IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL CONFIRMATION CASE NO.4 OF 2018
WITH
CRIMINAL APPEAL NO.603 OF 2018

1) CRIMINAL CONFIRMATION CASE NO.4 OF 2018 :

The State of Maharashtra,
through P.S.O., Bhandara,
Tah. and District Bhandara. ..... APPELLANT

// **VERSUS** //

1.Amir Ajaj Shaikh,
r/o. Ashrafi Nagar, Takiya
Ward, Bhandara.

2.Sachin Kundlik Raut,
r/o. Udyog Nagar, Takiya
Ward, Bhandara. ..... RESPONDENTS

Mr.N.B.Jawade, A.P.P. for Appellant/State.
Mr.O.W.Gupta, Advocate for the Respondents/Accused.
Mr.N.S.Khandewale, Advocate to assist the prosecution.

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2) CRIMINAL APPEAL NO.603 OF 2018 :

1.Amir Ajaj Shaikh,
Aged about 22 years, Occ.
A.C. Repairer, r/o. Ashrafi Nagar,
Takiya Ward, Bhandara, Tah. and
District Bhandara.

2.Sachin Kundlik Raut,
Aged 22 years, Occ. A.C. Repairer,
r/o. Udyog Nagar, Takiya Ward,
Bhandara, Tah. and District
Bhandara.. ..... APPELLANTS

// **VERSUS** //

The State of Maharashtra,
through Police Station Officer,
Bhandara, Tah. and District
Bhandara. ..... RESPONDENT

Mr.O.W.Gupta, Advocate for the Appellants/Accused.
Mr.N.B.Jawade, A.P.P. for Respondent/State.

Date of reserving the Judgment : 30.08.2019.
Date of pronouncement of the Judgment : 05.11.2019

CORAM : P.N.DESHMUKH AND
PUSHPA V. GANEDIWALA, JJ.

JUDGMENT (Per P.N.Deshmukh, J) :

1. Learned Sessions Judge, Bhandara vide Judgment in Sessions Trial No.65 of 2015, delivered on 30.6.2018 convicted appellant no.1 Amir Aziz Shaikh and appellant no.2 Sachin Kundalik Raut for the offences punishable under Sections 302, 307, 397, 452 and 460 read

with 34 of the Indian Penal Code and awarded death sentence to both the appellants for the offence punishable under Section 302 read with 34 of the Indian Penal Code directing that they shall be hanged by neck till they are dead as contemplated under Section 354(5) of the Code of Criminal Procedure.

2. Both the appellants are further convicted for the offence punishable under Section 307 read with 34 of the Indian Penal Code and are sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for one year. Both the above named appellants are further convicted for the offence punishable under Section 397 read with 34 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for seven years. For the offence punishable under Section 452 read with 34 of the Indian Penal Code, both the appellants are sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.3,000/- each, in default to suffer rigorous imprisonment for six months. And lastly, on the count of Section 460 read with 34 of the Indian Penal Code, the appellants are sentenced to suffer rigorous imprisonment

for seven years and to pay a fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for one year. All the substantive sentences are directed to run concurrently. Both the appellants are also held entitled for set off of the period already undergone by them under the provisions of Section 428 of the Indian Penal Code.

3. As required under Section 366 of the Code of Criminal Procedure, a reference is made to this Court by the learned trial Court for confirmation of death sentence, as awarded. While the appellants, as stated aforesaid, have preferred Criminal Appeal No.603 of 2018 having been aggrieved by the Judgment recorded as above.

4. In brief, it is the case of prosecution that, both the appellants, in furtherance of their common intention, committed house trespass to commit robbery in the house of PW-18 Rupesh s/o.Dayaji Bariya @ Patel and in the course of same transaction, committed murder of his wife deceased Priti and attempted to commit murder of their son Bhavya. PW-Rupesh Bariya was having a small unit manufacturing Soda water at Bhandara and at the time of incident, was

resident of Samrudhi Nagar, Plot No.5, Takiya ward, Bhandara. He was residing with his wife, aged 30 years and minor son Bhavya, aged 8 years. Both the appellants being Air Conditioner Mechanics working within Bhandara township, were familiar with the Bariya family as, prior to incident, they had visited their house for repairing Air Conditioner. In the background of above, it is the case of prosecution that, on 30.7.2015, Bhavya, after visiting his father's unit, returned back home at around 7.15 p.m. by his cycle. PW-Rupesh followed him and reached the house at about 8.00 p.m. and ranged the door bell. However, the same was not responded. Thus, he pushed the door which was not latched from inside to notice that his son Bhavya was lying in a pool of blood in the front room having bleeding injuries on his head. On his entering the kitchen room in the house, PW-Rupesh saw that his wife Priti lying on the floor in a pool of blood having sustained bleeding injuries. He also noticed that house hold articles from his bed room were lying scattered. Having shocked on witnessing the scene, he informed about it on phone to his brother Jitubhai, who immediately arrived in his house along with other relatives and arranged to shift both the victims to Civil hospital, Bhandara. The doctors at the

hospital gave information to police. On the basis of report (Exh.32) lodged by PW-1 Mahesh s/o. Girdharlal Ruparel, offence came to be registered vide Crime No.224 of 2015 (Printed F.I.R. at Exh.33) under Sections 307 and 452 read with 34 of the Indian Penal Code by PW-24 Jivandas s/o. Namdeo Lakde, P.S.I. against unknown persons, who immediately visited the spot and in presence of panchas, drew Spot Panchanama (Exh.37) and collected incriminating articles from the spot under Seizure Panchanamas (Exh. Nos. 38 and 39). At that time, PW-Lakde, P.S.I. arranged for Finger Print Expert, who was already in Bhandara in connection with another crime, who collected chance finger prints found on the mirror and handle of cupboard in the bed room. As Bhavya was unconscious, his statement could not be recorded on the day of incident.

5. Since deceased Priti succumbed to the injuries while undergoing treatment at Civil hospital, Bhandara at 11.45 p.m., offence punishable under Section 302 of the Indian Penal Code came to be added in the present crime. Further investigation was handed over to PW-25

Prashant s/o. Prabhakar Kolwadkar, Police Inspector, Local Crime Branch, Bhandara on 3.8.2015, who re-visited the spot, recorded statements of witnesses and collected blood samples of injured Bhavya.

6. It is further case of prosecution that both the appellants were already in police custody in Crime No.223 of 215 for attempting to commit murder of one Ashwini Shinde, which was registered on the same day i.e. on 30.7.2015 at 1.30 p.m., which was also investigated by PW-Kolwadkar P.I. in which, on interrogating appellant no.1 Amir, he made disclosure to produce hammer, his clothes, cash and ornaments involved in present Crime No.224 of 2015, which was reduced into writing proved on record (as per Exh.50). In pursuance to such Memorandum Statement, appellant no.1 Amir led police and panchas to his house and removed one black coloured rexine bag kept on iron cupboard and from the said bag, produced one scarf, one shirt having blood stains on both of its sleeves, one jeans pant having blood stains on its thigh portion, currency notes of Rs.1,73,000/- in different denominations, yellow and white metal ornaments consisting of ear tops, one silver locket, ring, idol of Lord Ganesh etc.,

which came to be seized under Panchanama (Exh.51).

7. On the same day, on 5.8.2015, PW-23 Gaurav s/o. Krishnarao Gawande, A.P.I., recorded Memorandum Statement of appellant no.2 Sachin (proved at Exh.58) to discover three silver coins and cash of Rs.10,000/-. In pursuance of said Memorandum Statement, appellant no.2 Sachin led police to his house and produced one tin box wherefrom he took out currency notes in various denominations and three silver coins, which were seized under Panchanama (Exh.59).

8. During the course of investigation, PW-Kolwadkar, P.I., after bringing of the seized articles in the Police Station, arranged for a Jeweller PW-11 Anil s/o. Ashokrao Maske who, on verifying the ornaments, issued Certificate (Exh.82). PW-Kolwadkar, P.I. issued requisition memos (Exh.91 and 101) to Medical Officer making query if the injuries sustained by the deceased and the injured were possible by hammer, to which query, opinions are received (vide Exh. Nos.92 and 102) on the back side of requisition letters itself. After receipt of hammer from the Medical

Officer, same was re-sealed in presence of panchas under Panchanama (Exh.52).

9. On 10.8.2015, since involvement of both the appellants was found in present Crime no.224 of 2015, their arrest was effected under Arrest panchanams (Exh.148 and 149), who were already in custody in Crime No.223 of 2015. Statement of injured Bhavya could not be recorded as, according to opinion of Medical Officer, he was still unable to make statement.

10. Seized muddemal articles were forwarded to Chemical Analyser under Requisition memo (Exh.65), of which acknowledgment is on record (at Exh.66). Viscera of deceased Priti was forwarded to Chemical Analyser under requisition memo (Exh.50), of which acknowledgement is on record (at Exh.152). On 11.8.2015, blood samples of both the appellants collected by Police Constable Krishna Borkar, were seized under Panchanamas (Exh.53 and 54). Sketch of scene of offence is on record (at Exh.168). On 31st August, 2015, P.I. Kolwadkar issued letter (Exh.158) to Chemical Analyser for obtaining D.N.A. profiles of injured Bhavya and appellants

and to conduct D.N.A. test of all seized articles, of which Chemical Analyser's reports and D.N.A. reports are on record (at Exh. Nos. 159 to 162 and 163). Again requisition memo (Exh.164) was issued to Medical Officer, Meditrina hospital, Nagpur for recording statement of injured Bhavya, but his statement could not be recorded as he was still not fit to make his statement.

11. On 13.9.2015, requisition memo (Exh.165) was issued to the Forest Office, Bhandara. Two panchas were made available, whose services were utilized on 16.9.2015 for effecting Panchanama of identification of seized muddemal articles consisting of idol of Lord Ganesh and Yellow metal chain, which was already in the Office of L.C.B., Bhandara, where PW-18 Rupesh, in presence of panchas, identified said seized muddemal articles as idol of Lord Ganesh was used by him for puja and the yellow metal chain was used by his deceased wife, of which panchanama is on record (at Exh.62). The chance Finger Print report was received and is on record (at Exh.123). Grips of handle of two wheeler bearing Registration No.MH-36/M-8399 owned by PW-14 Nutan Sarangpure, who was residing in neighbourhood of appellants,

having blood stains over them were seized under Panchanama (Exh.170).

12. During the course of investigation, Investigating Officer also collected copies of F.I.R. in Crime No.40 of 2015 registered against the appellants earlier with Arjuni Mor. Police Station, District Gondia, which are on record (at Exh.187) and the Final Report Form (at Exh.188). As stated earlier, apart from present crime, appellants were already involved in Crime No.223 of 2015 registered with Police Station, Bhandara, on the same day of incident committed in the house of one Ravindra Shinde having same modus operandi as in the present crime. On completion of investigation, charge-sheet was filed before the learned Court of Judicial Magistrate, First Class, Bhandara.

13. In the course of time, case came to be committed to the Court of Sessions for trial. Charge is framed against the appellants (vide Exh.16) for the offences punishable under Sections 302, 307, 397, 454, 460 read with 34 of the Indian Penal Code for committing murder of deceased Priti, for attempting to commit murder of Bhavya

and for committing house trespass and robbery, which the appellants denied and claimed to be tried.

14. To prove the charge, prosecution in all examined 26 witnesses and commenced its evidence by examining PW-1 Mahesh Ruparel, the Complainant, PW-2 Nitin Sony, panch on Spot panchanama (Exh.37), PW-3 Jevinkumar Makdiya, panch on Inquest panchanama (Exh.41), PW-4 Khetal Sawariya, panch witness on seizure of blood sample of deceased under panchanama Exh.44, PW-5 Devidas Chafale on Memorandum Statement and recovery of articles at the instance of appellant no.1, PW-6 Sudhakar Sarve, panch witness on Memorandum Statement of recovery of articles at the instance of appellant no.2, PW-7 Jagdish Nandurkar, panch on Panchanama (Exh.62) on identification of articles, PW-8 Jaideo Navkhare, Carrier who deposited seized articles with Chemical Analyser, PW-9 Satish Hajare on circumstances, PW-10 Baban Atkari, Photographer, PW-11 Anil Maske, who runs Jewelery shop, PW-12 Dr.Pradip Anand, Medical Officer who examined injured Bhavya, PW-13 Dr.Sunita Badhe, Civil Surgeon, who, on replying query,

opined of injuries if possible by hammer, PW-14 Ku.Nutan Sarangpure, owner of motorcycle seized by police, PW-15 Pramod Yellajwar, panch on seizure of clothes of deceased, PW-16 Dr.Madhuri Meshram, Medical Officer who performed Post Mortem and has replied query, PW-17 Dinendra Ambedare, Photographer, PW-18 Rupesh Bariya, husband of deceased Priti, PW-19 Rajendra Thakur, A.P.I. who has partially investigated the crime, PW-20 Bandu Nandanwar, Police Head Constable who produced blood sample of injured Bhavya, PW-21 Sanjay Bhorade, Finger Print Expert, PW-22 Dr.Ninad Gawande, Medical Officer who provided treatment to injured Bhavya, PW-23 Gaurav Gawande, A.P.I. Investigating Officer, who recorded Memorandum of appellant no.2 Sachin and effected recovery of muddemal articles at his instance, PW-24 Jivandas Lakde, P.S.I. who had drawn Spot Panchanama (Exh.37), PW-25 Prashant Kolwadkar, P.I., the Investigating Officer and concluded evidence on examining PW-26 Nandkumar Godbole, who has drawn sketch (Exh.168).

15. Statements of appellants under Section 313 of the Code of Criminal Procedure came to be recorded. None of the appellants examined any witness in support of their

defence. After considering the evidence, documents on record and the submissions made, the learned trial Judge convicted both the appellants, as aforesaid. Hence, present Confirmation Case is submitted by the trial court for confirmation of death sentence awarded by the trial Court as per section 366 of the Code and the present Criminal Appeal is preferred by the appellants challenging the same Judgment. Pending appeal, appellants amended the prayer clause, challenging the appeal only on the point of sentence.

16. Heard Mr.N.B.Jawade, learned Additional Public Prosecutor in the Confirmation Case who, before commencing his submissions, had tendered on record Judgments in Sessions Trial No.64 of 2015, dt.29.6.2018 arising out of Crime No.223 of 2015 and in Sessions Trial No.89 of 2015, dt.15.11.2018 against the appellants herein who are convicted and sentenced to suffer rigorous imprisonment for life in both the cases. Learned Additional Public Prosecutor referred to charge in Sessions Trial No.64 of 2015, wherein appellant no.1 Amir is convicted for the offence punishable under Section 307 of the Indian Penal Code and sentenced to suffer life imprisonment and appellant no.2

Sachin is convicted for the offence punishable under Section 397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years. Learned Additional Public Prosecutor also referred to charge in Sessions Trial No.89 of 2015 wherein both the appellants are convicted for the offences punishable under Sections 302 and 394 of the Indian Penal Code and are sentenced to suffer life imprisonment and the sentences are directed to run concurrently. The incidents in both these cases are dated 9th July, 2015 and 30th July, 2015 respectively; while the incident involved in the appeal in hand is dated 30.7.2015, between 7.45 p.m. to 8.00 p.m., which took place in the house of deceased at Bhandara when she was brutally murdered by assault by Hammer on her head. Similarly, in the course of same transaction, both the appellants, in furtherance of their common intention, committed house trespass by entering into the house of deceased and committed robbery and intentionally caused grievous injuries to Bhavya, knowing that, under such circumstances, if they, by that act, cause death, would be guilty of murder. Learned Additional Public Prosecutor, by referring to the Judgments in Session Trial No.64 of 2015 and 89 of 2015 afore-stated, contended that the modus operandi

adopted by both the appellants in the present crime, as well as in the above referred two crimes is similar, since the victims of assaults were female and the brutal assaults were committed by the appellants within a span of one month, which shows criminal mindset of both the appellants and hence, urged that there is no possibility of their reforms.

17. Learned Additional Public Prosecutor submitted that all the charges levelled against the appellants are established beyond reasonable doubt. Learned Additional Public Prosecutor firstly referred to evidence of PW-16 Dr.Madhuri Meshram and P.M. notes (Exh.100) along with query and her opinion and had contended that, from her evidence, prosecution has established its case of deceased sustaining three fracture injuries to her skull, which are certified to be the cause of death of deceased, which fact goes to establish that Priti died of homicidal death. By referring to evidence of PW-12 Dr.Pradip, who had initially examined minor injured Bhavya, it is submitted that, from his evidence, it is established that the injuries sustained by him on his scalp were caused within six hours and were possible by hard and blunt object. The minor was referred to this

Medical Officer while he was unconscious having bleeding from his nose and having considering seriousness on his injuries, he was referred to Government Medical College and Hospital, Nagpur. However, his family members preferred to take him to Meditrina hospital at Nagpur where he was attended by PW-22 Dr.Ninad Gawande and by referring to his evidence, learned Additional Public Prosecutor contended that the injured had sustained grievous injuries endangering his life, which could prove fatal if not surgically interfered and has opined that the injuries were possible by hard and blunt object having impact of very high velocity. Learned Additional Public Prosecutor thereafter, by referring to evidence of PW-13 Dr.Sunita Badhe, submitted that, on confronting with the muddemal article Hammer, said Medical Officer had opined that the injuries sustained by injured Bhavya were possible by this weapon. With this evidence, learned Additional Public Prosecutor further submitted that above evidence establish that heinous crime is committed by both the appellants, which needs to be considered by keeping in mind that both the appellants, since prior to incident, had earlier visited the house of deceased and were knowing that she is alone in the house at a particular time and as such, taking advantage of

such a situation, committed her murder when she was unable to resist since alone in the house and when her minor son, aged eight years had arrived, was also brutally assaulted, though there was no fault of either of the victims. Learned Additional Public Prosecutor, therefore, submitted that the act of appellants does not deserve any leniency to be shown to either of them.

18. Learned Additional Public Prosecutor referred to evidence of PW-18 Rupesh, husband of deceased, who happens to be the first person to reach the scene of offence after the incident and has come out with a case that both the appellants were known to deceased as Air Conditioner Mechanics and since they had visited their house for repairing Air Conditioner earlier, they were given access in the house. Presence of appellants on the spot is said to be further established on the basis of blood stains found on the muddemal articles and their finger prints found on the articles in the house of deceased. It is further submitted that this witness has even identified the stolen muddemal articles which came to be recovered at the instance of both the appellants which, according to prosecution, is a strong

circumstance established against both the appellants.

19. PW-1 Mahesh Ruparel is Complainant who has proved his report (Exh.32), while PW-24 Jivandas Lakde, P.S.I. is the witness who, at the material time, received report and on its basis, registered offence and drew Spot panchanama (Exh.37). Learned Additional Public Prosecutor thereafter referred to evidence of Investigating Officer and panchas to connect the chain of circumstances establishing involvement of both the appellants and submitted by referring to material evidence of these witnesses that, when the entire evidence is collectively considered along with C.A. reports, D.N.A. reports and Panchanamas of identification of stolen property seized at the instance of both the appellants, involvement of both the appellants is clearly established as the assailants in the present crime. From the available evidence on record, thus, learned Additional Public Prosecutor contended that prosecution has even established motive on the part of both the appellants for commission of present crime which, from the evidence on record, is to commit robbery in the house of deceased and on committing the same, had caused death of Priti and brutally injured Bhavya,

which aspect has been clearly established from the seized muddemal i.e. white metal and gold metal ornaments, idols as well as currency notes which are recovered at the instance of the appellants.

20. As regards confirmation of death penalty to the appellants, learned Additional Public Prosecutor sets out the following aggravating and mitigating circumstances on the basis of the catena of judgments of the Apex Court and relevant to the instant case :-

AGGRAVATING CIRCUMSTANCES :

i. 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.

ii. The offence was committed while the

offender was engaged in the commission of another serious offence.

iii. 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.

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

MITIGATING CIRCUMSTANCES.

i. The manner and circumstances in and under which the offence was committed, for example mental or emotional disturbance or extreme provocation in contradiction to all these situations in normal course.

ii. The age of the accused is a relevant consideration but not a determinative factor by itself.

iii. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

iv. 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.

21. Accordingly, the learned Additional Public Prosecutor contended that in the background of above facts and law, with regards to consider the aggravating and mitigating circumstances, no case is made out for showing any leniency to either of the appellants inasmuch as presence of both the appellants in the house of deceased, apart from finding of blood stains on their clothes, is established from the finger prints found inside the house of deceased and both the appellants, apart from present case, have indulged in similar act having similar modus operandi in commission of same by committing murderous assault on helpless women within a short span of time of about one month.

So far as incident involved in this case is concerned, it is submitted that, while allowing appellants in the house, deceased Priti could not have sensed of any doubt as they had already visited her house for repairing Air Conditioner earlier who, however, on taking advantage of lonely lady in the house, apart from committing robbery done her to death. It is submitted that the offence of murder in a heinous and brutal manner came to be caused apart from serious injury to minor to receive money or monetary benefit. From the evidence brought on record, gravity of the injuries sustained by deceased as well as injured has been established, which injuries are caused by the appellants to both the victims involved in this crime and hence, murder of Priti can only said to be a cold blooded murder without provocation on her part. With this, learned Additional Public Prosecutor concluded his arguments submitting that, as against these aggravating circumstances, the only mitigating circumstance which could be considered in favour of appellants can be their age who, on the day of incident, were aged 19 and 22 years old respectively. However, it is contended that, this by itself can be no determinative factor and apart from having indulged in series of crimes wherein

they are convicted for life, behaviour of accused no.1 Amir while in jail was also not satisfactory and in fact, on a complaint made by Superintendent of Jail, he was subjected to inquiry by Judicial Magistrate, whose report is on record. The Confirmation appeal is, therefore, prayed to be allowed.

22. On the point of confirmation of the death penalty to the appellants, the learned Additional Public Prosecutor, relied upon the following Authorities :

a) Bachan Singh .vs. State of Punjab, (1980) 2 SCC 684.

b) Macchi Singh and Others .vs. State of Punjab, (1983) 3 SCC 470.

c) Surja Ram .vs. State of Rajasthan, (1996) 6 SCC 271.

d) Sushil Murmu .vs. State of Jharkhad, 2004 Cri.L.J. 658.

e) Bantu .vs. State of Uttar Pradesh, (2008) 11 SCC 113.

f) B.A. Umesh .vs. Registrar General, High Court of Karnataka, (2011) 3 SCC 85.

g) Mofil Khan and another .vs. State of Jharkhand, (2015) 1 SCC 67.

h) Shabnam .vs. State of Uttar Pradesh, (2015) 6 SCC 632.

l) Purushottam Dashrath Borate and another .vs. State of Maharashtra, (2015) 6 SCC 652.

j) Khushwinder Singh .vs. State of Punjab, 2019 ALL SCR (Cri) 838.

k) Judgment in Confirmation Case No.2 of 2016, State, through Wanwadi Police Station .vs. Vishwajeet Kerba Masalkar, dt.23.7.2019.

l) Judgment in Confirmation Case No.3 of 2017, State, through Sarkarwada Police Station .vs. Eknath Kisan Kumbharkar, dt.6.8.2019.

m) Sanjay @ Papdya @ Pawan @ Prashant @ Rahul Kale @ Pawar Bhosale @ Chavan vs. the State of Maharashtra, 2015 ALL MR (Cri) 1678.

n) Rajendra Pralhadrao Wasnik .vs. State of Maharashtra, (2012) 4 SCC 37.

o) State of Orissa .vs. Dayanidhi Bisoi, 2003 Cri.L.J. 123.

p) M. A. Antony @ Antappan .vs. State of Kerala, 2009 (4) Mh.L.J. (Cri.) 515.

23. As already stated above, Mr.O.W.Gupta, learned Counsel for both the appellants restricted his arguments only on the point of sentence since did not challenge the convictions. As such, we have heard the learned Defence Counsel on the point of sentence, who submitted that the appellants have even not challenged earlier convictions awarded to them by the learned Sessions

Judge in Sessions Trial No. 64 of 2015 and Sessions Trial No.89 of 2015. Learned Counsel further submitted that both appellants are young, educated upto matriculation and are unmarried having no criminal history, except for above referred two crimes which circumstances fall in their favour for considering them for awarding lesser punishment. On commenting upon case of appellant no.2 Sachin, it is submitted that there is no evidence establishing actual role of said appellant and thus, contended that prosecution could not establish its case as to who had assaulted deceased by hammer nor there is anything on record to establish sequence of incidents if deceased was done to death first and then robbery was committed or vice versa. It is further contended that, in the background of above facts, the appellants are entitled for leniency. In support of above submissions, the learned Counsel for the appellants has relied upon the following cases :

I) M.A.Antony @ Antappan .vs. State of Kerala,2018 (4) Crimes 515 (also relied by learned A.P.P.)

II) Rajendra Pralhadrao Wasnik .vs. State of Maharashtra, AIR 2019 SC 1.

24. In the background of above submissions and facts involved in these appeals, based on circumstantial evidence, we find that Hon'ble Apex Court in its various pronouncements has issued guidelines showing how to evaluate and consider the case of prosecution when it is solely based on circumstantial evidence. One such Authoritative pronouncements of Hon'ble Apex Court is the case of **Hanumant Nargundkar .vs. State of Madhya Pradesh** reported in AIR 1952 SC 343.

In the case of Hanumant Nargundkar (supra), in para 10, it is guided as to how circumstantial evidence is to be appreciated. For the sake of convenience, we have re-produced below para no.10 thereof.

> "*10. Assuming that the accused Nargundkar had taken the tenders to his house, the prosecution in order to bring the guilt home to the accused, has yet to prove the other facts referred to above. No direct evidence was adduced in proof of those facts. Reliance was placed by the prosecution and by the Courts below on certain circumstances, and intrinsic evidence contained in the impugned document, Ex. P3-A. In dealing with circumstantial evidence the*

rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in Reg. v. Hodge,(1838) 2 Lewin 227) where he said:

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

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. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ex.P-3A or outside and we are constrained to observe that the Courts below have just fallen into the error against which, warning was uttered by Baron Alderson in the above mentioned case."

25. Further, in the landmark case of **Sharad Birdhichand Sarda vs. State of Maharashtra**: AIR 1984 SC 1622, the Hon'ble Apex Court ruled the following five golden principles, which the Hon'ble Court has said as 'Panchsheel' on proof of a case based on circumstantial evidence. It would be useful to reproduce the following observations from the said authoritative pronouncements of the Apex Court:

"*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 (supra). 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 vs. State of Uittar Pradesh (1969) 3 SCC 198; and Ramgopal v.State of Maharashtra (AIR 1972 Sc 636;. It may be useful to extract what Mahajan, J, has laid down in Hanumant case:

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: 1973 2 SCC 793 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 a 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."

The Apex Court in Sarda's case (supra) at paragraph 157, ruled as under :-

"*157. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. .....*"

In view of above principles, in-spite of appellants not challenging their conviction but sentence only, we have evaluated the entire evidence on record to satisfy ourselves

if, from the available material and evidence on record, prosecution can said to have established its case beyond reasonable doubt thereby establishing involvement of both the appellants as master minds of this crime, involving innocent victims, who were even unable to resist their attack.

26. Perusal of evidence of PW-18 Rupesh, husband of deceased would reveal that he along with his wife and minor son Bhavya were residing in their house situated at Samrudhi Nagar, Plot No.5, Takiya Ward, Bhandara. On the day of incident, on 30.7.2015, Bhavya had visited him in his factory Office and returned back home at about 7.15 p.m, to whom he followed within half an hour and on reaching home, saw Bhavya lying in pool of blood in the front room having bleeding injuries to his head, while his wife Priti was lying on the floor in the kitchen room having similar injuries and noted that all the house hold articles in bed room were scattered. He, therefore, informed of the incident to his brother Jitubai Bariya (not examined) who, in turn, informed his other relatives, who arrived on the spot and arranged to carry both the victims to hospital, where Priti succumbed to her injuries while Bhavya was referred from Government hospital,

Bhandara to Medical College, Nagpur. However, he was taken to Meditrina hospital, Nagpur where he was unconscious for a long time.

27. PW-18 Rupesh has further deposed that, two days after the incident, he learnt of recovery of white and yellow metal ornaments and cash amount, which were robbed from his house, from appellants as informed by police who were identified by him as, prior to incident, both the appellants had visited his house for repairing Air Conditioner. It has further come in the evidence of PW-Rupesh that, during the course of investigation, he visited the Office of L.C.B. at Bhandara wherein, in presence of independent panch witnesses, he identified one yellow metal chain out of four such chains kept for identification as he had purchased the same for his wife and white metal idol of Ganesh as it was used by him in puja and has proved the Seizure panchanama (Exh.62).

28. Evidence of PW-Rupesh thus establish fact of his arrival in house immediately after the incident which took place on 30.7.2015 at about 7.30 p.m. as he arrived in his

house half an hour after arrival of his son in the house at about 7.15 p.m. and found the victims having brutally injured and commission of robbery in his house. His evidence further establishes identification of both the appellants by him who were arrested in this crime within two days of the incident, to whom he identified as Air Conditioner mechanics since they had visited his house for repairing of Air Conditioner earlier, from whom the muddemal articles were recovered, which were identified by him including currency notes.

29. In the background of evidence of PW-Rupesh, evidence of PW-1 Mahesh would reveal that, on knowing about the incident, he visited house of Rupesh and saw him crying asking him to save lives of his wife and son, who were by then taken to the hospital and noted that the floor of his house was having pool of blood and house hold articles were lying scattered having broken cupboards in the room. Accordingly, he lodged report (Exh.32).

30. Evidence of PW-24 Jivandas Lakade, P.S.I. then attached to Police Station, Bhandara corroborates evidence of Complainant Mahesh when he deposed that, on

30.7.2015, he was on duty from 8.00 p.m. to 8.00 a.m. PW-1 Mahesh lodged his report (Exh.32), upon which he registered Crime No.224 of 2015 for the offences punishable under Sections 307 and 452 of the Indian Penal Code against unknown persons and on registering the same, visited the spot situated at Samruddhi Nagar and on arranging for two panch witnesses, drew Spot panchanama (Exh.37) and also seized cotton swabs of blood and one napkin having blood stains under Panchanamas (Exh.38 and 39). He has deposed that, on his arrival to the scene of offence, PW-Rupesh was found in shocked mental condition and was, as such, unable to make his statement. This evidence is found corroborated by evidence of PW-2 Nitin Sony, when he has deposed that, on 30.7.2015, police had called him to act as panch in the house of Rupesh where he found blood lying on the floor in the house and the household articles were lying scattered with broken cupboards and in his presence, Seizure panchanamas (Exh.37 to 39) came to be drawn.

31. Evidence of PW-19 Rajendra Thakur, A.P.I. would reveal about his drawing Inquest Panchanama on the body of deceased (as per Exh.42) in Civil Hospital, Bhandara

and about forwarding it for post mortem under Requisition memo (Exh.115). He further deposed that Police Constable Sarode produced blood sample, nail sample, hair sample and clothes of deceased Priti, which he seized under Panchanama (Exh.96). After considering the evidence of above witnesses who established preliminary part of investigation, on perusal of evidence of PW-16 Dr. Madhuri Meshram, her evidence would establish homicidal death of deceased as it has come in her evidence that, on performing post portem, she noted the following external injuries.

> I) There was CLW on left side of temporal parietal region underline depressed fractures to skull, size 2 x 3 x 6 cm.
>
> 2) There was CLW on left side of occipital region, size 6 x 3 x 3 cm. with underline depressed fractures to skull, 2 x 2 x 8 cm.
>
> 3) There was CLW lateral to above injury of occipital region, size 5 x 3 x 3 cm. associated with depressed underline fractures to skull, 3 x 2 x 8 cm.
>
> 4) There was CLW on lateral end of supra orbital ridge 2 x 1 x 2 cm.
>
> 5) There was contusion on right side in peri orbital region (eye lid) extending up to 1 cm. In frontal forehead.
>
> 6) There was CLW lateral end of left clavicle.

32. PW-16 Dr. Madhuri has further deposed that all the fracture injuries sustained by deceased were having underline haematoma and that cause of death of Priti was head injuries sustained by her, which were ante mortem injuries, possible by hard and blunt object. She has proved post mortem report (Exh.100). The Medical Officer further deposed that, on 6.8.2015, she received one query vide requisition letter from the Investigating Officer along with weapon 'hammer'. She has given opinion (vide Exh.102) that the injuries sustained by deceased are possible by the said hammer. Evidence of Dr.Madhuri, therefore, goes to establish that the deceased did not die a natural death, but died due to sustaining injuries to her head, which injuries are possible by hammer, which are also certified to be cause of her death, which evidence, thus, goes to establish that the deceased died of homicidal death.

33. Evidence of PW-12 Dr.Pradip Anand establishes fact of Bhavya having sustained grievous injuries when he was examined by this Medical Officer initially at Civil hospital, Bhandara on 30.7.2015, at about 9.00 p.m., who was found to have sustained the following internal injuries.

1) Contused lacerated wound over the parietal frontal region on the scalp. With query of skull bond. Size of it was 6 x 2 cm approximately.

2) Abrasion with contusion left temporal region of scalp, size 3 x 3 cm. approximately.

34. According to PW-13 Dr.Pradip, Medical Officer, the injuries were caused within six hours and were possible by hard and blunt object. The patient was referred in unconscious state of health and was having nasal bleeding, who was referred by this doctor to G.M.C., Nagpur for further treatment. As per evidence of this doctor, both the injuries sustained by injured were serious in nature, possible to cause death, and has, accordingly, issued Medico-legal Certificate (Exh.87) on record and on being confronted with hammer (Article 'C'), deposed that the injuries sustained by minor Bhavya were possible by said weapon. As per his evidence, at the same time, Priti was also admitted to hospital in dead condition, of which he gave intimation to police. Evidence of both these doctors i.e. PW-16 Dr. Madhuri and PW-12 Dr.Pradip, thus, establish fact of deceased having died of homicidal death and of minor Bhavya having sustained

injuries which were sufficient to cause death, which injuries sustained by both of them were possible by hammer.

In the line of this evidence when evidence of PW-22 Dr.Ninad Gawande is perused, it is revealed that he was serving as a Medical Officer in Meditrina hospital at Ramdaspeth, Nagpur, where, on 30.7.2015, at 11.00 p.m., injured Bhavya was brought by PW-Rupesh. Said Medical Officer, thus, gave intimation to Sitabuldi Police Station and on examination, he found him to have sustained following injuries :

> a) lacerated wound present over high parietal area near vertex of size 10 x 1.5 cm. X bone deep. On CT scan of brain multiple comminuted depressed fractures of bilateral high parietal bones extending upto temporal and frontal bone of left ide was seen. Comminuted displaced fracture of roof of right orbit was seen. Under lying extra dural haematoma with multiple haemorrhagic contusions were present in left fronto temporal pareital region with mass effect with signs of subfalcine herniation was seen. Diffuse cerebral edema was present.
>
> Following injuries were found on the face of Bhavya.
>
> b) contusion over left side of forehead and over left Zygoma of size 3 x 2 cm. to 1 x 1 cm. red in color, with bi-lateral peri-orbital ecchymoses present.

On examination, it was found that age of injuries were within 12 hours and fresh in nature. The injuries were of grievous type and it may endanger life of patient and may prove fatal it not surgically interfered. The injuries were caused due to hard and blunt objects with impact of very high velocity.

35. PW-22 Dr.Ninad, the Medical Officer accordingly issued Medical Certificate (Exh.128). As per his further evidence all the injuries were caused by dangerous weapon in a brutal manner and on being confronted with hammer (Article C), deposed that such injuries are possible by it on use by force and had specifically deposed that full recovery of Bhavya is impossible. It has further come in his evidence that, during the course of investigation, on 31.7.2015, 1.8.2015 and 10.8.2015, he received Requisition memos (Exh. Nos.129 to 131) to certify if injured was in a position to make statement, to which, on examining physical condition of injured Bhavya, PW-Dr.Ninad opined that he was unable to speak and even unable to understand the nature of

questions put to him as his mental age was less as compared to his physical age since he was suffering from Para Paresis, decreasing power of right side. Record reveals that, at the time of trial when questions were put by the learned trial Judge to the injured, he was found unable to understand the same and was even unable to walk or speak fluently. Evidence of Dr.Ninad, as such, establishes serious injuries sustained by Bhavya in a brutal attack, of which he is victim for no fault of his except for his being present in the house after his mother was brutally killed by the appellants.

36. Lastly, evidence of PW-13 Dr.Sunita Badhe further establishes case of prosecution when in her evidence she has deposed that, on 6.8.2015, she received Requisition letter (Exh.91) alongwith hammer and had opined that the injuries sustained by him were possible by the weapon hammer and accordingly, gave her opinion (Exh.92) and has also identified hammer (Article C) to be the same, which was referred to her for obtaining her opinion.

37. On consideration of evidence of above Medical Officers collectively, brutal assault on deceased Priti

as well as Bhavya is clearly established, which assault is abundantly proved by prosecution to have been caused to both the victims by hammer, due to which, on sustaining four skull fractures, deceased Priti died, while injured Bhavya has become crippled for rest of his life at the age of eight as, from the medical evidence on record as discussed above, there are no chances of his getting recovered. In the background of above evidence, circumstances like appellants' knowing the particular time when the deceased was likely to be alone in the house and as such, helpless to defend herself and, commission of robbery by them on their getting access inside the house easily and further causing death of deceased in the house as well as assaulting her son brutally are very strongly establishing appellants' involvement in the present crime..

38. Similarly, evidence of PW-5 Devidas Chafle, an independent panch, when perused would reveal that, on 5.8.2015, he attended Office of L.C.B., Bhandara as called by police, where two accused were in custody. In his presence, one amongst them disclosed his name as Amir Shaikh (appellant no.1), who had informed police that he had to make his statement. Accordingly, Memorandum Statement of

said appellant to the effect that he shall produce ornaments from his house came to be recorded, which is proved and marked (as Exh.50). He has further deposed that, in pursuance to Memorandum Statement as aforesaid, appellant no.1 Amir took the investigating team to Takiya ward, Ashrafi Nagar, Bhandara where his two storeyed house is situated. The appellant went on the first floor, to whom this witness as well as police followed, and removed one bag which was kept above iron cupboard and from that bag, he produced one scarf, pant, shirt and hammer, which articles were stained with blood, and currency notes of Rs.1,73,000/- wrapped in polythene sheet and one purse containing in it yellow and white metal ornaments and chain, which articles came to be seized under Seizure Panchanama (Exh.51). It has further come in the evidence of PW-Devidas that these acts were photographed and during trial, the panch had identified hammer marked as Article 'C', one blue coloured pant as Article 'D', one blue and yellow coloured checks shirt as Article 'E', Purse as Article 'F', one Samsung black bag marked as Article 'G'.

39. White and yellow metal ornaments including

pair of tops etc. are identified by this witness, which are collectively marked as Article 'H'. This witness has also proved seizure of hammer when this weapon was referred for query to Medical Officer which Panchanama is on record (Exh.52) and has lastly proved Panchanamas (Exh.53 and 54) vide which two sealed bottles, as produced by one Police Constable, came to be seized in his presence.

40. Similarly, from evidence of PW-6 Sudhakar Sarve, another independent panch, it is revealed that, on 5.8.2015, he was summoned to the Office of L.C.B., Bhandara, where he was informed by Police that one of the accused amongst the two arrested, has to make statement and accordingly, in his presence, appellant no.2 Sachin Raut, who disclosed his name as such to this witness, in his presence made a statement to police to produce ornaments and cash amount of Rs.10,000/-, three silver coins concealed by him in his house, which Memorandum Statement is proved by this witness marked (as Exh.58).

41. PW-Sudhakar has further deposed that thereafter he along with another panch of the raiding team

followed appellant Sachin in police vehicle, who took them to Bhojapur Road, Takiya Ward near Majar, Bhandara where his house was situated, where his father Pundlik was present. He further deposed that appellant no.2 Sachin thereafter entered in his house and from one iron box, which was kept in the first room in his house, produced cash of Rs.10,000/- in various denominations and three silver coins which articles were seized by police under Panchanama (Exh.59). During the course of his evidence, he has identified the muddemal coins produced before the Court to be the same seized in his presence, which are collectively marked as Article 'I'.

42. In the cross-examination of PW-Devidas and PW-Sudhakar, both independent witnesses, nothing could be elicited to doubt their evidence and as such, their evidence establish fact of recovery of ornaments and cash robbed from the house of deceased at their instance, which evidence is further found corroborated from the evidence of PW-25 Prashant Kolwadkar, the Investigating Officer, who has deposed that, on 5.8.2015, when he was interrogating appellant no.1 Amir in police custody in another Crime being Crime No.223 of 2015, said appellant made Disclosure

Statement to produce his clothes and weapon, which was reduced into writing in presence of independent panch as per Exh.50. PW-Prashant Kolwadkar has further deposed that, in pursuance of such Memorandum Statement of appellant no.1 Amir, one Scarf, blood stained shirt, jeans, yellow and white metal ornaments, hammer and cash to the extent of Rs.1,73,000/- in various denominations came to be seized under Panchanama. The Investigating Officer has also identified all the above articles as deposed by PW-5 Devidas.

43. Similarly, evidence of PW-23 Gaurav Gawande, A.P.I., the Investigating Officer corroborates the evidence of independent witness PW-6 Sudhakar on the point of recording of Memorandum Statement of appellant no.2 Sachin and recovery of Muddemal articles when he deposed that, on 5.8.2015, while he was investigating present crime, said appellant Sachin made a statement to discover three silver coins and cash amount of Rs.10,000/-, which statement was reduced into writing as per Exh.58. PW-Sudhakar has further deposed that, in pursuance of the said statement, appellant no.2 Sachin led police and independent panchas to his house towards Bhojapur road, where his father was

present and from the first room of his house, removed one iron box wherefrom he produced three white metal coins and currency notes, which came to be seized under Seizure Panchanama (Exh.59). Evidence of all these witnesses, as such, further establish involvement of both the appellants in the present crime since the muddemal articles consisting of ornaments and currency notes came to be seized at their instance, which fact is also unexplained and as such, is a strong circumstance.

44. In the background of above evidence, on evaluating other evidence of PW-18 Rupesh on the point of identification of seized muddemal, it is revealed that, on 17.9.2015, he attended Office of A.C.B., Bhandara as called for identification of muddemal articles recovered in the present crime, when he identified chain of his deceased wife, silver idol which was in his home used for puja purposes, of which panchanama came to be drawn (as per Exh.62). At this juncture, evidence of PW-7 Jagdish Nandurkar requires consideration as, from his evidence, it has come on record that, on 17.9.2015, he, on the request by police, acted as panch when, on that day, PW-18 Rupesh had identified silver

idol of Lord Ganesh and chain from amongst the articles produced before him by police, of which Identification Panchanama is proved by him on record (Exh.62). Above evidence since is materially corroborated by each other and independent panch witness Jagdish further establish involvement of both the appellants in present crime.

45. In the background of above stated evidence, evidence of PW-11 Anil Maske when perused, would further establish case of prosecution of recovery of muddemal ornaments involved in the present crime at the instance of both the appellants when said witness has deposed that he is running a jewellery shop at Mohta Bazar, Bhandara, which is their ancestral business since he was 16 years old. He further deposed that, on 5.8.2018, police arrived in his shop along with two persons and police had produced before him yellow and white metal ornaments, which he weighed and issued Certificates proved on record (at Exh. Nos. 81 and 82) and has also identified three white metal coins referred in Certificate (at Exh.81) to be that of silver and other 16 articles as mentioned in Certificate (at Exh.82). His evidence further corroborates the case of prosecution of PW-18 Rupesh

identifying ornaments recovered from the possession of both the appellants as PW-6 Anil, Gold Smith further deposed that, on 16.9.2015, he was requested by police to produced golden chain and silver idol of Lord Ganesh, which items he supplied. The Requisition letter is on record at Exh.84. The said ornaments and idol is found to be kept in the identification parade of muddemal held in presence of PW-7 Jagdish, the panch and identified by PW-Rupesh. When evidence of independent witnesses PW-5 Devidas, PW-6 Sudhakar, PW-7 Jagdish, PW-11 Anil, Gold Smith coupled with evidence of PW-18 Rupesh and P.I. PW-25 Kolwadkar and PW-23 Gaurav, A.P.I. is collectively considered, prosecution can said to have established appellants' involvement in the present crime as, from the above evidence, it has come on record that both the appellants, at the time of incident, apart from committing murder of Priti and caused grievous hurt to Bhavya and caused robbery in the house of deceased thereby robbing yellow and white metal ornaments and cash which, during the course of investigation, came to be recovered at their instance and are seized under Panchanama which are identified by Rupesh to be the same belonging to their family.

46. Prosecution, while establishing case against both the appellants, has also relied upon evidence of PW-21 Sanjay Bhorade when he has deposed that, in the year 2015, he was attached to the Office of State C.I.D., Nagpur as a Finger Print Expert and was holding additional charge for Bhandara. On 30.7.2015, when he was already in Bhandara town in connection with investigation in Crime No.223 of 2015, he was informed of incident involving present crime and had accordingly attended the house of PW-18 Rupesh, where he inspected the spot of incident and found three chance prints on mirror, wooden cupboards and on its hande, which he got lifted after applying powder and had developed on the plastic strips, of which photographs were obtained after comparing the photographs with the finger prints of suspected Criminals of which record is maintained by police, which did not match with any of the such records of Criminals. It has further come in his evidence that, on 16.8.2015, he received finger prints slips of appellants along with that of PW-18 Rupesh and his family members Mahesh and Jitendra Bariya and noted that the finger print slip of appellant no.1 Amir and appellant no.2 Sachin matched with the finger prints found on the spot and PW-21 Sanjay has

accordingly, proved his report marked (Exh.121) and letter vide which he received finger prints of appellants as well as of informant Mahesh, , PW-18 Rupesh and Jitendra vide letter (Exh.122) and has proved final Finger Print Report on record at Exh. 123.. Nothing is brought in the cross-examination of said witness to doubt his evidence. On the contrary, his evidence establishes one more circumstance involving both the appellants in the present crime whose finger prints since were found at the scene of offence.

47. In the background of above discussed evidence establishing involvement of appellants in the present crime, their involvement is further established from the evidence of PW-9 Satish Hajare, an independent witness, whose evidence would reveal that he happened to know both the appellants since they were visiting his pan shop situated at Hanuman Nagar, Bhandara. On the day of incident i.e. on 30.7.2015, at 5.00 p.m., both the appellants had attended his pan shop when appellant no.1 Amir was having black coloured bag and both were wearing checks shirts. On the same day, at 8.00 p.m., PW-Satish learnt about the present incident. In his cross-examination, it has come that only

appellant no.1 Amir was wearing checks full sleeves shirt.

48. This evidence of PW-Satish stating that appellant no.1 was wearing checks shirt on the day of incident at 5.00 p.m. is corroborated by another independent witness PW-5 Devidas who has proved Memorandum Statement of appellant no.1 Amir and Seizure Panchanama in respect of clothes of said appellant along with other articles including one checks shirt, which is identified by him to be seized as recovered at the instance of appellant no.1 Amir marked as Article 'E'. With this evidence, appellant no.1 Amir having on his person shirt Article 'E' has been amply established by prosecution. Evidence of PW-4 Khetal Sawariya would reveal that, on 31.7.2015, police had seized clothes of deceased Priti and blood sample, nail clippings and scalp hair of deceased in presence of this witness as produced by Ashok Sarode, Police Constable, which was seized by PW-19 Rajendra Thakur, A.P.I. under Panchanama (Exh.44).

49. Similarly, evidence of PW-15 Pramod Yellajwar establishes seizure of clothes of deceased consisting

of Kurti Payjama, underwear, brassier with blood stains also produced by Ashok, Police Constable, which came to be seized by PW-19 Rajendra Thakur under Seizure Panchanama (Exh.96).

In the background of above evidence, from the evidence of PW-14 Nutan Sarangpure, it has come on record that, at the time of incident, appellant no.1 Amir was residing in front of her house and on the day of incident, had requested her to provide her two wheeler and accordingly, she gave her two wheeler i.e. Honda Aviator Motor Cycle bearing registration No.MH-36 M-8399 to him. Her evidence would further reveal that appellant no.1 Amir contacted her on the day of incident at 1.20 p.m. demanding her vehicle for 10 to 15 minutes. However, he did not return it back for a long time and thus, she went to his house. The said vehicle was brought to her by appellant no.2 at about 8.00 p.m. In the same night, she received a phone call from police directing her to come to Police Station in the morning, where she learnt about the incident and informed police of her vehicle being used by appellant no.1 Amir, which was then seized and on inspecting the same, blood stains were found

on the grip covers of its handle which grip covers were, therefore, seized. PW-Nutan had identified the grip covers of her vehicle which are marked as Article 'J' and has also identified both the appellants at the time of trial. Nothing incriminating could be brought on record in her cross-examination. Evidence of this witness, a lady Police Constable, is worthy to be relied upon who, even otherwise, has no reason to depose against the appellants, who, in fact, in her capacity as a neighbour, on request of appellant no.1 Amir, had made her vehicle available to him, which vehicle was, however, used by said appellant in commission of present crime. Fact of seizure of said grip covers is further corroborated by evidence of PW-Kolwadkar, the Investigating Officer, who has proved them at Exh.170. In the background of seizure of various muddemal articles involved in the present crime, evidence of PW-8 Jaideo Navkhare, A.S.I. establishes that, on the basis of Duty pass (Exh.64) issued by P.I. Kolwadkar, he carried 16 incriminating articles on 10.8.2015 in sealed condition along with Requisition memo (Exh.65) and on depositing the same with Chemical Analyser, Nagpur, obtained acknowledgement (Exh.67).

50. PW-8 Jaideo has further deposed that, on 12.8.2015, again on the basis of Duty pass issued to him vide Exh.67, he deposited further muddemal property under Requisition memo (Exh.68) to the Chemical Analyser, Nagpur consisting of blood sample of both the appellants and obtained acknowledgement (Exh.69), whose evidence thus establishes that the blood sample and other articles involved in this crime were forwarded to the Chemical Analyser.

51. Perusal of Chemical Analyser's report (Exh.159) on record would reveal that blood group of blood of appellant no.1 Amir is of group 'B', while as per Chemical Analyser's report (Exh.160), blood group of appellant no.2 Sachin is 'A'. Muddemal articles (as per Exh.161) like blood smaple, nail clippings and hair of deceased were referred for D.N.A. analysis. Human blood is detected in the nail clippings and hair of deceased. While, according to Chemical Analyser's report (Exh.162), clothes of deceased and appellant no.1 Amir and hammer is found stained with human blood. Similarly cotton swab of blood found on the floor, wash basin and napkin near the wash basin were also found stained with human blood. As per Chemical Analyser's report

(Exh.163), napkin, kurta payjama, nicker, bra of deceased, clothes of appellant no.1 Amir and hammer were found having thereon blood of deceased Priti as well as of injured Bhavya. Statements under Section 313 of the Code of Criminal Procedure of both the appellants did not give any satisfactory explanation as to under what circumstances blood of deceased was found on the clothes of appellant no.1 Amir and on the hammer used for commission of the present crime as well as other articles found on the scene of offence including napkin. From the above aspect, appellants' involvement in commission of present crime is, thus, further established, which is further substantiated from the D.N.A. report of blood stained shirt, jeans of appellant no.1 Amir as well as blood found on the grip covers of two wheeler. According to Chemical Analyser's report, D.N.A. profile obtained from the blood detected on shirt, jeans as well as handle grip covers are certified to be identical and from one and the same source of female origin and matched with D.N.A. profile of blood of injured Bhavya.

52. Prosecution has proved recovery of muddemal articles and blood stained clothes of appellant no.1

Amir at his instance including hammer and cash amount, which articles have been duly identified by PW-Rupesh, which fact has been further substantiated by evidence of PW-11 Anil Mhaske, the Gold Smith who, on examining the muddemal articles, issued Certificate and has also identified the same to be brought in his shop by police, which he had examined, His evidence also establishes of his providing similar ornaments to police for placing the same for identification of muddemal articles, wherefrom PW-Rupesh has identified his yellow metal chain and white metal idol of Lord Ganesh. Another circumstance which strongly goes against the appellants is of evidence of PW-21 Sanjay - the Finger Print Expert who has deposed that finger prints of both the appellants were found on the articles at the scene of offence, which goes to establish presence of both the appellants at the spot at the time of incident. Similarly, from the evidence of PW-14 Nutan, it is established that when she received back her two wheeler, which was made available by her to appellant no.1 Amir on the day of incident in the noon and which was received back by her on the same day in the night, was found having blood stains on its grip covers. Blood on said covers as per Chemical Analyser's report is certified to be of injured

Bhavya. Similarly, blood found on the articles seized at the spot like napkin above wash basin and the blood found on the floor was established to be of deceased. When said evidence is collectively considered with the evidence of Medical Officer PW-16 Dr.Madhuri, PW-12 Dr.Pradip Anand as well as PW-13 Dr.Sunita and PW-22 Dr.Ninand Gawande from Meditrina hospital, involvement of both the appellants is clearly established.

53. Since presence of both the appellants in the house of deceased at the time of incident has been amply established, in view of Section 106 of the Evidence Act, burden is cast upon appellants to give cogent explanation as to how Priti died. However, no reasonable explanation is forthcoming from the appellants on any of the circumstances as detailed above. The appellants, after having found present on the spot at the time of incident, cannot get away by simply keeping quiet and offering no explanation. This is a strong mitigating circumstance against the appellants indicating their involvement in commission of present crime.

54. The motive attributed to the appellants is

commission of robbery and in course of same transaction, appellants, however, are found to have committed murder and murderous assault on the helpless victim. As held in the case of **State of Rajasthan vs. Kashi Ram,** 2006 (12) SCC 254, it is for the accused to explain as to what happened to the deceased. If the accused does not throw any light on the fact which is within his knowledge, his failure to offer any explanation has to be considered as a circumstance against him. It is noted that, in the case in hand, neither of the appellants, even while recording their statements under Section 313 of Code of Criminal Procedure, had given any satisfactory explanation of the incriminating circumstance against them since both have simply denied the evidence which is incriminating in nature and plead that they are innocent.

55. As pointed out earlier, in catena of judgments, Hon'ble Apex Court has held that, if conviction is based on circumstantial evidence, there should not be any gap in the chain of circumstances and if there is any such gap, the accused is entitled to benefit of doubt. In the present case, by cogent and convincing evidence, prosecution

has established the circumstance of motive as well as fact of homicidal death of deceased, conduct of appellants having found involved in similar such offences caused within short span of time, absence of explanation from appellants as to death of deceased as against the circumstances relied upon by prosecution which are proved by cogent and reliable evidence. The circumstances when cumulatively considered form a complete chain pointing out that the murder of Priti as well as brutal assault on minor Bhavya was committed by the appellants and none else.

56. As stated earlier, learned defence counsel very fairly conceded to the conviction of the appellants in this case. He emphasized on the point of death sentence, awarded by the learned trial Court as, according to him, the facts and circumstances in the present case do not deserve it to be placed in the category of rarest of rare case.

57. A perusal of the impugned judgment would reflect following facts which impressed the learned trial Court to award the death sentence to the appellants:-

(i) The crime was committed with the motive to commit robbery with deadly weapon i.e. hammer.

(ii) The appellants assaulted on vital part of the body i.e. head and face of both, the deceased Preety and Bhavya. It was not a single blow.

(iii) The deceased Preety was a young housewife, aged around 30 years and Bhavya was aged around only 8 years.

(iv) Both, the deceased Preety and the injured Bhavya, being women and child resp. are the weaker section of the society.

(v) It was a pre-planned assault, intellectually chosen the house of the deceased for robbery.

(vi) It was a cold blooded murder without any provocation.

(vii) Modus operandi of the accused to commit two crimes of similar nature on the same day.

(viii) They entered the house of the deceased Prity due to trust of earlier familiarity and they belied the trust.

(ix) The accused persons do not deserve rehabilitation as one more case of murder pending for trial before the Sessions Court at Gondia, against these appellants.

58. In the instant case, undisputedly, the appellants were working as Air Conditioner mechanics, which itself suggest their socio-economic background. Evidently, except the tools which are used for air conditioner repairing, they did not carry any other deadly weapon. Hammer seems to be one of the tools for air conditioner repairing. It is also not the case of the prosecution that apart from hammer, the appellants used any other deadly weapon for inflicting injuries to the deceased – Priti and injured Bhavya. It is obvious that the prime intention of the appellants is to commit robbery. Murder is the by product of robbery. For facilitating the commission of robbery, they first immobilized the deceased – Priti by inflicting blows of hammer on her head and face. We do not see anything uncommon in the present facts. It has not come on record as to which of these two appellants used the weapon or played active role in

inflicting blows with hammer either on deceased Priti or on injured Bhavya. No doubt, assault on head with hammer may result in death, but the question is whether such act can be branded as a brutal, diabolic, depraved and heinous kind of attack attracting the capital punishment. Experience shows that in every case of robbery with murder or dacoity with murder, there is always a murderous attack with deadly weapon, but in the rarest of rare case, the capital punishment is awarded.

59. Evidently, prior to the present incident, on the same day, the accused persons had committed similar kind of crime at around 1.30 pm in another house and one more crime of similar nature prior to one month in Gondia District. Apart from these three incidents, nothing is brought on record by the prosecution to show their long standing criminal record to brand them as hardened criminals. The aforesaid criminal activities, as per the prosecution case, are the happenings within a short span of one month. It appears that in order to earn easy money, they adopted easy course. In their first attempt, within the jurisdiction of District Gondia, they succeeded. This developed courage in them to proceed

for the second attempt and the third one. Their passion to earn easy money could not last even for a month and they got apprehended at the hands of police.

60. The crucial question to be decided in the instant case is whether this case falls under the category of rarest of rare case attracting capital punishment. In our clear opinion, it does not fall under the rarest of rare category. First and foremost, there is nothing on record to show that which of the appellants played active part or used weapon - hammer in sustaining injuries to the deceased – Priti as well as injured Bhavya. Age of the appellants, at the relevant time, were in the range between 19 and 22 years resp.. They were working as air conditioner mechanics which itself reflect their socio-economic status in their life. They carried with them tools for air conditioner repairing and no other deadly weapon. In our considered view 4-5 blows with hammer on head cannot be branded as a brutal, diabolic and heinous crime. The three incidents of robbery in a period of one month without any prior long standing criminal record does not brand the appellants as hardened criminals. The chances of reformation in them are at higher side. Though there was

an inquiry by the learned Magistrate about the behavior of the appellants in the jail as reported by the Superintendent of Jail where the appellants have been lodged, however, nothing is found in the said inquiry as reported by the learned Magistrate. Undisputedly, prior to one month of the incident, they were earning their livelihood by working as air conditioner mechanics. It appears that looking to the materialistic world with all glamour of advance technology, they tried their luck to earn easy money and got apprehended within a period of one month of their new avocation.

61. In these facts and circumstances, to extinguish the appellants from this world is not the ultimate remedy. The facts and circumstances which are brought on record are the normal circumstances for the offence of robbery and murder. There is nothing uncommon in it. Experience shows that in most of such cases, the sentence for life imprisonment is awarded at the level of trial courts. In the instant case, the trial court is persuaded by the similar nature crime committed by the appellants on the same day for which they have been convicted by the trial court on the

previous day of the pronouncement of the impugned judgment. We do not find this circumstance is sufficient to extinguish the appellants from this world who have just came out of their minority and finding ways and means to earn livelihood.

62. The learned Trial Court in the impugned judgment referred to the judgment of the Apex Court in the case of Purushottam Dashrath Borate vs. State of Maharashtra (supra) and reproduced the aggravating circumstances which according to the Apex Court are expected to be considered to convict the accused for death penalty. The following are the aggravating circumstances in the aforesaid judgment of the Apex Court:-

i. 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.

ii. The offence was committed while the offender was engaged in the commission of another serious offence.

iii. 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.

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

v. Hiring killings.

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

vii. The offence was committed by a person while in lawful custody.

viii. 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.

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

x. 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.

xi. When murder is committed for a motive which evidences total depravity and meanness.

xii. When there is a cold-blooded murder without provocation.

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

62. None of the aforesaid situations are present in the instant case except that the deceased was a woman and the injured was a child. No doubt, murder is committed while committing other offence i.e. robbery. However, robbery without arm is less serious than armed dacoity. It would not come under henious crime like rape, armed dacoity kidnapping etc. In the case of Bachan Singh (Supra) and Macchi Singh (Supra), the following principles were laid down for awarding death penalty:-

(i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability.

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

(iii) Life imprisonment is the rule and death sentence must be imposed only when life imprisonment appears to be in altogether inadequate punishment having regard to the relevant circumstances of the crime, and

provided, and only provided, the option to impose sentence of imprisonment for life can not be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

63. As stated earlier, the present case is not the gravest case of extreme culpability and depravity. Further, it is not also the case that life imprisonment to the appellants would be an altogether inadequate punishment in view of the facts and circumstances, as stated earlier.

64. Upholding the constitutional validity of death penalty for the offence punishable under Section 302 of the Indian Penal Code, the Constitution Bench of the Hon’ble

Apex Court in the case of Bachan Singh (Supra) has laid down certain principles of rarest of rare case. However, the Hon'ble Apex Court in the said case refrained from laying down fixed standards or norms restricting the area of the imposition of the death penalty to a narrow category of murders. The Hon'ble Apex Court gave the following four reasons for not laying down the standards or norms:-

(i) There is a little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence.

(ii) Criminal cases do not fall into set behavioristic patterns. There are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. They are 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.

(iii) A standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity.

(iv) Standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation.

In the concluding para of the said judgment, the Hon’ble Apex Court has observed as under:-

> “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 over-emphasized 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 bloodthirsty. Hanging of murderers has never been too good for them."

The Hon'ble Apex Court in para 39 of the judgment in the case Machhi Singh (supra) has said that in order to apply these guidelines inter alia the following questions may be asked and answered:-

> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

65. Considering the overall global view of all the circumstances in the light of the aforesaid prepositions, we do

not find that there is something uncommon about the crime in the present case which renders sentence of imprisonment for life inadequate and calls for a death sentence.

66. In our view, the circumstances of the crime in this case are not of such a kind for which there is no alternative but to impose death sentence. The offence committed in the instant case is not of an exceptionally depraved and heinous character. The manner of its execution and its design would not put it at the level of extreme atrocity and cruelty.

67. Recently, the Apex Court while reviewing its judgment in the case of M. A. Antony @ Antappan (supra) accepted the defence arguments to the effect that “collective conscience of the society” and reference to it for the purposes of imposition of a sentence is totally misplaced. It is not possible to determine public opinion through evidence recorded in a trial for an offence of murder and it is even more difficult, if not impossible, to determine something as amorphous as the collective conscience of the society. The Apex Court approved the view that a judicial opinion does not

necessarily reflect the moral attitudes of the people. The Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion. Not being representatives of the people, if is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.

68. In the said judgment, while promoting socio-economic factors as one of the considerations for the purpose of deciding whether to award life sentence or death sentence, the Apex Court said that although Bachan Singh (Supra) does not allude to socio-economic factors for being taken into consideration as one of the mitigating factors in favour of a convict, the development of the law in the country, particularly through the Supreme Court, has introduced this as one of the factors to be taken into consideration. In para 16 of this judgment, the Apex Court endorsed and accepted that socio-economic factors must be taken into consideration while awarding a sentence particularly the ground realities relating to access to justice and remedies to justice that are not easily available to the poor and the needy.

69. The judgments cited by the learned APP on behalf of the State are the judgment of the Apex Court wherein death penalty was confirmed by the Court, while the judgments cited on behalf of the convict are the judgments wherein death penalty was commuted into life imprisonment. We have already considered the broad principles to be taken into consideration while deciding the sentence in murder case. After all, it is a question of judicial discretion to be applied on the basis of sound judicial principles. The facts of the cases cannot be identical. As we have already reached to the conclusion that the present case is not the rarest of rare case awarding death penalty and considering the socio-economic circumstances under which the present appellants were brought-up, they deserve life imprisonment instead of death. They are neither hardened criminals, nor is it impossible to reform them. Both are of young age, who have just came out of their minority. With a temptation to earn easy money, they adopted this way, however, they failed before they could enjoy the fruits of their act. The whole case is based on circumstantial evidence. There is no evidence as to which of the appellants inflicted blows with hammer.

Certainly, to commit murder was not their prime motive. They entered the house to commit robbery. In order to de-activate the housewife, they inflicted 4-5 blows on her head with hammer. We do not see any uncommon thing in it. In the cases of robbery/dacoity and murder, obviously, the intention of the accused is not to commit murder. Murder is only the by product to facilitate crime and probably to extinguish the evidence.

71. For all the aforesaid reasons, the death penalty is not the ultimate solution in this case. We find the alternative punishment of life imprisonment would be just and proper vis-a-vis the nature of crime and the criminals. In the circumstances, the case referred by the learned Sessions Judge does not deserve confirmation. The conviction of the appellants is maintained, however, their sentence of death is commuted to life imprisonment with fine of Rs. 10,000/- each in default to suffer simple imprisonment for one year each. All the substantive sentences shall run concurrently with benefit of set off. Rest of the operative part of the impugned judgment shall remain unchanged. The appeal against conviction of the appellants is accordingly partly allowed and

disposed of.

JUDGE **JUDGE**

[jaiswal]