

Shailaja

This judgment is corrected vide speaking to minutes of the  
order dated 8th December, 2021.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO.1 OF 2017

|                          |   |                        |
|--------------------------|---|------------------------|
| The State of Maharashtra | ] | Appellant              |
|                          |   | (Original Complainant) |

Vs.

|                               |   |                            |
|-------------------------------|---|----------------------------|
| 1. Rahimuddin Mohfuz Shaikh @ | ] |                            |
| John Anthony D'Souza @ Babu   | ] |                            |
| @ Baba                        | ] |                            |
|                               |   |                            |
| 2. Sandip Samadhan Shirsath @ | ] |                            |
| Raghu Rokda                   | ] | Respondent                 |
|                               |   | (Orig. Accused No.1 and 2) |

.....

Ms. M.M. Deshmukh A.PP for Appellant-State.

Ms. Rebecca Gonsalvez i/b Dr. Yug Chaudhry, appointed Advocate  
for Respondents.

....

|               |                                                         |
|---------------|---------------------------------------------------------|
| CORAM         | : SMT. SADHANA S. JADHAV &<br>PRITHVIRAJ K. CHAVAN, JJ. |
| RESERVED ON   | : 18th November, 2021.                                  |
| PRONOUNCED ON | : 25th November, 2021.                                  |

**JUDGMENT:** [Per Prithviraj K. Chavan, J.]

1. The learned Additional Sessions Judge, Thane had submitted the proceedings in Sessions Case No.599 of 2012 under section 366 (1) of the Code of Criminal Procedure (for short 'Cr. P.C') for

confirmation of sentence of death passed under section 302 r/w 34 of the Indian Penal Code (for short 'I.P.C') in respect of accused persons namely; Rahimuddin Mohfuz Shaikh @ John Anthony D'souza @ Babu @ Baba and Sandip Samadhan Shirsat @ Raghu Rokda.

2. Apart from sentence of death, both of them have also been convicted of the offences punishable under sections 376 (2) (g), 326 r/w 34 I.P.C and sentenced to suffer rigorous imprisonment for life and rigorous imprisonment for 10 years on each count with fine of Rs.5,000/- each.

3. The prosecution case, as emerged from the record, can be stated as under.

4. This again is a sordid story of two poor, helpless and hapless victims who had not only been raped but one of them had been brutally murdered. (They shall be referred to as "Deceased-X" and "Survivor-Y" for the sake of brevity).

5. There were two victims. They were friends and were rag pickers. That was their only source of livelihood. Survivor-Y was aged about 18 to 19 years. While deceased-X was about 28 years and was married. Survivor-Y was roofless and hence, the railway platform of *Vashi* station was her night abode.

6. On the fateful day of 9th May, 2012, deceased-X came to meet survivor-Y from Ghatkopar. Since survivor-Y earlier used to

collect garbage at Ghatkopar and, therefore, both were acquainted with each other.

7. Survivor-Y did not know the accused previously, however, deceased-X knew accused No.1-Rahimuddin Shaikh. On that day, around 12.00 noon, survivor-Y and deceased-X were standing near Vashi garden in front of railway station. At that time, both the accused came over there and said that they would arrange for some job. Deceased-X and survivor-Y, therefore, decided to go along with the accused. Both the accused took deceased-X and Survivor-Y to Jui Nagar Bridge in a rickshaw. They offered deceased-X and survivor-Y '*Pepsi*' cold drink. Deceased-X and survivor-Y had drunk the said cold drink. Thereafter, both of them took deceased-X and survivor-Y to CBD Belapur by boarding another rickshaw. The accused thereafter took deceased-X and survivor-Y beneath a bridge and thereafter they offered them liquor. Deceased-X and survivor-Y also consumed liquor offered by both the accused. The accused then took both of them below the tunnel of the bridge. Thereafter, the accused raped survivor-Y and deceased-X. When deceased-X and survivor-Y resisted, both the accused assaulted them with hacksaw blade and a knife. Deceased-X and survivor-Y sustained multiple injuries on the vital parts of their body. However, survivor-Y escaped from the clutches of the accused and ran away from the spot. While running away, she fell down below the bridge and sustained a head injury. She became unconscious, however, deceased-X died on the spot due to the multiple injuries.

8. On 9th May, 2012 itself around 4.30 p.m., one rickshaw driver noticed injured survivor-Y lying in an injured condition and was unconscious. He, therefore, informed C.B.D Belapur Police Station. The Police arrived on the spot and lifted survivor-Y to the Hospital. It is the case of the prosecution that survivor-Y was not in a position to give her statement on that day as she was unconscious.

9. On 10th May, 2012, in the morning a Watchman by name Sawansingh Tolasingh Bhatera, who was staying below C.B.D over-bridge, saw, in a hollow portion (cavelet) of the over-bridge dead body of a woman fully naked with injuries on her person. So, he informed the Police. The Police came to the spot at about 10.00 a.m and removed the body from the tunnel with the help of Fire Brigade Personnel. An inquest *panchanama* was drawn in the presence of two *panchas*. The body was sent for postmortem. A spot *panchanama* was also drawn in the presence of two *pancha* witnesses. A torn red coloured *punjabi* dress stained with blood and mud, a brassier, an *odhani*, a pair of black *chappal*, one bottle of 100 m.l liquor, three yellow coloured bangles and five white coloured bangles stained with blood came to be seized. The Police had also collected blood stained mud and sample mud from the spot. All these articles were seized from the spot.

10. The prosecution case further indicates that on the next day morning, survivor-Y regained consciousness. On the basis of the information given by her, an F.I.R came to be recorded at about 3.30 p.m. She gave description of those two assailants in her

report. She had stated in her report that those persons said "*tumko kaam pe lagate hai*". Therefore, under that pretext took them below the C.B.D Belapur over-bridge and subjected them to rape and assault. Survivor-Y had sustained injuries on her face, chin, ear, backside. Survivor-Y had also stated that both the assailants had assaulted deceased-X with sharp weapon and committed her murder.

11. A crime bearing No.73 of 2012 came to be registered under section 302, 376 (2) (g) r/w section 34 of the Indian Penal Code with C.B.D Belapur Police Station on 10th May, 2012 at 15.30 hours.

12. PW.9- A.C.P Shekhar Tore held investigation into the crime. He drew inquest *panchanama*, spot *panchanama* and also sent the body of deceased-X for postmortem. The accused came to be arrested on 14th May, 2012 at 12.20 hours. The Investigating Officer had also recorded statements of watchman and the relatives of survivor-Y and deceased-X. He recorded the statement of one caterer who was working with both the accused under section 164 of the Code of Criminal Procedure.

13. The Investigating Officer had forwarded the seized *muddemal* articles to the Forensic Science Laboratory for chemical analysis. After the investigation, a charge-sheet came to be filed against the accused in the Court of J.M.F.C, Vashi, Navi Mumbai.

14. Since the offences were exclusively triable by the Sessions Court, the learned Magistrate committed the case to the Sessions Court, Thane. The learned Additional Sessions Judge framed a charge against both the accused below (Exhibit 3) under sections 376 (2) (g), 302 and 326 r/w 34 of the I.P.C. It was read over and explained to the accused. They pleaded not guilty and claimed to be tried. Their defence was of total denial and false implication in the alleged offence. No defence witness has been examined.

15. To substantiate its case, prosecution examined eleven witnesses and tendered documentary evidence in the form of the reports of chemical analyzer, inquest *panchanama*, spot *panchanama* etc .

16. After considering the evidence of the prosecution witnesses and hearing the prosecution as well as the defence on the point of sentence, the learned Additional Sessions Judge, by the impugned judgment found that the murder of deceased-X was committed by the accused in such a brutal, grotesque and diabolical manner and it being a cold blooded murder wherein deceased-X and survivor-Y were helpless women, awarded sentence of death to both of them. The learned Additional Sessions Judge, *inter alia*, awarded life imprisonment i.e the remainder of their natural lives for having committed the offence of gang rape, *inter alia*, imposing a fine of Rs.5000/- each on both counts. They were also convicted and sentenced of the offence punishable under section 326 r/w 34 and were directed to undergo rigorous imprisonment for 10 years with fine of Rs.5,000/-. The substantive sentences were directed to

run concurrently.

17. As already stated, the reference under section 366 (1) of the Cr. PC has been made by the learned Additional Sessions Judge for confirmation of the death sentence.

18. Before adverting to the question of the confirmation of sentence of death passed by the learned Additional Sessions Judge, Thane *qua* both the accused, it would be essential to mention that this Court by an oral judgment dated 22nd October, 2019 (Coram: B.P. Dharmadhikari & Sandip Shinde, J.J.) discharged accused No.2 Sandip Shirsat alias Raghu Rokda from Sessions Case No.599 of 2012 by quashing and setting aside the findings recorded against him in the judgment dated 11th May, 2017, *inter alia*, directing the respondent-State to produce the juvenile before the Juvenile Justice board in accordance with the Juvenile Justice (Care and Protection of Children) Act, 2015. The said judgment came to be passed pursuant to an application taken out on behalf of accused No.2 - juvenile-in-conflict-with-law, contending that on the date of the incident i.e on 9th May, 2012, he was 16 years and 9 months old.

19. We have heard Ms. Deshmukh, learned A.PP and Ms. Gonsalvez, learned Counsel appearing for the accused.

20. At the outset, Ms. Gonsalvez would argue that the prosecution has failed to establish identity of deceased-X in the sense that there is neither oral nor documentary evidence to

conclusively establish her identity. She would argue that despite giving an information by survivor-Y, no F.I.R came to be registered, promptly. The F.I.R came to be registered only on the next date of the incident at 3.30 p.m for which there is no explanation tendered by the prosecution. As a matter of fact, survivor-Y was very much conscious on 9th May, 2012 itself, however, an F.I.R came to be recorded belatedly around 3.30 hours on 10th May, 2012 and, therefore, it was a fabricated document. Learned Counsel took us through the medical papers *qua* survivor-Y wherein the Psychiatrist, who had examined and described the psychological aspect of survivor-Y which also renders her testimony doubtful as regards commission of the alleged offence by the accused.

21. So far as the testimony of P.W.8-Sameer Shaikh is concerned, it is submitted that he had no occasion to see the accused during the trial as they were not produced before the Court. Extra judicial confession of the accused before this witness is only in respect of the murder but there are no details as to how and whose murder had been committed by the accused. There is no evidence of rape.

22. Ms. Gonsalvez has drawn out attention to the name of the accused also which is Rahimuddin Mohfuz Shaikh @ John Anthony D'Souza @ Babu @ Baba. She submits that it is difficult to ascertain whether accused is Hindu, Muslim, Christian or otherwise. Even identity of the accused, according to the learned Counsel, has not been properly proved by the prosecution. There is even no evidence that he had, in fact, was the person responsible

for committing murder of the deceased-X as well as causing multiple wounds/injuries on the person of survivor-Y. The learned Counsel has also questioned the evidence of other witnesses including evidence of P.W.7- Deepali Dinkar Mahadik, who is said to have conducted Test Identification Parade in respect of both the accused.

23. It has been vehemently argued by the learned Counsel that in fact, the trial has been vitiated for the reason that the learned Additional Sessions Judge had recorded the evidence of the prosecution witnesses only in English by accepting *pursis* (Exhibit 19) by showing as if the Additional Public Prosecutor and the defence Counsel had no objection which is in total breach of the provisions of the Criminal Manual and the Code of Criminal Procedure. Even the accused were not produced before the Court on certain occasions when evidence of important prosecution witnesses came to be recorded. Learned Counsel has, therefore, submitted that this is not the case of confirmation, rather, it is the case of acquittal of the accused as the prosecution has miserably failed to bring home guilt of the accused beyond all reasonable doubts.

24. On the other hand, Ms. Deshmukh, the learned A.P.P supported the impugned judgment by arguing that it is a case of direct evidence of survivor-Y which has been corroborated by the medical evidence on record. Ms. Deshmukh, would argue that looking to the social background of survivor-Y, who is an illiterate rag picker, it is not expected that she would give all the minute

details. However, she had duly identified both the accused during the Test Identification Parade and also during the trial which is the substantive evidence.

25. As regards the injuries on the person of survivor-Y, our attention is drawn to the evidence of P.W.11-Dr. Vijay Waman Dhakare who had opined that injuries were on the vital part of the body and the patient could have gone into coma had there been no immediate medical help. The learned A.P.P would argue that defective investigation cannot result into giving some benefit to the accused for the reason that the evidence on record, spot *panchanama*, inquest *panchanama* and the medical evidence fully established the complicity of the accused in the present case who had committed brutal murder of deceased-X by inflicting blows of a knife along with juvenile-in-conflict-with-law resulting into death after having committed rape upon her. She would argue that even survivor-Y had been subjected to rape by the accused and thereafter she could have also been murdered, had she not resisted and escaped from the clutches of both the accused. The learned A.P.P would further argue that looking to the gravity, nature and manner in which the offence had been committed by the accused, the learned Additional Sessions Judge has rightly awarded death sentence which needs to be confirmed. In support, the learned A.P.P has placed reliance upon some authorities with which we shall deal hereinafter.

26. To substantiate it's case, the prosecution examined as many as eleven witnesses. The important evidence is that of survivor-Y.

In the month of May, 2012, she was staying at Vashi in a hut at the relevant time and was collecting garbage. Her source of income was selling garbage. However, she again testified that she does not possess any house but stays at the platform of Vashi Railway Station. On 9th May, 2012, her friend deceased-X came to meet her from Ghatkopar. She also used to collect garbage at Ghatkopar. They were old friends as both were collecting garbage at Ghatkopar. Her evidence further reveals that she knew both the accused, however, again she testified that she was not knowing them previously.

27. On the day of the incident, according to survivor-Y, around 12.00 in the noon, both of them were standing near a garden in front of Vashi Railway Station. At that time, both the accused approached them and asked to accompany them as they would arrange job for both of them. Both deceased-X and survivor-Y, therefore, accompanied the accused in a rickshaw to Jui Nagar bridge where deceased-X and survivor-Y were offered *Pepsi* (soft drink). Both of them drank *Pepsi*. The accused thereafter took both of them to C.B.D Belapur in another rickshaw. Thereafter, the accused took both of them to a tunnel under the bridge. Here, both the accused offered liquor to deceased-X and survivor-Y. They consumed liquor and were under its influence. Her evidence further indicates that both of them (deceased-X and survivor-Y) had slept over there. Thereafter, the accused again took both of them to another bridge beneath which there was a hollow portion (cavelet). Survivor-Y did not know as to how they were taken to the last spot, since according to her both of them were not only

under the influence of liquor but also had slept.

28. Evidence of survivor-Y further reveals that after taking both of them in the tunnel like place under the bridge, both the accused had raped her and deceased-X. This witness was first raped by accused Rahimuddin and then by the juvenile. Survivor-Y had identified accused Rahimuddin in the Court. However, survivor-Y again confused and testified that she did not know the name but it was the second accused who had raped her first and then the first accused.

29. After committing rape on both of them, both the accused assaulted them. Accused Rahimuddin assaulted deceased-X as well as survivor-Y by means of a knife. He had inflicted blows of knife on her neck, stomach, legs and below her ear. She became unconscious. The evidence further indicates that due to the assault upon her friend in a similar manner, she too was grievously injured, however, survivor-Y escaped from the clutches of the accused. While running from the spot, she fell down from the bridge and sustained head injury. Thereafter, survivor-Y did not know as to what had happened to her friend.

30. According to her, she was taken to a Hospital at Kamothe by the Police and, thereafter, to Sion Hospital where she was admitted as an indoor patient. Initially, her statement was recorded in the Hospital and subsequently another statement came to be recorded on 22nd May, 2012 at the Police Station. On the basis of her statement (Exhibit 21) an F.I.R came to be registered on 10th May,

2012 at 15.30 hours. It has been specifically testified by survivor-Y that in her complaint recorded by the Police at the Hospital, she did not name any of the accused but had given their description. Subsequently, she was taken to Taloja Jail on 22nd May, 2012 for identification of the accused. There were around 20 persons in the row and she had been asked to identify if the accused were amongst any of them. She had identified both the accused. This is the examination-in-chief of survivor-Y.

31. From the examination-in-chief itself, it is quite apparent that both deceased-X and survivor-Y were not coerced or forced by the accused to accompany them in a rickshaw. It is also apparent that both deceased-X and survivor-Y had consumed liquor at ease without any hesitation. Rather, it is not the evidence of survivor-Y that they were forced or compelled to consume liquor. The evidence is also clear on the aspect that after consuming liquor, both deceased-X and survivor-Y were under its influence and had slept. The fact that deceased-X and survivor-Y, who were friends, were consuming liquor has been substantiated by PW.9-Shridhar Tore, Investigating Officer. According to this witness, one Shankar Vishwanath Chavan during the interrogation had stated before him that deceased-X and survivor-Y along with husband of deceased-X went to Mankhurd for consuming liquor. The said Shankar Vishwanath Chavan was working as a coolie as well as an agent for booking railway tickets. Deceased-X used to work for him. According to said Shankar Vishwanath Chavan when he had given money to deceased-X for her work, she along with her husband went to Mankhurd. The case papers of Sion Hospital of survivor-Y

also demonstrate the said fact that she had a history of consumption of unknown drugs on the day of the incident before the assault. No doubt, what had been stated by the said Shankar Vishwanath Chavan to the Investigating Officer is of hearsay nature, yet it is a relevant fact in the given set of circumstances.

32. During her cross-examination, survivor-Y admits and buttressed the fact that that sometimes deceased-X along with her used to consume liquor and sometimes, even husband of deceased-X used to give them company for consuming liquor. It was suggested in her cross that she also used to consume *whitener* along with her friend, which she has denied. A suggestion that survivor-Y along with deceased-X had indulged into prostitution and, therefore, used to go with the customer/s on that count, has also been denied by survivor-Y. But the suggestion cannot be said to be without substance in view of the attending circumstances which have been surfaced during the course of evidence of survivor-Y. If they were earning their livelihood as rag picker, they would not have readily accepted invitation and offer of the accused who, according to them, were unknown and would accompany them, consume liquor and go under the bridge in a hollow(cavelet). Be that as it may.

33. In the cross-examination, survivor-Y admits that after her complaint was recorded in the hospital, it's contents were not read over to her. That being so, the complaint of survivor-Y has been rendered otiose. She herself did not know what was written by the Police. This goes to the very root of the persecution case. This

is a canard. The cross-examination further reveals that both deceased-X and survivor-Y were not acquainted with the accused before the incident. Survivor-Y had categorically admitted that the Police had shown both the accused to her at the Police Chowky on that day when she had identified them. It obviously means that the identification of the accused by survivor-Y during the Test Identification Parade conducted by P.W.7-Deepali Mahadik was nothing but a farce. It is difficult to accept whether survivor-Y was completely in her sense to understand as what had exactly happened at the time of the alleged incident of rape and the assault upon both of them in view of the fact that she was fully under the influence of the liquor and both of them had slept. Her clear admission as to how they were taken to the spot of the incident itself renders her testimony quite suspicious and unacceptable as to whether it were the accused and none other who took them to the spot of the incident. It is not the case of the prosecution that deceased-X and survivor-Y were not in an inebriated state at the relevant time.

34. The most important question is as to whether the testimony of survivor-Y who herself is an injured witness can be fully accepted as a truthful version of the entire episode *sans* corroboration, which is significant in light of the fact that it has been held by catena of decisions that corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law but a guidance of prudence under given circumstances. One should not be unmindful of the fact that from place to place, from different life styles and behavioral complexes

as well as different set of facts, oral and circumstantial evidence will have to be taken into account. There should not be a dead uniformity but realistic diversity, otherwise rigidity in the form of rule of law in this area would be introduced which could be a new type of precedent.

35. Normally, evidence of an injured eye witness cannot be discarded in *toto*, particularly when the evidence is tested in the light of broad probabilities, it can be concluded that he or she was a natural eye witness and had no reason to concoct a case against the accused. Presence of injuries on the person of survivor-Y does not guarantee of her truthfulness. Admittedly, there were several injuries on the person of survivor-Y. The injuries on her person, at the most, assured of her presence at the spot but they do not add anything more. Her truthfulness has to be demonstrated otherwise. There should not be any reason for the witness to falsely implicate the accused persons. Merely because, she is an injured eye witness, her evidence cannot be mechanically accepted though her testimony holds more credence. We say so for the reasons which are substantiated not only from the evidence of survivor-Y herself as discussed hereinabove but also from the medical evidence *qua* survivor-Y.

36. P.W.11-Dr. Vijay Waman Dhakare was attached to Sion Hospital run by Bombay Municipal Corporation. On 9th May, 2012, he was on duty. Around 9.00 to 9.15 p.m, a Police Constable Buckle No.2890 of C.BD Belapur Police Station brought survivor-Y to Sion Hospital. She was conscious but sleeping. She was able to

talk little. She had given the history of sexual assault by 2 to 3 persons near Belapur and that she was given some drink before sexual assault. This evidence of P.W.11-Dr. Vijay Dhakare and history given by survivor-Y clearly contradicts the evidence of P.W.9- Shekhar Tore, the Investigating Officer who had stated that on 9th May, 2012 survivor-Y was found in an unconscious condition by a *rickshawala* who informed the Police about the said fact. The prosecution had not examined the said *Rickshawala* nor Assistant Police Inspector namely Birari who is stated to have made a station diary entry on that day and had admitted survivor-Y in Vashi Hospital. According to P.W.9- Shridhar Tore, statement of survivor-Y could not be recorded as she was unconscious which is in sharp contradiction with the evidence of P.W.11-Dr. Vijay Dhakare. It necessarily means that the Investigating Agency had suppressed the real genesis of the crime, for, had there been a prompt F.I.R on 9th May, 2012 itself, even deceased-X could have been traced out who was lying underneath the bridge of C.B.D Belapur. The prosecution could have unearthed the truth had there been a prompt F.I.R on the basis of the statement of survivor-Y by Assistant Police Inspector Birari and, perhaps, life of deceased-X could have been saved by tracing her from underneath C.B.D Belapur bridge where she was lying on 9th May, 2012 itself.

37. P.W.11-Dr. Vijay Dhakare examined survivor-Y and found following external injuries;

*"(a) Incised lacerated wound, 5 c.m at right angle on mouth horizontal;*

*(b) Incised lacerated wound, 4 c.m over right upper lip;*

- (c) Incised lacerated wound, 4x2x2 c.m over left lower jaw;*
- (d) Incised lacerated wound 7x1x1 c.m over neck arterial part;*
- (e) Linear abrasion 15 c.m over right and left side of abdomen;*
- (f) Incised lacerated wound left upper medial thigh 2x1x0.5 c.m deep wound;*
- (g) Incised lacerated wound medial aspect of left thigh, 3x0.5x0.5 c.m. deep wound;*
- (h) Two linear abrasion over both labia majora;*
- (i) Incised lacerated wound over right thigh medial aspect 5x0.5x0.5 c.m*
- (j) Incised lacerated wound left side of mandible 3x1x1 c.m;*
- (k) Incised lacerated wound with linear abrasion over right lateral aspect of thigh, 5x0.5x0.5 c.m;*
- (l) Incised lacerated wound over left forearm posterior aspect;*
- (m) Friction abrasion over left arm;*
- (n) Friction abrasion over neck and manubrium sternum;*
- (o) Incised lacerated wound over left cheek zig-zag shape 5x0.5x0.5 c.m*
- (p) Friction abrasion over forehead, 2 x 2 c.m;"*

38. P.W.11-Dr. Vijay Dhakare further deposed that all the injuries were fresh. The incised lacerated wounds are probable by sharp weapon. All the injuries collectively are sufficient to cause death.

Considering all the injuries, it was found that the patient was assaulted and she had tried to protect herself. The injuries on thigh and labia majora shows that she was forcibly sexually assaulted against her will. The zig-zag injury on cheek shows that there was forceful attack upon her and she tried to protect herself. If the patient tries to escape from the assault, the friction abrasion are possible. Her blood pressure was very low. It was opined by P.W.11-Dr. Viay Dhakare that had there been no timely treatment, she would have gone into vegetative state. He had also opined that considering the injuries on her private part, rape by more than one person cannot be totally ruled out. From the evidence, it can be gathered that survivor-Y had strongly resisted the assailants and in that process, several injuries on her person were inflicted by the assailants.

39. Survivor-Y was an indoor patient from 9th May, 2012 to 22nd May, 2012. The treatment papers and the medical reports are proved at Exhibit 141. Article- 8 and Article-11 i.e hacksaw blade and a knife were shown to PW.11-Dr Vijay Dhakare. He opined that incised lacerated wounds are possible by those weapons. The evidence of this witness has not been shattered by the defence in the cross-examination. However, it has been elicited that had there been delay in bringing the patient by one or two hours, she would have gone into coma.

40. There can be no dispute that survivor-Y had been brutally assaulted with sharp edged weapons such as hacksaw blade and knife. However, question is whether prosecution has brought forth

sufficient and believable evidence on record to connect the accused with the injuries sustained by survivor-Y and also responsible for causing homicidal death of deceased-X.

41. There is one more very vital aspect surfaced in this case. Survivor-Y was also subjected to psychiatric examination. Ms. Gonsalves has drawn our attention to the notes of the Psychiatrist. Before the Psychiatrist also she was brought by Police Constable, Buckle No.2890. The Police Constable Buckle No.2890 was a very important witness as he was the Police Constable who had carried survivor-Y all the way from Vashi to Sion Hospital without any medical assistance. However, the prosecution has not examined this important witness.

42. The reason for withholding the evidence of this witness is best known to the prosecution. Despite such a precarious condition of survivor-Y, without medical assistance, she was brought to Sion Hospital by this Constable. It is not clear whether he was a male or female constable. No evidence has been adduced that survivor-Y was provided with an ambulance or any medical staff looking to the seriousness of the injuries suffered by her. An adverse inference is required to be drawn against the prosecution for not examining Police Constable buckle No.2890.

43. After recording the history of the assault, survivor-Y gave her history that she had depressive features along with sadness of mood and occasional death wishes. She has also given history of slashing her wrist multiple times in the past out of anger, but her

intention was not to end her life. The patient also claimed that about one week back, she slashed her wrist as she had an argument with a female over sleeping place and she wanted to take revenge by lodging a Police complaint against her. No history of any sleep disturbance. There is history of suicide attempt in the past i.e about two to three years back when there was some quarrel with her sister. Visible cuts over the neck. Grossly oriented to time, place and person.

44. Looking to the report of the Psychiatrist coupled with the fact that survivor-Y was under the influence of liquor at the time of the incident, it would not be safe to accept her testimony as a truthful version of the incident in respect of the alleged assault by the accused.

45. PW.2-Amir Ali Raja Bhatiya was working as a security guard at the relevant time and was on duty from 8.00 p.m to 8.00 a.m. According to him, on 9th May, 2012, after his duty hours, he came home and then in the afternoon, he went to give meals to his friend under the bridge of C.B.D Belapur. At that time, he noticed two males and two females sitting under the bridge. One of them was Baba (Accused-Rahimuddin) whom this witness already knew. He was not aware of the name of the other person. Baba (accused-Rahimuddin) had called him but he did not respond and went for work. Thereafter, he went to his friend, gave him meals and also told him that he had seen those four persons under the bridge.

46. His evidence further reveals that on the next date, the Police had been to him. They showed him photograph of a girl and also of Babu (accused Rahimuddin). The Police asked him whether he had seen them a day before, near the spot under the bridge. He had, thus identified Baba (accused Rahimuddin) and the said girl to whom he had seen under the bridge on the earlier day. He had identified the accused Baba (Rahimuddin) in the Court to be the same person. However, this witness could not identify the second accused as a person along with accused Baba (Rahimuddin) on the earlier day.

47. Interestingly, he testified that the girl to whom he had identified was affected with polio and that she was alive while the other girl was murdered whose photograph was not shown to this witness. It is quite surprising as to whether this witness was really a security guard since it has been surfaced in his cross that neither he has been given any identity card nor there is any proof that he was working with M.A.P Security Agency. There is neither any muster roll nor register. Secondly, what was the reason for this witness to go under the bridge of C.B.D Belapur in the hollow (cavelet) portion as it is not the case that he was also residing under the bridge. Third reason to discard his evidence is that when the accused were arrested on 14th October, 2012 i.e five days after the incident, how he could know that another girl was murdered whose photograph was not shown to him. His clairvoyance is surprising.

48. One more reason is that why the Police would directly approach him and show him the photographs of the accused and deceased-X and survivor-Y when it is nobody's case that this witness had himself approached the Police? It is not clear which friend of this witness was residing under the bridge. Had it been the intention of the accused to commit murder of deceased-X or injuring survivor-Y, why he would call this witness? It is surprising as to how the Police came to know that he could be the witness on the point of last seen together. He could not identify the second accused in the Court. It is nobody's case that survivor-Y had polio nor there is any medical evidence. It is doubtful whether he was in hand in gloves with the accused, for, history given by survivor-Y to P.W.11- Dr. Vijay Dhakare was that she was sexually assaulted by two or three persons. The evidence of this witness, therefore, needs to be discarded altogether as he is a got up witness by the Investigating Officer.

49. P.W.3-Dr. Bhushan Vilasrao Jain (Exhibit 28) had conducted autopsy on the dead body of the deceased-X on 11th May, 2012. On external examination, he noticed following injuries;

*"(a)Contusion over left forehead 5x5 c.m reddish;*

*(b)Aberated contusion over left maxillary region, 6x3 c.m reddish;*

*(c)contused lacerated wound over chin inferior surface 2x0.5 c.m bone deep, reddish;*

*(d)A semicircular linear incised wound seen over left chest below breast 14x0.2 c.m skin deep, reddish;*

*(e)A semicircular linear incised wound seen over right chest medial to breast 24.0.2 c.m skin deep, reddish;*

*(f)A linear incised wound seen over left arm 5x0.2 c.m skin deep, reddish;*

*(g)Two parallel linear incised wounds seen over left thigh anteromedially of size 18.0.2 c.m and 15x0.2 c..m, skin deep, reddish, situated one below another;*

*(h)Two parallel linear incised wounds seen over right thigh upper past anteromedially of size 20x0.2 c.m and 16 x 0.2 c.m skin deep, reddish situated one below another;"*

50. On internal examination, he noticed internal injury over head-haemorrhage under scalp. External injury No.1 was correlated to internal injury mentioned in column No.19. He had also noticed other internal injury over occipital region on both sides. Brain showed contusions over left frontal, occipital and right occipital lobes of 2 x 2 c.m, 3 x 3 c.m and 3 x 2 c.m respectively, reddish in colour.

51. All injuries were antemortem in nature and are sufficient to cause death in ordinary course of nature. The probable weapon used for head injury was hard and blunt object. He had preserved viscera of the deceased and also obtained samples of blood and nail clippings and various samples for relative examination. According to him, the probable time of death was within 18 to 24 hours prior to keeping the body in cold storage. According to this witness, the cause of death of deceased-X was head injury. The postmortem notes are proved at Exhibit 29.

52. It is surprising to note that learned Counsel appearing for the accused was absent when the evidence of PW.3-Dr. Bhushan Jain was recorded on 29th April, 2014. The learned Additional Sessions Judge had asked accused No.1 and 2 to cross-examine the Doctor. Obviously, they declined. The learned Additional Sessions Judge ought to have given an opportunity to the learned Counsel for the accused to cross-examine PW.3-Bhushan Jain whose evidence is vital in nature *qua* postmortem of deceased-X. A note is put by the Additional Sessions Judge on 29th April, 2014 viz:

*"taken before me and signed by me in the presence of the accused to whom the deposition was explained and opportunity given to cross examine the witness".*

53. No opportunity was given by the learned Additional Sessions Judge to the Counsel for the accused to cross-examine this witness. No sane man would expect that such uneducated and rustic accused would cross-examine a Doctor who had conducted autopsy over the corpse of deceased-X. On this count itself, the trial gets vitiated. This is ridiculous. However, from the evidence of this witness, it has been established that the deceased-X was subjected to brutal assault by the assailants which had resulted into her death due to the head injury. However, there is no evidence by the medical officer as regards rape upon the deceased-X. No hard and blunt object - a probable weapon to cause head injury has been recovered or produced by the prosecution. Since the identity of the deceased-X has not been disputed during the course of trial by the defence, it cannot be said, at this stage, that

the prosecution had not established her identity. No reason to disbelieve the evidence of survivor-Y in that regard, as no suggestion to that effect had been given to any of the witnesses.

54. On the aspect of identification of the accused, evidence of P.W.7-Deepali Mahadik, who was Special Executive Officer, indicates that she received a letter for conducting a Test Identification Parade in respect of the accused in connection with C.R.No.73 of 2012 registered with C.B.D Police Station. She was asked to conduct Test Identification Parade in respect of the arrest of John Anthony D'Souza and Sandeep Samadhan Shirsat. It has not been mentioned in the correspondence that Test Identification Parade was in respect of Baba (accused Rahimuddin) but in respect of John Anthony D'Souza. She issued a letter to Taloja Central Prison and a Test Identification Parade was conducted on 7th July, 2012 at Taloja Central Prison.

55. Survivor-Y was produced before her at 10.50 am. Her evidence reveals that she asked survivor-Y whether photographs of the accused were shown to her, to which she answered in the negative. Thereafter, along with survivor-Y two *panchas* reached Taloja prison at 11.55 a.m. The witness had instructed Superintendent of Jail to arrange for six dummies for each of the accused. Thereafter, Test Identification Parade was held. Two rows including six dummies and the suspects were arranged. Survivor-Y was asked to identify the suspect. According to this witness, survivor-Y had identified both the accused.

56. However, the evidence of this witness is rebutted in the cross when she admits that during the Test Identification Parade accused by name Rahimuddin Shaikh was not present. This is a vital blow to the case. She also admits that she did not ask survivor-Y whether Police had described the accused before conducting the Test Identification Parade. As already stated hereinabove, survivor-Y had already admitted that the accused were shown to her at the Police Station and, therefore, Test Identification Parade conducted by this witness wherein even the accused was not present, is of no consequence and was a futile attempt on the part of the prosecution to confirm identity of the accused-Rahimuddin Shaikh.

57. It creates a doubt whether John Anthony D'Souza and Rahimudddin Shaikh are two different persons or one and the same person. The prosecution has not clarified this anomaly at all which gives rise to a reasonable doubt in the mind as regards the identity of this accused. Survivor-Y had testified that there were 20 persons during the Test Identification Parade. However, according to this witness, there were two rows of six persons each. Both are at variance on this vital aspect.

58. So far as the evidence of PW8-Sameer Shaikh is concerned, he testified that on 9th May, 2012 he was sleeping in the staff room at *Sathe Nagar Zopadpatti* when John Anthnoy D'Souza alias Babu and juvenile-in-conflict-with-law came in the staff room at 1.00 a.m under the influence of liquor and were shouting. He, therefore, got up and asked them as to why they were shouting.

He testified that both of them said that they had killed one girl. They were under the influence of liquor. This witness did not pay attention since they were under the influence of liquor. In the next morning, John Anthony D'souza alias Babu and juvenile-in-conflict-with-law did not come for work. This witness was also working at *Triveni Caterers* where these two accused were also working. On the next day, he read in the newspaper that a girl was raped and murdered. On 12th May, 2012, the Police had inquired with him and, therefore, he narrated what he heard from the accused on 9th May, 2012 at 1.00 a.m.

59. Interestingly, it cannot be said to be an extra judicial confession, as observed by the learned trial Judge. The accused did not confess before this witness as to whom, when and how they had killed. There is nothing on record to show that they had also confessed/said about the rape. Every utterance would not be extra judicial confession. He also appears to be a got up witness, as in the cross, he admits that he did not ask the accused as to which girl they had killed and even did not ask them on the next day as to why they did not attend the work. He even did not remember the newspaper where he read the news about the murder of a girl. Interestingly, during the evidence of this witness accused were not produced from Jail on 1st July, 2016 and on 2nd July, 2016 when the witness was cross-examined. It appears that they were not produced even through video conferencing.

60. Evidence of P.W.9-Shekhar Tore, the Investigating Officer indicates that on 10th May, 2012 beneath C.B.D Belapur Bridge, in

a hollow portion (cavelet) one watchman by name Savansingh Taulsingh Bhatera was residing. When he arrived in the morning after his night duty, he noticed a woman lying dead with injuries and was in a naked condition. He informed the Police. P.W.9- Shridhar Tore along with the staff members reached the spot. With the help of fire brigade, dead body of the deceased-X was taken out. It is surprising as to why the prosecution has not made serious attempt to summon and examine Savansingh Bhatera who could have been the best witness to depose about the fact of noticing dead body of deceased-X? Several important aspects could have been unearthed, had he been examined by the prosecution. There is indeed something amiss.

61. It is quite probable that, perhaps, Savansingh Bhatera could be acquainted either with the accused or with deceased-X for the reason that as per the prosecution story, the accused had taken survivor-Y and deceased-X in the said hollow portion (cavelet). Entire incident of rape and murder occurred therein. If the said hollow portion (cavelet) was the place of residence of Savansingh Bhatera, then definitely there is something vital which appears to have been suppressed by the prosecution, otherwise, the moment survivor-Y was taken to the hospital, she could have also informed about the deceased-X lying in the hollow portion (cavelet). However, as already stated, she was in such an inebriated condition and in view of the fact that she had stated before P.W.11- Dr. Vijay Dhakare that they were assaulted by two or three persons, the role of Savansingh Bhatera assumes significance as to whether he could be the third person? Under such circumstances,

evidence of watchman Savansingh Bhatera could have been quite important. Adverse inference is required to be drawn against the prosecution again, for not procuring the presence of not only watchman Savansingh Bhatera but also Shankar Chavan who had on 9th May, 2012 said to have given money to deceased-X and her husband and thereafter they went to consume liquor.

62. The Investigating Officer had also not produced the extract of station diary to substantiate the fact that information of finding the dead body of deceased-X was given by watchman Savansingh Bhatera. Normally, in case of rape sometimes there is a delay in lodging the report because of our social norms. The prosecutrix or the parents of the prosecutrix apprehend a social stigma in reporting the matter to the Police, immediately, which is not the matter in the case at hand. P.W.9- Shridhar Tore, the Investigating Officer admits that the F.I.R was recorded as per the information given by survivor-Y, however, he could not assign any reason as to why her signature was not obtained over the F.I.R. This also creates a serious doubt about the authenticity and genuineness of the prosecution case and it also goes to the root of the case. Even he is unable to tell at what time the F.I.R came to be recorded. He is unable to testify as to how many times survivor-Y was called at the Police Station. The Investigating Officer had, in fact, suppressed material facts and evidence from the Court for the reasons best known to him. The investigation had been carried out in a most casual and perfunctory manner.

63. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests upon the prosecution and on its failure it cannot fall back upon the evidence, if any, adduced by the accused in support of his defence. It is always for the prosecution to bring home the guilt of the accused. In an accusatory system, such as that prevailing in our country, it is for the prosecution to prove beyond reasonable doubt that the accused committed the offence; it is not for the Court to speculate as to how the crime has been committed.

64. It is a well settled principle of law that corroboration is not a *sine qua non* for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. However, in the given set of facts, circumstances and evidence, complicity of the present accused itself is shrouded with several doubts and suspicions that it would not be safe to rely upon the sole testimony of survivor-Y.

65. PW.4-Satyavan Dengale was the witness on memorandum *panchanama* under section 27 of the Indian Evidence Act. The sum and substance of his evidence is that he was called by the Police at C.B.D Belapur Police Station on 16th May, 2012 along with other *pancha* Yogesh. Accused Rahimuddin was there. It is again doubtful whether Rahimuddin and John Anthony D'souza and Babu alias Baba is one and the same person or some one else. Be that as it may. Said Rahimuddin made a statement in the presence of this witness that he would discover the clothes which were on

his person at the time of the incident and weapon used i.e knife. His memorandum statement was recorded as per his say which is at Exhibit 57. His evidence further indicates that in pursuance of his memorandum, Police party along with this witness and the accused proceeded in a private vehicle to *Annabhau Sathe Nagar, Ambedkar Chawl*, in a room. There are no details as regards room number or whether the said room belongs to the accused himself. It is not his evidence that the accused led the Police team and they followed him. According to this witness, accused took out clothes i.e one full shirt of pink colour having stains of blood, chocolate coloured full pant having stains of blood and one knife having blood on it. The Police had seized those articles by drawing *panchanama* under his signature which is at Exhibit 58. During the course of trial, he identified the knife-Article-8, pink coloured shirt-Article 9 and chocolate coloured full pant-Article 10.

66. In a similar manner, on the same day, in the evening pursuant to the statement made by the juvenile-in-conflict-with-law, similar procedure was followed and even juvenile-in-conflict-with-law too had taken out a black coloured full shirt stained with blood and black coloured full pant having stains of blood and one hacksaw blade from the drawer of the table. How can it be so similar that both the accused would go to the same chawl and the same room and took out similar articles, *albeit*, there is knife and hacksaw blade from the drawer of the table?

67. In the cross-examination, P.W.4-Satyawan Dengale admits that first the Police went to the house of one Naresh Hargovinddas

Parmar. The prosecution has not clarified as to who was this person and why the Police had been to his house? Whether accused Rahimuddin first led them to his house and the articles were seized from the said house of Naresh Parmar or there is something else. The witness expressed his inability to say whether the Police had recorded the statement of Naresh Parmar, however, he clarified that the Police did ask him about the clothes and weapons but he refused to tell.

68. This also creates a strong suspicion as to how the Police had asked said Naresh Parmar about the weapons and clothes alleged to have been discovered in connection with this crime. This is also an unsolved mystery. The object of section 27 is to admit evidence which is relevant to the matter under inquiry, namely, the guilt of the accused and not to admit the evidence which is not relevant to that matter. The essential requirements for the application of section 27 are (i) the person giving information must be an accused and (ii) he must be also in Police custody. If the Police had first went to the house of Naresh Parmar and asked about the articles then it is unfathomable as to how the articles were discovered from a room which was shown by accused Rahimuddin. It is not clear whether it was the house of Naresh Parmar or Rahimuddin. If the articles were in possession of Naresh Parmar, then what was his connection with the crime in question.

69. The discovery of a material object is of no relevancy to the question whether accused is guilty of the offence charged against him, unless, it is connected with the offence. It is, therefore, the

connection of the thing discovered which renders its discovery a relevant fact. The connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery but that does not exclude proof of the connection by the statement itself. Evidence of P.W.4-Satyavan Dengle, therefore, would not be of any help to the prosecution.

70. P.W.5-Smita Sawant was the witness on inquest *panchanama* which was drawn on 10th May, 2012 under C.B.D Belapur over-bridge on Panvel-Mumbai High way by the Police. The sum and substance of her evidence is that it was a naked body of woman having injuries under left eye, cut injury below both breasts, and also cut injuries upon thighs near private part. She also noticed vomit spewed and a yellow substances spread over her face and body. Panchanama is drawn which is at Exhibit 63.

71. P.W.6- Ramji Ramnarayan Yadav is the witness in whose presence personal search of the accused was carried out on 14th May, 2012 at 11.00 a.m at the crime branch of Police at Sector 19, Nerul. Accused Rahimuddin and the juvenile-in-conflict-with-law were present. After their search, they were arrested in the presence of this witness. Why the Investigating Agency had not taken the accused for their medical examination to ascertain whether there were any bruises, injuries etc on their person in light of the fact that survivor-Y had strongly resisted the assailants at the relevant time. How the accused could escape from getting themselves injured or hurt in such a fierce fight? This aspect also is of vital

importance. No evidence in that regard has been adduced. Witnesses on spot *panchanama* have not been examined by the prosecution, as, they were untraceable. So, no independent witness has been examined to prove the spot *panchanama*?

72. It is pertinent to note that the chemical analyzer's reports do not at all support the prosecution case. PW.10-Rama S. Jadhav is the Assistant Chemical Analyzer in Forensic Science Library, Kalina, Santacruz, Mumbai. He had proved C.A report Exhibit 93. His evidence reveals that C.A report in M.L.C No.2234 of 2012 dated 22nd November, 2012 (Exhibit 88) was signed by him. The contents are correct. According to this witness, pubic hair of survivor-Y were examined by him, however, no semen was detected on it. In respect of second report in MLC No.2235 of 2012 (Exhibit 89) which was nail clipping of survivor-Y, no blood was detected. In the vaginal swab of survivor-Y in MLC No.2336 of 2012, (Exhibit 90) wherein labial swab and high vaginal swab was taken, no semen was detected. Blood group of survivor-Y was "B". It would be apposite to extract the articles examined by this witness and result of analysis given by him;

*"(i)Kurta (cut)*

*(ii)Piece of clothes;*

*(iii)Brassiere wrapped in paper, together labelled as A-3,*

*(iv)Odhani wrapped in paper labelled as A-4,*

*(v)Liquid in plastic bottle wrapped in paper labelled as A-5,*

- (vi)Metal bangles wrapped in paper labelled as A-6,*
- (vii)Earth wrapped in paper labelled as A-7,*
- (viii)Earth wrapped in paper labelled as A-8,*
- (ix)Cotton swab wrapped in paper labelled as A-9,*
- (x)Suri wrapped in paper labelled as A-24,*
- (xi)Full shirt wrapped in paper labelled as A-25,*
- (xii)Full pant wrapped in paper labelled as A-26,*
- (xiii)Hacksaw blade wrapped in paper labelled as A-27;*
- (xiv)Full shirt wrapped in paper labelled as A-28,*
- (xv)Full pant wrapped in paper labelled as A-29.*

**Result of Analysis**

- (i)Exh 1 is stained with blood mostly on front portion,*
- (ii)Exh.2 is stained with blood mostly at one side,*
- (iii)Exh.3 is stained with blood at places,*
- (iv)Exh 8 is mixed with blood,*
- (v)Exh. 9 is stained with blood,*
- (vi)Exh. 10 and 13 are stained with blood on blade;*
- (vii)Exh.11 is stained with blood mostly on front lower portion,*
- (viii)Exh. 12 is stained with blood mostly on front upper portion,*
- (ix)Exh. 14 is stained with blood mostly on back side,*
- (x)Exh. 15 has one blood stain of about 1 c.m in diameter on left leg middle portion,*

*No blood is detected on Exh. 4 to 7,*

*No semen is detected on Exh. 1 to 15 ,*

*Blood stains detected on Exhs. 1, 10 to 15 are referred to DNA division for DNA analysis;*

*Species origin and blood grouping results are as follows-*

| <i>Exh. No.</i> | <i>Species Origin</i> | <i>ABO grouping</i>  |
|-----------------|-----------------------|----------------------|
| <i>2</i>        | <i>Human</i>          | <i>Inconclusive</i>  |
| <i>3</i>        | <i>Human</i>          | <i>Inconclusive</i>  |
| <i>4</i>        | <i>Human</i>          | <i>Inconclusive</i>  |
| <i>5</i>        | <i>Human</i>          | <i>Inconclusive"</i> |

Thus, the C.A report also does not corroborate the prosecution case and it's evidence.

73. Our attention has been drawn by Ms. Gonsalvez to certain anomalies and irregularities committed by the learned Additional Sessions Judge while conducting the trial of such a sensitive case. It is a matter of record that after the prosecution closed it's evidence, statement of the present accused as well as juvenile came to be recorded under section 313 of the Code of Criminal Procedure by the learned Additional Sessions Judge on 24th October, 2016. Subsequently, the prosecution sought to examine P.W.11-Dr. Vijay Dhakare who had examined survivor-Y at Sion Hospital on 9th May, 2012. We have already referred the evidence of this witness in the preceding paras.

74. During the examination of P.W.11-Dr. Vijay Dhakare (on 9th January, 2017), the accused as well as juvenile-in-conflict-with-law

were not produced before the Court and, therefore, when their statements under section 313 of the Cr.PC came to be recorded on 13th January, 2017 and very first question was asked whether they heard and understood the evidence of P.W.11-Dr. Vijay Dhakare, they answered that they were not produced at that time. Though a Counsel namely Mr. Devghare appointed by the District Legal Services Authority had represented the accused, there is no material on record to ascertain whether the evidence of the medical officer was explained to the accused by the Court. It would be essential to extract paragraph 27 of chapter (iii) of the Criminal Manual which reads thus;

#### **Medical Witnesses**

*"27 (i) Section 291 of the Code of Criminal Procedure 1973, requires that the deposition of a medical witness should be not only taken, but also attested in the presence of the accused by the Magistrate, in order to render it admissible in other proceedings. An attestation in the following form should, therefore, always be appended to such depositions, namely;*

*"Taken before me and signed by me in the presence of the accused, to whom the deposition was explained and opportunity given to cross-examine"*

*Date: (Signature of Magistrate)*

*(2) Care should always be taken to record medical evidence fully and intelligently on all the salient points so that a second examination by another Court may not be necessary. The evidence should be fully interpreted to the accused, if necessary, and he should be allowed*

*an opportunity to cross-examine the medical witness".*

75. The learned Additional Sessions Judge committed a grave error in not fully interpreting evidence to the accused, though it appears that the Counsel representing the accused had cross-examined the witness. Paragraph 27 of Chapter III of the Criminal Manual specifically contemplates that the evidence of the medical witness should be recorded in the presence of the accused to whom the deposition should be explained. The answer to the first question asked to the accused as above would indicate that they were unaware of what P.W.11-Dr. Vijay Dhakare had testified *qua* survivor-Y as regards her injury. There is even no evidence that Counsel representing the accused had explained the evidence of P.W.11-Dr. Vijay Dhakare, later on.

76. Our attention has been drawn by Ms. Gonsalvez to a representation dated 3rd September, 2016 (Exhibit 125) made by the juvenile-in-conflict-with-law to the Sessions Court, Thane from Talaja Central Jail prison, Kharghar, New Mumbai in Marathi. In short, the juvenile-in-conflict-with-law had written in a very sincere and humble manner requesting the Court that he had been falsely implicated in the instant case. Evidence of the witnesses had not been recorded in his presence. He was unaware as to what had happened in the case. He, therefore, requested for furnishing the translated copies of the depositions of survivor-Y, Doctor, other witnesses and *panchas* in Marathi language.

77. Astonishingly, the learned Additional Sessions Judge who was then dealing with this matter did not pass any order or issued any directions for furnishing the copies, in clear violation of section 277 (a) to (c) of the Code of Criminal Procedure. Section 277 reads thus;

***"277. Language of record of evidence.***

*In every case where evidence is taken down under section 275 or section 276 ,-*

*(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;*

*(b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;*

*(c) where under clause (b) evidence is taken down in language either than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record:*

*Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation".*

78. The learned Additional Sessions Judge by accepting the *pursis* (Exhibit 19) recorded the evidence of almost all the witnesses in English language. The said *pursis* dated 15th January, 2014 reads thus;

*"That, the above mentioned matter is on today's board for hearing. Accused has no any objection if recorded deposition in only English language.  
Hence, this pursis"*

The said *pursis* indicates that the accused had no objection in recording the deposition in English language when, in fact, it seems that the accused were illiterate rustic persons who are not expected to know the procedural law. Secondly, the *pursis* was signed by one Advocate Kokate. It was not a joint *pursis* given by Counsel Mr. Kokate for accused No.1 and 2 and Additional Public Prosecutor. Rather, Additional Public Prosecutor appears to have put his signature beneath the signature of Advocate Kokate. The learned Additional Sessions Judge had simply endorsed 'filed'.

79. As a matter of fact, the learned Additional Sessions Judge appears to have fallen into grave error in not recording the evidence of prosecution witnesses in *Marathi* which is the language of the District Courts in the State of Maharashtra. In our considered view, due to such a lapse on the part of the learned Additional Sessions Judge, a failure of justice has been occasioned and the proceedings stand vitiated.

80. In that regard, it would be apposite to make a mention of Gazette Notification of Government of Maharashtra dated 21st July, 1998 which reads thus;

**"GENERAL ADMINISTRATION DEPARTMENT "**

*Mantralaaya, Mumbai 400 032, dated the 21st July, 1998  
CODE OF CRIMINAL PROCEDURE, 1973.*

*No. OFL. 1098/CR-50/98/20-B--- In exercise of the powers conferred by section 272 of the Code of Criminal Procedure, 1973 (II of 1974), in its application to the State of Maharashtra; and supersession of all previous notifications issued in this behalf, the Government of Maharashtra, hereby with effect from the 21st day of July, 1998, determines **Marathi language** to be the language of all Criminal Courts in the State other than the High Court except for the purposes specified in the Schedule hereto.*

*Schedule*

- "(1) Writs, warrants, summonses, notices and other processes which are required to be sent for service or execution to other States, and correspondence connected therewith;*
- (2) Post mortem notes and evidence of medical and expert witnesses;*
- (3) Paper Books in Appeals and Revisions to the District Court and the High Court;*
- (4) Proceedings (both judicial and administrative) that are required to be submitted to the High Court;*
- (5) Periodical returns and statements to the High Court or statistical burcaus;*
- (6) All account books and returns and statements pertaining to accounts, budget estimates and correspondence pertaining to service matters;*
- (7) Departmental examinations;*

*(8) Matters relating to Departmental enquiries including reports and correspondence thereon with the High Court and Government;*

*(9) Correspondence with the High Court and Government".*

81. The Juvenile-in-conflict-with-law had again requested the Sessions Court, Thane by his communication dated 24th October, 2016 (Exhibit 133) to furnish copies of notes of evidence in Marathi language as the trial had not been conducted in his presence and he did not know as to what had happened. Again, no order came to be passed on this application also. Even though juvenile-in-conflict-with-law is not before this Court, nevertheless, the procedure adopted by the learned Additional Sessions Judge is unknown to the settled principles as to how the evidence of witness has to be recorded and the importance of the statement of the accused under section 313 of the Criminal Procedure Code.

82. Ms. Gonsalvez vehemently argued that not recording the evidence in the language of the Court is, in fact, a miscarriage of justice. According to her, it was shocking that the learned Additional Sessions Judge did not pass any order on two representations made by the juvenile-in-conflict-with-law from the Jail.

83. It would be apposite to refer a judgment of the Hon'ble Court in case of **Reena Hazarika Vs. State of Assam, AIR 2018 Supreme Court 5361** on the point of section 313 of the Cr. PC. Paragraphs 16 and 17 of the judgment are extracted below;

"16. Section 313, Cr. PC, cannot be seen simply as a part of *audi alteram partem*. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313 (2), Cr. PC. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under section 313 (1) (b) Cr PC the Court is duty bound under Section 313 (4) Cr. PC to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr. PC., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr. PC and to either accept or reject the same for reasons specified in writing".

17. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr. PC to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of

*the facts and the nature of other evidence available as discussed hereinabove. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in *Hate Singh Bhagat Singh v State of Madhya Bharat*, AIR 1953 SC 468 observing as follows:-*

*"26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to assess the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person but for the word a reasonable defence which is likely to be true,..... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true friend pitted against a vacillating case is bound to raise a reasonable doubt of which the accused must get the benefit...."*

*A similar view is expressed in *M. Abbas v State of Kerala*, (2001) 10 SCC 103 as follows:-*

*"10.... On the other hand, the explanation given by the appellant both during the cross-examination of prosecution witnesses and in his own statement recorded under Section 313 CrPC is quite plausible. Where an accused sets up a defence or offers an explanation, it is well-settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities...."*

84. Taking into consideration the totality of the circumstances in the case at hand as well as failure on the part of the trial Court in not promptly furnishing translated copies of English deposition to juvenile-in-conflict-with-law may vitiate the trial and it cannot be said to be a fair and impartial trial, especially when capital punishment is sought to be inflicted upon the accused.

85. Ms. Gonsalvez would argue that there was no real and effective representation of the accused by competent lawyer in a case where the death penalty has been inflicted upon the convicts. Our attention has been drawn to the record of the trial Court by which it appears that the Counsel have been changed from time to time. It would be apposite to extract observations of the Hon'ble Supreme Court in the case of **Mohd. Hussain @ Zulfikar Ali V. State (Govt of NCT of Delhi) 2012 (2) Supreme Court Cases 584** on the aspect of fair and impartial trial as well as right to cross-examine. The judgment also speaks about the denial of right of providing aid of a Counsel especially in case of conviction and capital punishment under sections 302, 307, 121 and Section 121-A of the Indian Penal Code. The observations read as under;

*"Every person has a right to a fair trial in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented persons are to see that accused gets free and fair, just and reasonable trial of charges. The right of cross-examination is included in the right of accused in a criminal case, to confront the witness against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased (sic, may be biased). Herein, recording of*

*Order sheet of Trial Judge is not accurate. Initially, during committal proceedings, accused Appellant was represented by a Counsel provided by State. Thereafter, one other Counsel employed by State assisted Appellant before Sessions Judge for few days but he stopped to attend proceedings, that too, at fag end of trial, another Counsel was appointed. For counsels' conduct, Court observed that, 'less said the better'. The Trial was conducted in a very casual manner in a capital punishment case. The appellant did not have aid of counsel in real sense, so to be represented in substantial and meaningful manner".*

More or less, similar was the situation in the instant case.

86. In the case of **Ashish Batham Vs. State of Madhya Pradesh, AIR 2002 Supreme Court, 3206** in paragraph 89 of the judgment, it has been held by the Hon'ble Supreme Court which reads thus;

*"Realities or Truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is not effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is*

*a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between conjectures and sure conclusions to be arrived at on the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record".*

*More serious crime more strict proof would be requisite."*

87. This ratio is squarely applicable to the case in hand, as having appreciated the entire evidence on record as well as material discrepancies, lacunae and blatant illegalities would definitely indicate that the prosecution has utterly failed in connecting the dots and bringing home the guilt of the accused. Merely because the crime is heinous and brutal, it would not be just to get carried away *sans* any legal proof required to substantiate the charge of murder and rape. The standard of proof is not in consonance with the gravity of the offences. This can, at the most, be a case of strong suspicious and no more. From the evidence, it is also apparent that the murder was neither pre-planned nor premeditated. The evidence is neither clear, cogent nor credible. There is absolutely no question of awarding death sentence to the accused, rather, it is the case wherein the accused must be given a benefit of doubt, nay, it would be a travesty of justice.

88. Here also the trial was conducted in a casual manner without ascertaining whether the legal aid provided to the accused was competent and whether the trial was just and fair in a capital punishment case. The quality and credibility of the evidence adduced is not even upto the mark.

89. The learned A.PP has placed reliance on several judgments of the Hon'ble Supreme Court on death penalty. To name a few are;

- (a) *Bachan Singh Vs State of Punjab, AIR 1980 Supreme Court 898;*
- (b) *Jaroop Singh Vs. State of Punjab, (2012) 11 Supreme Court Cases 768;*
- (c) *Bodhisatwa Woman Gautam Vs. Subara Chalraborty, (1996) 1 Supreme Court Cases 490.*

90. Since we are of the considered view that the prosecution has miserably failed to bring home the guilt of the accused and, therefore, there is no question of considering whether the case falls under the rarest of rare category wherein the question of award of capital punishment or otherwise would arise?

91. Ms. Deshmukh, the learned A.PP has placed reliance upon judgment of the Hon'ble Supreme Court in case of **Sheikh Sintha Madhar @ Jaffer @ Sintha Vs. State represented by Inspector of Police with Shahjahan Vs. State represented by Inspector of Police, (2016) 11 Supreme Court Cases 265** on the point of Test Identification Parade. The law is no more *res integra* that the

whole purpose of Test Identification Parade is to ensure that investigation is going on a right track and it is merely a corroborative evidence. Actual identification must be done in the court i.e the substantive evidence. Paragraph 16 of the said judgment reads thus;

*"16. The next question is whether the Test Identification Parades were vitiated on account of delay or for holding those TIPs jointly, or on account of the identity of the accused having been already revealed before the TIP could be conducted. It is clear from the evidence that there is no inordinate delay in conducting the TIP. As and when the accused were arrested, within reasonable time they were produced for the TIP. Also, there is no invariable rule that two accused persons cannot be made part of the same TIP. Joint TIP would thus, in no manner, affect the validity of the TIP. The purpose of a TIP is to ensure that the investigation is going on the right track and it is merely a corroborative evidence. The actual identification must be done in the Court and that is the substantive evidence. If the accused is already known to the witness, the TIP does not hold much value and it is the identification in the Court which is of utmost importance. PW1 identified all the seven accused appellants in the Court as well as in the TIP".*

92. We have already discussed in the preceding paras as to how the Test Identification Parade was nothing but a farce since survivor-Y had already seen accused at the Police station and even as per the evidence of P.W.7-Deepali Mahadik, accused Rahimuddin was not present while conducting the Test Identification Parade. This witness even did not ask any

question to the identifying witness whether Police had described the accused before conducting the Test Identification Parade. We are afraid, ratio laid down by the Hon'ble Supreme Court in the case of **Sheikh Sintha Madhar @ Jaffer @ Sintha** (supra) would not be of any help to the prosecution.

93. The impugned judgment of conviction and sentence of death awarded by the learned Additional Sessions Judge is a result of incorrect appreciation of evidence which is nothing but reproduction of the evidence adduced by the prosecution witnesses without application of mind. The judgment is full of surmises and conjectures. There is no marshalling of the evidence. The entire approach of the trial Court in dealing with the evidence was patently illegal and the conclusions arrived at by it are wholly untenable. The findings are palpably wrong and manifestly erroneous in such a serious case wherein death sentence has been awarded. It is needless to reiterate several findings arrived at by the learned trial Court which are contrary to the evidence on record. However, it would not be out of place to refer to paragraphs 112 to 114 of the impugned judgment wherein the learned trial Judge discussed the scope of section 106 of the Indian Evidence Act which are extracted as under:

**"112. Section 106 of the Evidence Act reads as under:-**

*"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".*

*113. In the present case the accused have put in a defence of denial. No evidence of whatsoever nature has been led by the accused to point out that the deceased*

*victim and injured victim were not in their company on the fateful day. They have not examined any witness to establish that the victims were not in a company of the accused and they were present elsewhere. The accused have not given any explanation why PW.2-Amir deposed against accused 'Baba' that he was knowing him and on the fateful day he had seen Baba and other three below the CBD bridge at about 12.00 noon.*

*114. The accused have not given any explanation why PW.8-Samir Shaikh, deposed against them. Whether there was any enmity with PW.2 or PW.8 is not explained by the accused. They have not explained how their clothes and weapons found in their possession stained with human blood. No explanation also has been given by the accused in their statement under section 313 of Cr. PC. The accused, therefore, have miserably failed in discharging the burden which was cast on them and that would be an additional circumstance which will have to be taken into consideration against the accused".*

94. The law is no more *res integra* on the applicability of section 106 of the Indian Evidence Act. This section does not cast any burden on an accused person to prove that no crime was committed by proving facts especially within his knowledge; nor does it warrant conclusion that if anything is unexplained which the Court thinks the accused can explain, he ought, therefore, to be found guilty. The initial burden is always upon the prosecution and is not shifted onto the accused by reason of this section. The learned trial Court fell into a grave error in misinterpreting the scope of section 106 of the Indian Evidence Act.

95. Evidence of the prosecution witnesses is recorded by three Additional Sessions Judges;

| <b>Sr. No.</b> | <b>Prosecution Witnesses</b>   | <b>Date</b>                     | <b>Exhibit No.</b> | <b>Judge</b> |
|----------------|--------------------------------|---------------------------------|--------------------|--------------|
| 1.             | PW.1- Survivor-Y               | 15.01.2014                      | Exh.20             | First        |
| 2.             | PW.2- Amir Ali Raja Bhatiya    | 26.03.2014                      | Exh.26             | First        |
| 3.             | PW.3-Dr. Bhushan Vilasrao Jain | 29.04.2014                      | Exh.28             | First        |
| 4.             | PW.4-Satyavan Maruti Dengle    | 26.08.2015                      | Exh.56             | First        |
| 5.             | PW.5-Smita Ashok Sawant        | 05.09.2015                      | Exh.62             | First        |
| 6.             | PW.6-Ramji Ramnarayan Yadav    | 18.11.2015                      | Exh.69             | Second       |
| 7.             | PW.7-Deepali Dinkar Mahadik    | 16.02.2016<br>02.03.2016        | Exh.98             | Second       |
| 8.             | PW.8-Sameer Ismile Shaikh      | 01.07.2016<br>and<br>02.07.2016 | Exh.110            | Third        |
| 9.             | PW.9-Shekhar Asharam Tore      | 13.07.2016<br>&<br>26.07.2016   | Exh.112            | Third        |
| 10.            | PW.10-Rama Shripati Jadhav     | 06.10.2016                      | Exh.129            | Third        |
| 11.            | PW.11-Dr. Vijay Waman Dhakare  | 09.01.2017                      | Exh.140            | Third        |

96. As such, recording of evidence is in blatant violation of settled norms and rules as discussed hereinabove. Even at the time of recording evidence of PW-8 Sameer Shaikh on 1st July, 2016 and 2nd July, 2016 and PW-11 Dr. Vijay Dhakare on 9th January, 2017, the accused were not produced in Court.

97. Chapter XXIII deals with evidence in inquiries and trials and mode of taking and recording evidence.

Section 272 and 273 of the Criminal Procedure Code read thus;

***"272. Language of Courts.***

*The State Government may determine what shall be, for purposes of this Code, the language of each Court within the State other than the High Court.*

**OBJECTS AND REASONS**

*(1) "Clauses 279 to 290 (Secs. 272 to 283) these clauses correspond to Sections 353 to 364, 343 and 365 and deal with taking and recording of evidence.*

*Provision is being made that in sessions trial, the evidence should ordinarily be recorded in the form of questions and answers The special provision in the case of Presidency Magistrates contained in Section 362 is being omitted."- SOR, Gaz of Ind.,10-12-1970, Pt. II, Sec. 2, Extra P. 1309 (1322).*

*(2) Also see under Sec. 274 infra.*

***273. Evidence to be taken in presence of accused.***

*Except as otherwise expressly provided all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.*

*a[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused]*

***Explanation.-*** *In this section, "accused" includes a person in relation to whom any proceedings under Chapter III has been commenced under this Code."*

*[a]Inserted by Criminal Law (Amendment) Act (13 of 2013), S20. (3-2-2014)"*

98. It is not clear from the record as to whether the Counsel representing the accused had sought exemption from personal appearance of the accused at the time of recording the evidence of prosecution witnesses and whether the learned Sessions Judge had dispensed with the personal attendance.

99. A fortiori of the entire discussion of facts, circumstances and evidence is that the prosecution has failed to bring home guilt of the accused beyond all reasonable doubts. Consequently, reference of confirmation made by the learned Additional Sessions Judge needs to be answered in the negative.

100. Now, to the order.

**:O R D E R:**

[a] Reference of confirmation of the death sentence is hereby dismissed;

[b] The judgment and order of conviction and sentence of death awarded to the accused Rahimuddin Mohfuz Shaikh @ John Anthony D'Souza @ Babu @ Baba by the Additional Sessions Judge, Thane on 11th May, 2017 in Sessions Case No.599 of 2012 is quashed and set aside by extending him a benefit of doubt.

[c] The accused is acquitted of the offences punishable under section 376 (2) (g), 302 and 326 of the Indian Penal Code in view of section 368 (c) of the Criminal Procedure Code;

[d] Fine amount, if paid, be refunded to the accused;

[e] The accused be released forthwith, if not required in any other case.

**[PRITHVIRAJ K. CHAVAN, J.]      [SMT. SADHANA S. JADHAV, J.]**