

IN THE HIGH COURT AT CALCUTTA

CIRCUIT BENCH AT JALPAIGURI

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Rajarshi Bharadwaj

and

The Hon'ble Justice Shampa Dutt (Paul)

Death Reference 01 of 2023

with

CRA 11 of 2020

Surjei Bhujel

Vs

State of West Bengal.

For the Appellant

: Mr. Aniruddha Biswas,
Mr. Swarup Das.

For the State

: Mr. Aditi Shankar Chakraborty, APP,
Mr. Sourav Ganguly,
Mr. Arjun Chowdhury.

Heard on

: 12.04.2023

Judgment on

: 06.07.2023

Shampa Dutt (Paul), J.:

1. The death reference and the Criminal Appeal arises out of the judgment and order dated 27.01.2020 and 28.01.2020, passed by the learned Sessions Judge, Kalimpong in Sessions Trial No. 04 of 2018 arising out of Sessions Case No. 07 of 2018, convicting the appellant Surjee Bhujel for commission of offence punishable under Section 302 of the Indian Penal Code and sentenced to death (capital punishment) and also sentenced to pay a fine of Rs. 1,00,000/- (Rupees One Lakh) in default to suffer rigorous imprisonment for five years.
2. **Prosecution Case:-**

The prosecution case initiates from the written complaint dated 03.02.2018 lodged at 08.15 hrs by (PW 1) Smt. Nima Dolma Tamang:-

"I Nima Dolma Tamang, W/o. Tarzen Tamang residing of Dalgoan, Jaldhaka P.S., District Kalimpong would like to request you that today on 03.02.2018 approximately about 8.30 in the evening I got an information that my sister Junita Lama, 28 years old, D/o. Ajay Lama and her children 1) Akrit Bhujel 8 years old, 2) Atith Bhujel 6 years old were murdered by my brother-in-law's brother Surjee Bhujel, S/o. Dhan Bahadur Bhujel at the house at Dara goan, Vhasmay with a sharp weapon and when I reached the place of occurrence I saw the dead body of all the three in a dreadful condition. The incident had taken place at about 8 o'clock in the evening.

Therefore I request you that the culprit Surjee Bhujel be inflicted with rigorous punishment which is my humble request."

3. **The case in brief:-**

The opinion of witnesses and police officer as to cause of death was murder. (PW 18) Sub-Inspector of Police posted as officer in charge, Jaldhaka P.S. took up the investigation, visited the place of occurrence (P.O.), prepared rough sketch map with index of the P.O. (Ext 19 and 19/1) and recorded the statements of witnesses, arrested the accused, who took the police to a jungle in Bhasmay gaon (about 100 meters away from the P.O.), where as per the instruction of the accused, he recovered one Iron made sharp cutting knife namely “Bamfak” from the said jungle and seized the same. The “Bamfak” was stained with blood. On 07.02.2018 between 15.25 hrs and 15.45 hrs, the I.O. went with the accused and force to Murti Khola, below the bridge near Sombaredhara, Kumai Tea Estate and recovered the wearing apparels of the accused from below the Bridge in wet condition and seized the same. Statements under Section 164 Cr.P.C. was recorded of witnesses Rajen Bhujel (PW 6) and Dhan Bahadur Bhujel (PW 8). Charge sheet was submitted under Section 302 IPC against the accused. The post mortem report of deceased Junita Bhujel (28 years), Akrit Bhujel (8 years) and Athit Bhujel (6 years) show that the cause of death was the deep cut in the neck and excessive bleeding which is “homicidal” in nature. All the deaths were caused by deep cut in the neck.

The case was committed to the Court of Sessions on 15.05.2018. Charge was framed under Section 302 of the Indian Penal Code against

accused Surjay Bhujel on 26.06.2018 to which the appellant pleaded “not guilty” and claimed to be tried.

In course of trial, prosecution examined 18 witnesses and exhibited documents and material evidences.

On conclusion of trial, the Session/Trial Judge by the judgment under appeal convicted the appellant and sentenced him to death for committing the murder of his sister in law, Junitha Bhujel (28 years) and her sons Akrit Bhujel (8 years) and Athit Bhujel (6 years).

4. **The reference and appeal**

The present death reference is for confirmation of the death sentence imposed by the Trial Court.

The appeal by the convict is for setting aside the judgment and order under appeal and reference.

The Death reference and the appeal have been heard analogously.

The prosecution has examined the following **18 witnesses**.

5. **Evidence for the prosecution**

Prosecution witness no.1 (PW 1) Nima Dolma Tamang has deposed that deceased Junita Lama (28 years) was her sister and deceased Aakrit Bhujel and Athit Bhujel aged 8 years and 6 years were the sons of Junita and this witness’s nephews. Surjey Bhujel murdered them.

Surje is the brother in law (devar) of deceased Junita and uncle of the deceased children of Junita. PW 1 has identified the accused on dock. PW 1 has deposed that the husband of Junita Lama died in the month of July, 2017, by drowning. He used to work in the Cinchona plantation which is under the control of the Government and after his death Junita was employed by the Government by invoking died-in-harness process (on compassionate ground) of the service rules and that was the reason Surje Bhujel killed Junita and her two minor sons because he wanted to get the job himself and not Junita.

Prosecution witness no. 2 (PW 2) (hostile) Raj Kumar Bhujel (cousin of the appellant Surje Bhujel). He has proved his signature on the seizure list (marked Ext. 2). PW 2 has deposed that he heard from the villagers that Surje had murdered Junita and her children.

This witness has denied the seizure of the 'Bamfak', the weapon allegedly used to commit the crime. On 04.04.2019, when the seized weapon was produced, PW 2 has **admitted his signature on the label** (Ext. 3) and identified the weapon as "Bamfak".

Prosecution witness no. 3 (PW 3) (hostile) Sri Tshering Sherpa knows all the parties to this case including Dhruba Bhujel, deceased husband of Junita, who was an employee at Cinchona plantation along with this witness.

He has stated that he does not know anything. He heard about the incident from villager. He has identified his signature on the seizure

list (Ext. 2/1) but has deposed that he and PW 2 Raj Kumar were called to the police station and made to sign on blank papers. PW 3 has also **admitted his signature (Ext. 3/1) on the label of the seized weapon.**

PW 3 has stated in his examination in chief that police had called him along with Raj Kumar (PW 2) to Jaldhaka Police Station and made him to sign on a blank paper at the Police Station.

On being cross examined by the prosecution, being declared hostile, he has denied the recovery of the weapon in his presence. Here he has deposed that police asked him to sign on a blank paper after the seizure of the “Bamfak”. (He has thus admitted his presence at the time of seizure of the offending weapon “Bamfak”).

Prosecution witness no. 4 (PW 4) Sri Sajan Tamang, had accompanied PW 1 to the place of occurrence and has fully corroborated the statements of PW 1. He is the scribe of the written complaint, which he wrote as per the statement of PW 1. **He has also identified his signature on the seizure list by which the blood stained articles were seized** and has proved his signature on the labels of the material exhibits (Exhibit 5, 6 & 7). PW 4 has reiterated the statements as made by him in examination in chief. But this witness has then stated that he put all his signatures at the police station. He has denied that he has implicated Surjeet falsely

Prosecution witness no. 5 (PW 5) Sri Tarjan Tamang is the husband of PW 1. He accompanied PW 1, 4 and others to the place of

occurrence. He has also reiterated the evidence of PW 1 and 4 and proved his signature on seizure lists and labels (Ext. 4/1, 5/1, 6/1 and 7/1). He accompanied the elder brother of Surjei when the dead bodies were handed over. He has reiterated his evidence in chief and denied falsely implicating Surjei Bhujel.

Prosecution witness no. 6 (PW 6) Sri Rajen Bhujel (brother of convict Surjei Bhujel (hostile)).

This witness has denied making a statement before the police, that on the date of occurrence i.e. on 03.02.2018 at about 9 p.m. when he stated that Surjei Bhujel came to his house suddenly and that he noticed blood stains on his wearing apparels and suddenly he told him that he committed murder of his sister-in-law and her two children. That Surjei Bhujel came inside his room and he took away his wearing apparel. At that point of time he went to the house of Junita Lama and saw the dead body of Junita Lama being spattered with blood and stated before the police in presence of co-villagers that he will give his statement before the Court, if he is allowed to do so.

The most relevant part of the evidence of PW 6 is as follows:-

*“It is a fact that myself came to the Court and gave my statement on 08.03.2018 inside the chamber of the Ld. Magistrate. There was myself and the Ld. Magistrate only. Thereafter recording the statement I stated in Nepali about the statement and after coming to know about the contents, myself signed the statement. The statement under Section 164 Cr.P.C. is marked as Exhibit 8 (with objection). **Myself did not state before the Ld. Magistrate that I made the statement as tutored by the police.** I was present at the time of inquest of the*

*dead bodies. Myself saw the dead bodies. My sister-in-law's name is Junita Lama. Then says when I reached there the dead bodies have already been wrapped up with plastic. The police prepared the inquest report. This is my signature on the inquest report of Junita Lama prepared by police, marked Exhibit 9. This is my signature on the inquest report of Aakrit Bhujel prepared by police, marked Exhibit 10. This is my signature on the inquest report of Athit Bhujel prepared by police, marked Exhibit 11. **The name of the husband of Junita Lama was Dhruba Bhujel. Dhruba Bhujel died on 26.08.2018. He worked in the Cinchona Plantation. After the death of Dhruba Bhujel Junita got the job in the Cinchona Plantation.***"

On being cross examined by the defence, he has stated that he and his father were detained over night at Jaldhaka Police Station (on 07.02.2018) and were brought by the police to the Magistrate's Court on 08.12.2018.

He has also deposed that he was tutored and threatened by the police to make the statement against the accused.

Prosecution witness no. 7 (PW 7) Sri Ritesh Sherpa has proved his signature on the seizure list (Ext. 12) though stating that he put his signature at the request of the police and that nothing was shown to him and on hearing about the incident had visited the P.O. He has also proved his signature on the label (Exhibit 13).

Prosecution witness no. 8 (PW 8) Sri Dhan Bahadur Bhujel is the father of the accused (hostile). He has denied making any statement to the police.

On being cross examined he has denied stating to the police that on 03.02.2018 at about 8 p.m. his son Surjei Bhujel cut down Junita

Bhujel and her two sons Aakrit Bhujel and Athit Bhujel with a sharp cutting knife and that he was present there and that on hearing the shouts and cries he went there to intervene but Surjey Bhujel also threatened him by putting a knife on his neck to keep silent and that he went to the police station and that if he be given the chance to say all the facts before the Court he will state the same.

The relevant part of his evidence is as follows:-

“It is correct that myself came before the Ld. Magistrate. It is correct that after the statement was recorded by the Ld. Magistrate the same was read out to me and explained to me in Nepali language and thereafter coming to know about the contents of the same. I put my signature on it. The statement under Section 164 of Cr.P.C. and the signature is marked Exhibit 14 (objected to). Not a fact as Surjey Bhujel is my younger son and out of love to save him from the punishment I am deposing falsely before this Court.”

Though, PW 8 has deposed on being cross examined by the defence that he made the statement before the Magistrate as he was threatened by the police.

An important question was put by the Court as follows:-

“Court: Did you feel important to come to the Court on earliest occasion to state that you were being threatened to give statement against my son by the Police.

Ans.: No. I did not feel it so.

Police of Jaldhaka P.S. was just outside the chamber of the Ld. Magistrate. I was bought from Jaldhaka P.S.”

Prosecution witness no. 9 (PW 9) Sri Kul Bahdur Bhujel (hostile). This witness heard about the incident and went to see and

has also stated that he was made to sign on blank paper. (Ext 9/1, 10/1, 11/1, 12/1). **But he has admitted being present at the place of occurrence when the police took away the dead bodies and he had then put his signature on the three inquest reports.**

Prosecution witness no. 10 (PW 10) Sri Meghlal Subba is an employee of the Chinchona plantation (hostile). On cross examination he has denied making the statement to the police that, Junita Lama would get a lot of money after the death of her husband and the said money was due and payable to her and that regarding inheritance of service and money, due to death of Dhurba Bhujel the family of the accused person used to visit the office of IPICAC Plantation and **due to all this, the incident of murder happened.**

He has stated to the Court as follows:-

“The accused person is a resident of Gairibus and he is unmarried.

At the time of death the deceased Junita Bhujel along with her two sons used to reside in her house at village Gairibus.

I do not know whether any other person used to reside with Junita Bhujel in her house.

It will take about 10 minutes on foot to go to the house of the deceased from the house of the accused person in village Gairibus.

The accused person and the deceased did not reside together in the same house at the time of death of Junita Bhujel.”

Prosecution witness no. 11 (PW 11) Sri Pravin Tirwa is a team member of child line. He has deposed as reproduced here:-

“On 8.2.2018 I attended the chamber of the Judicial Magistrate, Kalimpong to work as interpreter for

two witnesses viz. Rajen Bhujel and Dhan Bahadur Bhujel and they gave statement in Nepali language and I explained the same to the Judicial Magistrate in Hindi and thereafter I signed on those two statements recorded by the said Judicial Magistrate in English. These are my signatures on the said two statements. These signatures are marked as Exhibit 8/1 and Exhibit 14/1.

I explained the contents of the statements made by those two witnesses to them in Nepali and after understanding the same the said two witnesses put their signatures on the said two statements.

The Director of Bal Suraksha Avhiyan, Kalimpong asked me to attend the chamber of the Judicial Magistrate to work as interpreter and then I attended the said chamber and did the said work.

The said Director gave me letter in this respect.

At the Police Station no police officer tutored me as to what had to be done by me in the chamber of the Judicial Magistrate.”

Prosecution witness no. 12 (PW 12) Arjun Chhetri, is a Constable with Jaldhaka Police Station. He has signed on the dead body challans (Exbt. 15, 15/1 and 15/2) and (Exbt. 15/3, 15/4 and 15/5) and (Exbt. 16) MAT Exts. B to H and Exbt. 1 collectively.

Prosecution witness no. 13 (PW 13) Dr. Shyam Kanta Basu is the Doctor who held the post mortem. On examination he found the following injuries:-

“Two incised wounds on the right hand in dorsal aspect on her media side, size 5x3x2 cm and another 4x2x2 cm situated longitudinally middle, ring and little fingers were amputated. Neck injury almost decapitated. The head was decapitated. Only portion of skin 5x2x3 cm hanging on the left side. Due to deep cut on the neck and homicidal in nature.

The above injuries may be caused by any sharp cutting weapon.

*He did not find any internal injury. **His opinion as to the death was due to deep cut on the neck and homicidal in nature.***

He also opined that the above injuries may be caused by any sharp cutting weapon. He has proved the post mortem report (Ext. 17)."

To Court:-

"With force by only one attempt any person can be beheaded by a sharp cutting weapon.

His deposition to the prosecution is the same:

Sharp cutting weapon may have been used to cut the middle, ring and little fingers of the right hand of the deceased.

The remaining pieces of said fingers were not produced before me for examination.

*On that date I also held postmortem examination on the dead body of **Aakrit Bhujel** at about 14.00 hours, one after another and on examination I found deep incised wound on the right side of the neck starting from face just below right ear 8x5x5 cm size. Another incised wound on the scalp 10x3x2 cm just above the wound on the neck. All the muscles of the right side neck was cut.*

All the vessels of the right side of the neck were cut.

I did not find any internal injury on the dead body.

As per my opinion the death was due to excess bleeding from the cut injury and homicidal in nature.

The same sharp cutting weapon may have been used for injury of the deceaseds.

This original postmortem report was prepared and signed by me. It is marked as Exhibit 17/1.

*On that date I held postmortem examination on the dead body of **Athit Bhujel** at the same time one after another and on examination I found deep incised wound on the neck starting from left side cutting all the structures of the neck including blood vessels, nerves, muscles, cervical vertebra, spinal cord, small flap of skin 5x2x3 cm hanging on the right side. I did not find any internal injury.*

As per my opinion the death was due to incised wound on the neck and homicidal in nature.

The above injuries may have been caused by the above sharp cutting weapon.

This is the original postmortem report prepared and signed by me. This is marked as Exhibit 17/2."

Prosecution witness no. 14 (PW 14) ASI of Police Shiva Kumar

Rai is a witness to the seizure (Ext. 16/1) and has identified MAT Exhibit B to I collectively.

Prosecution witness no. 15 (PW 15) Moyazzem Hossain, was

posted as **Judicial Magistrate** at Kalimpong on 08.02.2018.

He has deposed as follows:-

“On that date I had examined witness Rajen Bhujel and Dhan Bahadur Bhujel u/s 164 of the Cr.P.C. and recorded their statements in my chamber according to law.

At the time of examination of both the witnesses I took the help of one Interpreter Prabin Tirwa because I did not know Nepali language and the witnesses were unable to speak either in English, Bengali or Hindi.

The said interpreter was able to speak in Bengali, Hindi, English besides Nepali.

I told the said questions to the interpreter in Hindi and the interpreter translated the said questions in Nepali to the witnesses and the witnesses gave answers in Nepali to the interpreter and the interpreter told the said answers to me in Hindi and then I recorded the said answers in English.

After recording the said statements the same was read over and explained to the witnesses through the said interpreter in Nepali and after understanding the same the said witnesses told through interpreter to me that they have understood the contents of the statements recorded by me and then they put their signatures on the said statements.

I took signatures of both the witnesses and the interpreter on the said statements and I also gave two certificates in respect of two statements and I have also signed on those two statements.

In respect of both the witnesses, the same procedure was followed by me because both the witnesses were unable to speak in Bengali, Hindi and English except Nepali and the same interpreter was used for the purpose of translation and has proved the statements (Ext. 8/2 and 14/2).”

This witness has denied the suggestions of the defence.

Prosecution witness no. 16 (PW 16) Arjun Chettri, Civic Volunteer at Jaldhaka P.S. had accompanied the officer in-charge to the P.O. He took photographs of the dead bodies as directed by the O.C. He had denied the suggestions of the defence. He has identified accused Surje Bhujel in Court.

Prosecution witness no. 17 (PW 17) Dibakar Sarki printed the copies of photographs as asked by PW 16. He has denied the suggestion of the defence.

Prosecution witness no. 18 (PW 18) Nilam Sanjiv Kujur was the officer in-charge of Jaldhaka P.S. on the date of incident and he started the P. S. Case No. 4/18 dated 03.02.2018 and filled up the formal FIR (Ext. 18) and took up the investigation of the case himself.

During investigation he visited the P.O. alongwith force and prepared one rough sketch map with index of the P.O. (Ext. 19 and 19/1) and recorded the statements of the available witnesses.

On 03.02.2018 he seized some blood from the floor of the room where the dead body of Junita Bhujel was found. He also seized some blood from floor near the dead body of the deceased Akrit Bhujel.

He also seized one white and red colour printed bed sheet stained with blood, one white and pink colour printed pillow cover stained with blood, one yellow and red printed pillow cover stained with blood, one red and yellow printed pillow cover stained with blood, one sky and

white printed piece of cloth with blood stain in torn condition from the house of deceased Junita Bhujel and prepared one seizure list.

He has proved the seizure list (prepared and signed by him) marked Ext. 4/2.

On 04.02.2018 he went to the house of the accused person and arrested him from his house at 2.00 p.m., (Memo of arrest (Ext. 20)) forwarded the accused person to the Court and prayed for police remand of the accused for five days and Court granted remand period for five days.

From 04.02.2018 to 08.02.2018 the accused person was in the police custody.

During the remand period the witness recorded the statement of the accused person, Surjei Bhujel.

In custody accused person told him that he has concealed the murder weapon ('Bamfak') in the jungle and his wearing apparels below one bridge and if he was given an opportunity he will be able to recover the same.

This relevant portion of the statement of the accused person regarding information about the concealed articles was recorded and signed by him. Statements are marked as Ext. 21 series (with objection).

On 07.02.2018 in between 16.45 to 17.05 hours he went to Bhasmay gaon alongwith the accused person and force and local

persons. Bhasmay gaon is at about 100 metre away from the place of occurrence.

Then the accused person took them to a jungle in the said Bhasmay gaon.

Then as per instruction of the accused person, PW 18 recovered one iron made sharp cutting knife namely 'Bamfak' from the said jungle and then he seized the said weapon under a seizure list in presence of the witnesses and the accused person (Exhibit 2/1).

At the time of seizure of said 'Bamfak' PW 18 saw that it was stained with blood.

PW 18 has then identified the 'Bamfak' (already marked MAT Ext.-A) and stated that it was seized by him from the Jungle as per instructions of the accused person.

On 07.02.2018 in between 15.25 hours and 15.45 hours PW 18 went to Murti Khola below the bridge near Sombaredhara, Kumai Tea Estate under P.S. Jaldhaka with the accused person, force and witnesses.

Then as per instruction of the accused person he recovered and seized one blue colour round neck half sleeve T. shirt designed as 'Doexist' and Skull printed on the front of the T. shirt in wet condition from below the said bridge and seized the same under a seizure list in presence of the accused person and the witnesses and they also signed on it.

Seizure list dated 07.02.2018 is marked as Exbt. 12/2.

'Do-exist' mark T. Shirt was recovered by PW 18 (already marked as Mat Exbt. H) as per the instruction of the accused person from below the said bridge.

The accused person signed on the two seizure lists. Signatures marked as Exbt. 2/3 and 12/3.

On 05.02.2018 PW 18 seized the wearing apparels of the three deceased from Constable Arjun Chettri (PW 16) after the postmortem examination and prepared one seizure list.

Seizure list dated 05.02.2018 is marked as Exbt. 16/2.

Five wearing apparels of the deceased (already marked as MAT Exbt.-I collectively) were seized by PW 18.

He made a prayer before the Court for recording statements of witnesses namely Rajen Bhujel and Dhan Bahadur Bhujel and the said prayer was allowed and they made statements before the Magistrate which was recorded under Section 164 of the Cr.P.C.

Collected the said copies of the said statements recorded u/s 164 of the Cr.P.C.

Collected the postmortem reports of the three deceased.

Sent the blood stained earth, blood stained bed sheet, pillow covers with blood stained and blood stained one piece of cloth, blood stained track pant and shirt, blood stained T. Shirts, sweater, blood

stained bamfak, postmortem blood of the deceased to the expert for examination. But did not receive the FSL report.

On 30.04.2018 he submitted charge sheet against the accused Surjei Bhujel under Section 302 of the IPC and in the charge sheet he stated that he will submit the supplementary charge sheet after receiving the FSL report.

He stated that he seized the bed sheet, torn cloth, blue cloth, pillow cover, sky blue cloth and pillow cover (already marked as MAT Exbt. from 'B' to 'G').

He has denied all the suggestions of the defence.

The prosecution has exhibited, the following documents/material (Exhibits):-

Exhibit	Description
Exhibit 1	Written complaint and endorsement.
Exhibit 2, 4, 16 series	Seizure list and signatures therein.
Exhibit 3,5,6,7,13	Label and signatures therein.
Exhibit 9, 10, 11	Signatures on inquest report.
Exhibit 12	Seizure list and signatures therein.
Exhibit 14 series and 8 series	Statements under Section 164 of the Cr.P.C. and signatures therein.
Exhibit 15 series	Signature on dead body chalans.
Exhibit 17 series	3 post mortem reports and endorsements therein.
Exhibit 18	Formal FIR.
Exhibit 19 series	Rough sketch map and index.
Exhibit 20	Memo of arrest.
Exhibit 21	Portions of 161 Cr.P.C.

	Statement of accused Surje Bhujel.
MAT Exhibit A	'Bamfak' (offending weapon).
MAT Exhibit B	Bed sheet.
MAT Exhibit C	Torn cloth.
MAT Exhibit D	Blue torn cloth.
MAT Exhibit E	Pillow cover.
MAT Exhibit F	Sky blue torn cloth.
MAT Exhibit G	Pillow cover.
MAT Exhibit H	T-shirt of the accused.
MAT Exhibit I	Five wearing apparels of deceaseds.
MAT Exhibit J	Five photographs.

The defence has exhibited:-

Exhibit A - charge sheet.

6. **Prosecution Case:-**

Written notes submitted by the State.

Mr. Aditi Shankar Chakraborty, learned Public Prosecutor on filing a written notes of argument has submitted as follows:-

The defacto complainant being the PW 1 is the sister of deceased Junita Lama and she has proved the motive of murder, stating that the deceased lady Junita Bhujel used to work in the cinchona plantation which is under the control of the Government of West Bengal and she was employed by the government of West Bengal by invoking die-in-harness after the death of her husband Dhurba Bhujel (Brother of the

accused) and that is the reason the appellant Surje Bhujel committed murder of the deceased Junita Bhujel and her two minor sons.

She further deposed that she found that the head of the deceased Junita Bhujel was almost severed and her left hand fingers were severed. Similarly dead body of the deceased minor Aakrit Bhujel was found with deep cut mark injury on the head and head of the deceased Athit Bhujel was partly severed. On examination by the Court the PW 1 has deposed that at 20.30 hrs her sister Junita Lama was murdered.

The ground taken by the appellant that there are contradictions with regard to the time of lodging of FIR shall not sustain in view of the judgment laid down by the Hon'ble Supreme Court that the documentary evidences shall prevail over oral testimonies and in light of the aforesaid judgments and also the settled proposition of law that the FIR need not to disclose each and every fact in detail and may only contain the concise facts of the crime answers. The submission of the appellant with regard to the contradiction of time in lodging of FIR shall not sustain and is liable to be rejected.

Furthermore, the written complaint and the Formal FIR have not been challenged by the appellant during the trial and therefore are in accordance with law, the unchallenged documentary evidence i.e. the written complaint and the Formal FIR shall prevail over the oral evidence of PW 1, PW 4 and the PW 5 regarding the time of receiving the

FIR about the incident of murder and subsequent arrival at the place of occurrence and the lodging of the FIR.

So it was proved beyond reasonable doubt that the PW 1 lodged the FIR at the Police Station on 03.02.2018 at 21.25 hrs after hearing the incident of the murder and seeing the dead bodies at 20.30 hrs on that date and PW 1 also saw different types of cut injuries on the dead bodies of the three deceased and the head of the deceased Junita Lama was almost severed and the fingers of her hand were also severed and the head of the deceased Athit Bhujel and Akrit Bhujel was partly severed and the post mortem report supports the above statements of the PW 1.

PW 2 and PW 3 were the seizure witnesses to the recovery of the murder weapon, recovered on the basis of the leading statement of the appellant/accused Surjei Bhujel while in police custody under Section 27 of the Evidence Act.

PW 2 Raj Kumar Bhujel is the cousin of the accused/appellant Surjei Bhujel and PW 3 is the acquaintance/friend of the accused/appellant Surjei Bhujel and their signatures appear in the seizure list dated 07.02.2018. However in their evidence before the Court they have resiled from their statements and stated that they have not witnessed the seizure of the offending weapon Bamfak and consequently declared hostile by the prosecution.

But PW 2 Raj Kumar Bhujel, in his cross examination admitted that he was not forced to sign on a blank paper which prima facie proves that he was made to sign on a already filled up seizure list dated 07.02.2018 as he himself admitted and proved his signature on the seizure list which was marked as Ext. 2. He also proved his signature on the label as Exbt. 3 and the offending weapon as Bamfak as MAT Exbt. A but he has denied the factum of seizure in his presence only to save the accused person as he is a close relative of the accused. On the contrary there is no evidence on record to show that the PW 2 signed on the seizure list and the label at the police station which proves that he signed on the seizure list and on the label at the place of recovery.

So far as PW 3 is concerned he stated that after 3/4 days of the incident he was called at the Jaldhaka Police Station by the Police and PW 2 also accompanied him there and in the police station he was asked to sign on 4 blank papers. He has proved his signatures on the seizure list. After he was declared hostile by the prosecution and while being cross examined by the prosecution, he deposed that he did not see the accused person bringing out one bamfak from the vicinity of the house of the deceased from the bush shown by the accused person and at the spot police asked him to sign on a blank paper after the seizure of Bamfak. Though he stated that he did not see the alleged recovery of Bamfak but he admitted that he was present at the place of recovery

which disproves his version of signing blank papers in the police station.

PW 4 Sajan Tamang being the scribe of the FIR deposed before the court that he was the scribe of the FIR and it was scribed in accordance with the oral instruction of the PW 1 and it was read out to her and thereafter she put her signature on the **FIR**.

Both the PW 6 and the PW 8 recorded their statements before the learned Judicial Magistrate under Section 164 of the Code on 08.02.2018 which is just 5 days after the incident. That both the PW 6 and the PW 8 are blood relatives of the deceased persons as well. PW 6 is the brother in law of the deceased Junita Bhujel and uncle to the minor deceased boys Athit and Akrit. PW 8 is the father in law of deceased Junita Bhujel and grandfather to the minor deceased boys Athit and Akrit. The remorse of losing their own family members that too such close blood relatives were on them at that point in time and they made their statements relating to the involvement of the accused Surjey Bhujel in the commission of the murder before the Ld. Magistrate.

PW 6 admitted that he gave his statement under Section 164 of the Code on 08.03.2018 before the Ld. Magistrate and after the Statements were taken it was read over to him in Nepali and after understanding the contents of the same he signed the statements. He further deposed that he did not state before the Ld. Magistrate that he

was tutored by the police. He also deposed that after the death of Dhurba Bhujel, his wife Junita Lama got the job in cinchona plantation.

PW 8 in his cross examination by the prosecution after he was declared hostile stated that **“when I went to the room I saw that my daughter-in-law has been cut down and her body was lying there and next to her Aakrit was lying with multiple injuries and thereafter I saw Athit Bhujel and his neck was also cut.”** Though he had taken the plea that he was not present at the place of occurrence and was at Naxal but during his cross examination by the prosecution the truth was revealed that he was present there and henceforth the statements given under Section 164 were taken to be true and correct and his subsequent stand before the Court during evidence was an afterthought and an attempt to save his son from punishment. He also admitted that he gave statement under Section 164 of the Code and signed on the same after he was explained the contents of the statement in vernacular. So far as their statements in court relating to coercion or threat by the police, the same was not proved on want of sufficient evidence and was given only as an attempt to damage the prosecution case.

The accused pleaded that the incriminating evidence against him were not placed before him. PW 6 and PW 8 have not made any statements in court but their admission before the Magistrate u/s 164 of the Code has been held to be true and correct. They have chosen not

to corroborate the statements made by them under Section 164 of the Code while deposing before the Court and as such the learned Trial Judge placing reliance on Section 80 of the Evidence Act held that the statement under Section 164 is true and correct and good in law. Since PW 6 and PW8 did not depose the same before the Court the learned Trial Judge thought it fit not to place that before the accused u/s 313 Cr.P.C. as the defence case categorically is that the statements are not substantive evidence.

The following judgments have been relied upon by the prosecution:-

In respect of examination under Section 313 Cr.P.C.

- (a) *Gian Chand & Ors. vs State of Haryana, AIR 2013 SC 3395.*
- (b) *Paramjeet Singh @ Pamma vs State of Uttarakhand, AIR 2011 SC 200.*
- (c) *State (Delhi Administration) vs Dharampal, AIR 2001 SC 2924.*

In respect of Recovery under Section 27 of the Act:-

- (a) *Amit Singh Bhikam Singh Thakur vs State of Maharashtra (2007) 2 SCC 310.*
- (b) *A. N. Venkatesh vs State of Karnataka, (2005) 7 SCC 714.*
- (c) *State of Himachal Pradesh vs Jeet Singh, (199) 4 SCC 370.*

Regarding defects in investigation.

(a) *Karnel Singh vs State of UP*, (1995) 5 SCC 518.

(b) *Ram Bihari Yadav vs State of Bihar*, AIR 1998 SC 1850.

Mr. Chakraborty, learned public prosecutor has further submitted on the point of sentence. His contention is that Surjei Bhujel committed murder of his widow sister in law Junita Bhujel and his two minor nephews, one 8 years old and another 6 years old in a preplanned manner. The murder was planned since long with cool head and he has executed the plan on the fateful day. The brutality of the crime shows that the convict Surjei Bhujel has no remorse and also there is no possibility of any reformation of the convict. The convict has murdered two minor children who were innocent and were unconnected with the nitty and gritty of the world. These two children could have been spared but they were also brutally murdered probably because the minor children after attaining the age of majority should not come up with any claim in the family property or the job of their mother and to eliminate all such possibilities these cold blooded murders of the entire family was done by the convict Surjei Bhujel. Such convict if allowed to live shall be a threat to the society and even inside the correctional home shall be a threat to the other inmates.

The brutality and gravity of the crime squarely brings it within the ambit of the rarest of rare cases and the sentence of death is the just punishment in the facts and circumstances of the present case. **[Relied**

upon Dhananjoy Chatterjee vs State of West Bengal, (1994) 2 SCC 220, Para 13-16].

In view of the above, it has been humbly prayed that the sentence of death imposed upon the convict Surjeet Bhujel be upheld and the death reference of the convict be confirmed by this Hon'ble Court.

7. Defence Case:-

Mr. Aniruddha Biswas, learned counsel for the appellant has submitted on also filing his written notes of argument as follows:-

It is submitted on behalf of the appellant that there is complete departure from the time stated in the FIR lodged by PW 1 and the fact deposed before the Court. Exhibit-1 shows that the FIR was lodged at 09.25 pm on 03.02.2018. On the other hand the deposition shows that she received the information at midnight and went to the spot at 12.15 am.

In the FIR lodged at 21.25 hrs she mentioned that, she had already visited the place of occurrence. Whereas, in the depositions she has stated she visited the place of occurrence around 12.10-12.15 am.

FIR being the first document to set the ball of investigation into motion has prime importance in a criminal trial and deviation from the basic facts stated in FIR invites suspicion and doubt as to the authenticity of the same.

Basant Tamang who allegedly informed the PW-1 about the incident neither appeared before the police, nor appeared before the court to record his deposition. Therefore, the evidence of PW-1 as regards to the Information relating to the alleged incident is inadmissible in evidence as hearsay evidence does not hold any evidentiary value.

A careful reading of the deposition of PW 4 Sajen Tamang shows that in his examination in chief he stated that he remained at Jaldhaka police station till 7 am. But in the cross examination he stated that on 04.02.2018, one 'Bamfak' was shown to him by the police before he left the police station. Police told him that the Bamfak was used by the accused to commit the offence. The memo of arrest (Exhibit-20) clearly shows that the accused was brought under arrest on 04.02.2018 at 02.00 hrs. Exhibit-2, is the seizure list showing the alleged recovery on 07.02.2018 in between 16.45hrs-17.05hrs.

It is submitted by the appellants that, neither PW 2 nor PW 3 proved the content of Exhibit-2 except their signature. PW 3 clearly stated that, he was called to the police station 3-4 days after the incident and on being insisted by the police, he signed on four blank papers along with PW 2 without knowing the purpose of the same. Therefore, the prosecution has failed to prove the recovery of alleged murder weapon.

[Para 76, 83, 84 of C. Muniappan & Ors. Vs State of Tamilnadu reported in (2010) 09 SCC 567].

PW 4 in his cross examination clearly stated that he was present at the police station till 07 am in the morning (04.02.2018) and a 'Bamfak' was shown to him before he left the police station. He also added that he was told by the police that the said 'Bamfak' was used for the commission of the alleged murder. The principle behind recovery under Section 27 of the Indian Evidence Act lays down that there should be an information received from an accused while in the custody of the police and the information being confirmed by the subsequent recovery that is the fact thereby discovered.

It is settled position of law what is not covered, cannot be discovered. As per the Evidence of PW 4, the police was in possession of the 'Bamfak' allegedly used for commission of the alleged offence. The accused was in custody of the police from 04.02.2018 before 07.00 am whereas the recovery Exhibit 2 series shows that the alleged recovery was made on 07.02.2018 in between 16.35 hrs-17.05 hrs. Therefore, the alleged recovery relied upon by the prosecution and the learned Trial Court is doubtful and cannot be said to have been proved beyond reasonable doubt.

That, in a criminal trial the purpose of 164 statements is limited.

A statement under revision 164 of Cr.P.C. cannot be used as

substantive evidence of truth of the fact but may be used for contradictions and corroborations of a witness who made it.

- i. Utpal Das vs State of West Bengal (2010) 6 SCC 493.**
- ii. Ramkrishan Sing vs Harmit Kaur & Anr. Reported in (1972) 3 SCC 282.**
- iii. Baji Nath Sah vs State of Bihar (Criminal Appeal 1475 of 2003 decided on 29th April, 2010).**

In the instant case, the Trial Court has relied upon the 164 Cr.P.C. statements and used those statements to convict the accused. The statements under Section 164 Cr.P.C. not being substantive evidence has been used to base conviction of the appellant which is not sustainable on the anvil of criminal jurisprudence. Therefore, the material relied upon by the prosecution and the Ld. Trial Judge for convicting the accused is inadmissible being “NOT SUBSTANTIVE EVIDENCE”. Hence, it is submitted by and on behalf of the appellant that the conviction is bad in the eye of law and liable to be set aside.

PW 18 the Investigating Officer:-

The time of arrest as per I.O. is 2 pm whereas the memo of arrest shows 2 am.

The I.O. did not obtain signature of the accused on the statement recorded by him.

(Jakaran Singh vs State of Punjab (1997) SCC (Crl) page 651).

The disclosure statement cannot be believed as it was made long time after the accused was taken into custody.

The RSFL report with respect to the alleged murder weapon was never brought on record.

The I.O. in his evidence said he did not find a label on the Bamfak. The case diary is also silent about it.

The evidence of I.O. regarding recovery cannot be relied upon without independent corroboration.

In **Maheswar Tigga vs State of Jharkhand reported in (2020) 10 SCC page 108 paragraph No. 07 to 09**, the Apex Court has been pleased to observe “it stands well settled, that the circumstances not put to the accused under 313 Cr.P.C. cannot be used against him, and must be excluded from consideration.”

In **State of Punjab vs Hari Singh & Ors. (2009) 4 SCC page 200. Paragarph 16 & 18** the Apex Court has been pleased to discuss the object and purpose of Section 313 Cr.P.C. and effect of not putting incriminating circumstances to the accused during his examination under Section 313 Cr.P.C.

In the case in hand, the circumstances i.e. the statement of PW 6 & PW 8 recorded under Section 164 Cr.P.C. were not put to the accused. But, those statements have been used to base a conviction and death sentence which is thus clearly bad in law.

It is stated that conviction cannot sustain on such unstable and inadmissible evidence. There is neither direct nor circumstantial evidence to justify the conviction.

Submissions on the point of Rarest of Rare Case and imposition of death penalty.

It is not the absolute rule that in every case involving multiple murders, death penalty is justified. The alternative course of life imprisonment would take care of any apprehension of recidivism without extinguishing another human life. Lack of criminal antecedents play an important role may opt for a more humanistic approach or imposition of life imprisonment. The probability of the accused being reformed or rehabilitated are also important considerations. In the judgment following previous judgments, the Apex Court expressed the view that number of deaths cannot be ground to infer the offences fell in the “rarest of rare case”.

(1) Vijay Kumar vs State of Jammu & Kashmir, on 14th November, 2018, (2019) 12 SCC page 791.

(2) Gudda vs State of MP (2013) 16 SCC page 596.

Learned counsel for the appellant has thus prayed for setting aside the judgment and order under reference.

8. **Analysis of evidence:-**

From the materials on record, the documents, materials exhibited and the submission of both sides, it is seen that the present case is based on **circumstantial evidence**.

The Trial Courts finding on the chain of circumstances:-

“The chain of circumstances may be short or long according to the prosecution case and in this case the chain is short because it is the case of the prosecution that on 03.02.2018 at about 20.00 hours the accused person murdered three deceaseds of this case by sharp cutting weapon in their house and then the accused person made extra judicial confession before his full brother i.e. the PW 6 and the PW 8 saw the accused person to flee away after killing the three deceased of this case and in the house of the three deceased the accused person was found present alongwith the three deceased when the said deceased were alive before their murder and then the accused person murdered them there and then as per instruction of the accused person police recovered the offending weapon and one. T-shirt of the accused person from a bush and below one bridge, and considering the materials on record, the statements of the PW 6 and the PW 8 before the Magistrate, the extra judicial confession of the accused person before the PW 6, the last seen theory and recovery of the seized articles as per the instruction of the accused person and Section 8 of the Indian Evidence Act, I hold that the prosecution has successfully proved the chain of circumstances, which only indicate the guilt of the accused person behind murder of the three deceased of this case.”

Let us now proceed to analyze whether the judgment under reference and appeal is in accordance with law.

9. **First Information Report:-**

The FIR (Exhibit 1) has been proved by the maker (P W 1) and the scribe (P W 4). Time of incident is around 20.00 hrs on 03.02.2018. The FIR was lodged at 21.25 hrs on 03.02.2018. The distance between P.O. and P.S. is four kms. PW 4 had accompanied PW 1 to the P.O. Thus there is no apparent delay in filing the FIR, considering the trauma, shock and the distance to the P.S. The FIR mentions the name of the sole accused/appellant Surjei Bhujel. Place of occurrence is not in dispute (house of the deceaseds). The learned Trial Judge has relied upon the following judgments in support of his findings relating to evidentiary value of the statements of the witnesses.

(1) Ramasish Roy vs Jagdish Singh, 2005 A.I.A.R. (Cri) page 62.

(2) Uttar Pradesh vs M.K. Anthony, A.I.R. 1985 Supreme Court 48.

(3) Vimal Suresh Kamble vs Chaluverapinakeapal S. P. & another, 2003 Supreme Court Cases (Cri) 596.

(4) Sucha Singh and another vs State of Punjab, 2003 A.I.R. SCW 3984.

(5) Karnel Singh vs The State of M.P., 1995 (5) SCC page 518.

(6) Ram Behari Yadav vs The State of Bihar, 1998 (4) SCC page 517.

(7) Ramesh and another vs The State of A.P., 1999 SCC (Cri) page 1437.

(8) The Hon'ble Supreme Court has held in a case reported in 2003 AIR S.C.W. page 241.

The prosecution case is that deceased Junita Bhujel (28 years) and her sons Athit Bhujel (6 years) and Aakrit Bhujel (8 years) have been brutally murdered in their own house by accused/convict Surjeet Bhujel, brother in law (Dewar) of Junita and uncle of her sons.

The Supreme Court has laid down the law in respect of circumstantial evidence in the following land mark judgments:-

- i. ***Bodh Raj @ Bodha and Ors vs State of Jammu and Kashmir, Appeal (crl.) 921 of 2000, 2002 CRI.L.J. 4664, on 3 September, 2002.***

*“9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. **To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.***

10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan [(1977) 2 SCC 99 : 1977

SCC (Cri) 250 : AIR 1977 SC 1063] , *Eradu v. State of Hyderabad* [AIR 1956 SC 316 : 1956 Cri LJ 559] , *Earabhadrapa v. State of Karnataka* [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , *State of U.P. v. Sukhbasi* [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , *Balwinder Singh v. State of Punjab* [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and *Ashok Kumar Chatterjee v. State of M.P.* [1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621 : 1954 Cri LJ 1645] it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.* [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205] wherein it has been observed thus : (SCC pp. 206-07, para 21)

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

12. In *Padala Veera Reddy v. State of A.P.* [1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests : (SCC pp. 710-11, para 10)

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

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

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

13. *In State of U.P. v. Ashok Kumar Srivastava [(1992) 2 SCC 86 : 1992 SCC (Cri) 241 : 1992 Cri LJ 1104] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.*

14. *Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence : (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;*

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

16. In *Hanumant Govind Nargundkar v. State of M.P.* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129] it was observed thus : (AIR pp. 345-46, para 10)

“10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

17. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] . Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before

conviction could be based on circumstantial evidence, must be fully established. They are : (SCC p. 185, para 153)

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

ii. Ramesh Bhai & Anr. Vs State of Rajasthan, Criminal

Appeal nos. 868-869 of 2004, on April 24, 2009.

“5. *It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Eerabhadrapa v.*

State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

6. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

7. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

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

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

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

8. In State of U.P. v. Ashok Kumar Srivastava, (1992 CrLJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

9. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

10. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

11. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which

the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. *A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

13. *These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and in State of U.P. v. Ram Balak & Anr. [2008 (13) SCALE 541.]”*

iii. Ramanand @ Nandlal Bharti vs State of Uttar Pradesh,

Criminal Appeal Nos. 64-65 of 2022, on October 13, 2022.

“45. In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special inference. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered:

a) The **Factum probandum**, or say, the principal fact (the fact the existence of which is supposed or proposed to be proved; &

b) The **Factum probans** or the evidentiary fact (the fact from the existence of which that of the factum probandum is inferred).

46. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an Accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as follows:

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

2 . Those circumstances must be of a definite tendency unerringly pointing towards guilt of the Accused and must be conclusive in nature;

3 . The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else; and

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved.

47. *There cannot be any dispute to the fact that the case on hand is one of the circumstantial evidence as there was no eye witness of the occurrence. It is settled principle of law that an Accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely points towards the involvement and guilty of the suspect or Accused, as the case may be. The Accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an Accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the expected principles in that regard.*

48. *A three-Judge Bench of this Court in **Sharad Birdhichand Sarda v. State of Maharashtra**, MANU/SC/0111/1984 : (1984) 4 SCC 116, held as under:*

152. *Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [MANU/SC/0037/1952 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri. L J 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri.) 55] and Ramgopal v. State of Maharashtra [MANU/SC/0168/1971 : (1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [MANU/SC/0037/1952 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri. LJ 129]:*

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of

guilt is to be drawn should in the first instance be fully established, and

all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should

be of a conclusive nature and tendency and they should be such as to

exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused.

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

(1) the circumstances from which the conclusion of guilt is to be drawn

should be fully established.

It may be noted here that this Court indicated that the circumstances

concerned 'must or should' and not 'may be' established.

There is not

only a grammatical but a legal distinction between 'may be proved' and

"must be or should be proved" as was held by this Court in Shivaji

Sahabrao Bobade v. State of Maharashtra [MANU/SC/0167/1973 :

(1973) 2 SCC 793 : 1973 SCC (Cri.) 1033 : 1973 Cri. L J 1783] where

the following observations were made : [SCC para 19, p. 807 : SCC

(Cri.) p. 1047]

Certainly, it is a primary principle that the Accused must be and not

merely may be guilty before a court can convict and the mental

distance between 'may be' and 'must be' is long and divides vague

conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not

be explainable on any other hypothesis except that the Accused is

guilty,

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

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

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

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

49. In an Essay on the Principles of Circumstantial Evidence by William Wills by T. And J.W. Johnson and Co. 1872, it has been explained as under:

In matters of direct testimony, if credence be given to the relaters, the act of hearing and the act of belief, though really not so, seem to be

contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.?

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word "presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous.

Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of,

explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum.

50. *Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the Accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the Accused.”*

iv. Shankar vs The State of Maharashtra, Criminal

Appeal No. 954 of 2011, on 15 March, 2023.

“4. The appellants in the captioned appeals challenge the findings of conviction and consequential imposition of sentence raising various grounds. But, before considering the contentions against the concurrent findings raised by the appellants, we find it only appropriate to refer to the following decisions on the law relating circumstantial evidence.

5. *In the decision in Sarbir Singh v. State of Punjab¹, this Court observed and held thus: -*

“5. ...But in a case based on circumstantial evidence neither the accused nor the manner of occurrence is known to the persons connected with the victim. The first information report is lodged only disclosing the offence, leaving to the investigating agency to find out the offender.

6. *It is said that men lie but circumstances do not. Under the circumstances prevailing in the society today, it is not true in many cases. Sometimes the circumstances which*

are sought to be proved against the accused for purpose of establishing the charge are planted by the elements hostile to the accused who find out witnesses to fill up the gaps in the chain of circumstances. In countries having sophisticated modes of investigation, every trace left behind by the culprit can be followed and pursued immediately. Unfortunately it is not available in many parts of this country. That is why courts have insisted 1 1993 SCC (Cri) 860

(i) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established; (ii) all the facts so established should be consistent only with the hypothesis of the guilty of the accused and should be such as to exclude every hypothesis but the one sought to be proved; (iii) the circumstances should be of a conclusive nature; and (iv) the chain of evidence should not have any reasonable ground for a conclusion consistent with the innocence of the accused.

6. Further it was held therein as under:-

7. ...It has been impressed that suspicion and conjecture should not take the place of legal proof. It is true that the chain of events proved by the prosecution must show that within all human probability the offence has been committed by the accused, but the court is expected to consider the total cumulative effect of all the proved facts along with the motive suggested by the prosecution which induced the accused to follow a particular path. The existence of a motive is often an enlightening factor in a process of presumptive reasoning in cases depending on circumstantial evidence.

7. In Brijlal Prasad Sinha v. State of Bihar², this Court held thus:

“In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person

other than the accused. The law relating to circumstantial evidence no longer remains res integra and it has been 2 (1998) SCC (Cri) 1382 held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further, all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused."

8. *In the decision in Prakash v. State of Rajasthan³, this Court took note of the following principles laid down regarding the law relating circumstantial evidence in Sharad Birdhichand Sarda v. State of Maharashtra⁴ : -*

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

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

19. ... "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' 3 (2013) 4 SCC 668 4 (1984) 4 SCC 116 and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

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

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

9. After noting the above five golden principles, it was held in Prakash’s case (supra), that they would constitute the Panchsheel of the proof of a case based on circumstantial evidence and conviction could be sustained on the basis of last seen, motive and recovery of incriminating articles in pursuance of the information given by the accused if those five golden principles of the proof of a case based on circumstantial evidence are satisfied.

10. Virtually, the law laid down relating circumstantial evidence in those decisions are unfailingly followed by this Court while dealing with the cases where conviction is rested on circumstantial evidence.”

10. **Place of incident:-**

The incident occurred in the house of deceaseds Junita and her sons.

There is no contradiction neither any challenge as to the place of occurrence.

11. **Investigation:-**

PW 18, the Investigating Officer (I.O.) has proved before the Court starting from the filing of the written complaint (Exhibit 1) by PW 1, the formal FIR (Exhibit 18) being recorded, and being the officer in charge of

the police station took up the investigation. On taking up the investigation he proceeded to investigate by visiting the P.O., drawing up the rough sketch map and index, collecting blood stained earth (from the floor) and other blood stained articles and seized them as per seizure list (Ext 16 series), collected the statements recorded under Section 164 Cr.P.C. of PW 6 and PW 8 (Ext 8 and 14), recorded the statement of the accused (Exbt. 21) and recovered the offending (murder) weapon (MAT Exbt. A) along with blood stained clothes of the accused (MAT Exbt. H) and also the post mortem reports and on completing the formalities, submitted the charge sheet (Ext A). The total exercise of investigation has been in accordance with law. The Trial Judge too has given his correct findings by discussing the judgments relied upon.

12. **The offence of Murder:-**

On 03.02.2018, PW 1, the sister of the deceased Junita was informed by one Basant Tamang about the incident of the murder of Junita and her two minor sons. On reaching the place of occurrence, she (PW 1) entered the rooms along with the police.

Admittedly there are no eye witnesses to the incident in this case. (Not expected as it was inside the house of the deceased at around 8 p.m.). PW 2, 3, 4, 5 and 7 are witnesses who, have all heard that accused Surjey Bhujel murdered Junita and her two sons. Some of

them are also witnesses to the seizure. **There is no other version of the case.**

PW 6 Rajen Bhujel is the brother of accused Surjei Bhujel. He is a witness to the inquests and also an important witness to the seizure of the blood stained clothes of the accused, recovered as per the instructions/statement of the accused.

(Exhibit 8) The statement of this witness was recorded under Section 164 Cr.P.C. on 08.02.2018 (four days after the incident) and he stated before the Magistrate about the incident as follows:-

“Q:9:- Now tell me what you want to say?”

A:9:- On 03.02.2018 at about 8.30 p.m. to 9.00 p.m. while I was gossiping with my family after having dinner, all of a sudden my younger brother namely Surjei Bhujel came to me and told me. “I have cut bhabi and her two sons”. I asked him the reason and he replied me that You will understand afterwards. His clothes were full of blood stains. Thereafter, he ran away after taking my pant and jacket.”

During trial, he was declared hostile, but part of his evidence in spite of being declared hostile is as follows:-

That on the date of occurrence i.e. on 03.02.2018 at about 9 p.m. Surjei Bhujel came to my house suddenly and that he noticed blood stains on his wearing apparels and suddenly he told him that he committed murder of his sister-in-law and her two children. That Surjei Bhujel came inside his room and he took away his wearing apparel. At that point of time he went to the house of Junita Lama and saw the dead body of Junita Lama being spatting with blood and stated before the police in presence of co-villagers that he will give his statement before the Court, if he is allowed to do so. It is a fact that myself came to the Court and gave my statement on 08.03.2018 inside the chamber of the Ld. Magistrate. There was myself and the Ld. Magistrate only. Thereafter recording

*the statement I was stated in Nepali about the statement and after coming to know about the contents, myself signed the statement. The statement under Section 164 Cr.P.C. is marked as Exhibit 8 (with objection). Myself did not state before the Ld. Magistrate that I made the statement as tutored by the police. I was present at the time of inquest of the dead bodies. Myself saw the dead bodies. My sister-in-law's name is Junita Lama. Then says when I reached there the dead bodies have already been wrapped up with plastic. The police prepared the inquest report. This is my signature on the inquest report of Junita Lama prepared by police, marked Exhibit 9. This is my signature on the inquest report of Aakrit Bhujel prepared by police, marked Exhibit 10. This is my signature on the inquest report of Athit Bhujel prepared by police, marked Exhibit 11. The name of the husband of Junita Lama was Dhruba Bhujel. Dhruba Bhujel died on 26.08.2018. He worked in the Cinchona Plantation. After the death of Dhruba Bhujel Junita got the job in the Cinchona Plantation. **I do not know whether Surjey Bhujel had committed murder of Junita and her two children as because Surjey Bhujel did not get the job in the Cinchona Plantation in place of Junita after the death of Dhruba Bhujel.** Not a fact that I stated lie before this Court to save my brother Surjey Bhujel from getting punishment for committing murder of Junita Lama and her two children.*

Statements recorded under Section 164 Cr.P.C. though are not substantive evidence but are to be relied upon on the basis of other corroborative evidence by the prosecution and contradiction by the defence.

PW 7 is also a witness to the seizure of the wearing apparels of the accused recovered as per the statement of the accused.

PW 8 Dhan Bahadur Bhujel (father of the accused) was declared hostile by the prosecution though he too recorded his statement before the Magistrate under Section 164 Cr.P.C. (Exhibit 14) and stated as follows:-

“Q:9:- Now tell me what you want to say?”

*A:9:- On 03.02.2018 at about 8.00 p.m. to 9.00 p.m. while I was on my bed, I heard some sound. **When I got out of my room I found that my younger son namely Surjey Bhujel was running away after cutting the throat of my daughter-in-law and two grand-sons.** Thereafter, my son himself spread and narrated the incident in the village. On that day at night my son went to the Police Station and was been arrested by the police.”*

From the statements recorded under Section 164 Cr.P.C. of PW 6 (son) and PW 8 (father). it is evident from the evidence given by them, that the statement that they were threatened and tutored by the police is false. **It is clear from Exhibit 8 and Exhibit 14 that the statements are their own version. If they had been tutored there would have been similar statements.** PW 11, is the interpreter, whose evidence is strong and clear that the statements before the Magistrate by PW 6 and 8 were made out of their own free will and without any coercion. In a case of circumstantial evidence, these statements are the best evidence before this Court closest to direct evidence. PW 8, father of the accused has categorically stated that he saw the accused run away after cutting the throat of his daughter-in-law (Junita) and his grand sons. Later the accused himself told everyone in the village that he had murdered them.

The post mortem reports of all the three deceaseds also corroborate the statements under Section 164 Cr.P.C. to the extent that

all the deceased were murdered by cutting their throats and died of the said injuries.

Regarding recording of statement under Section 164 Cr.P.C. the Supreme Court In **Rabindra Kr. Pal @ Dara Singh vs Republic of India, on 21 January, 2011, held:-**

“23. In Shivappa v. State of Karnataka MANU/SC/0189/1995 : (1995) 2 SCC 76, while reiterating the same principle it was held:

6. From the plain language of Section 164 Code of Criminal Procedure and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 Code of Criminal Procedure, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 Code of Criminal Procedure. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 Code of Criminal Procedure and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the

time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of Sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164 Code of Criminal Procedure and the rules framed by the High Court for the guidance of the subordinate courts. **Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.**

29. The following principles emerge with regard to Section 164 Code of Criminal Procedure:

- (i) The provisions of Section 164 Code of Criminal Procedure must be complied with not only in form, but in essence.
- (ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced

and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Code of Criminal Procedure goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement.

Thus, the statements under Section 164 Cr.P.C. of PW 6 and PW 8, for the reasons discussed herein above are very vital/important and relevant piece of evidence.

PW 9 has proved his signatures on the inquest reports though admitting his signature, he turned hostile.

PW 13 Dr. Shyam Kanta Basu conducted the post mortem on the deceaseds (3). On examination he found the following injuries on deceaseds:-

(a) Junita Bhujel:- *Two incised wounds on the right hand on dorsal aspect on its medial side measuring 5x3x2 cm and another measuring 4x2x2 cm situated longitudinally, middle, right and little fingers of right hand were amputated due to cut injury and neck injury almost decapitated, only portion of skin measuring 5x2x3 cm hanging on the left side and all the structures of the neck were cut and separated including cervical vertebrae, all vessels, nerves, muscles, larynx and esophagus and as per his opinion, death was due to deep cut on the neck and homicidal in nature and the above injuries may be caused by any sharp cutting weapon and he has proved the original postmortem report prepared and signed by him as **Exhibit 17**. No injuries/evidence as to sexual abuse is present in Exhibit 17, even though it has come before this court that there were no clothes on her body at the time of death.*

(b) Akrit Bhujel:- *On examination the Doctor found deep incised wound on the right side of the neck starting from face just below right ear measuring 8cm x 5cm x 5cm and*

*another incised wound measuring 10x3x2 cm on the scalp just above the wound on the neck and all the muscles of the right side of the neck were cut and all the vessels of the right side neck were cut and as per his opinion, death was due to excess bleeding from the cut injury and homicidal in nature and he has stated that the same sharp cutting weapon may have been used for injury of the deceased and he has proved the original postmortem report prepared and signed by him as **Exhibit 17/1**.*

(c) Athit Bhujel:- *On examination the Doctor found deep incised wound on the neck starting from left side cutting all the structures of the neck including blood vessels, nerves, muscles, cervical vertebrae, spinal cord and only a small flap of skin measuring 5x2x3 cm hanging on the right side and all the muscles of the neck were injured and as per his opinion, death was due to the incised wound on the neck and homicidal in nature and the above injuries may have been caused by the same sharp cutting weapon and he has proved the original postmortem report prepared and signed by him as **Exhibit 17/2**.*

There remains no doubt that the deceaseds were all murdered by cutting of their neck/throats with a sharp cutting weapon.

Recovery under Section 27 of the Evidence Act.

The fatal injuries noted were caused by a sharp (meat) cutting weapon, in this case 'Bamfak' as recovered.

PW 18 the investigating officer has also proved the recovery of the offending murder weapon "Bamfak" (a sharp cutting weapon used to cut meat) (MAT Exbt.-A) and the blood stained wearing apparels (MAT Exbt.-H) of the accused recovered as per the statement of the accused (Exhibit 21) while in **police custody from 04.02.2018 to 08.02.2018** and during the remand period he recorded the statements of the accused person and in custody the accused person told him that he had concealed the offending knife in the jungle and his wearing apparels below one bridge and if he was given an opportunity he will be able to recover the same and the relevant portion of the statement of the accused person regarding his information about the concealed articles was recorded and signed by him and he has proved the said relevant statement as **Exhibit 21 and 21/1**. He has further stated that then on 07.02.2018 in between 16.45 and 17.05 hours he went to Vasmay gaon alongwith the accused person, force and local persons and the said Vasmay gaon is about 100 metres away from the P.O. and the accused person took them to a jungle in that Vasmay gaon and as per the

instruction of the accused person, he (PW 18) took out one iron made sharp cutting knife namely 'Bamfak' from the said Jungle and then he seized the said weapon under a seizure list in presence of the witnesses and the accused person and he has proved the said seizure list prepared and signed by him as Exhibit 2/1 and he has stated that at the time of seizure of said Bamfak he saw that it was stained with blood and he has identified the seized 'Bamfak' already marked as **Mat Exhibit A** seized by him from the said jungle as per the instruction of the accused person and he did not find any label on the said bamfak and then on 07.02.2018 in between 15.25 hours and 15.45 hours he went to Murtikhola below the bridge near Sombaredhara, Kumai Tea Estate under P.S. Jaldhaka with the accused person, force and witnesses and then as per the instruction of the accused person he seized one blue colour round neck half sleeve T. shirt designed as Doexist and skull printed at the front size in wet condition from below the said bridge and seized the same under a seizure list (Ext 12 series) in presence of the accused person and the witnesses and they also signed on it and he has proved the seizure list dated 07.02.2018 prepared and signed by him as Exhibit 12/2 and he has identified the said T. shirt already marked as **Mat Exhibit H** which was recovered by him as per the instruction of the accused person from below the said bridge and he has stated that the accused person signed on the two seizure lists and he has identified the said signatures of the accused person and he has proved the said

signatures of the accused person as Exhibit 2/3 and 12/3 and he has stated that then he produced the accused person before the Court after police remand on 09.02.2018.

The following judgments become relevant here:-

(a) The Supreme Court in ***Kusal Toppa vs The State of Jharkhand***,

Criminal Appeal nos. 1691-1692 of 2010, on 7 August, 2018.

“20. The law under, Section 27, Indian Evidence Act is well settled now, wherein this court in Geejaganda Somaiah v. State of Karnataka, (2007) 9 SCC 315, has observed as under:

“As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act”

(b) In ***Ramanand @ Nandlal Bharti vs State of Uttar Pradesh***,

Criminal Appeal Nos. 64-65 of 2022, on October 13, 2022, the

Supreme Court held:-

“52. Section 27 of the Evidence Act, 1872 reads thus:

“27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it

amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence.....

64. The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

(1) Discovery of fact in consequence of an information received from accused;

(2) Discovery of such fact to be deposed to;

(3) The accused must be in police custody when he gave information; and

(4) So much of information as relates distinctly to the fact thereby discovered is admissible – **Mohmed Inayatullah v. The State of Maharashtra:** AIR (1976) SC 483 Two conditions for application –

(1) information must be such as has caused discovery of the fact; and

(2) information must relate distinctly to the fact discovered **Earabhadrapa v. State of Karnataka:** AIR (1983) SC 446”

65. We may refer to and rely upon a Constitution Bench decision of this Court in the case of **State of Uttar Pradesh v. Deoman Upadhyaya** reported in AIR (1960) SC 1125, wherein, Paragraph-71 explains the position of law as regards the Section 27 of the Evidence Act:

“71. The law has thus made a classification of accused persons into two: (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion, of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be

confessional in nature, as when the person in custody says: "I pushed him down such and such mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft."

[Emphasis supplied]

66. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in **Pulukuri Kottaya and Others v. Emperor**, AIR 1947 PC 67, which have become locus classicus, in the following words:

"**10.**It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

69. In **Dudh Nath Pandey v. State of U. P.**, AIR (1981) SC 911, this Court observed that the evidence of discovery of pistol at the instance of the appellant cannot, by itself, prove that he who pointed out the weapon wielded it in the offence. The statement accompanying the discovery was found to be vague to identify the authorship of concealment and it was held that pointing out of the weapon may, at the best, prove the appellant's knowledge as to where the weapon was kept.

72. In the aforesaid context, we may also refer to a decision of this Court in the case of Bodhraj alias **Bodha and Others v. State of Jammu and Kashmir** reported in (2002) 8 SCC 45, as under: "**18.**It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of

extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See State of Maharashtra v. Damu Gopinath Shinde [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301] .) No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of

information admitted should be consistent with 21 understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

[Emphasis supplied]

(c) **Bodh Raj @ Bodha and Ors vs State of Jammu and Kashmir,**

Appeal (crl.) 921 of 2000, 2002 CRI.L.J. 4664, on 3

September, 2002, (Supra), the Court held:-

“18. *Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short “the Evidence Act”) is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in Delhi Admn. v. Bal Krishan [(1972) 4 SCC 659 : AIR 1972 SC 3] and Mohd. Inayatullah v. State of Maharashtra [(1976) 1 SCC 828 : 1976 SCC (Cri) 199 : AIR 1976 SC 483] . The words “so much of such information” as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the*

preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in *Pulukuri Kottaya v. Emperor* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

(See State of Maharashtra v. Damu Gopinath Shinde [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301] .) No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which “distinctly relates to the fact thereby discovered”. But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.”

Thus from the findings of the Trial Judge it is seen that PW 18, recorded the said statements of the accused person on 07.02.2018 and then on 07.02.2018 itself he recovered the said articles as per the instruction of the accused person (at the earliest after recording the statement) and that on 04.02.2018 he had arrested the accused person and sent him to the court with a prayer for police remand and the said prayer for remand period was allowed by the court for five days and from 04.02.2018 to 08.02.2018, the accused person was in police custody. On 07.02.2018 he recorded the said statement of the accused person in custody and on that date itself he recovered the seized articles as per the instruction of the accused person (on the same day).

In respect of seizure of ‘Bamfak’ and the wearing apparels of the accused person on 07.02.2018, PW 18 has prepared two seizure lists (Ext 2 series and 12 series) as the said articles were recovered from two different places and in respect of recovery of the Bamfak, PW 18 has shown PW 2 and the PW 3 as seizure witnesses on the seizure list and

the PW 2 is the relative of the accused person and the PW 3 is a friend of the accused person.

Thus the recovery totally corroborates with the statement of the accused (Exhibit 21).

So considering the said decisions, the materials on record and the **statement of the accused person u/s 313 of the Cr.P.C. regarding his admitted signatures on the seizure lists and the label** on the point of recovery u/s 27 of the Evidence Act and the evidence of the PW 18, the I.O. of this case, that as per the statement of the accused person in custody regarding his information about the seized articles, PW 18 has recovered the seized 'Bamfak' and one T.shirt of the accused person from a bush and below a bridge respectively and that the recovery of the said articles has been made on the basis of the **voluntary disclosure statement of the accused person** and the said information was confirmed by the discovery of the said articles and thus the said information and the statement clearly led to the discovery of the offending weapon as per law.

The Trial Judge's finding that as the offending weapon and the wearing apparel of the accused person were recovered as per the instruction of the accused person, **it is to be held that only the accused person in the world had mental knowledge about the existence of the said articles in a bush and below one bridge, for which as per his instruction the said articles were recovered from**

the place. Moreover, the above conduct of the accused person is also relevant u/s 8 of the Evidence Act. Accordingly the Trial Court's finding that the prosecution has proved the said recovery u/s 27 of the Evidence Act is as per the materials on record and also in accordance with law.

13. **Motive:-**

One of the circumstances explaining the motive of the accused in the murder of the three persons, as has come before the Court is that after the untimely death of her husband, deceased Junita (28 years) had been given the Government job in a died in harness case (on compassionate ground) and all death benefits. The accused being the brother of Junita's husband was allegedly aggrieved and has thus committed the murders being aggrieved.

(a) *In **Nandu Singh vs State of Madhya Pradesh (Now Chhattisgarh),***

Criminal Appeal No. 285 of 2022, on 26.02.2022, the Supreme Court held:-

“10. In a case based on substantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and in its absence the case of Prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

11. In Anwar Ali vs. State of Himachal Pradesh¹ , this Court made the 1 (2020) 10 SCC 166 legal position clear in following words:-

24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in

*Suresh Chandra Bahri v. State of Bihar*² that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by this Court in *Babu*³, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under : (*Babu case*³, SCC pp. 200-01)

“25. In *State of U.P. v. Kishanpal*⁴, this Court examined the importance of motive in cases of circumstantial evidence and observed : (SCC pp. 87-88, paras 38-39)

‘38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.’

26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (*Vide Pannayar v. State of T.N.*⁵)”

12. In the subsequent decision in ***Shivaji Chintappa Patil vs. State of Maharashtra***⁶, this Court relied upon the decision in ***Anwar Ali***¹ and observed as under:-

“27. Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. The motive... ..”

(b) In ***Ramanand @ Nandlal Bharti vs State of Uttar Pradesh, Criminal Appeal Nos. 64-65 of 2022, on October 13, 2022 (Supra).***

“**87.** It is a settled principle of criminal jurisprudence that in a case based on circumstantial evidence, motive for committing

*the crime on the part of the accused assumes greater importance. This Court in various decisions has laid down the principles holding that motive for commission of offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of offence is available. It is equally true that failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. **However, it is also well settled and it is trite in law that absence of motive could be a missing link of incriminating circumstances, but once the prosecution has established the other incriminating circumstances to its entirety, absence of motive will not give any benefit to the accused.***

In the present case the presence of accused and his motive to kill the deceaseds has been substantiated by his own brother (PW 6), father (PW 8) and other witnesses being PW 1 Nima Dolma Tamang, PW 6 (hostile) Rajen Bhujel, PW 10, Meghlal Subba (an employee of the plant where deceased Junita had been given a government job), who were aware of the grudge the accused had against the deceased Junita, is an important link in the chain of incriminating circumstances duly proved in this case.

Examination under Section 313 Cr.P.C.:-

One of the arguments by the defence herein is that question relating to the recording of statement under Section 164 Cr.P.C. was not put to the accused. From the examination of the accused as seen in this case, the accused's only answer is of denial, no knowledge and innocence.

The Supreme Court in **Premchand vs The State of Maharashtra, Criminal Appeal no. 211 of 2023, on 3 March, 2023,**

observed:-

“13. There is a plethora of judicial pronouncements on consideration of section 313, Cr. P.C., a few of which need to be noted at this stage.

*14. A bench of three Hon’ble Judges of this Court in **State of U.P. vs Lakhmi**¹ has extensively dealt with the aspect of value or utility of a statement under section 313, Cr. P.C. The object of section 313, Cr. P.C. was explained by this Court in **Sanatan Naskar vs. State of West Bengal**² . The rationale behind the requirement to comply with section 313, Cr. P.C. was adverted to by this Court in **Reena Hazarika vs. State of Assam**³ . Close on the heels thereof, in **Parminder Kaur vs. State of Punjab**⁴ , this Court restated the importance of section 313, Cr. P.C. upon noticing the view taken in **Reena Hazarika (supra)** and **M. Abbas vs. State of Kerala**⁵ .*

15. What follows from these authorities may briefly be summarized thus:

a. section 313, Cr. P.C. [clause (b) of sub-section 1] is a valuable safeguard in the trial process for the accused to establish his innocence;

b. section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him;

c. when questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court;

d. the accused may even admit or own incriminating circumstances adduced against him to adopt legally recognized defences;

e. an accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him;

f. the explanations that an accused may furnish cannot be considered in isolation but has to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the section 313 statement(s);

g. statements of the accused in course of examination under section 313, since not on oath, do not constitute evidence under section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case;

h. statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission; and

i. if the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyze and consider his statements;

j. any failure to consider the accused's explanation of incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction.

16. *Bearing the above well-settled principles in mind, every criminal court proceeding under clause (b) of sub-section (1) of section 313 has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extend opportunity to the accused to explain any such circumstance in the evidence that could be used against him. Prior to the amendment of section 313 in 2009, the courts alone had to perform this task. Instances of interference with convictions by courts of appeal on the ground of failure of the trial court to frame relevant questions and to put the same to the accused were not rare. For toning up the criminal justice system and ensuring a fair and speedy trial, with emphasis on cutting down delays, the Parliament amended section 313 in 2009 and inserted sub-section (5), thereby enabling the court to take the assistance of the Public Prosecutor and Defence Counsel in preparing such questions [the first part of sub-section (5)]. Ideally, with such assistance (which has to be real and not sham to make the effort effective and meaningful), one would tend to believe that the courts probably are now better equipped to diligently prepare the relevant questions, lest there be any infirmity. However, judicial experience has shown that more often than not, the time and effort behind such an exercise put in by the trial court does not achieve the desired result. This is because either the accused elects to come forward with evasive denials or answers questions with stereotypes like 'false', 'I don't know', 'incorrect', etc. Many a time, this does more harm than good to the cause of the accused. For instance, if facts within the special knowledge of the accused are not*

satisfactorily explained, that could be a factor against the accused. Though such factor by itself is not conclusive of guilt, it becomes relevant while considering the totality of the circumstances. A proper explanation of one's conduct or a version different from the prosecution version, without being obliged to face cross-examination, could provide the necessary hint or clue for the court to have a different perspective and solve the problem before it. The exercise under section 313 instead of being ritualistic ought to be realistic in the sense that it should be the means for securing the ends of justice; instead of an aimless effort, the means towards the end should be purposeful. Indeed, it is optional for the accused to explain the circumstances put to him under section 313, but the safeguard provided by it and the valuable right that it envisions, if availed of or exercised, could prove decisive and have an effect on the final outcome, which would in effect promote utility of the exercise rather than its futility.

17. *Once a written statement is filed by the accused under subsection (5) of section 313, Cr. P.C. and the court marks it as an exhibit, such statement must be treated as part of the accused's statement under sub-section (1) read with sub-section (4) thereof. In view of the latter sub-section, the written statement has to be considered in the light of the evidence led by the prosecution to appreciate the truthfulness or otherwise of such case and the contents of such statement weighed with the probabilities of the case either in favour of the accused or against him."*

In the present case the accused during his examination under Section 313 Cr.P.C. has only denied the commission of the crime and has claimed that he is innocent. There is not a single answer which explains his part of the case or any alternative theory. No written statement under Section 313(5) Cr.P.C. has been filed by accused in this case. The examination of the accused by the Court has been done putting all the relevant facts to the accused. The question as to the statements under Section 164 Cr.P.C. were not put the accused as the witnesses had

turned hostile, **though part of their evidence on oath has corroborated other evidence on record.**

The accused though admitted his signature on a label dated 07.02.2018 he said he signed a blank paper. The labels relate to the seizure of the offending weapon 'Bamfak' and the T. shirt which were recovered as per the statement of the accused (Exhibit 21 & 21/1).

14. **Chain of circumstances:-**

The following judgments of the Supreme Court are relevant here:-

- (i) In ***Bodh Raj @ Bodha and Ors vs State of Jammu and Kashmir, Appeal (crl.) 921 of 2000, on 3 September, 2002 (Supra)***, the Court held:-

“9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

10. *It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the*

guilt of any other person. (See *Hukam Singh v. State of Rajasthan* [(1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063] , *Eradu v. State of Hyderabad* [AIR 1956 SC 316 : 1956 Cri LJ 559] , *Earabhadrapa v. State of Karnataka* [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , *State of U.P. v. Sukhbasi* [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , *Balwinder Singh v. State of Punjab* [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and *Ashok Kumar Chatterjee v. State of M.P.* [1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621 : 1954 Cri LJ 1645] it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.* [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205] wherein it has been observed thus : (SCC pp. 206-07, para 21)

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

12. In *Padala Veera Reddy v. State of A.P.* [1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests : (SCC pp. 710-11, para 10)

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

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

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

13. *In State of U.P. v. Ashok Kumar Srivastava [(1992) 2 SCC 86 : 1992 SCC (Cri) 241 : 1992 Cri LJ 1104] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.*

14. *Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence : (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must*

be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

15. *There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.*

16. *In Hanumant Govind Nargundkar v. State of M.P. [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129] it was observed thus : (AIR pp. 345-46, para 10)*

“10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

17. *A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] . Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are : (SCC p. 185, para 153)*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

- (ii) In **Ramesh Bhai & Anr. Vs State of Rajasthan, Criminal Appeal nos. 868-869 of 2004, on April 24, 2009, (Supra)**, the Court held:-

“5. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrapa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of

the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

6. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

7. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

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

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

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent

with the guilt of the accused but should be inconsistent with his innocence.

8. *In State of U.P. v. Ashok Kumar Srivastava*, (1992 CrLJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

9. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

10. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

11. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances

should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

13. These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and in State of U.P. v. Ram Balak & Anr. [2008 (13) SCALE 541.]”

- (iii) In **Ramanand @ Nandlal Bharti vs State of Uttar Pradesh, Criminal Appeal Nos. 64-65 of 2022, on October 13, 2022, (Supra)**, the Court held:-

“45. In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special inference. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered:

*a) The **Factum probandum**, or say, the principal fact (the fact the existence of which is supposed or proposed to be proved; &*

*b) The **Factum probans** or the evidentiary fact (the fact from the existence of which that of the factum probandum is inferred).*

46. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an Accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as follows:

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

2 . Those circumstances must be of a definite tendency unerringly pointing towards guilt of the Accused and must be conclusive in nature;

3 . The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else; and

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved.

47. There cannot be any dispute to the fact that the case on hand is one of the circumstantial evidence as there was no eye witness of the occurrence. It is settled principle of law that an Accused can be punished if he is found guilty even in cases of circumstantial evidence

provided, the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely points towards the involvement and guilty of the suspect or Accused, as the case may be. The Accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an Accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the expected principles in that regard.

48. A three-Judge Bench of this Court in **Sharad Birdhichand Sarda v. State of Maharashtra**, MANU/SC/0111/1984 : (1984) 4 SCC 116, held as under:

152. *Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [MANU/SC/0037/1952 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri. L J 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri.) 55] and Ramgopal v. State of Maharashtra [MANU/SC/0168/1971 : (1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [MANU/SC/0037/1952 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri. LJ 129]:*

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of

guilt is to be drawn should in the first instance be fully established, and

all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should

be of a conclusive nature and tendency and they should be such as to

exclude every hypothesis but the one proposed to be proved. In other

words, there must be a chain of evidence so far complete as not to

leave any reasonable ground for a conclusion consistent with the

innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused.

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

(1) the circumstances from which the conclusion of guilt is to be drawn

should be fully established.

It may be noted here that this Court indicated that the circumstances

concerned 'must or should' and not 'may be' established.

There is not

only a grammatical but a legal distinction between 'may be proved' and

"must be or should be proved" as was held by this Court in Shivaji

Sahabrao Bobade v. State of Maharashtra [MANU/SC/0167/1973 :

(1973) 2 SCC 793 : 1973 SCC (Cri.) 1033 : 1973 Cri. L J 1783] where

the following observations were made : [SCC para 19, p. 807 : SCC

(Cri.) p. 1047]

Certainly, it is a primary principle that the Accused must be and not

merely may be guilty before a court can convict and the mental

distance between 'may be' and 'must be' is long and divides vague

conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not

be explainable on any other hypothesis except that the Accused is

guilty,

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

(4) they should exclude every possible hypothesis except the one to be

proved, and

(5) there must be a chain of evidence so complete as not to leave any

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

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

49. *In an Essay on the Principles of Circumstantial Evidence by William Wills by T. And J.W. Johnson and Co. 1872, it has been explained as under:*

In matters of direct testimony, if credence be given to the relaters, the act of hearing and the act of belief, though really not so, seem to be

contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential.

There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.?

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word "presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous.

Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum.

50. *Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the Accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the Accused."*

(iv) In **Shankar vs The State of Maharashtra, Criminal Appeal**

No. 954 of 2011, on 15 March, 2023, (Supra), the Court held:-

"4. The appellants in the captioned appeals challenge the findings of conviction and consequential imposition of sentence raising various grounds. But, before considering the contentions against the concurrent findings raised by the appellants, we find it only appropriate to refer to the following decisions on the law relating circumstantial evidence.

5. *In the decision in Sarbir Singh v. State of Punjab¹, this Court observed and held thus: -*

"5. ...But in a case based on circumstantial evidence neither the accused nor the manner of occurrence is known to the persons connected with the victim. The first information report is lodged only disclosing the offence, leaving to the investigating agency to find out the offender.

6. *It is said that men lie but circumstances do not. Under the circumstances prevailing in the society today, it is not true in many cases. Sometimes the circumstances which are sought to be proved against the accused for purpose of establishing the charge are planted by the elements hostile to the accused who find out witnesses to fill up the gaps in the chain of circumstances. In countries having sophisticated modes of investigation, every trace left*

behind by the culprit can be followed and pursued immediately. Unfortunately it is not available in many parts of this country. That is why courts have insisted 1 1993 SCC (Cri) 860

(i) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established; (ii) all the facts so established should be consistent only with the hypothesis of the guilty of the accused and should be such as to exclude every hypothesis but the one sought to be proved; (iii) the circumstances should be of a conclusive nature; and (iv) the chain of evidence should not have any reasonable ground for a conclusion consistent with the innocence of the accused.

6. Further it was held therein as under:-

7. ...It has been impressed that suspicion and conjecture should not take the place of legal proof. It is true that the chain of events proved by the prosecution must show that within all human probability the offence has been committed by the accused, but the court is expected to consider the total cumulative effect of all the proved facts along with the motive suggested by the prosecution which induced the accused to follow a particular path. The existence of a motive is often an enlightening factor in a process of presumptive reasoning in cases depending on circumstantial evidence.

***7. In Brijlal Prasad Sinha v. State of Bihar**², this Court held thus:*

“In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains res integra and it has been 2 (1998) SCC (Cri) 1382 held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused so

that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence, it must satisfy itself that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further, all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused.”

8. In the decision in Prakash v. State of Rajasthan³, this Court took note of the following principles laid down regarding the law relating circumstantial evidence in Sharad Birdhichand Sarda v. State of Maharashtra⁴ : -

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

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

19. ... "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' 3 (2013) 4 SCC 668 4 (1984) 4 SCC 116 and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

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

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

9. After noting the above five golden principles, it was held in Prakash’s case (*supra*), that they would constitute the Panchsheel of the proof of a case based on circumstantial evidence and conviction could be sustained on the basis of last seen, motive and recovery of incriminating articles in pursuance of the information given by the accused if those five golden principles of the proof of a case based on circumstantial evidence are satisfied.

10. Virtually, the law laid down relating circumstantial evidence in those decisions are unfailingly followed by this Court while dealing with the cases where conviction is rested on circumstantial evidence.”

“Reasonable doubt” in a criminal proceeding has been explained by the Supreme Court in ***Vijaya vs State Rep by the Inspector of Police, Criminal Appeal No. 1573 of 2022, on 15th September, 2022.***

“16. At this stage, it is important to understand the ambit of "reasonable doubt" in a criminal proceeding. In *State of Haryana v. Bhagirath & Ors.* (1999) 5 SCC 96 the difficulty in demarcating the contours of "reasonable doubt" was remarked upon:

"10. It is nearly impossible in any criminal trial to prove all elements with scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression "reasonable doubt" is incapable of

definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge.

11. Francis Wharton, a celebrated writer on Criminal Law in United States has quoted from judicial pronouncements in his book on "Wharton's Criminal Evidence" as follows (at page 31, volume 1 of the 12th Edition):

It is difficult to define the phrase "reasonable doubt." However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Saw in the Webster Case. He says: "It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

12. In the treatise on "The Law of Criminal Evidence" authored by HC Underbill it is stated (at page 34, Volume 1 of the Fifth Edition) thus:

*The doubt to be reasonable must be such a one as an honest, sensible and fairminded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. **An honestly entertained doubt of guilt is a reasonable doubt.** A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. **There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.***

17. Thus, the focus for us when ascertaining reasonable doubt is not merely the possibility of doubt or of another version of events **but rather a version that survives**

the scrutiny of an honest and conscientious judicial mind.....”

**On the point of lingering/reasonable doubt the Supreme Court
in *Sharad Birdhi Chand Sarda vs State of Maharashtra, Criminal
Appeal No. 745 of 1983, on 17.07.1984*, held:-**

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra MANU/SC/0167/1973 : 1973CriL J1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not

merely may be guilty before a Court can convict, and the mental

distance between 'may be' and 'must be' is long and divides vague

conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the

guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

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

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

(5) there must be a chain of evidence so complete as not to leave any

reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

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

154. *It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry (1952) NZLR 111, thus:*

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

Again on the point of reasonable doubt.

The Supreme Court in ***Vijaya vs State REP by the Inspector of Police, Criminal Appeal No. 1573 of 2022, on 15th September, 2022***, held:-

"16. *At this stage, it is important to understand the ambit of "reasonable doubt" in a criminal proceeding. In State of Haryana v. Bhagirath & Ors. (1999) 5 SCC 96 the difficulty in demarcating the contours of "reasonable doubt" was remarked upon:*

"10. It is nearly impossible in any criminal trial to prove all elements with scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression "reasonable doubt" is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge.

11. Francis Wharton, a celebrated writer on Criminal Law in United States has quoted from judicial pronouncements in his book on "Wharton's Criminal Evidence" as follows (at page 31, volume 1 of the 12th Edition):

It is difficult to define the phrase "reasonable doubt." However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Saw in the Webster Case. He says: "It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

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The doubt to be reasonable must be such a one as an honest, sensible and fairminded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt."

17. *Thus, the focus for us when ascertaining reasonable doubt is not merely the possibility of doubt or of another version of events but rather a version that survives the scrutiny of an honest and conscientious judicial mind....."*

In the present case the chain of incriminating circumstances

is as follows:-

- (i) The deceaseds being the sister in law (28 years) and nephews (8 years and 6 years) of the accused were found **murdered** by cutting of their throats in their own house at around 8 p.m. on 03.02.2018.
- (ii) The accused stated that he had murdered them to his full brother PW 6 and father PW 8 who saw the accused running away from the house of the deceased just after the incident and stated their **own truthful version** before the learned Judicial Magistrate and their statements **(not similar, thus not tutored)** were recorded **under Section 164 Cr.P.C.** where it is clear that the accused had murdered the deceaseds by cutting their neck. The interpreter (PW 11) has also verified the authenticity of the statements recorded in his presence under Section 164 Cr.P.C.
- (iii) **Motive** being the dispute relating to the death benefits of deceased Junita's husband who is also the brother of the accused and also the Government job given to deceased Junita after the death of her husband in a died in harness case. (The fact has come before the Court from the evidence of PW 1, PW 6 and PW 10).
- (iv) The **recovery** of the offending weapon 'Bamfak' and the apparel worn by the accused at the time of offence, as per the statement of the accused (Exhibit 21 and 21/1) while in police custody. All the seizure witnesses (PW 2 and 3) including the accused have proved

their signature on the seizure lists and the labels on the seized articles.

- (v) **The injuries** which caused the death of the deceaseds as per the post mortem reports, have been caused by a sharp cutting weapon and the recovery of the offending weapon “Bamfak” which is a sharp cutting weapon, proves the case of the prosecution that death was caused with the “Bamfak” recovered as per the statement of the accused.

Thus in the present case, the chain of circumstances is conducive and is totally consistent with the guilt of the accused. The circumstances proved are conclusive to the finding of guilt of the accused alone. There is no doubt as to the guilt of the accused which has been proved by the chain of evidence/circumstance (oral, documentary and material) beyond all reasonable doubt by the prosecution.

The chain of circumstances proved in this case is complete and it has been proved by and beyond reasonable doubt that the crime was committed by the accused and none else. **There is absolutely no other case as the alternative theory, before this Court, not even stated by the accused while being examined under Section 313 Cr.P.C.** and this thus goes to strengthen the findings of guilt of the accused as proved by the prosecution by and beyond all reasonable doubt. The circumstances herein only proves the guilt of the accused, **there being**

no other hypothesis (even remote), thus leaving no reason for any doubt as to the guilt of the accused Surjei Bhujel (*Sharad Birdhi Chand Sarda (Supra)*).

Accordingly, the convict/appellant namely Surjei Bhujel is proved guilty of committing offence punishable under Section 302 of IPC the Indian Penal Code and the trial courts judgment of conviction is in accordance with law.

Death sentence:- whether justified in the present case (whether falls under the category of rarest of rare case).

The learned District and Sessions Judge, Kalimpong (Trial Judge) has awarded death sentence to the convict/appellant.

(1) The Supreme Court in ***Deepak Rai vs State of Bihar, Criminal***

Appeal nos. 249-250 of 2011, on 19 September, held:-

“46. There being no impropriety by the Courts below in compliance with the procedure prescribed under law for sentencing the appellants, only the question of adequacy and correctness of the special reasons assigned for awarding sentence of death requires to be considered by us. In our considered opinion, as noticed above, it is only upon examination of the facts and circumstances of the case could the adequacy of the special reasons recorded by the Courts below be determined by us. Therefore, we would now consider the second issue to determine whether at all the case falls in the category of rarest of the rare offences.

Issue two: Does this case fall into the category of rarest of the rare cases?

47. We are mindful of the principles laid down by this Court in Bachan Singh v. State, (1980) 2 SCC 684 : (AIR 1980 SC 898) and affirmed in Macchi Singh v. State of

Punjab, (1983) 3 SCC 470 : (AIR 1983 SC 957) to be observed on the sentencing policy in determining the rarest of the rare crimes. In Bachan Singh case (supra) this Court has held as follows:

"While considering the question of sentence to be imposed for the offence of murder u/s. 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

48.*In Machhi Singh case (AIR 1983 SC 957) (supra), this Court has awarded death sentence to the accused who had methodically in a preplanned manner murdered seventeen persons of a village including men, women and children. Therein, this Court has besides outlining the five broad categories of rarest of rare cases held that in order to apply the guidelines of Bachan Singh case (AIR 1980 SC 898) (supra) the following questions ought to be answered:*

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

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?" This Court has held that if the answer to the above is in affirmative, then death sentence is warranted. This Court has further observed that the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are few of the many factors which normally weigh in the mind of the Court while awarding death sentence in a case terming it as the "rarest of the rare" cases. While applying the test of rarest of the rare case, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes which shake the collective conscience of the society.

49.*This Court in Rajesh Kumar v. State, (2011) 13 SCC 706 has noticed the observations and principles evolved in Bachan Singh case (AIR 1980 SC 898)*

(supra) resonating through the international sentiments on death penalty, as follows:

"83. The ratio in **Bachan Singh** (AIR 1980 SC 898) has received approval by the international legal community and has been very favourably referred to by David Pannick in *Judicial Review of the Death Penalty: Duckworth* (see pp. 104-05). Roger Hood and Carolyn Hoyle in their treatise on *The Death Penalty*, 4th Edn. (Oxford) have also very much appreciated the Bachan Singh ratio (see p. 285). The concept of "rarest of rare" which has been evolved in Bachan Singh by this Court is also the internationally accepted standard in cases of death penalty.

84. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: *The Mitigating Exercise in Capital Cases in Death Penalty Conference* (3-5 June), Barbados: Conference Papers and Recommendations.] It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases" and Fitzgerald argues:

"Such a restrictive approach can be summarised as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation." (Quoted in *The Death Penalty*, Roger Hood and Hoyle, 4th Edn., Oxford, p. 285.)

85. Opposing mandatory death sentence, the United Nations in its interim report to the General Assembly in 2000 advanced the following opinion: "The proper application of human rights law-especially of its provision that 'no one shall be arbitrarily deprived of his life' and that 'no one shall be subjected to ... cruel, inhuman or degrading ... punishment'- requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty of committing a 'most serious crime'. As a result, these

factors can only be taken into account in the context of individualised sentencing by the judiciary in death penalty cases The conclusion, in theory as well as in practice, was that respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualised sentencing that accounts for all of the relevant factors.... It is clear, therefore, that in death penalty cases, individualised sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life."(The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 281.)

50.*In Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 : (AIR 2012 SC 1357) : (2012 AIR SCW 1917), this Court has reflected upon the aforesaid decisions and culled out the principles as follows:*

"76. 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 eye-witness 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."

51.*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 straight jacket 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.*

52.*We would now notice the decisions of this Court to reflect upon the various circumstances which have acted as mitigating and aggravating factors in given facts to result in commutation of sentence or confirmation of death penalty; so as to examine the sentencing policy in*

the backdrop of balance-sheet of such factors in the case at hand. Cases where death sentence is confirmed.”

(2) In **Sundar @ Sundarrajan vs State of Inspector of Police, Review Petition (Crl.) Nos. 159-160 of 2013 in Criminal Appeal Nos. 300-301 of 2011, on 21.03.2023**, the Supreme Court held:-

“76. In Rajendra Pralhadrao Wasnik v State of Maharashtra, a three judge bench of this Court took note of the line of cases of this Court which underline the importance of considering the probability of reform and rehabilitation of the convicted accused before sentencing him to death. The court observed: 43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.

[...]

45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the “special reasons” requirement of Section 354(3) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. **To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated.** This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

46. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite

prolonged to enable the parties to gather and lead evidence which could assist the trial court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. *Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in Bariyar and in Sangeet v. State of Haryana where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken.* *The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible.*

(emphasis supplied)

77. *The law laid down in **Bachan Singh** requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and*

rehabilitation scheme. As noted in **Santosh Kumar Satishbhushan Bariyar v State of Maharashtra**, this requires looking beyond the crime at the criminal as well:

66. The rarest of rare dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? **As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, along with other circumstances.** This is not an easy conclusion to be deciphered, but Bachan Singh sets the bar very high by introduction of the rarest of rare doctrine.

(emphasis supplied)

78. A similar point was underlined by this Court in **Anil v State of Maharashtra** where the Court noted that:

33. In Bachan Singh this Court has categorically stated, ‘the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society’, is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar. **Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for**

additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.
(emphasis supplied)”

Regarding sentencing by a Court, the Court in **Sundar @**

Sundarrajan (Supra) further held:-

“2. In Mohd. Arif, this Court took note of the irreversible nature of the death penalty and of the possibility of two judicial minds reaching differing conclusions on the question of a case being appropriate for the award of the death penalty. The judgment of the majority allowed the right to oral hearing in review for cases involving death penalty:

29. [...] death sentence cases are a distinct category of cases altogether. Quite apart from Article 134 of the Constitution granting an automatic right of appeal to the Supreme Court in all death sentence cases, and apart from death sentence being granted only in the rarest of rare cases, two factors have impressed us. **The first is the irreversibility of a death penalty. And the second is the fact that different judicially trained minds can arrive at conclusions which, on the same facts, can be diametrically opposed to each other. Adverting first to the second factor mentioned above, it is well known that the basic principle behind returning the verdict of death sentence is that it has to be awarded in the rarest of rare cases. There may be aggravating as well as mitigating circumstances which are to be examined by the Court. At the same time, it is not possible to lay down the principles to determine as to which case would fall in the category of rarest of rare cases, justifying the death sentence.** It is not even easy to mention precisely the parameters or aggravating/ mitigating circumstances which should be kept in mind while arriving at such a question. Though attempts are made by Judges in various cases to state such circumstances, they remain illustrative only.

30. [...] A sentence is a compound of many factors, including the nature of the offence as well as the

circumstances extenuating or aggravating the offence. A large number of aggravating circumstances and mitigating circumstances have been pointed out in *Bachan Singh v. State of Punjab*, SCC at pp. 749-50, paras 202 & 206, that a Judge should take into account when awarding the death sentence. **Again, as pointed out above, apart from the fact that these lists are only illustrative, as clarified in *Bachan Singh* itself, different judicially trained minds can apply different aggravating and mitigating circumstances to ultimately arrive at a conclusion, on considering all relevant factors that the death penalty may or may not be awarded in any given case. Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not necessary to dwell upon this aspect elaborately, at the same time, it needs to be emphasised that when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of “reasonable procedure”.**

(emphasis supplied)”

In *Deepak Rai vs State of Bihar (Supra)* the Court further held:-

“85. Further, in respect of the mitigating factors of lack of criminal antecedents or probabilities of the appellants to be menace to the society, we would re-iterate the observations of this Court in *Gurdev Singh v. State of Punjab*, (2003) 7 SCC 258 that 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, based upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools."

In the present case the Trial Judge keeping with the guidelines of the Supreme Court **has heard the convict** (held guilty on 27.01.2020) and on the point of sentence at length on 28.01.2020.

While considering, whether a Death Sentence is justified, the Court has to consider the mitigating circumstances in the case, if any.

Mitigating circumstances has been laid down in ***Bachan Singh vs State of Punjab, on 9 May, 1980***, held:-

"216. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us 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. 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. This is so because 'style is the man'. 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. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and, therefore, all murders are cruel. 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.

*217. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia*, in general, and*

Clauses (2)(a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances".

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion :

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed.

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

221. Dr. Chitale has suggested these mitigating factors :

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

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

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

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

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

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

(6) That the accused acted under the duress or domination of another person,

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

222. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a 'child', that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

223. According to some Indian decisions, the post-murder remorse, penitance or repentance by the murderer is not a factor which may induce the Court to pass the lesser penalty (e.g. *Mominaddi Sardar*). But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Section 235(2) and 354(3). We have already extracted the view of A.W. Alchuler in *Cr. Y.E. by Messinger and Bittner* (*ibid*), which are in point.

224. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood-thirsty. Hedging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency—a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by

us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

253. It is also necessary to point out that death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. One Psychiatrist has described Death Row as a "grisly laboratory" "the ultimate experimental stress in which the condemned prisoner's personality is incredibly brutalised." He points out that "the strain of existence on Death Row is very likely to produce...acute psychotic breaks." Vide the article of "West on Medicine and Capital Punishment." Some inmates are driven to ravings or delusions but the majority sink into a sort of catatonic numbness under the over-whelming stress." Vide "The Case against Capital Punishment" by the Washington Research Project. Intense mental suffering is inevitably associated with confinement under sentence of death. Anticipation of approaching death can and does produce stark terror. Vide article on "Mental Suffering under Sentence of Death". 57 Iowa Law Review 814. Justice Brennan in his opinion in *Furman v. Georgia* 408 US 238 gave it as a reason for holding the capital punishment to be unconstitutional that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." Krishna Iyer, J. also pointed out in *Rajendra Prasad's case* (supra) that because the condemned prisoner had "the hanging agony hanging over his head since 1973 (i.e. for six years)..."he must by now be more a vegetable than a person." He added that "the excruciation of long pendency of the death sentence with the prisoner languishing near-solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonising." The California Supreme Court also, in finding

the death penalty per se unconstitutional remarked with a sense of poignancy : The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

304. *But when it was contended that sentencing discretion is inherent in our legal system, and, in fact, it is desirable, because no two cases or criminals are identical and if no discretion is left to the court and sentencing is to be done according to a rigid pre-determined formula leaving no room for judicial discretion, the sentencing process would cease to be judicial and would de-generate into a bed of procrustean cruelty. The argument was that having regard to the nature of the sentencing process, it is impossible to lay down any standards or guidelines which will provide for the endless and often unforeseeable variations in fact situations and sentencing discretion has necessarily to be left to the court and the vesting of such discretion in the court, even if no standards or guidelines are provided by the legislature for structuring or challenging such discretion, cannot be regarded as arbitrary or unreasonable. This argument plausible though it may seem, is in my opinion not well founded and must be rejected. It is true that criminal cases do not fall into set behaviouristic patterns and it is almost impossible to find two cases which are exactly identical. There are, as pointed out by Sarkaria, J. in the majority judgment, "countless permutations and combinations which are beyond the anticipatory capacity of the human calculus". Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. That is why, in the interest of individualised justice, it is necessary to vest sentencing discretion in the court so that appropriate sentence may be imposed by the court in the exercise of its judicial discretion, having regard to the peculiar facts and circumstances of a given case, or else the sentencing process would cease to be just and rational and justice would be sacrificed at the altar of blind uniformity. But at the same time," the sentencing discretion conferred*

upon the court cannot be altogether uncontrolled or unfettered. The strategem which is therefore followed by the legislatures while creating and defining offences is to prescribe the maximum punishment and in some cases, even the minimum and leave it to the discretion of the court to decide upon the actual term of imprisonment. This cannot be regarded as arbitrary or unreasonable since the discretion that is left to the court is to choose an appropriate term of punishment between the limits laid down by the legislature, having regard to the distinctive features and the peculiar facts and circumstances of the case. The conferment of such sentencing discretion is plainly and indubitably essential for rendering individualised justice. But where the discretion granted to the court is to choose between life and death without any standards or guidelines provided by the legislature, the death penalty does become arbitrary and unreasonable. The death penalty is qualitatively different from a sentence of imprisonment. Whether a sentence of imprisonment is for two years or five years or for life, it is qualitatively the same, namely, a sentence of imprisonment, but the death penalty is totally different. It is irreversible; it is beyond recall or reparation; it extinguishes life. It is the choice between life and death which the court is required to make and this is left to its sole discretion unaided and unguided by any legislative yardstick to determine the choice. The only yardstick which may be said to have been provided by the legislature is that life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded, but it is nowhere indicated by legislature as to what should be regarded as 'special reasons' justifying imposition of death penalty. The awesome and fearful discretion whether to kill a man or to let him live is vested in the court and the court is called upon to exercise this discretion guided only by its own perception of what may be regarded as 'special reasons' without any light shed by the legislature. It is difficult to appreciate how a law which confers such unguided discretion on the court without any standards or guidelines on so vital an issue as the choice between life and death can be regarded as constitutionally valid. If I may quote the words of Harlan, J. : Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principles, not

on ad hoc notions of what is right or wrong in a particular case.

There must be standards or principles to guide the court in making the choice between life and death and it cannot be left to the court to decide upon the choice on an ad hoc notion of what it conceives to be 'special reasons' in a particular case. That is exactly what we mean when we say that the government should be, of laws and not of men and it makes no difference in the application of this principle, whether 'men' belong to the administration or to the judiciary.. It is a basic requirement of the equality clause contained in Article 14 that the exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situate. Where unguided and unfettered discretion is conferred on any authority, whether it be the executive or the judiciary, it can be exercised arbitrarily or capriciously by such authority, because there would be no standards or principles provided by the legislature with reference to which the exercise of the discretion can be tested. Every form of arbitrariness, whether it be executive waywardness or judicial adhocism is anathema in our constitutional scheme. There can be no equal protection without equal principles in exercise of discretion. Therefore the equality clause of the Constitution obligate that whenever death sentence is imposed, it must be a principled sentence, a sentence based on some standard or principle and not arbitrary or indignant capital punishment It has been said that 'a Judge untethered by a text is a dangerous instrument, and I may well add that Judge power, uncanalised by clear principles, may be equally dangerous when the consequence of the exercise of discretion may result in the hanging of a human being. It is obvious that if judicial discretion is not guided by any standard or norms, it would degenerate into judicial caprice, which, as is evident from the foregoing discussion, has in fact happened and in such a situation, unregulated and unprincipled sentencing discretion in a highly sensitive area involving a question of life and death would clearly be arbitrary and hence violative of the equal protection clause contained in Article 14. It would also militate against Article 21 as interpreted in Maneka Gandhi's case (supra) because no procedure for depriving a person of his life can be regarded as reasonable, fair

and just, if it vests uncontrolled and unregulated discretion in the court whether to award death sentence or to inflict only the punishment of life imprisonment. The need for well recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power not structured or guided by any standards or principles would fall foul of Article 21."

The reasons given by the Trial Judge while according the death sentence are as follows:-

- (1) It has been proved from the materials on record that on 03.02.2018 at about 20.00 hours in the house of the three deceased the convict has murdered the three deceased of this case.
- (2) In this present case, there is no evidence on record to show that due to sudden provocation or self defence or extreme mental or emotional disturbance or moral justification or mental defect of the convict at the time of the incident, he has murdered the three deceased of this case.
- (3) On the other hand, the circumstantial evidences on record clearly prove that in a cool, cruel and unusual manner the convict has murdered the three deceased and the said murder shows extreme brutality and it is a case of inhumane, gruesome, brutal, heinous, unprovoked and cold blooded murder.
- (4) The taking advantage of a winter night committed the murder in a planned manner.

- (5) That he brutally murdered by several strokes.
- (6) Conduct of the convict at the time of the incident was inhumane, brutal, gruesome and cruel.
- (7) It was the gruesome murder of a young mother and her two children.
- (8) The entire proved facts and circumstances of this case along with cruelest conduct of the convict at the time of the incident, if considered in the light of the above mentioned decisions of the Hon'ble Apex Court, the case falls under the category of the rarest of rare cases as the nature and gravity of the crime in this case is of highest order and this case is an example of gravest case of extreme culpability and the society expects a penalty of greatest severity for such type of cases and the convict has ceased the right to live in a civilized society on account of his macabre crime and by his conduct he has inflicted terror in the minds of the people of the locality.

In the present case, the appellant is the brother in law of deceased Junita, who was aged only 28 years old and had got the death benefits and also the Government Job (died in harness) of her husband (brother of the appellant), who had died by drowning. The appellant was aged about 31 years when he committed the heinous crime by cutting the throat of Junita and her two sons aged 8 years and 6 years with a

sharp cutting weapon known as the 'Bamfak'. 'Bamfak' is a weapon used for cutting meat. There is no evidence on record to show that the murders were preplanned. Nor is it on record to show that the appellant went to the deceased's house with the said weapon. A weapon such as a 'Bamfak' used for cutting meat is found in the kitchen of a house. So it appears that the incident in this case happened all on a sudden and such a weapon being available in a house, was used for the said murders. Thus the murders were not preplanned. The appellant has been convicted and sentenced on 27.01.2020 and 28.01.2020 respectively. He is in custody since 04.02.2018. There is nothing to show that he has any prior antecedents in crime. Nor is there any report from the side of the prosecution to show that he violated any rules in the correctional home. There is no report of any violence after his arrest and being convicted. The appellant prior to the incident was working as a driver in the town of Siliguri. **The Trial Judge on hearing the appellant/convict on the point of sentence did not specifically consider the mitigating circumstances.**

The conduct of the appellant after the incident, when he rushed to tell his brother (PW 6) and (PW 8) his father that he killed Junita and her two children, makes the circumstances speak that he did the act in sudden spur of the moment, in haste and in quick succession. He rushed to his parents house and stated about the crime. He would have not done so if it was pre planned. He took a change of clothes from PW 6

(thus not prepared). The appellant/convict was arrested from his house by the police (PW 18) on 04.02.2018 at 2 p.m. (did not abscond). This shows that the accused did not flee away after commission of the crime, it could be out of repentance too. Though the appellant contended that he was not at the P.O. at the time of occurrence and was away at Siliguri, there is no materials at all to substantiate the said claim, which, could give the accused the benefit of doubt.

One question has remained unsolved. That is, the body of deceased Junita (28 years) was found without any clothes. The post mortem report also does not note any injuries as in such cases.

The report of the Superintendent of Jalpaiguri Correctional Home about the conduct of the appellant Surjei Bhujel is on record and is as follows:-

“.....The conduct of the said convict is good. The convict is very submissive and maintains good behavior inside the Correctional Home. No adverse report has been found against him. He is clam and polite and maintains good relation with his co-inmates inside the correctional home.

**Sd/
Superintendent
Jalpaiguri Central Correctional Home”**

All these go to show that the crime was not a planned one nor is the convict a hardened criminal. The family lives in a village in Kalimpong, the accused worked as a driver (skilled worker) and the husband of deceased Junita had a Government Job at the Chinchona

Plantation. Junita lived with her children. From these factors, it cannot be said that there is no possibility of reformation even though the crime in this case is inhuman, cruel and heinous. The appellant is now aged about 38 years.

Considering the said factors, this court is of the view that the circumstances herein do not put the present case in the rarest of rare category and the death sentences awarded by the Trial Court has been passed without taking into consideration, all the mitigating circumstances as discussed above and also without considering the possibility of reformation of the appellant.

But as a sentence of life imprisonment is subject to remission, the said sentence will not be adequate and sufficient considering the nature of the crime. It will give a wrong message to the society at large and will be an injustice to the dead, where three innocent young lives have suffered such brutal death for no fault of theirs.

The Supreme Court in **Sundar @ Sundarrajan (Supra)** held:-

*“91. This court has been faced with similar situations earlier where it has noticed that the sentence of life imprisonment with remission may be inadequate in certain cases. For instance, in **Swamy Shraddananda (2) @ Murali Manohar Mishra v State of Karnataka** the Court noted that:*

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court

*carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. **But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be 31 2008 (13) SCC 767 27 to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 year's imprisonment would amount to no punishment at all.***

(emphasis supplied)"

Accordingly as this Court intends to replace the death sentence with that of life imprisonment, it is of the view that a sentence of life imprisonment for a period not less than 20 years without remission of sentence will be just and sufficient and shall meet the ends of justice by also having a deterrent effect.

Thus this Court modifies the sentence passed by the Sessions Judge, Kalimpong in Sessions Trial No. 04 of 2018 arising out of Sessions Case No. 07 of 2018 and directs that **the appellant Surjey**

Bhujel having been found guilty of the offence under Section 302 of the Indian Penal Code, the death sentence imposed upon the appellant is commuted to life imprisonment for not less than 20 years without remission. The sentence as to fine as imposed by the trial Court is affirmed.

Period of detention suffered by the appellant, namely, Surjei Bhujel during investigation, trial and on conviction shall be set off from the substantive sentence imposed, in terms of section 428 of the Code of Criminal Procedure.

The death reference and the criminal appeals are, accordingly, disposed of.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Rajarshi Bharadwaj, J.)

(Shampa Dutt (Paul), J.)