A RONNY @ RONALD JAMES ALWARIS ETC.

v.

STATE OF MAHARASHTRA

MARCH 5, 1998

B [M.K. MUKHERJEE AND S.S.M. QUADRI, JJ.]

Criminal Procedure Code, 1973.

Criminal Trial—Test Identification Parade (TIP)—Witness not
C *participating in TIP—Identifying accused for the first time in Court—Identification challenged—Held, if a witness has known an accused earlier then absence of corroborative evidence by way of test identification parade would not be material—Under the facts and circumstances, testimony of such witnesses reliable—Indian Evidence Act—Section 9.*

D

Sections 100(4) and (5)—Search and Recovery of Articles—Witness to search not from the locality—Witness was driver of investigating team—Evidence of witness challenged—Held, if there is intrinsic merit in the evidence, it cannot be rejected solely on the ground that witness is not from the locality of search or has been brought by the police.

E

Indian Evidence Act—Section 114(a)— Robbery and murder—Articles belonging to deceased persons recovered from the possession of accused persons—Recovery without delay—Possession of articles unexplained—Effect—Held, presumption would be attracted against the accused persons
F *that they had committed the offence.*

Indian Penal Code—Section 376—Injury on the private parts of deceased mentioned in post-mortem report—Opinion about sexual assault not mentioned in the report—Doctor making statement about sexual assault in court—Testimony challenged—Strong circumstantial evidence suggesting
G *sexual assault—Held, testimony of doctor based on injuries noted in post-mortem certificate cannot be brushed aside.*

Section 354(3)—Death Sentence—Special Reasons—Held, whether the case is rarest of the rare has to be determined on the facts of each case—
H *Factors constituting rarest of rare case stated—Case based on circumstantial*

evidence—Not possible to ascertain role of which accused is more culpable in degree—Under the facts and circumstances, capital punishment commuted into life imprisonment.

Appellants, A-1, A-2 and A-3, were charged for the commission on the night of 20th July, 1992 of offence of murder under Section 302 read with Section 34, IPC of three members, M, R and O, of a family; offence of rape of R under Section 376 IPC, besides some other offences. It was alleged that the appellants were allowed inside the house of the deceased persons for staying on 20th July, 1992 night as one of the appellants was close relative of the deceased persons. PWs-29 and 34, friends of R, were present in the house when the appellants came and they were introduced by R to the appellants Appellants left the house in the morning of the next day in the Maruti Car of the deceased persons which was witnessed by PWs-22, 24 and 26. Since the night of 20th July, the deceased persons did not come out of the house and were not seen on 21st and 22nd July by persons who ought to have seen them. The deceased persons did not go to the Hospital where mother of R was undergoing treatment and where they were going daily. All the doors of the house were locked and the lights were also on during these two days. When the relatives of the deceased persons came to enquire about them and found the house locked, they requested the watchman to look into the house; he found their dead bodies in the bathroom. On breaking open the door, the house was found rensacked and the bedsheet contained stains of blood and seman. Post-mortem was conducted on 23rd July, 1972 at 10 :30 A.M. and the report indicated that death may have taken place between 24 and 72 hours earlier. The report also indicated injuries on the private parts of R. The appellants were arrested by the police and from their possession and also at their instance, articles belonging to the deceased persons were recovered which included amongst others the Maruti car key and the key of the main door of the house of the deceased persons. The Maruti car found abandoned contained the finger prints of A-2 according to the finger print expert.

Trial Court found the appellants guilty on the basis of circumstantial evidence since their were no eye-witnesses to the occurrence and convicted them under Section 302 read with Section 34 IPC, Section 376(2)(g) IPC, besides under some other sections and sentenced them to death and referred the case for confirmation, to the High Court. The High Court heard the reference with regard to confirmation of the sentence of death awarded to

A the appellants alongwith the appeals filled by them and confirmed the judgment of the trial court except in respect of charge under Section 201 IPC. Against the judgment of the High Court, the appellants have filed the present appeal.

The appellants contended that their identification by some witnesses for the first time in court without participating in the test identification B parade (TIP) was worthless and should not have been considered; that the search and recovery of articles was in alleged violation of the provisions of Section 100(4) and Section 166(3) and (4) Cr. P. C. as PW-6 who witnessed the search at the house of Appellant, A-3, was not from the locality and was brought by the investigating officer and the copies of the letter/notice C mandatorily required to be sent to the other police station in whose jurisdiction the search and seizures were made were not produced; that the death of the victims could have taken place after the appellants had lift the house as the post-mortem report indicated that the deaths had occurred between 24 and 72 house earlier and the injuries were recent; that the evidence detected in D connection with different crimes could not have been used against the appellants; that the charge against the appellants under Section 376 IPC had not been made out as the evidence of the doctor who prepared the post-mortem report could not be given any weight since he did not express any opinion about the sexual assault in the report and spoke about the sexual assault only in his statement given in court; and that the facts and E circumstances of the case did not justify awarding of death sentence to the appellants.

The respondent contended that the criteria of prior identification of an accused by a witness in test identification parade would not apply to a witness F who had known the accused earlier and identification by such witnesses for the first time at the time of trial could be considered.

Partly allowing the appeal, the Court

G HELD : 1.1. The evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused person at his trial. The statement of the witness made in the court, afortiori identification by him of an accused is substantive evidence but from its very nature it is inherently of a weak character. The evidence of identification in the TIP is not a substantive evidence but is only H corroborative evidence. It falls in the realm of investigation. The substantive

evidence is the statement of the witness made in the court. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength for trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such piece of evidence. But if a witness has known an accused earlier in such 9 circumstance which lends assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of accused should not be relied upon as any other acceptable but uncorroborated testimony.

[180-F-H; 181-A-C]

Rameshwar Singh v. *State of Jammu & Kashmir*, AIR (1972) SC 102 = [1972] 1 SCR 627, referred to

Budhsen & Anr. v. *State of Uttar Pradesh,* AIR (1970) SC 1321= [1970] 2 SCC 128; *Kannan & Ors.* v. *State of Kerala,* AIR (1979) SC 1127 =[1979] 3 SCC 319 and *Mohd. Abdul Hafeez* v. *State of Andhra Pradesh,* AIR (1983) SC 367 = [1983] 1 SCC 143, distinguished.

1.2. The presence of the appellants in the house of the deceased persons on the night of occurrence has been established by the evidence of PW-29 and PW-34. They were talking to the deceased, R, at the time when the appellants came to the bungalow. Appellant A-1 wished the deceased R who introduced A-1. Thereafter, A-1 introduced appellants, A-2 and A-3 to R and PW-29 and PW-34. They talked together for about 7-8 minutes. Under the facts and circumstance, the absence of corroborative evidence by way of test identification parade would not be material. [183-F-G]

2.1. Section 100(5) Cr. P. C. provides that the search has to be made in the presence of witnesses in accordance with Section 100(4) Cr. P. C. and a list of things seized in the course of such search and of the places in which the things are found, is required to be prepared by the things are found, is required to be prepared by the said officer and signed by such witnesses. If there is intrinsic merit in the evidence of the witnesses of search the same cannot be rejected solely on the ground that witness is not from the locality of search or that he was brought by the police with it. The evidence, however, can be rejected if it suffers from any serious infirmities or if there is any inherent inconsistency in the testimony. [185-A-F]

A *State of Maharashtra* v. *P.K. Pathak,* AIR (1980) SC 1224 = [1980] 2 SCC 259, relied on.

2.2. PW-6 was one of the drivers of the cars in which the investigating team came to Bombay from Pune. For the sake of convenience, he was taken as a witness for search. There is no material in the cross-examination to B discredit his testimony. Thus, the testimony of PW-6 cannot be disbelieved. [185-G]

3. The investigating officer stated that he had sent the letter required under Section 166(4) Cr. P. C. to the concerned police station in whose jurisdiction the search and seizure were made, therefore, the presumption C under Illustration (e) of Section 114 of the Evidence Act would arise and the official acts would be deemed to have been preformed regularly. There is thus no non-compliance of Section 166(4) of the Code of Criminal Procedure. [186-E]

4. The articles belonging to the deceased persons were recovered from D the possession for the appellants soon after the robbery and the murder of the deceased persons. The possession has remained unexplained by the appellants, so the presumption under Illustration (a) of Section 114 of the Evidence Act would be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion, would, therefore, be that the E appellants and no one else had committed the three murders and the robbery. [186-G]

Biju v. *State of Madhya Pradesh*, [1978] 1 SCC 588 and *Gulab Chand* v. *State of Madhya Pradesh*, AIR (1995) SC 1598 = [1995] 3 SCC 574, relied F on.

Union Territory of Goa v. *Beavanture D'Souza,* AIR (1993) SC 1199 = [1993] Suppl. 3 SCC 305, distinguished.

5. The autopsy was conducted on the dead bodies on 23rd July at about G 10:30 A.M. and thereafter. The post-mortem reports clearly indicate that the death might have occurred between 24 and 72 hours and that would corroborate the prosecution case that the murders were committed in the intervening night of 20th and 21st July and the presence of appellants between 8:30 P.M. on 20th July and 8.00 or 8.30 A.M. on 21st July has been established. In view of this position, the age of injurises 'as recent' would H mean inflicted at or about the time of death. [189-E]

6. The Germane question is not as to in connection with that offence during the investigation the evidence had come to light, but whether the evidence so collected is relevant and admissible to establish the charge in the present case and it is not the submission that the evidence so let in was irrelevant or inadmissible. [189-F]

7. The doctor who conducted autopsy on R stated in his evidence in Court that the injury on her private parts was as a result of violent sexual assault. It is true that in post-mortem certificate on opinion is expressed about sexual attack but what the doctor has stated in court was on the basis of the notes of the post-mortem and the injuries already noted in post-mortem certificate. So this cannot be said to be an after-thought. There is a strong additional circumstance which conclusively points to the sexual assault by the appellants, i.e. presence of stains of semen on bed sheet in the master bed room of the house where M and R were sleeping. The reports of the chemical analysts show that the blood group of M, R and their son, three deceased persons was 'B', so the possibility of M having sexual intercourse with R on the night of occurrence can be safely ruled out. The bed sheet contained stains of semen which are of the blood group of 'A', 'AB' and 'O'. The reports of the analysts further show that blood group of A-1 is 'A', blood group of A-2 is 'AB' and blood group of A-3 is 'O'. Thus, it is clear that stains of semen found on the bed sheet, opined to be of the blood group of 'A', 'AB' and 'O' can only be of A-1, A-2 and A-3 respectively. On the ground that in the post-mortem certificate, the doctor did not express any opinion about the sexual assault, his testimony and opinion cannot be brushed aside which is based on injuries already noted in the post-mortem certificate. The charge under Section 376 IPC against the appellants is proved by the circumstantial and medical evidence. [192-D-H]

8. This is not a case where a singly fact forms a link in the chain of circumstances. It is a case where there are plethora of circumstance which are plenty and overlapping and are so twined to from a stout cord which rope in the appellants in such a way that the escape from the conclusion of their guilt becomes difficult, may, impossible. However, there is no material to confirm the sentence for offences under Sections 467 and 471. IPC. Therefore, the conviction of the accused-appellants recorded by the courts below in respect of all other charges is confirmed. [190-C]

9. The choice of death sentence has to be made only in the rarest of the rare case that where culpability of the accused has assumed depravity or where the accused is found is to be an ardent criminal and menace to the society and; where the crime is committed in an organised manner and is

A gruesome, cold blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation, the case would present special reason for purposes of Sub-section(3) of Section 354 of the Criminal Procedure Code. Whether the case is one of the rarest of the rare case is a question which has to be determined on the facts of each case. The number of victims would not per se bring the case as falling in the rarest
B of rare cases. [195-A-B]

Bachan Singh v. *State of Punjab,* AIR (1980) SC 898 = [1980] 2 SCC 684, followed.

Machhi Singh v. *State of Punjab,* [1983] 3 SCC 470; *Allauddin Mian*
C v. *State of Bihar*, AIR (1989) SC 1456 = [1989] 3 SCC 5; *Shamshul Kanwar* v. *State of U.P.,* AIR (1995) SC 1748 = [1995] 4 SCC 430 and *Sheikh Ishaque* v. *State of Bihar*, [1995] 3 SCC 392, relied on.

10. Considering the cumulative effect of all the factors, it cannot be
D said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard the nature of offences and circumstances in which they were committed, it is not possible to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years old, A-2 is 35 years old and A-3 is 25 years old. The appellants cannot
E be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that role of one has been more culpable in degree than that of others and *vice versa.* Where in a case like this it is not possible to say as to whose case falls within the 'rareat of the rare' case, it would serve the ends of
F justice if the capital punishment is commuted into life imprisonment. [195-H; 196-A-B]

11. The sentence awarded by courts below under Section 302 read with Section 34 is modified from death to life imprisonment. The sentence for the offences for which the appellants are convicted, except under Section
G 376(2)(g) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(g) IPC consecutively, after serving sentence for other offences. [196-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1064 of 1997.

H From the Judgment and Order dated 9.12.14, 15.2.96 of the Bombay High

Court in C.C. No. 1/95 with Crl. A. No. 225 of 1995. A

U.R. Lalit A.M. Khanwilkar, A.P. Mayee and Vijay Kumar for the Appellant in Crl. A. No. 1064/97.

Ms. Shilpa Malvankar, S.C. Paul and Anand Jain for J.D. Jain for the Appellant in Crl. A. No. 1065/97. B

I.G. Shah, M.S. Nargolakar and D.M. Nargolkar for the Respondent.

The Judgment of the Court was delivered by

QUADRI, J. The appellants [Nitin Anil Swargey (A -1), Ronny @ Ronald James Alwaris (A-2) and Santu @ Santosh Balkrishna Desai (A-3), in C these three appeals, have been found guilty of offences under Section 302 read with Section 34 IPC and are condemned to death; they are also awarded different punishments under various provisions of the Indian Penal Code on their trial by the learned Additional Sessions Judge, Pune in Sessions Case No. 574 of 1992 *vide* Judgment dated April 28/29, 1995. In regard to sentence of death awarded to the three appellants, the learned Additional Sessions D Judge referred the case, Confirmation Case No. 1 of 1995, to the High Court of Bombay, which was heard along with three appeals filed by the above said three appellants. They were disposed of by the High Court by a common judgment dated March 27, 1996, confirming the conviction of and sentences awarded to the appellants. Against the said judgment, by special leave, these appeals are filed. E

The case set up by the prosecution is as follows:

A new colony, Varsha Park Society, is situate at Baner Road near Pune. Among newly constructed houses are two bungalows, 'Rooman Bungalow' of Mr. Mohan Ohol, the President of, and 'Rohini Bungalow' of Mr. Vyankat F Krishnan, the Secretary of the Society, which are separated by a *Kutcha* road. In Rooman bungalow a well placed family of Ohols was residing. The family comprised of four members, namely, Mr. Mohan Ohol, a Mechanical Engineer, who was working as Executive Officer in Kirloskar Pneumatic Company at Hadapsar, Pune; Mrs. Ruhi Ohol, Ph. D., a research scholar, who having worked as Head of the Department of Master Degree in Business Management G (M.B.A.), had started working with the Tata Management Institute as visiting Professor and was organising seminars for M.B.A. students; a seventeen years old son Mr. Rohan Ohol, a student studying in the last year of the Computer Engineering Course and a sixteen years old daughter, Ms. Reina Mohan Ohol, who was doing course of diploma of Hotel Management and Catering Technology. To undergo practical training programme of two months, H

A on July 8, 1992, she left Pune for Bombay where she was staying in MLA Hostel. Out of the relations of Mr. Mohan Ohol, his brother, Mr. Vijay Ohol who was working as Assistant Commissioner Revenue, his sisters, Mrs. Mandakini Gaekwad and Mrs. Rajni, his nephews Viren S/o Mr. Vijay Ohol, Nitin Anil Swargey (A-1) S/o Mrs. Rajni and niece Rhoda D/o Mrs. Mandakini and Mrs. Viola Muzaffar (mother of Mrs. Ruhi Ohol) who was a cancer patient
B and was undergoing treatment in Ruby Hospital, need be mentioned.

Nitin Anil Swargey (A-1) and his two friends, Ronny and Santu, A-2 and A-3 respectively, are residents of Bombay; A-1 and A-3 reside at Borivili, Bombay, whereas A-2 resides at Vasai, Distt. Thane, Bombay. They went to
C Pune on July 18, 1992. There they contacted Tulsi Bhagwan Shetty (PW-46), a partner of Natraj Hotel for a room. For obtaining the room, A-1 signed, what is known as "A Form" (Article 98). They were given Room No. 16 in that hotel. It appears A-1 left the hotel but A-2 and A-3 stayed there till the morning of 20th July. Ramesh Madhavakar (PW-47), a room boy, took them to that room and looked after them during their stay. After A-1 joined them
D on 20th July, they left. They paid the charges of the hotel under receipt (Article 97). They asked PW-46 about tourist vehicle to go to Panchgani. He suggested them to approach Deccan Luxury Service, near Deccan Gymkhana, Pune. They went there and contacted Dadasaheb Bhagaji Dhumal (PW-69), Manager of the said Deccan Luxury Service. As no vehicle was available with
E Deccan Luxury Service, he arranged Maruti Van No. MH-15A-263 of Sri Babar, a sub-contractor, whose driver was paid Rupees two hundred. The name of the hirer was noted as "Sunil Desai" of 1312, Shivaji Nagar, Pune on the chit (Article 89) (Exhibit 258) for booking the vehicle, which was signed by A-1. They then went to the hotel, took the luggage and left the hotel at about 1.30 P.M. From the statement of Mr. Sanjay Mantri (PW-45) it has come on record
F that from his medical shop, A-1 purchased adhesive tape. At about 6.30 P.M., they came to Bharti Vidyapeeth Rickshaw Stand at Dhankawadi, Pune and hired rickshaw bearing Registration No. MPF-1044. The rickshaw driver (PW-42) who was also the owner of the said rickshaw, took them to Deccan Gymkhana near Lalit Mahal Hotel on Fergusson College Road. From there, they went to Baner Road ahead of Green Park Hotel. To the left side of that
G hotel is a *kutcha* road leading to Varsha Park Society, which had become slushy due to rain. So the rickshaw driver refused to go further on the road but A-1 who was said to be wearing goggles took out a revolver and directed him to proceed. Accordingly, he advanced further. The rickshaw was stopped near the Rooman bungalow wherein the lights inside and outside were 'on'.
H In the verandah of the bungalow, three persons were talking "Rohan and his

two class mates, K.S. Pradhan (PW-29) and Rajesh Sundaram (PW-34). PWs. 29 and 34, stated that they were students of Computer Engineering in Pune Institute of Computer Engineering Technology at Dhankavadi; that Rohan was their friend from the first year of the course; that they were close to one another and were frequently visiting the house of Rohan, on the request of Rohan, they brought a book and a note book (Articles 30 and 31) to his house on 20th July between 8.15 and 8.30 P.M. When they were talking with each other in the verandah of the bungalow, having come down from the room of Rohan, which was on the first floor, they noticed that three persons came to the bungalow in a rickshaw and approached them; one of them wished Rohan saying "Hello Rohan". Rohan introduced that person as Nitin Swargey (A-1) who in turn introduced A-2 and A-3 as Ronny and Santosh to them. A-1 expressed to Rohan that they wanted to stay overnight at his bungalow as their vehicle has broken down on their way to Panchgani. All of them stood talking there for about eight minutes and then Rohan told them to sit inside the house. A-1, A-2 and A-3 left their muddy shoes in the Verandah and entered in the house. Thereafter, PWs. 29 and 34 left and on their way, about 50-100 feet away from the bungalow, noticed that the parents of Rohan were coming in their Maruti car from the opposite direction.

Smt. Asha Tarachand Kolge (PW-35) is the maid servant, who was attending to the work of cleaning utensils and washing clothes at the residence of Mr. Ohol. Her son and daughter also used to attend to the work at the bungalow. She was attending to the work at 5.00 P.M. or 5.30 P.M. for about one or two hours. On 20th July, she went to the residence of Mr. Ohol at 5.00 or 5.30 P.M. and pressed the door bell, Mr. Rohan opened the door. He was alone at that time. After attending to the work, she left. When she was leaving, she found that Mr. Ohol had come. He told her to come early on the next day as she would have to go the hospital to get his ailing mother-in-law discharged.

On the night of 20th July, 1992, Popat Kolge (PW-21), watchman of the society noticed Mrs. Ruhi Ohol in the house when he and the other watchman were collecting torch and other things from the rear side of the bungalow. Next day, i.e., on 21st July, in the morning when he went to the bungalow to put back the torch, he found the footwears, containing mud, lying over in the verandah and lights of the bungalow 'on'. He kept the torch as usual and went home. At about 8.00 in the morning on 21st July, Balasaheb Hiraman Kalambkar (PW-22), the milkman, who went to deliver the milk, noticed that three persons were leaving the Rooman bungalow in the car. He went and kept the milk bags in the rack and the newspaper given to him by the

A newspaper man (PW-23) at the bungalow and gave the usual call "Dooh". Mr. Mhatre (PW-23) is the newspaper man. He was delivering 'Maharashtra Herald' and 'Sunday Times' newspaper at the residence of Mr. Mohan Ohol. He stated that on 21st July, he met PW-22 in the morning and handed over him the newspaper for delivering it at Ohols' bungalow as he was going there to supply milk. Mr. Vyankat Pandit (PW-24). who was a resident of that colony B noticed, after he returned to his house leaving the children in the school, that the Maruti car of the Ohols' family had stuck in the mud and that two persons, who came out of the car, were pushing the car on 21st July at about 8.00 A.M. Thereafter, they boarded the car and went away. At about the same time, Mr. Vyankat Krishnan (PW-26), owner of Rohini bungalow, referred to above, while he was taking his wife to Junior College in Loyalla, Pashan Road, C Pune, found Maruti car of Mr. Mohan Ohol outside the gate but later it followed his car. After coming on the main Baner Road, he stopped his car near Hotel Green Park and gave signal to stop Mr. Ohol's car. When the car stopped, he peeped through the door glass and saw two persons on the front seats and one person on the ear seat. He gave the descriptions of the driver D and person sitting next to him, but not of the person sitting on the hind seat, which coincide with the identity of A-1 and A-2. Finding that Mr. Mohal Ohol was not in the car, he told them to go.

The Maruti car was later found abandoned by A-1, A-2 and A-3 at Shirur. Thereafter, they started dealing with the properties of Ohols. At about E 11.15 A.M., on the same day, from Shirur they boarded the bus; this fact is spoken to by the bus driver, Kundalik Bhanudas Garad (PW-55). At about 12.30 P.M.. A-1 went to the Bank of Maharashtra, Hadapsar Branch, Pune, presented a cheque (Exhibit 146) for Rs. 12,000 purportedly signed by Mr. Mohan Ohol and drawn in favour of one Mr. M.K. Chavan, to the Bank clerk, Nand Kishore Tukaram Shinde (PW-31) who asked A-1 to sign at the back F of the cheque and he signed as M.K. Chavan. P.W. 31 gave Token No. 109 (Article 142) and endorsed '109' on the cheque. The cheque was given to Mr. Damodar Apte, the Assistant Branch Manager (PW-30), for verification. He found that the signature of Mr. Mohan Ohol was not tallying and so A-1 was asked by him either to get Mr. Mohan Ohal's instruction or another cheque G from him. He also asked A-1 to return the token and take back the cheque, but A-1 disappeared from the Bank, Consequently, the uncashed cheque remained with the Bank and the token remained with A-1. On the same day, A-1 went to Ravindra Babhutmal Oswal (PW-19) to pledge ear-tops (Article 83) but as he did not help, A-1 got the services of Prakash Kamble (PW-28), Ratan Kamble (PW-37) and Vishnu Ramchandra Randive (PW-36) for pledging H the ear-tops.

Not finding Rohan in the college on 21st July, PW-29 tried to contact him on phone after returning from college but got no response . On 21st July, 1992, PW-35 went for her daily chore at about 4.00 P.M., rang the bell but nobody opened the door. She went to the back side of the bungalow and knocked the door. She did no get any response. She found the milk sachets in the verandah. She thought that the condition of the mother of Mrs. Ohol might be serious and the family might have gone to the hospital. So, she took the milk sachets and went home. At about sunset, she sent her daughter and son with the milk bags to the bungalow to deliver the same, but they returned with the milk bags stating that nobody was attending to the door bell and also informed that the maruti car was not in the porch. PW-26 did not see Mr. Mohan Ohol and his maruti car in the evening of 21st July, generally, he used to see Mr. Ohol in the evening between 7.00 and 7.30 P.M. On 22nd July, in the morning, when PW-22 went to Rooman bungalow, he saw the newspaper attached to the gate. He entered the gate and went near the rack and found the newspaper of the earlier day still there but he did not find the milk bags put by him on 21st July. He kept the newspaper of 22nd July, which he had picked up from the gate and shouted "Doodh, Doodh." As the maruti car was not there, he thought the family had gone out. He pressed the door bell but did not get any response. He then left the place with milk bags. On the way, he enquired from the wife of watchman of bungalow of Sardarji and learnt that the relative of Ohols' family was sick and that they might have gone there and that somebody might have taken away the milk bags. On 22nd July, PW-23 kept newspaper at the gate in the morning as usual. On the evening of 22nd July, after PW-26 returned from his work, he did no see Mr. Ohol between 7.00 and 7.30 P.M. as usual and he also noticed that the car of Mr. Ohol was not in the bungalow. In the evening, the nephew and niece of Mr. Ohol, Viren and Rodha, came to the bungalow to enquire as their parents were informed that neither Mrs. Ohol nor any member of her family had gone to the Ruby Hospital to see her ailing mother and they were not getting any response on phone. They noticed that the lights on the ground floor of Rooman bungalow were burning. On 22nd July, when PW-21 went to the bungalow at 9.00 P.M., he pushed the door bell button but the bell did not ring. The entrance door of the bungalow was closed, the lights were `on' on the ground and the first floor but the maruti car was not there, Then he went to the bungalow of PW-26. When he returned, he found PW-3, two others and PW-26 there, They asked PW-21 to go on the terrace and find out if there was anything abnormal. He reported that he did not find anything there but thereafter he pointed out that ants were going in and coming out of the bath room on the ground floor. He then removed glass and saw that human bodies were lying in the tub in the bath room. All the doors were closed. By that time,

A Vijay Ohol (PW-3) had also come. He and PW-21 went to the police in a jeep. Sahebrao Pangare, Assistant Sub-Inspector of Police (PW-63) and PW-82 accompanied them to the scene of offence. They broke open the door of the kitchen. They found that the house was ransacked. The disfigured dead bodies of Mr. Mohan Ohol, Mrs. Ruhi Ohol and their son, Rohan Ohol were lying in the tub in the bath room. The dead bodies were removed from the B tub and panchnamas were prepared. Mr. Salim Mohammed Sheikh (PW-1) is the panch witness of inquest panchnamas conducted by PW-78. Exhibit 11 is the inquest panchnamas of the dead body of Rohan Ohol, which was identified by PW-26. In the said panchnama, the condition of the body was described. Exhibit 13 is the inquest panchnama of the dead body of Mrs. Ruhi C Ohol, which was identified by PW-3. The condition the dead body was described therein. Exhibit 13 is the inquest panchnama in respect of the dead body of Mr. Mohan Ohol. It contains the particulars of the dead body of Mr. Mohan Ohol. The dead bodies were sent to the hospital for post-mortem examination. Dr. Lakshman Govindan Ferwani (PW-73) conducted autopsy on the dead bodies of the deceased, Rohan Ohol and Mohan Ohol and issued D post-mortem certificate, Exh. 268 and Exh. 270 respectively, and Dr. Lakshmikant Bade (PW-74) conducted autopsy on the dead body of Mrs. Ruhi Ohol and issued the post-mortem certificate (Exh. 278). PW-73 opined that the cause of death of Mr Rohan Ohol and of Mr. Mohan Ohol was due to suffocation and the compression of the neck. Similar was the opinion of PW-74 as to the cause of death of Mrs. Ruhi Ohol. Among the injuries found on the dead body of E Mrs. Ruhi Ohol, there were injuries on her private parts which were opined to be due to violent sexual attack by more than one person on her. PW-82 conducted Panchnama (Exh. 28) of the scene of occurrence and the following among other articles were found: spool of celo plast, Newspaper, . "The Sakal". of 18th July, 1992, but it did not have the first and the last page; Books of PW-29, Gold Flake cigarette stubs; bed sheet containing stains of blood F and semen in the bath room, it was also noted that the maruti car (MAF-5436) of Mohan Ohol was not at the bungalow. The investigating officer (PW-83) was entrusted with this case. He took over the case from PW-82 and continued investigation. He sent the message about the theft of the car and kept PSI Tukaram Dwarkanath Gaud (PW-48) on watch duty. PW-78 was entrusted with further investigation.

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PW-22, PW-23 and PW-35 noticed in the morning of 23rd July. 1992 that the police had taken charge of the 'Rooman bungalow' and sealed it.

On 23rd July, 1992 A-1 gave Seiko digital wrist watch (Article 114) to Ramesh Shamlal Thakur (PW-58) for repair. A-2 kept VCR (Article 64) with H Bharat Dhondiram Salekar (PW-59). With the help of PW-59, A-2 went to

Mehendra Choksi (PW-60), a jeweller, and sold two gold bangles (Article 66) for Rs. 4760. A-2 had kept scientific calculator (Article 138), Agfa camera (Article 136), Flash gun (Article 137), Flash gun tube (Article 139) and Plastic Bag (Article 140) with Ramesh Thakur (PW-58). He also sold some gold ornaments, chain, ring, ear-tops etc. (Articles 67 to 72) to PW-60 with the help of PW-59. A-3 pledged ladies wrist watch (Article 95) with Bhagwan Dhondu Bane (PW-56) for Rs. 250 on July 24, 1992. He gave some trousers to Bharat Solanki (PW-61) for alteration for the purpose of reducing the length and on the next day, he gave Table clock (Article 96) of Phillips to Manoj Shantaram Mundhe (PW-57).

On 23rd July, Ms. Reina Ohol, the only surviving member of the Ohols' family, returned to Pune from Bombay. On 24th July the funeral and the burial of the deceased persons, Mr. Mohan Ohol, Mrs. Ruhi Ohol and Mr. Rohan Ohol, took place. On the same day, the maruti car of Mr. Mohan Ohol was escorted from Shirur petrol pump. PSI Bhandari (PW-78) brought the car at Chaturshringi Police Station and on the morning of 25th July, he handed over all the articles and the concerned papers which were found in the said car.

On the night of July 27th, Investigating Officer (PW-83) and his party went to Bombay in three vehicles. After getting the clues of the accused persons, they first went to Borivili. A-3 was not there in the house but his brother's wife, Smt. Archana Desai, was there. In the search made by them, certain articles were found. Exhibit 30 is the search panchnama. PW-6 is one of the panch witnesses. Among the articles found were: silver tea set, silver tray, two pairs of socks. two sets of keys, the keys included maruti car key, the key of Kinetic Honda and the key of the main door of Rooman bungalow, one stainless steel knife, one hot-shot camera and one two-in-one of National company. In the said tape recorder, one cassette was there with a sticker containing the name, address and phone number of Mr. Rohan Ohol. The seizure memo of these articles is Exhibit 30. The panchas and PW-83 signed the said seizure memo. A-1 and A-2 were arrested on 28th July, 1992. On personal search of A-1, one cigarette packet of Gold Flake containing four cigarettes, one key and Rs.19 were found with him. The arrest panchnama is Exhibit 31. Those articles were not seized. Thereafter, Exh. 32, arrest panchnama of A-2 was drawn. No incriminating articles were found from his person. A-2 made his voluntary statement (Exhibit 36) pursuant to which a black brief case of VIP company with the stickers "M" "O" was recovered. On opening the said brief case, visiting card of Mr. Mohan Ohol, Pneumatic Kirloskar Company, was found. The other articles recovered were one small tape recorder, one transistor, one eliminator, one wrist watch of Allwyn Company, one

A country made revolver, one pair of shoes wrapped in the first and the last page of the newspaper of Pune 'The Sakal' dated 18th July, 1992 and one button knife having brass handle. In the said revolver, there were four cartridges. The articles recovered under panchnama (Ext. 37) are marked as Articles 55 to 63. Pursuant to the further statement (Exhibit 38) made by A-2 VCR of National Panasonic Company was recovered from the house of one B Bharat Salekar (PW-59) and ornaments (Articles 64 to 73) were recovered from Choksi Jewellery shop, V.P. Road, Borivili. The ornaments that were sold by A-2 on 24th and 25th July are three golden rings, two bangles having black beads, one neckless (disco chain), one pair of ear tops and one small ear chain. The gold ornaments and the receipt books were seized under recovery C Panchnama Exhibit 39.

On 30th July. 1992, PW-26, the owner and resident of Rohini bungalow and the Secretary of the society identified *A-1 and A-2 in the TIP* as well as in the court at the trial. PWs. 30 and 31 , the Assistant Branch Manager and the Bank Clerk respectively of the Maharashtra Bank, Hadapsar Branch D identified *A-1 in TIP* on 30th July, 1992 as well as at the trial in court. On 5th August, 1992, *A-3 was identified in TIP* by PWs. 46 and 47, the partner and room boy respectively of Natraj Hotel and by PW-55, the driver of the bus. On 26th August, 1992, *A-1 and A-2 were identified in TIP* by PW-46, PW-47 and PW-69. All of them identified the three appellants at their trial also in E the court. Apart from the above witnesses, A-1 to A-3 were identified by PW-29, PW-34, PW-42 and PW-45, though they did not participate in TIP. PW-11, PW-19, PW-28, PW-36 and PW-37, who helped A-1 in pledging two gold ear tops with PW-19 identified A-1 in court . So also PW-58 identified A-1 in court. A-2 was identified in court by PW-59 whom he is said to have given VCR. So also by PW-58 whom A-2 is said to have given Agfa camera, F calculator, flash gun, flash gun tube and yellow plastic bag for keeping them with him. PW-60, a jeweller at Borivili, who purchased a gold chain, three gold rings, one chain of ear tops, a pair of ear tops with the help of PW-59, identified A-2 in court. Apart from the witnesses already referred to above, A-3 was also identified in court by PW-56 who was handed over ladies wrist G watch (Citizen) by A-3. PW-61, a tailor, who was given two jean pants for alteration by A-3 identified him in court. A-3 was also identified in court by PW-57 who was given table clock of Phillip Quartz company for keeping it with him. The aforementioned articles were recovered at the instance of the appellants within a week of the date of commission of the offence. Those articles were identified in the test identification of the articles by PW-3 and H PW-40, the only remaining member of the Ohol family.

The cigarette stubs of Gold Flake found at the scene of occurrence and noted in the panchnama (Exhibit 28) were sent for chemical analysis. Bed sheet found in the master bed room of Rooman bungalow containing the stains of blood and semen was also sent to the chemical analyser along with other blood stained articles. The blood and hairs of the deceased as also the samples of blood and hairs of the appellants were sent for chemical analysis. The reports of the chemical analyst disclose that the blood group of the deceased Mr. Mohan Ohol, Mrs. Ruhi Ohol and Mr. Rohan Ohol was 'B' group (Exhibits 341, 342 and 343). The blood group of A-1 is 'A', of A-2 is 'AB' and of A-3 is 'O' (Exhibits 337, 338 and 339). Exhibit 340 contains the report which shows that the semen detected on the pieces of bed sheet is human - of blood groups 'A', 'AB' as well as 'O' in serial Nos. 21 and 22 and that the stains of saliva on the cigarette stubs are of group 'A'. Thus, it is demonstrated that saliva on the cigarette stubs was that of A-1 and that semen stains detected on the bed sheets were that of A-1, A-2 and A-3 having regard to their respective blood groups 'A', 'AB' and 'O'. The Gold Flake cigarette stubs are sought to be connected with the Gold Flake packet of cigarettes found on the search of the person of A-1 at the time of his arrest on 28th July, 1992. So also the newspaper 'The Sakal' of July 18, 1992 noted in panchnama of the scene of occurrence (Exhibit 28) not containing the first and the last page is sought to be connected with the recovery made at the instance of A-2 where pair of shoes of Rohan was found wrapped in the missing pages (first and the last pages of 'The Sakal'). On 6th August, 1992. A-1 made the statement (Exhibit 69) and thereafter led the investigating officer to Rooman bungalow where he pointed out a commode in which the articles were thrown. After search, adhesive tape, nylon strip and nylon rope were found in the drainage pipe leading from the commode to the septic tank of the said bungalow. The adhesive tape, some hairs and small ear ring of yellow colour was found stuck with the adhesive tape. The ring recovered is the counterpart of the ear ring (one) mentioned in Exh. 28 and was identified by PW-40 as belonging to her mother. The hairs were similar to that of late Mrs. Ruhi Ohol. The tape was containing the superficial layer of the skin which explains the injury Nos. 28 and 29 in the post-mortem report (Exh. 278). The writings found on "A Form". (Article 98) of the Natraj Hotel and on the chit (Article 89), written at the time of hiring the car through PW-69 and on the back of cheque of July 20, 1992 [Exh. 146] which was presented by A-1 to the Maharashtra Bank, Hadapsar Branch were sent to the hand writing expert, Shri J. Landge (PW-80) who opined that the writings on those articles were similar to that of admitted writing of A-1 . After the maruti car bearing registration No. MMP-5346 of the Ohols' family was discovered in Shirur near

A B C D E F G H

A petrol pump, it was noted that there were finger prints thereon. Finger print expert was called. The finger prints found on the rear view mirror and the print of the palm found on the frame of the rear left hand side of maruti car, were taken. The finger prints and the palm prints of the appellants were also taken for purposes of comparison. Finger print expert, Mr. Indarchand Sharma (PW-52) after enlarging and comparing the prints on the car with the admitted B prints of the appellants found that the palm prints on the frame of the door of maruti car were that of A-2. They are said to contain nine similarities between the print on the car and the admitted print of A-2.

Admittedly, there are no eye witnesses of the occurrence. The entire C evidence is circumstantial evidence. The prosecution culled out the circumstances from the evidence on record, proved them and relied upon them to establish its case. The trial court enumerated them and after due consideration held that they formed a complete chain so as to bring home the guilt of the accused without giving room to any other hypothesis consistent with the innocence of the accused. Accordingly, the trial court found the D appellants guilty and convicted then of offences punishable under Section 302 read Section 34 IPC and sentenced them to death subject to confirmation by the High Court; Section 449 read with Section 34 IPC sentenced them to suffer rigorous imprisonment for five years and to pay a fine of Rupees two hundred and in default, suffer one month rigorous imprisonment; Section 347 E read with Section 34 IPC, sentenced them to rigorous imprisonment for one year and to pay a fine of Rupees one hundred and in default, suffer one month rigorous imprisonment; Section 394 read with Section 34 IPC, sentenced them to rigorous imprisonment for seven years and to pay a fine of Rupees two hundred and in default, suffer one month rigorous imprisonment; Section 376 (2) (g) IPC, sentenced them to ten years rigorous imprisonment and to pay F a fine in Rupees two hundred and in default, one month rigorous imprisonment; Section 467/471 read with Section 34 IPC, sentenced them to rigorous imprisonment for five years and to pay a fine of Rupees five hundred and in default, one month's rigorous imprisonment; Section 201 read with Section 34 IPC, sentenced them to rigorous imprisonment for three years and to pay a G fine of Rupees two hundred, in default, one month's rigorous imprisonment. Further, A-2 and A-3 were convicted for offences under Sections 109, 467 and 471 but no separate sentence was passed on that count. It was, however, directed that substantive sentences shall run concurrently.

As already noted above, the High Court heard the reference with regard H to confirmation of the sentence of death awarded to the appellants along with

the appeals filed by them and after considering the entire evidence exhaustively, confirmed the judgment of the trial court except in respect of charge under Section 201 IPC.

In these appeals, various contentions were urged by Sri U.R. Lalit, the learned senior counsel appearing for Appellants Nos. 1 and 2 and Smt. Shilpa Malvankar , for appellant No. 3. On the submissions of learned counsel for the appellants, three points worth consideration arise:

(1) what, if any, would be the effect of:

(a) identification of the appellants by the witnesses for the first time in court [without participating in test identification parade]; and

(b) the alleged non-compliance of sub-section (4) of Section 100 and sub-section (3) and (4) of Section 166 Cr. P.C.;

on the judgment under appeal?

(2) whether the charge under Section 376 against the appellants has been made out; and

(3) whether the facts and circumstances of the case justify awarding of death sentence to the appellants.

Point No. 1 : This consists of two parts; Part-(a) deals with identification of the appellants by various witnesses and Part (b) is about not calling local panch witnesses at the time of conducting recovery panchnama and not taking the help of local police.

We shall take up Part (a) first. After their arrest, the appellants were identified by various witnesses; some identified them in test identification parade and subsequently in court but some identified them for the first time in Court. A-1 and A-2 were arrested on 28th July, 1992. The first test identification parade [TIP] in respect of them was conducted by Special Judge, Sri Khomane (PW-76) in the Yerawada Central Prison, Pune on July 30, 1992 where PW-26 identified A-1 and A-2. In that TIP, PW-30 and PW-31 also identified A-1. A-3 was arrested on 3rd August, 1992. He was produced before the court on 4th August, 1992 and magisterial custody was obtained for identification parade. The second TIP was conducted in the presence of PW-76 at Yerawada Central Prison on 5th August, 1992 wherein PW-46, PW-47, PW-55 and PW-69 identified A-3. On 26th August, 1992, the third identification parade was held in the presence of PW-76 at Yerawada Central

A Prison, Pune in which A-1 and A-2 were identified by PW-46, PW-47 and PW-69. Those witnesses identified the appellants in the court also. Further, PW-11, PW-19, PW-28, PW-36, PW-37 and PW-58 identified A-1 in court. A-2 was identified by PW-56, PW-57, PW-59, PW-60 and PW-61 in court. A-3 was identified in court by PW-56, PW-57 and PW-61. A-1 to A-3 were also identified by PW-29, PW-34, PW-42 and PW-45 in court. It may be noted here B that many of these witnesses did not participate in the TIP. So far as identification by these witnesses at the time of trial without their participation in the TIP is concerned, it was argued that their identification was worthless and, therefore, that part of the evidence should be excluded from consideration and thus a vital link in the chain of circumstances would be missing, so their C conviction based on such identification had to be set aside, Sri Shah, the learned senior counsel for the State of Maharashtra, contended that the test identification of an accused by a witness was for the purposes of ensuring that the prosecution was on the right track and to ensure that the memory of the witness did not fail on account of lapse of time from his first seeing the accused and this criteria would not apply to a witness who has known D the accused earlier, so their identification for the first time at the time of trial would not demolish the case of the prosecution. Mr. Lalit's attack is directed mainly against identification of the appellants by PW-29 and PW-34 for the first time in court. These two witnesses establish an important link in the chain of circumstance, that is, entry of the appellants in 'Rooman bungalow' E with muddy shoes on the night of 20th July, 1992 at about 8.30 P.M.

Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, *inter alia*, facts which establish the identity of any thing or person whose identity is relevant, insofar as they are necessary for the purpose, are relevant. So the evidence of identification F is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused person at his trial. The statement of the witness made in the court, afortiori identification by him of an accused is substantive evidence but from its very nature it is inherently of a weak character. The evidence of identification in the TIP is not a substantive evidence but is only corroborative evidence. It falls in the realm G of investigation. The substantive evidence is the statement of the witness made in the court. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the H witness identifying the accused at his trial in court. If a witness identifies the

accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such piece of evidence. But if a witness has known an accused earlier in such circumstances which lend assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of accused should not be relied upon as any other acceptable but uncorroborated testimony.

In *Budhsen & Anr.* v. *State of Uttar Pradesh*[1], the witness saw the assailants when they were running away after the alleged murder. Observing that the witness had only a mere fleeting glimpse and for identification one would certainly expect more firm and positive reference, this court did not consider it safe to rely on the TIP evidence as corroborative evidence of identification in court by the witness. About the identification of the accused in court, it was indicated that the same did not provide safe and trustworthy evidence to sustain conviction. This court also explained the nature of identification parade, its essentials and value.

In Rameshwar Singh v. *State of Jammu & Kashmir*[2], a three-Judge Bench of this Court while dealing with the question of the identification parade observed as follows:

> "it may be remembered that the substantive evidence of a witness is his evidence in court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial... The identification during police investigation, it may be recalled, is not substantive evidence in law and it can only be used for corroborating or contradicting evidence of the witness concerned as given in court. The identification proceedings, therefore, must be so conducted that evidence with regard to them when given at the trial, enables the court safely to form appropriate judicial opinion about its evidentiary value for the purpose of corroborating of contradicting the statement in court of the identifying witness".

Sri Lalit, learned counsel for the appellants, relied upon the observations of this Court in *Kannan and Ors.* v. *State of Kerala*[3] and argued that the

1. AIR 1970 S.C. 1321 = 1970(2) SCC 128.
2. AIR 1972 S.C. 102 = 1970(1) SCC 627.
3. AIR 1979 S.C. 1127 = 1979(3) SCC 319.

A evidence of identification of PWs. 29 and 34 is valueless as they were not called to identify the appellants in the test identification parade. In that case, the charge against the accused was that they entered into a conspiracy as members of naxalite party to raid the police station Kuttiadi. In the course of the raid, the police station was attacked and articles were burnt. No member B of the police station or staff was able to identify the raiders. Apart from the evidence of conspiracy, there was evidence of PW-25 who identified the appellants therein running away near the scene of occurrence after the raid took place in the police station. Firstly, his presence in the travelling bungalow was doubted and secondly it was pointed out that he identified the appellants C therein as persons who were running away near the place of occurrence and that the witness had admitted that he knew those two persons by face, yet he named them while identifying them in court. It was observed that there was huge crowd after the police station was attacked and if those two appellants were seen running away that by itself should not show that they had taken D part in the raid. It was on those facts, it was observed that where a witness identified an accused in the court for the first time, who was not known to him, his evidence was absolutely valueless unless there had been a previous test identification parade to test his power of observation and that the idea of holding test identification parade was to test the veracity of the witness on the question of his capability to identify an unknown person whom the E witness might have seen only once and that is no test identification parade was held, it would be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in court. The rational behind the observation of this court is that as the evidence of identification of an accused in court is inherently of a weak character, as such it requires F corroboration by way of test identification parade, so where the attending circumstances are such that the possibility of identifying the accused by the witness becomes bleak, as in that case, the witness only saw the appellants running away from the crowd, then such uncorroborated evidence cannot be relied upon to base a conviction. That judgment, in our view, did not lay down G as a principle of law that where the accused was known to the witness from an earlier period or where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to observe the distinctive features of the accused, his evidence of identification in the court cannot be given any credence merely because the witness was not H asked to identify the accused in the test identification parade.

In *Mohd. Abdul Hafeez* v. *State of Andhra Pradesh.*[4] the accused, along with others, was convicted under Section 392 read with Section 34 IPC. The victim did not give the name or description of the appellant therein in the first information report. This court observed that the total absence of any such description which would have provided a yardstick to evaluate the identification of the appellant at a later date by a victim would render his later identification weak. No test identification was conducted in that case so, it was held that the identification in court would hardly furnish any evidence against the appellant. Indeed, in that case, this court observed that the witness did not give the description of the accused in the first information report or before the identification and the evidence of his identification was found to be weak, in the absence of corroboration, for being acted upon.

The identification of appellants by PW-29, PW-34, PW-42 and PW-45 in court for the first time without prior identification by them in the test identification parade has been the subject matter of comment. Insofar as the identification of appellants by PW-42 and PW-45 are concerned, the trial court as well as the High Court had not accepted the same but the identification of appellants by PW-29 and PW-34 had been accepted by both the trial court as well as by the High Court and in our view rightly. We have already laid down above that the identification of the accused by a witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in court and that the absence of corroborative evidence by way of test identification parade would not be material. From the above mentioned aspect, the evidence of PW-42 and PW-45 has been rightly rejected by the trial court and the High Court as PW-42 is a rickshaw driver who had no opportunity to see closely the appellants whom he took to Rooman bungalow in the night. So also PW-45's identification of A-1 in court without his participation in the TIP has also no probative value inasmuch as he went to the shop of the witness as one of the customers and there was no specific reason why he should watch A-1 closely. But the same is not the position with PW-29 and PW-34. They were talking to the deceased Rohan Ohol at the time when the appellants came to Rooman bungalow. Indeed A-1 wished the deceased Rohan who introduced A-1 as Nitin Anil Swargey. Thereafter, A-1 introduced A-2 and A-3 to Rohan Ohol and PW-29 and PW-34. They talked together for about 7-8 minutes and on Rohan Ohol's saying them to sit inside the house, they left their soiled shoes in the verandah and entered the house. it can safely be presumed that had they not given the name and description of the appellants at the earliest when their statement

4. AIR 1983 S.C. 367 = 1983(1) SCC 143.

A was recorded by the police on 24th July, 1992, the defence in their searching and lengthy cross-examination would have brought on record omissions and contradictions with reference to their earlier statement given to the police. As such evidence of identification of the appellants at their trial by the said witnesses even without the corroboration of the identification parade, had been rightly relied upon by the trial court as well as by the High Court. We, B therefore, find no illegality in the judgment of the courts below in accepting their evidence of identification.

A faint attempt is also made to attack the identification of articles by PW-3 and PW-40 on the ground that some of the articles are common articles. C Both the trial court as well as the High Court rightly accepted the identification of articles by those witnesses. As the brother of the deceased Mohan Ohol and the daughter of the deceased, late Mrs. and Mr. Mohan Ohol, would certainly be in a position to identify the articles even if they are of common nature. This contention has been mentioned only to be rejected.

D The next aspect of this point remain to be considered. It pertains to the search and recovery of articles in alleged violation of the provisions of Section 100(4) and Sections 166(3) and (4) Cr.P.C.

It will be useful to read both sub-section (4) and (5) of Section 100 here:

"(4) Before making a search under this Chapter, the officer or other E person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any or them so to do.

F

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a G witness of the search unless specially summoned by it".

These provisions require the officer making the search under Chapter VII to call two or more respectable inhabitants of the locality in which the place to be searched is situate and if no such inhabitant of that locality is willing to be a witness to the search, then to call persons of any other of any H other locality to attend and witness the search and for that purpose, the

officer making the search is empowered to issue an order in writing to them or any of them so to do. The search has to be made in their presence and a list of things seized in the course of such search and of the places in which the things are found, is required to be prepared by the said officer and signed by such witnesses. it further provides that unless specially summoned by the court, such persons/witness in the search need not attend the court.

In *State of Maharasrtra v. P.K. Pathak*[5], the witnesses of the search were the custom officials themselves. The High Court held that as no independent witness of the locality was taken by the custom authorities to witness the search, no reliance could be placed on the searches or the recovery of the smuggled articles. The High Court also rejected the evidence of lone non-official witness on the ground that he was not a witness of the locality and on the ground that he has assented to accompany the police and custom officials to witness the various recoveries wherever he was taken by the police. Disapproving the view of the High Court of Bombay, this Court held that the fact that they were custom officials would be no ground to distrust their evidence; so also the fact that the non-official witness was approached by the police and the custom authorities to accompany them to witness the search would not by itself show that he was an unreliable or interested witness. Observing that his evidence was corroborated by the police officer of the rank of Sub-Inspector, this Court held that his evidence ought to be believed. It may be noted that the evidence of the witness of search was accepted notwithstanding the fact that he was not of the locality where the search took place and notwithstanding the fact he was brought by the police along with them for the purposes of search. The evidence, however, can be rejected if it suffers from any serious infirmities or if there is any inherent inconsistency in the testimony. It there is intrinsic merit in the evidence of the witness of search the same cannot be rejected solely on the ground that witness is not from the locality of search or that he was brought by the police with it. We are not persuaded to accept the contention that the evidence of Nandu Ambadas Jadhav (PW-6) cannot be accepted for the reasons that he was not a witness of the locality and that he was brought from Pune by the investigating officer to witness the search. He was one of the drivers of the cars in which the investigating team came to Bombay from Pune. For the sake of convenience, he was taken as a witness for search. We do not find any material in the cross-examination to discredit his testimony. The only ground of attack on the evidence of PW-6 that he was not from the locality as contemplated under sub-section (4) of Section 100 Cr.P.C. fails

5. AIR 1980 S.C. 1224 = 1980(2) SCC 259.

A because in our view a witness of search other than the one from the locality even if he has been brought by the investigating agencies along with them cannot be disbelieved only on that ground and we do no find anything in his evidence to discredit his testimony.

Section 166 is an enabling provision, which enables an officer in charge B of a police station to require another to issue search warrant. Sub-section (3) of Section 166 provides that whenever there is a reason to believe that by requiring an officer in charge of another police station section to cause a search to be made under sub-section (1) of that section might occasion delay and result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for the investigating officer of team making C investigation under Chapter XII to search or cause to search any place in the limits of another police section in accordance with the provisions of Section 165 Cr.P.C. as if such place were within the limits of his own police station. Sub-section (4) requires that after conducting the search as contemplated under sub-section (3), the officer shall forthwith sent a notice to the officer D in charge of the police station within the limits of such place and a copy of the list, if any, prepared under Section 100 to that police station and to the nearest Magistrate empowered to take cognizance of the offence along with the copies of the record referred to in sub-sections (1) and (3) of Section 165. When the investigating officer (PW-83) was questioned on this aspect, he replied that he wrote two letters to the police station in which the articles were E seized. However, what is pointed out before us is that the copies of the letters sent to the other police station in whose jurisdiction the search and seizures were made, had not been produced. We find no substance in this submission. The witness stated that he has sent the letter to the concerned police station, therefore, the presumption under Illustration (e) of Section 114 of the Evidence F Act would arise and the official acts would be deemed to have been performed regularly. There is thus no non-compliance of the aforementioned provisions of the Code of Criminal Procedure.

Apropos the recovery of articles belonging to the Ohols family from the possession of the appellants soon after the robbery and the murder of the G deceased (Mr. Mohan Ohol, Mrs. Ruhi Ohol and Mr. Rohan Ohol) which possession has remained unexplained by the appellants, so the presumption under Illustration (a) of Section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore, be that the appellants and no one else had committed three H murders and the robbery.

In *Biju* v. *State of Madhya Pradesh*[6], the appellant gained access to the house of the deceased who was childless on the pretext that by sorcery, he would remove the evil effect which would enable him to beget children. On 20th January, 1975, he took the deceased to a nearby nala on the pretext of performing some religious rites, killed him there and threw his dead body in the nala. In the same way, he killed another lady of the family, named Smt. Fulkunwar, one of the wives of the deceased. He then went to the house of the deceased and killed his mother Smt. Bhagwanti and his nephew Mr. Rambakas while they were sleeping there. he ransacked the house, broke open the boxes, took away number of articles including transistor, watch, torch, clothes, ornaments etc. On the next day, the neighbour of the deceased and his nephew finding unusual calm in the house peeped inside the house and found the dead bodies of Smt. Bhagwanti and Mr. Rambakas. On 28th January, 1975 the appellant was arrested and at his instance the stolen articles were recovered from him. They were put for identification and were identified by the surviving wife of the deceased. On those facts, the learned Sessions Judge convicted the appellant for offence under Sections 302 and 394 IPC. The High Court confirmed the conviction and sentence, on appeal. On further appeal to the Supreme Court, by special leave, it was held that the offences were committed on the night intervening January 20 and 21 and the stolen property was recovered from the house of the appellant or at his instance on January 28, 1975. The accused did not explain about the possession of those articles. It is observed that the question whether a presumption should be drawn under Illustration (a) of Section 114 of the Evidence Act is a matter which depends on the evidence and circumstances of each case and that the nature of the stolen articles, manner of their acquisition, nature of evidence about its identity, the manner it which they were dealt with by the appellant, the place and circumstances of their recovery, the length of intervening period, the ability or otherwise of the appellant to explain his possession are factors which should be taken into consideration in arriving at a decision and held that there was ample justification for reaching the inevitable conclusion that it was the appellant and no one else who had committed four murders and the robbery and that the presumption uner Illustraction (a) of Section 114 was attracted.

In *Gulb Chand* v. *State of Madhay Pradesh*[7] the question which fell for consideration of this Court was whether presumption under Illustration (a) of Section 114 of the Evidence Act as to commission of murder and robbery by

6. 1978 (1) S.C.C. 588.

7. AIR 1995 S.C. 1598 = 1995 (3) SCC 574.

A the accused would be attracted. The appellant was charged under Sections 302, 394 and 396 IPC for having committed the murder of Kapuriyabai on the intervening night of 23rd and 24th April, 1979. The trial court acquitted them of the said offences but convicted him under Section 380 IPC. The High Court allowed the appeal of the State against the said judgment of the learned Sessions Judge. There the appellant was arrested after four days of the B occurrence. On search of his house, the stolen articles were recovered. In the test identification parade of the articles, the ornaments were identified as belonging to the deceased by the wintnesses. Relying on the judgment of this court in *Tulsiram* v. *State*[8], it was held that the presumotion under Illustraction (a) of Section 114 of the Evidence Act had to be read along with the important C time factor and if ornaments of the deceased were found in possession of a person soon after the murder, the presumption of guilt in respect of murder by the possessor of the stolen goods also might be permitted. But if serveral months have expired, the presumption could not be perimtted to be drawn. As in that case some of the ornaments of the deceased were sold by the appellant within 3-4 days and some others were recovered from his house, D such close proximity of the recovery was held to be in important time factor. It was held on the facts of that case, that murder and rebbery had been proved to be the integral parts of the same transaction and therefore, the presumption would arise under Illustration (a) of Section 114 of the Evidence Act that not only the appellant committed the rebbery but also the murder E of the deceased. Here the decision of this *Court in Union Territory of Goa* v. *Beaventura D'Souza*[9] may be noticed. the facts of that case were that the respondents were tried for offences under Sections 463, 307, 397 read with Section 34 IPC. The allegation was that in the intervening night of 3rd and 4th Septemper, 1980, the respondents committed the murder of two ladies and committed rebbery by stealing articles belonging to them. There was also an F injured witness. The case rested on circumstantial evidence. The circumstance relied upon was recovery of articles at the instance of the accused person. The trial court raised the presumption under Illustration (a) of Section 114 of the Evidence Act and convicted them but the High Court acquitted them. On appeal by special leave, this Court pointed implicate out that the third person who was injured did not implicate any one of the accused for murder. This G court took note of the fact that the High Court had doubted the overnight stay of the accused in the house of the victims; the recovery of articles in that case was effected after one month of the occurrence and noticing the distinguishing features of that case, nemely that there was no proximity of

8. AIR 1954 SC1.

H 9. AIR 1993 SC 1199 = 1993 Suppl. (3) SCC 305.

time and that the injured witness did not implicate them, it was held that there were no such circumstances to connect the accused with the murder. Therefore, the presumption under Illustration (a) of Section 114 of the Evidence Act would be only to the extent of holding the accused quilty under Section 411 IPC. The distinguishing factors of this case, as noted above, speak for themselves.

Here, we also refer to other contentions of the learned counsel.

The question of the time of death of the victims was debated by the learned counsel for the appellants very meticulously with reference to *rigor mortis*. The learned counsel submitted that the post-mortem reports would show that the death had occurred between 24 and 72 hours; it was also noted that the injuries were recent and that *rigor mortis* had passed off in the upper extremities and it was present in the lower extremities; therefore, the murder could have taken place at any time in the morning of 22nd July or in the intervening night of 21st and 22nd July and the presence of the appellants during that period in Rooman bungalow was not established. The trial court and the High Court found no substance in this submission. In our view also, this submission is deviod of any merit. After the dead bodies were sent for post-mortem examination, PW-73 and PW-74 conducted autopsy on the dead bodies on 23rd July at about 10.30 A.M. and thereafter. The post-morten reports clearly indicate that the death might have occurred between 24 and 72 hours and that would corroborate the prosecution case that the murders were committed in the intervening night of 20th and 21st July and the presence of appellants between 8.30 P.M. on 20th July and 8.00 or 8.30 A.M. on 21st July, as noted, has already been established. In view of this position, the age of the injuries 'as recent' would mean inflicted at or about the time of death.

Smt. Shilpa made yet another submission that the evidence detected in connection with different crimes could not have been used against the appellants, particularly the third appellant. This submission is also devoid of merit. The germane question is not as to in connection with what offence during the investingation the evidence had come to light, but whether the evidence so collected is relevant and admissible to establish the charge in the present case and it is not the submission that the evidence so let in was irrelevant or inadmissible. This submission is without any substance.

In this case, the trial court as well as the High Court have enumerated all those circumstances which have been established and which form a complete chain so as to bring home the guilt of the accused without giving

A room to any other hyopthesis except the guilt of the accused and those circumstances are inconsistent with the innocence of the deceased. It may not be necessary to repeat them here as the thrust of the arguments is to break the chain of circumstances, if we may say so, with reference to the identification of the appellants by PW-29 and PW-34 and of the articles by PW-3 and PW-40 and by challenging the recovery of the articles on the ground of violation B of Section 100(4) and Section 166(3) and (4) Cr. P.C. We have negatived the contentions on those aspects. We may observe here that this is not a case where a single fact forms a link in the chain of circumstances. It is a case where there are plethora of circumstances which are plenty and overlapping and are so twined to form a stout cord which rope in the appellants in such C a way that the escape from the conclusion of their guilt becomes difficult, may, impossible. However, we may observe that we find no materail to confirm the sentence for offences under Sections 467 and 471 IPC, we, therefore, confirm the conviction of the accused recorded by the trial court and confirmed by the High Court in respect of all court and confirmed by the High Court in respect of all other charges; the conviction of the appellants under Section D 376 IPC will be considered under Point No. 2.

Point No. 2 : This relates to the charge of offence under Section 376 against the appellants. The presence of the appellants in the Rooman bungalow on the night of 20th July, 1992 has been established by the evidence of PW-29 and PW-34. There leaving the Rooman bungalow in the maruti car of the E Ohol family in the morning of 21st July as spoken to by PW-22, PW-24 and PW-26 is also proved. In the morning of 21st July, none of the three members of the Ohol family, Mr. Mohan Ohol Mrs. Ruhi Ohol in the and Mr. Rohan Ohol came out of the houses. They were not found by those who ought to have seen them on 21st and/or 22rd. PW-29 did not find Rohan Ohol in the F college on 21st and 22nd July. The family did not go to Ruby Hospital where mother of Mrs. Ruhi Ohol was undergoing treatment and where they were going daily. Mr. Mohan Ohol did not attend the office as spoken to by PW-26, PW-30 and PW-31. PW-26 daily used to see decased Mohan Ohol between 7.00 and 7.30 P.M. but on those dates he did not find him. PW-22 (Milkman) and PW-23 (Newspaper man) did not see them on 21st and 22nd July and G indeed, nobody took the milk and the newspaper on the morning of 21st and 22nd July. PW-35 (Maid servant) who came on 21st at 4.00 P.M. as directed by Mr. Mohan Ohol found the house locked. In the evening, she sent her children who also found the house locked though the lights were 'on'. On 22nd July, when PW-3, his son Viren and his niece Rodha came to the house, H at their instance PW-21 (Watchman) looked into the house and found that the

dead bodies were lying in the tub in the bath room. Therefore, it becomes clear that in the intervening night of 20th and 21st July, Mrs. Ruhi Ohol was sexually assaulted and was put to death. PW-74 (Doctor) who conducted authopy issued post-mortem certificate (Exh. 278). The following injuries insofar as they are relevant to the charge Section 376 are as follows;

> "(3)Abrasion on upper third of LT. Thigh. 6. below LT. Anterior Illiac spine, oblique in direction measuring 3. Red in colour.
>
> (24)Cresentric abrasions on medial side of LT thigh upper 1/3rd lateral to labia majoras in an area of 4 x 3, each abrasion measuring 1/3. x 1/4. Vital reaction with swelling and redness present.
>
> (28)Abrasions on RT cheeks 1 and 1/2 lateral to angle of mouth verying in size from 1/3/. x. 1/2. x 1/4. in between at places skin is intact. No vital reaction present. Post-mortem in nature.
>
> (29)Abrasions LT Cheeks smaller region in the area of 2 x 1 measuring x 1/4 in between at places skin is intact and vital reaction is absent. Post-mortem in nature."

He noted 38 injuries and four internal injuries. In his statement, PW-74 referred to Column 15 of Exh. 278 which reads as follows :

15.	Injuries to external genitals. Indication of purging.	Injuries menioned in Supplement Reddish Fluid through vagina purging present. Auxillary Hairs shaved, pubic Hair about 1/4 cm.

He stated the reddish fluid the vagina was as a result of external injury No. 23, namely laceration on posterior wall of vagina 1 and 1/2 from vervix measuring 1/3 x 1/2 mucosal deep with swelling and ante-mortem blood clots. The said injury No. 23 was due to sexual assault on the vagina. He stated that the said injury was as a result of great violence and opined that a woman of 45 years or more who had given birth to two childern and accustomed to sexual intercourse would not suffer the injury of the kind noted due to simple sexual assault. PW-74 has also opined that injuries Nos. 3 and 24 suggest that efforts were made to separate the thighs in order to facilitate penetration. Though he answered the suggestion in the affirmative that if while standing she is stripped down and is pushed, as a result of assault on her in spite of resistance he comes in contact with hard and blunt object like floor then all the abrasions and contusions to the extremities, are possible but has pointed

A out that semi-circular abrasions would not be possible as such abrasions are possible only by nails in view of crescentic shaps. He also opined that considering the injuries on her dead body there was an assault by more than one person and the nature of assault was very violent and that if there was a pressure on the neck, mouth and nose, the victim would not be able to screma. He further opined that if an adhesive tape is fixed upon the mouth B and lips and subsequently tied to the back side of the head, then it is improbable that there would be even a whisper. It is also in his evidence that if an adhesive taps is fixed on the month, lip and ears and tied at the back of the head of the victim then in such an event not only the ornament of the ear of the victim but also her superficial skin layer would get attached to he C adhesive tape along with the ornaments. Injuries Nos. 28 and 29 showed abrasions on right and left cheek and the skin underneath at places is intact and at other places it is removed.

It is submitted that this part of the evidence of PW-74 could not be given any weight as in the post-mortem certificate (Exh. 278) he did not D express any opinion about the sexual assault and that it was only in the statement given in court that he spoke about the sexual assault. We are afraid, we cannot accede to this submission. This contention was not accepted by the trial court as well as by the High Court. It is true that in Exh. 278 no opinion is expressed about sexual attack but what the doctor had stated in court was on the basis of the notes of the post-mortem and the injuries E already noted in Exh. 278 (post-mortem certificate). So this cannot be said to be an after-thought. There is a strong additional circumstance which conclusively points to the sexual assault by the appellants, i.e. presence of stains of semen on the bed sheet in the master bad room of Rooman bungalow where Mr. and Mrs. Ohol were sleeping. The reports of the chemical analysts F show that the blood group of Mr. Mohan Ohol. Mr. Rohan Ohol and Mrs. Ruhi Ohol was "B", so the possibility of Mr. Mohan Ohol having sexual intercourse with Mrs. Ruhi Ohol on that night can be safely ruled out. The bed sheet contained stains of semen which are of the blood group of 'A'. 'AB' and 'O'. The reports of the analysts further show that blood group of A-1 is 'A'. blood group of A-2 'AB' and blood group of A-3 is 'O'. Thus. G it is clear that stains of seman found on the bed sheet, opined to be of the blood group of 'A', 'AB' and 'O', can only be of A-1 A-2 and A-3 respectively. On the ground that in Exh. 278, PW-74 did not express any opinion the sexual assault we are not persuaded to brush aside his testimony and opinion based on injuries already noted in the post-mortem certificate (Exh. 278.). The charge H under Section 376 IPC against the appellants is proved by the circumstanial

and medical evidence. In our view, the trail court and the appellante court have rightly found the appellants guilty of the above said offence and we find no reason to take a different view of the matter.

Point No.3 : In regartd to the quantum of punishment to be awarded to persons found guilty of offences dealt with in the India Penal Code (for short, 'the Code'), the scheme of the code is, it confers wide discretion on the cort in the matter of awarding appropriate punishment by prescribing the maximum punishment and in some cases both the maximam as well as the minimum punishment for the offence. Though no general guidelines are laid down in the code for the purpose of awarding punishment, generally the judicial discretion of the court is guided by the principle that the punishment should be commensurate with the gravity of the offence having regard to the aggravating and mitigating circumstances vis-a-vis an accsed in each case. The obligation of the court in making the choice of death sentence for the person who is found guilty of murder is onerous indeed. But by sentencing a person to death, the court is giving effect to the command of law which is in public interest whereas in committing the murder or being privy to commit murder, even if it be a vengeance for another murder, the convict is violating the law which is against public interest. However, on the question of awarding the sentence for the offences for which life imrisonment as well as the death sentence is prescribed, sub-section (3) of Section 354 Cr.P.C. enjoins that in the case of sentence of death, special reasons for such sentence shall be started. The provisions of the said section fell for consideration in *Bachan Singh* v. *State of Punjab*[10]. The court pointed out the change in the policy of sentencing thus :

> "Section 354(3) of the Code of Crminal Procedure, 1973 marks a significant shift in the legislative policy underlying the Code of 1898 as in force immediately before April 1, 1974, according to which both the alternative sentence of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code were normal sentences. Now, according to the changed legislative policy which is patent on the face of Section 354(3) the normal punishment for murder and six other capital offences under the Penal Code is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.

For acertaining the existence or absence of special reasons in the

10. AIR 1980 SC 898 = 1980 (2) SCC 684.

A context, it was observed that though, in a sense, to kill is to be cruel and, therefore, all murders are crule, yet such cruelty may very in its degree of culpability and it is only when culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist. It was emphasised that life imprisonment was the rule and death sentence was an exception and that death sentence must be imposed only when life B imprisonment appers to be an altogether inadequtate punishment having regard to the relevant circumstance of the crime and provided that the option to sentence of imprisonment for life cannot be conscientiously execised having regard to the nature and circumstances of the crime and all the relevant circumstance.

C

In *Machhi Singh* v. *State of Punjab*[11], a three-Judge Bench of this Court having considered the guidelines laid down in the above noted case added that the following two questions might be asked and answered as a test to determine the rarest of rare case in which death sentence could be inflicted:

D

> "(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 circumstance of the crime such that there is no altervative but to impose death sentence even after according maximum weightage E to the mitigating" circumstances which speak in favour of the offender."

It may, however, be noted here that in *Allauddin Main* v. *State of Bihar*[12], it was laid down that unless the nature of the crime and the circumsantces of the offender reveal that the criminal was a menace to the society and the sentence of life imprisonment would be altogether inadequate, F the court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only.

It will also be relevant to note here that the number of victims would not per se bring the case as falling in the rarest of rare cases. *See Shamshul* G *Kamwar* v. *State of U.P.*[13] *and Sheikh Ishaque* v. *State of Bihar.*[14]

These principles have been applied in various judgments of this court

11. 1983 (3) SCC 470.

12. AIR 1989 SC 1456 = 1989 (3) SCC 5.

13. AIR 1995 3 SC 1748 = 1995 (4) SCC 430.

H 14. (1995) Current Criminal Reports 48 = 1995 (3) SCC 392.

thereafter and it is unnecessary to multiply the cases here. Whether the case is one of the rarest of the rare case is a question which has to be determined on the facts of each case. Suffice it to mention that the choice of the death sentence has to be made only in the rarest of the rare case and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent cirminal and menace to the society and; where the crime is committed in an orgainsed manner and is gruesome, cold blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation, the case would present special reason for purposes of sub-section (3) of Section 354 of the Criminal Procedure Code.

Now reverting to the facts of this case, the mitigating circumstances in favour of the appellants are that A-1 is a qualified civil engineer and a married person having a son of four years old, his parents are serving at Spriritual Life Centre, Narsapur for the last thirty six years; A-2 is 'Thaneshri' and 'Vasaishri', titles conferred on him for his body building; his marriage is a love marriage performed against the will of his parents as well as the volition of the parents of the wife and there is nobody of look after his wife and their two daughters and two sons of whom one is 1½ years old; A-3 pleaded that he is having a sick father and that he is only 27 years' old and an unmarried person. They are having no adverse antecedents in the sense of being habitual cirminals. The aggravating circumstances are that A-1 is no other than the nephew (daughter's son) of the deceased Mr. Mohan Ohol. Because of the relationship, he gained access inside the house for him and for his friends; they enjoyed the hospitality of Ohols' family is it was found that there were five used plates in the sink which indicate that five had food; may be, all the three appellants and the couple or two of them. The victims were unarmed; the heinous crime was committed for gains, namely to rob the valuables of the Ohols faimly; to give effect to their nefarious plans the unholy alliance of the appellants not merely robbed the family of the valuables but killed all the three members of the family then in the house and above all committed sexual assault on Mrs. Ruhi Ohol. It cannot but be a dastradly act for A-1 to commit rape of Mrs. Ohol, who is none other than the wife of his maternal uncle and perhaps as old as his mother.

Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for, the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the court to predict that the appellant would

A not commit criminal act of violence or would not be a threat to the society. A-1 as 35 years' old, A-2 is 35 years' old and A-3 is 25 years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be reuled out. Form the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that role of one has been more culpable in degree than B that of others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" case. it would serve the ends of justice if the capital punishment is commuted into life imprisonment. Accordingly, we modify sentence awarded bt courts below under Section 302 read with Section 34 from death to life imprisonment. The sentences for the C offences for which the appellants are convicted, except under Section 376(2)(g) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(g) IPC consecutively, after serving sentence for other offences.

The appeals are allowed in part, as indicated above.

D A.K.T. Appeals partly allowed.