2011 after finishing the temple works, when P.W.1 returned to his house, his mother Jayalakshmi, viz., the deceased was not in the house. P.W.1 has further stated that he searched at all the usual places frequented by his mother and since he could not find her, request has been made to the police authorities to find out his mother. In the said complaint,

P.W.1 has also stated that the deceased was suffering from cancer and eye problems and that she was wearing a green colour saree on the day of her disappearance. The complaint was simpliciter 'Woman Missing'. However, on coming to know about the presence of a dead body in the shop of the accused and on identifying the body as that of his mother P.W.1 had given the complaint, Ex.P-2, which, of course, cannot be treated as a substantive piece of evidence and it is only a police statement, which suffers the vice of the general prohibition under Section 162 Cr.P.C. Nevertheless, the evidence of P.W.1 relating to the identification of his mother's body and the jewels, M.O.s 1 to 7, worn by his mother, is relevant under Section 9 of the Evidence Act. Therefore, non-mentioning of the jewels in the complaint, Ex.P-1, is of no consequence in the facts and circumstances of the case. Further, it is common practice of any individual, at the first instance, to file a complaint only for tracing the missing person and not entertain a doubt that the missing person might have been killed. Simple identification is all that is required. A careful perusal of Ex.P-1 shows that at the earliest point of time, P.W.1 had only given a complaint to the police to trace his missing mother and in the complaint, he had even included the dress she was wearing to facilitate the police in the enquiry. There was no necessity for P.W.1 to entertain any doubt that his mother might have been abducted and murdered for gain.

37. The next circumstance projected by the prosecution pertains to the foul smell emanating from the shop of the deceased. P.W.4, the owner of the premises in which the shop was run by the accused, in chief examination, has deposed that since the arrest of the accused on 11.3.2011 in a case relating to theft, the shop of the accused was closed. P.W.4 further deposed that he was informed by the adjacent shop owner, P.W.6 that foul smell was emanating from the shop of the accused and, therefore, on 27.3.2011 P.W.4 contacted the father of the accused, viz., Veerapathiran, and enquired about the foul smell emanating from his shop and requested him to open the shop and clean the place. However, since Veerapathiran did not clean the shop, P.W.4 contacted Veerapathiran once again on 29.3.2011 and Veerapathiran asked P.W.4 to send some person to his house so that he will send the keys. P.W.4 asked P.W.7 to get the keys from Veerapathiran and, accordingly, P.W.7 got the keys for the shop from Veerapathiran and handed over the same to P.W.4. P.W.4, thereafter, along with P.W.5, Sundaram, opened the shop and on opening the shop, they noticed the foul smell emanating from the fridge. When P.W.4 opened the fridge, they found a gunny sack, which was brought out by P.W.s 4 and 5. On opening the gunny sack, a leg protruded from the sack. Within a short span of time, people gathered near the

place. P.W.1, who came to the scene of occurrence, identified the body as that of his mother and P.W.1, thereafter, proceeded to the police station for giving a complaint. The above evidence of P.W.4 stands corroborated on all material particulars by the evidence of P.W.s 5 to 7.

38. In spite of detailed and lengthy cross-examination of P.W.s 4 to 7, the defense has not elicited any evidence to its advantage. All the witnesses have categorically deposed that foul smell emanated from the shop of the accused, in his absence, upon his arrest in Crime No.200/2012.

39. Learned senior counsel for the appellant drew the attention of this Court to the deposition of P.W.4 in cross examination wherein he has deposed that the electrical switch to the freezer box was switched off and that he does not know when the same was switched off. Attention of this Court was also drawn to the cross examination of P.W.22, who has deposed that foul smell will emanate within three or four days of death. It is the submission of the learned senior counsel for the appellant that it is the case of the prosecution that the accused was selling milk and ice cream in his shop and if that is true, then there would have been no occasion for the appellant to switch off the

freezer box, else all the items that are kept in the freezer box would have become useless. It is also the further contention of the learned senior counsel that had the accused actually murdered the deceased and put the body in the freezer box, definitely he would have kept the freezer box in the switch on position. The fact that the freezer box was switched off at the time when the body was found shows that the theory put forth by the prosecution is prone to doubt. It is therefore the contention of the learned senior counsel for the appellant that the prosecution having not explained as to when the freezer box was switched off or by whom, the case of the prosecution cannot be believed.

40. The above argument of the learned senior counsel appears to be totally unacceptable as the circumstantial evidence in this case clearly establishes that on the date of pledging the jewels by the appellant with Muthoot Finance in the presence of P.W.18, and the subsequent date when the appellant was arrested in connection with Crime No.200/2011 coupled with the complaint of P.W.1 dated 23.2.11 makes it clear that there was no foul smell initially. It is only after the arrest of the accused in Crime No.200/2011 on 11.3.11, when he was in judicial custody foul smell started emanating from the shop of the accused and, therefore, the adjacent shop owners informed P.W.4, the

owner of the premises. It is also the case of the prosecution that the shop was closed since the arrest of the accused on 11.3.11. The keys were handed over to P.W.4 by the father of the accused for the purpose of opening and cleaning the shop. Such being the case, we are unable to accept the submission of the defence that the appellant had no reason to switch off the freezer box and, therefore, the prosecution having not established as to when the freezer box was shut off, the case of the prosecution has to fail. The prosecution has established beyond cavil that it was the accused who was running the shop and the shop remained closed since the arrest of the accused on 11.3.2011 in connection with Crime No.200/2011. Under Section 106 of the Evidence Act, the burden is on the accused to explain whether he had switched off the freezer or that he had left it running as this is a fact, which is to the exclusive knowledge of the accused. The above factors clearly establish that the foul smell emanated from the shop after long period of time from the date of missing of the deceased. The evidence of P.W.22 shows that the body of the deceased was in a highly decomposed state. This adds credence to the prosecution version that the murder had happened long before and had surfaced only after the arrest of the accused in Crime No.200/2011.

41. Though P.W.22 has stated in cross examination that foul

smell would come within three or four days from the date of death, however, the defense, for reasons best known, has not put probing questions to P.W.22 with regard to the evidence of P.W.4 to the effect that the freezer box was switched off at the time of finding of the body. In the absence of any probing questions to P.W.22 and P.W.23 in cross examination and in the absence of any evidence being adduced by the defence in regard to the freezer box being kept on by the accused, the omission by the prosecution to bring that aspect of the matter cannot be held to be fatal to its case. It is for the defence to put forth necessary evidence disputing the version of the prosecution and the defence having failed to adduce any evidence, cannot pluck holes in the prosecution version to further its case. Even a presumption could be drawn that every day the accused was keeping the freezer box on during his presence in the shop and, thereafter at the closure of the shop the freezer box was switched off. Though P.W.23 has stated in cross examination that he did not ascertain till which date, milk was sold in the shop of the accused, yet the defense, for reasons best known, has not adduced any evidence to show that milk and ice creams were sold in the shop of the accused till the date of his arrest in connection with the other case.

42. It is well settled principle of law that material evidence

against the accused should be put to him in terms of Section 313 Cr.P.C. by the Court. The main object of recording of a statement from the accused under this provision is to give an opportunity to the accused to explain the circumstances appearing against him and to put forth his defence, if he so desires. But when the accused fails to avail the opportunity, then consequences in law must follow. Though in terms of Section 313 Cr.P.C., the accused has the freedom to maintain silence during investigation as well as before the Court, even when his statement is being recorded under Section 313 Cr.P.C., the court would be entitled to draw an inference, including adverse inference, as may be permissible to it in accordance with law. In the present case, the accused having flatly denied any involvement in the offence and not having put forward any defence explaining the circumstances appearing against him, it is left open to the Court to draw an inference, including adverse inference as is permissible in law. In the present case, the body was found in the freezer box in the shop of the accused and, therefore, it is for him to explain the said circumstance, which is against him. The absence of any explanation by the accused in his statement recorded under Section 313 (1) (b) of Cr.P.C., the circumstance can definitely be put against him.

43. It is the case of the prosecution that on the complaint,

Ex.P1, given by P.W.1, a case of 'Woman Missing' in Cr. No.137/2011 was initially registered by the respondent police on 23.2.2011. It is the further case of the prosecution that on 29.3.2011, P.W.1 appeared before P.W.23 and gave information based on which the police came to the place of recovery of the body. These aspects have been corroborated by P.W.4 in his evidence.

44. P.W.23 in his evidence in chief has deposed that on the arrest of the accused on 31.3.2011, he took the accused into custody on 5.4.2011. Pursuant to the confession statement given by the accused, the shirt worn by the accused and a knife with red handle were produced by the accused, which were concealed in the asbestos sheet in his shop and the same were recovered. Thereafter, the investigating officer recovered the jewels pledged by the appellant, which belonged to the deceased with Muthoot Finance Corporation; the other jewels pledged by the appellant, which belonged to the deceased with P.W.17, and the receipt under which the jewels belonging to P.W.18, which was pledged by the appellant under Ex.P-16.

45. It is the submission of the learned senior counsel for the accused that the prosecution has not adduced any evidence to show that it was the accused who had pledged the jewels at Muthoot Finance

Corporation as also at the pawn shop run by P.W.14. Further, it is also submitted that the prosecution has not adduced credible evidence to prove that jewels said to have been given by P.W.18 to the accused for being pledged were actually redeemed by P.W.18. In short, it is submitted by the learned senior counsel for the accused that the above aspects having not been proven in a manner known to law, the case of the prosecution has to fail.

46. This plea is not tenable. The evidence of P.W.18 shows that the accused used to borrow money from him frequently and that to help the accused, P.W.18 had given the chain belonging to his wife for being pledged and the accused assured to redeem the chain and return the same within one month. Since the accused failed to redeem the chain and return it, on being threatened by P.W.18, the accused asked P.W.18 to return after some time. When P.W.18 returned after some time on 22.2.2011, the accused showed two bangles and one chain stating that he had borrowed the same from his uncle for the purpose of raising money to return to P.W.18. Accordingly, P.W.18 accompanied the accused to Muthoot Finance Corporation, where the jewels were pledged in the name of P.W.18, as the accused did not have any identification document.

47. P.W.12, the Branch Manager of Muthoot Finance Corporation deposed that on 22.2.2011 the accused, accompanied by P.W.18 came to the office and wanted to pledge one chain and two bangles and on being enquired about the ownership of the jewels, P.W.18 informed that the same belongs to the accused. Since the accused did not have any identification document, the jewels were pledged in the name of P.W.18. Further, P.W.12 deposed that on 6.4.11 the police brought the accused to the office from where, on being identified by the accused, the jewels pledged in the name of P.W.18 were recovered.

48. The above evidence of P.W.12 stands corroborated on all material aspects by P.W.13, who is one other employee of Muthoot Finance Corporation.

49. Though the learned senior counsel for the accused strenuously contended that there is no evidence connecting the accused with the pledging of the jewels, the said submission cannot be countenanced for the following reasons. P.W.18 has deposed in his evidence that he had signed the visitors register maintained by Muthoot Finance Corporation in relation to persons visiting their office. The prosecution has marked Ex.P-10, the copy of the visitors register. A perusal of Ex.P-10 reveals that the first entry on 22.2.2011 is made

by Kathavarayan, P.W.18. However, from a further perusal of the register, in the last column, viz., 'signature', it is seen that the signature affixed is not that of P.W.18. However, a perusal of Ex.P-11, the pawn receipt issued by the Bhawarlal Pawn Shop, reveals that one Selvam has pledged a pair of gold ear studs, two gold rings and one gold nose stud (without screw) on the very same day, i.e., 22.2.2011. It is pertinent to mention here that P.W.s 12, 13 and 14 have identified the accused as the person, who had pledged the jewels. The evidence of P.W.s 12, 13 and 14 is strengthened by the fact that the signature in the visitor's register, Ex.P-10 as well as the signature in the receipt issued by Bhawarlal Pawn Shop, Ex.P-11 bears identical signatures. Further, P.W.17, in chief examination, has deposed that the signature found in Ex.P-16 is that of the accused. It is pertinent to mention that the signature in Ex.P-16 is identical to the signature found in Exs.P-10 and P-11. Though all the three witnesses have categorically identified the accused as the person who had pledged the jewels and P.W.17 has also identified the signature of the accused in Ex.P-16, the accused has not come out with any plausible explanation disputing their evidence and has also not adduced any oral or documentary evidence to show that the signature in Exs.P-10, P-11 and P-17 are not his signatures. The silence of the accused in not explaining or disputing the signatures in both the documents is fatal to

the defense. Though the incriminating evidence was put to the accused when questioned under Section 313 Cr.P.C., the accused has not come out with any explanation whatsoever.

50. Further, one other aspect which stares at the face of the defence is the possession of the property belonging to the deceased at the hands of the accused. P.W.1 has identified the jewels as the property belonging to the deceased, which the deceased was wearing on the date of disappearance, which was subsequently pledged by the appellant under Exs.P-6, P-7 and P-11.

51. The Supreme Court in the case of ***Ganesh Lal – Vs – State of Rajasthan (2002 (1) SCC 731)***, has held that adverse presumption has to be drawn in a case where the accused is in possession of property belonging to the deceased in the absence of any explanation. For better clarity, the relevant portion is extracted hereinbelow :-

15. A review of several decisions of this Court, some of which we have cited hereinabove, leads to the following statement of law. Recovery of stolen property from the possession of the accused enables a presumption as to commission of offence other than theft or dacoity being drawn against the accused so as to hold him a perpetrator of such other offences on the following tests being satisfied: (i) the offence of criminal misappropriation, theft or dacoity relating to the articles

recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-lag between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of incriminating evidence or circumstance, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance. Ordinarily the purpose of Section 313 of the Code of Criminal Procedure is to afford the accused an opportunity of offering an explanation of incriminating circumstances appearing in prosecution evidence against him. It is not necessary for the accused to speak and explain. However, when the case rests on circumstantial evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation which he failed to do."

52. In the present case, the deceased was found to be missing from the morning hours of 22.2.2011. On the very same day, her jewels were pledged by the accused with Muthoot Finance Corporation

and Bhawarlal Pawn Shop, which is evident from Exs.P-6, P-7 and P-11. The accused has not explained as to how he had come in possession of those jewels. Even during the questioning under Section 313 Cr.P.C., the accused maintained complete silence and given flat denial. Failure to explain possession of jewels belonging to the deceased is an additional link in the chain of circumstance connecting the accused with the commission of the crime. In such circumstances, this Court has no other alternative than to draw an adverse inference.

53. Insofar as the submission of the learned senior counsel that no evidence has been adduced by the prosecution to show that the jewels said to have been given by P.W.18 to the accused for being pledged were actually redeemed by P.W.18 with the money obtained from Muthoot Finance Corporation. However, a perusal of Ex.P-16, the receipt issued by Laxmi Pawn Broker reveals that one gold chain was pledged by Selvam on 3.1.2011 and an amount of Rs.34,000/= had been received. It is pertinent to note that in the said receipt also, the signature is identical to the one found on Exs.P-10 and P-11. The identical signature in all the three documents, viz., Exs.P-10, P-11 and P-16 corroborates the version of P.W.18 that the accused had pawned the jewels given by P.W.18, which was later redeemed by P.W.18 on the evening of 22.2.2011. Further, the signature found in Exs.P-10, P-

11 and P-16 have been identified by P.W.s 18, 14 and 16 respectively. The accused having pawned the jewels at Muthoot Finance Corporation for a like amount required for redeeming the jewels pawned at the Bhawarlal Pawn Shop, necessary corollary has to be drawn that the pawning of the jewels at Muthoot Finance Corporation is for the purpose of redemption of the jewels of P.W.18 and, therefore, necessary inference follows that the act of redemption must have taken place. The silence of the accused at all stages of the trial is fatal to his case. The defense has miserably failed to establish that the jewel was not redeemed by P.W.18 and in the absence of any cross examination worth mentioning, this Court is unable to subscribe to the theory advanced by the defense that P.W.s 12, 13, 14 and 18 are uttering falsehood to strengthen the case of the prosecution. The burden shifts heavily on the accused to prove his innocence, which he has miserably failed to do.

54. Though a feeble attempt is made by the learned senior counsel for the appellant in suggesting that in the chemical analysis report, blood was not detected in the knife, M.O.19 and, therefore, the recovery of the same as well as the other material objects is doubtful cannot be accepted for the simple reason that though no blood was detected in the knife, M.O.19, however, Ex.P-20, chemical analysis

report reveals that except for M.Os.17 and M.O.19, blood was detected in all the other material objects, viz., M.O.s 8 to 16, 18 and 20. It is also pertinent to point out that the chemical analysis report, Ex.P-20 reveals the presence of blood in the shirt, M.O.18, which was recovered at the instance of the accused. The appellant has not come out with any explanation as to how blood was found on all the objects that were in his shop, including his shirt, leave alone the dress worn by the deceased. It is for the appellant to explain the presence of blood in all the material objects that were recovered from his shop, in a convincing manner.

55. It is the submission of the learned senior counsel for the appellant that the non-availability of any identifiable fingerprints from the shop of the appellant creates a doubt as to whether the offence was committed in the manner as projected by the prosecution and, therefore, in the absence of proper evidence, the case of the prosecution has to fail.

56. Though such an argument is advanced, the same cannot be countenanced for more than one reason. Firstly, it is not the case of the appellant that the door of the shop was found broken. It is the evidence of P.W.4 that he obtained the keys from the father of the

accused and opened the shop. Further, it is also pertinent to mention that the chappals of the deceased were found inside the shop of the accused, for which also there is no explanation on the side of the defence. Useful reference in this regard can be had to the judgment of the Supreme Court in ***Gade Lakshmi Mangraju @ Lakshmi - Vs - State of A.P. (2001 (6) SCC 205)***, wherein the Supreme Court held as under :-

"21. Presence of a fingerprint at the scene of occurrence is a positive evidence. But the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene. If during perpetration of the crime the fingerprint of the culprit could possibly be remitted at the scene it is equally a possibility that such a remnant would not be remitted at all. Hence absence of finger impression is not guarantee of absence of the person concerned at the scene."

Therefore, the absence of fingerprints does not in any way help the defence in taking a plea that the accused was unconnected with the crime.

57. The other aspect, which diminishes the value of the non-availability of fingerprints is the recovery of the jewels belonging to the deceased at the instance of the appellant and identification of the appellant as the person, who pledged those jewels and also the

recovery of bloodstained material objects from the shop of the appellant. The defence having been unable to break the link in the chain of circumstance established by the prosecution, through the evidence of the witnesses, the non-availability of identifiable fingerprints at the scene of occurrence pales into insignificance.

58. As noted *supra*, the Supreme Court in *Deonandan's case* (*supra*) has laid down the parameters that are required to be followed in a case arising out of circumstantial evidence. In the present case, all the links in the chain of circumstance have been explained completely, as enunciated by the Supreme Court, and rules out any reasonable likelihood of the innocence of the accused and unerringly points to the accused as the probable assailant with reasonable definiteness and the accused having not offered any explanation, the same is an additional link in the chain of circumstance, which is complete in all respects.

59. Lastly it was contended by the learned senior counsel for the appellant that after conviction was rendered against the accused, the trial court did not grant reasonable opportunity to the accused for being heard before sentence of death was pronounced. The conviction and sentence was passed in tandem, thereby the accused has been

deprived of his rightful opportunity to present his case as contemplated under Section 235 (2) of Cr.P.C.

60. Section 235 of Cr.P.C. contemplates that the Judge shall hear the accused before passing the sentence. The contention of the learned senior counsel for the appellant is that the accused was not given the necessary time to react after he was convicted for the penal offence, before the sentence was pronounced. In such circumstances, learned senior counsel submitted that the sentence imposed on the appellant is, per se, not justified.

61. The law on sentencing by the Courts after conviction is passed has been dealt with by the Supreme Court in ***Dagdu – Vs – State of Maharashtra (1977 (3) SCC 68)***. For better clarity, the relevant portion is extracted hereunder :-

"78. Section 235 of the Criminal Procedure Code, 1973 reads thus:

"235. (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The imperative language of sub-section (2) leaves no room for doubt that after recording the finding of guilt and the order of conviction, the Court is under an obligation to hear the accused on the question of sentence unless it releases him on probation of good conduct or after admonition under Section 360. The right to be heard on the question of sentence has a beneficial purpose, for a variety of facts and considerations bearing on the sentence can, in the exercise of that right, be placed before the Court which the accused, prior to the enactment of the Code of 1973, had no opportunity to do. The social compulsions, the pressure of poverty, the retributive instinct to seek an extra-legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity — all these and similar other considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of Section 235(2) must, therefore, be obeyed in its letter and spirit.

79. But we are unable to read the judgment in Santa Singh as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question of sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That

opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."

62. It is clear from the law laid down by the Supreme Court that the Court, on convicting an accused, must unquestionably hear him on the question of sentence. In case of omission by the court below, the higher court may, on being brought to notice by the accused, give a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to produce before the Court all the data which he desires to produce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of

sentence.

63. In the case on hand, it is not the case of the accused that no opportunity was granted before sentence was passed. It is evident from the record that the Court questioned the accused prior to passing the sentence for which the accused replied that he has old aged parents to be taken care of and so lesser sentence be awarded. The Court, after hearing the accused and recording reasons, has passed the sentence of death. Therefore, in the above factual scenario, the submission of the learned counsel for the appellant that the accused was not given a reasonable opportunity before passing the sentence cannot be sustained.

64. Now the core question that needs to be decided is whether the case on hand is one falling under the *rarest of rare* category warranting sentence of death. While the learned senior counsel for the appellant submitted that the case does not fall under the category of rarest of rare cases as propounded by the Supreme Court, learned Public Prosecutor submits that the crime is a heinous crime committed by the accused on an old and infirm lady. Further, it is submitted by the learned Public Prosecutor that the accused is a habitual offender, which is evident from the conviction sustained by him in another

similar crime in S.C. No.6/2012 on the file of the same police station for which the accused was convicted under Section 394 r/w 397 IPC and sentenced to undergo rigorous imprisonment for a period of seven years. It is therefore submitted by the learned Public Prosecutor that the accused indulging in similar crime after the commission of the first crime unquestionably led the trial court to the inference that the accused is beyond reformation and his continuation in the social system would only lead to more similar crimes. Considering all the above factors, sentence of death was imposed on the accused and, therefore, no interference is called for.

65. In the light of the principles enunciated by the Supreme Court, the question that is to be decided by us is the nature of punishment to be awarded to the accused. In ***Bachan Singh – Vs – State of Punjab (AIR 1980 SC 898)***, the Supreme Court held that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal, and what is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely

cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator and that is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is cruel and therefore, all murders are act of cruelty. But, such cruelty may vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist. The Supreme Court, in the said judgment, held that in the exercise of its discretion, the court shall take into account the following circumstances, before awarding sentence :-

(a) That the offence was committed under the influence of extreme mental or emotional disturbance.

(b) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above.

(e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(f) That the accused acted under the duress or domination of another person.

(g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

66. In ***Machhi Singh & Ors. – Vs – State of Punjab (1983 SCC (Cri) 681***), the Supreme Court held that before awarding death sentence, the following questions may be asked and answered as a test to determine the '*rarest of rare*' case in which death sentence can be inflicted :-

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

(ii) 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?"

67. The Supreme Court went on to hold that the guidelines which emerge from *Bachan Singh's case (supra)*, will have to be applied to the facts of each individual case, where the question of imposition of death sentence arises. It was further held that in rarest of rare cases, when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power-centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded.

The community may entertain such sentiment in the following circumstances:-

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

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

(3) When murder of a member of 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-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

68. The Supreme Court was of the view that if upon taking an overall 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 determining the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

69. The above tests enunciated by the Supreme Court, while awarding death sentence, has been dealt with in a catena of decisions and the circumstances, which are mitigating and aggravating based on which sentence needs to be awarded, has been culled out from various decisions and highlighted by the Supreme Court in ***Ramnaresh – Vs – State of Chhattisgarh (2012 (4) SCC 257)***, and the same is extracted hereunder :-

"76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh and thereafter, in Machhi Singh. The aforesaid judgments, primarily dissect these principles into two different compartments — one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while

completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) Cr.P.C.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) *The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.*

(9) *When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.*

(10) *When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.*

(11) *When murder is committed for a motive which evidences total depravity and meanness.*

(12) *When there is a cold-blooded murder without provocation.*

(13) *The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.*

Mitigating circumstances

(1) *The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.*

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

(3) *The chances of the accused of not indulging in commission of the crime again and the*

probability of the accused being reformed and rehabilitated.

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

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

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

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

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

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

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

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

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

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

60. *This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award death sentence. Since such circumstances cannot be laid down as a straitjacket formula but must be ascertained from case to case, the legislature has left it open for the courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence."*

70. On the question of striking a delicate balance between the

proportionality of crime to the sentencing policy and arriving at the imposition of penalty in rarest of rare cases, the words of Lord Denning has been quoted with approval by the Supreme Court in ***Deepak Rai – Vs – State of Bihar 2013 (10) SCC 421***, which is quoted hereunder :-

".... The punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformatory or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."

71. In the case on hand, following the principles laid down by the Supreme Court above, this Court has to consider the aggravating and mitigating circumstances before inflicting the sentence of death on the accused. On a consideration of the circumstances, more particularly, the mitigating factors relating to lack of criminal antecedents or probabilities of the appellant to be a menace to the society, the Hon'ble Supreme Court in ***Gurudev Singh – Vs – State of Punjab (2003 (7) SCC 258)***, has observed as hereunder :-

".... it is indeed true that the underlying principle of

our sentencing jurisprudence is reformation and there is nothing in evidence to show that the appellants have been a threat or menace to the society at large besides the FIR regarding the theft of buffalo. It is also true that we cannot say that they would be a further menace to the society or not as we live as creatures saddled with an imperfect ability to predict the future. Nevertheless, the law prescribes for future, bases upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools."

72. Keeping in mind the above observations of the Supreme Court, this Court has analysed the aggravating and mitigating circumstances. As has been repeatedly held by the Courts, murder is cruel and, therefore, all murders are cruel. However, the cruelty of the murder alone will not tag it under the head of rarest of rare case for award of death sentence as propounded by the Supreme Court in *Bachan Singh's case (supra)*. If the crime perpetrated by the accused is so outrageous that it shocks the conscience of the entire community, then the wrongdoer deserves the punishment of death, whether it is a deterrent or not. Though the learned Public Prosecutor highlighted that the appellant has been convicted and sentenced under Section 394 r/w 397 IPC in a similar offence in S.C. No.6/2012 on the file of the same police station, yet that by itself would not suggest that the appellant/accused is a menace to the society at large. As held by the

Supreme Court in *Bachan Singh's case (supra)*, the State is bound to prove by evidence that the accused would commit criminal acts of violence that would constitute a continuing threat to the society and that the accused is beyond reformation or rehabilitation. No material in support thereof has been placed either before the trial Court or before this Court by the prosecution except relying upon the conviction of the appellant in S.C. No.6/2012. It is to be pointed out that in the present case, the judgment in S.C. No.6/2012 was not marked as exhibit before the trial court by the prosecution and, therefore, reliance placed on the said conviction by the trial court to arrive at the conclusion that the accused is a continuing menace to the society and is beyond reformation/rehabilitation, cannot be accepted. This Court finds it difficult to hold that the criminal was such a dangerous person that to spare his life would endanger the community.

73. The questions framed by the Supreme Court while determining the rarest of rare case in *Machhi Singh's case (supra)*, has to be taken into consideration while considering imposition of penalty. In the present case, the case of the prosecution itself reveals that the accused having been put under immense pressure by P.W.18 to return the money or else to face penal consequences, seems to have taken upon the act of murdering the deceased for the purpose of robbing her

jewels. Though the conviction of the appellant in S.C. No.6 of 2012 can be put against him to show that for the purpose of money, the appellant has committed similar act, but however, as stated above, the prosecution having failed to mark the said judgment before the trial court, cannot rely on the same to stress that the accused in the present case should be imposed with sentence of death. Further, the post-mortem certificate reveals that there was only one cut injury to the throat on the middle part of the neck of the deceased. This amply reduces the brutality and inhumanity with which the crime was committed. Further, the age of the accused, though not a determinative factor by itself, the Court has to keep in mind the same before award of sentence. There is no evidence on record to show that there was any diabolic planning to commit the crime, though murder by itself is a cruel act. In the light of the above stated factual position, this Court is of the considered opinion that this is not a case that could be categorized under the head of "*rarest of rare cases*" warranting imposition of sentence of death. The mitigating circumstances in the present case outweigh the aggravating circumstances and, therefore, this Court, taking a 'humanist approach', deems it fit to modify the sentence of death imposed on the accused.

74. In view of the reasons stated above, this Court confirms the

conviction imposed upon the appellant under Section 302; but, the sentence of death imposed upon him, is modified to one of imprisonment for life. But we direct that the appellant shall not be released unless he completes 30 years of actual imprisonment without any statutory remission or commutation. Such a course has been held to be permissible in ***Haru Ghosh – Vs - State of West Bengal (JT 2009 (11) SC 240)***, on the basis of the law laid down in ***Swami Shradhanand @ Murali Manohar Mishra – Vs - State of Karnataka (JT 2008 (8) SC 27)***, where the Supreme Court, after considering several cases, held that such a course was permissible. Insofar as the conviction and sentence imposed on the appellant u/s 380 and 201 IPC are concerned, both the conviction and sentence are confirmed. The sentences in this case are directed to run concurrently.

75. In the result, with the above modification in sentence, this appeal is dismissed. The reference of the learned III Addl. Sessions Judge, Ponnammallee, is answered accordingly.

(R.S.J.) (P.N.P.J.)
27-01-2016

Index : Yes / No

Internet : Yes / No

GLN

To

1. The III Additional Sessions Judge
Tiruvallur @ Poonamallee.
2. The Inspector of Police,
Maduravoyal Police Station
Chennai.
3. The Public Prosecutor
High Court, Madras.
4. The Superintendent of Central Prison
Central Prison, Puzhal
Chennai.

R. SUDHAKAR, J.
AND
P.N. PRAKASH, J.

GLN

**Pre-Delivery Common
Judgment in
R.T.No.1 of 2013 &
C.A.No.801 of 2013**

**Delivered on
27-01-2016**