HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
DIVISION BENCH : Hon'ble Shri Justice S.C. Sharma and Hon'ble Shri Justice Ved Prakash Sharma
CRRFC No.2/2016

State of M.P.
Vs.
Kailash S/o Madanlala Malviya

-x-x-x-x-x-x-x-x-x-x-x-

Cr.A. No.996/2016

Kailash S/o Madanlala Malviya
Vs.
The State of M.P.

Shri Milind Phadke, learned Public Prosecutor for the State.

Shri Gopal, Hardia, learned counsel for the accused-Kailash.

-x-x-x-x-x-x-x-x-x-x-x-

O R D E R

(Passed on 20th day of October, 2016)

Per : Ved Prakash Sharma, J.

The Reference made under Section 366 of the Code of Criminal Procedure, 1973 (for short 'the Code') by IInd Additional Sessions Judge, Ujjain for confirmation of death sentence imposed against Kailash – the appellant, on his conviction for offence under Sections 302 and 382 of Indian Penal Code (for short 'IPC'), vide judgment dated 04/05/2016 rendered in S.T. No.18/2016 and Criminal Appeal No.996/2016 preferred by the convict against the same judgment challenging conviction and sentence have been heard together and are being disposed of by this common judgment.

02. The appellant in his examination under Section 313

of 'the Code' has not disputed that Sadanand Dikshit (P.W.1), Madanlal Pawar (P.W.2), Devi Singh (P.W.3) and Ruwab Khan (P.W.5), all residents of Saraswati Colony, Tarana, Distt. Ujjain, knew the appellant as well as Chandrakanta (deceased) since before the date of alleged occurrence dated i.e. 27/10/2015. It has further not been disputed that appellant was arrested vide Ex.P/3 on 28/10/2015 in post midnight hours.

03. The prosecution story, as unfolded before the learned trial Court, briefly stated, is that on 27/10/2015 around 7.15 pm, Devi Singh (P.W.3), the next door neighbour of Babulal, resident of Saraswati Colony, Tarana, Distt. Ujjain heard cries coming out from the house of Babulal. He told his neighbour Sadanand (P.W.1) and other persons of the locality in this regard. Thereupon, Sadanand (P.W.1), Madanlal Pawar (P.W.2), Ruwab Khan (P.W.5), Deepak Limidiya (P.W.6), Jagdeesh (P.W.8), Deepak Patidar (P.W.9), Rajesh Kharetiya (P.W.10), Sumit Dikshit (P.W.11), all neighbours of Babulal, reached near his house and found it bolted from inside. The door of the house was then bolted from outside also by then so as to prevent apprehended escape of the assailant(s) from the house. In the meantime, the appellant, who was inside the house, jumped out from the rear window of the house and ran away towards the agricultural fields. However, he was chased by Sadanand (P.W.1), Jagdeesh (p.W.8), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11) and was ultimately apprehended some 300-400 meters away near the agricultural field and brought back near the house of Babulal. By this

time, Devi Singh (P.W.3) had already proceeded to Police Station-Tarana, situated some 2 kilometers away from the place of occurrence. On reaching the police station, he found that police officials have already proceeded to the spot. The door of Babulal's house, which was bolted from inside, was broke open by Kulwant Joshi (P.W.18), the then Station House Officer, Police Station Tarana, who by that time had reached there. He found the body of Chandrakanta inside the house lying in the pool of blood in a seriously injured condition. She was immediately rushed to Civil Hospital, Tarana, however, was declared brought dead by the doctors. Around 12 mid night, First Information Report (Ex.P/1) and merg report (Ex.P/6) was registered regarding this incident at Police Station Tarana. The appellant being already in police custody, was arrested vide memo Ex.P/3.

04. On being searched by Kulwant Joshi (P.W.20), a pair of silver '***Payajab',*** a pair of golden tops, a mobile phone, driving licence of appellant along with his bloodstained ***'Banyan'*** Pant and ***'Kurta'*** were seized from the appellant, vide seizure memo Ex.P/4.

05. Next day on 28/10/2015, the inquest proceedings were held by Kulwant Joshi (P.W.18) on the dead body and vide inquest report (Ex.P/6), it was found that Chandrakanta died because of multiple injuries on her head and chest. The dead body was sent for post-mortem examination. On 28/10/2015, a team of three doctors headed by Dr. Deepak Pipal (P.W.12) conducted autopsy on the dead body in Civil

Hospital, Tarana and vide post-mortem report (Ex.P/12) found following 15 ante-mortem injuries including 4 stab wounds, 5 incised wounds and 6 lacerated wounds on the person of the deceased:

i. Stab wound at the left side of chest at 2nd intercostal space piercing the intercostal muscle, pleura and lung. Pleura cavity containing blood. The size of wound 2.5 cm x 0.5 cm depth up to the lung parenchyma. Eccymosis present.

ii. Stab wound 2 cm lateral to injury No.1 size 2.5 cm x 0.5 cm piercing the intercostal muscle and pleura and lung parenchyma. Eccymosis present.

iii. Stab wound at intercostal space at left side of chest at mid clavicular line; underneath tissues cutted, blood present. Eccymosis present, thoracic cavity full of blood; size of the wound - 2 cm. x 0.5 cm x up to lung tissue.

iv. Incised wound just lateral to thyroid cartilage on left side vertical; underneath tissue cutted; blood present; size of the wound 2 cm. x 0.5 cm.; neck tissue cutted; blood present.

v. Stab wound on right side of chest vertical 2.5 x 0.4 cm., blood present. Underneath tissue cutted the Rt. atrium having cut marks.

vi. Four incised wounds at the neck above the sternal notch. One above the other three are in vertical plane. One just left the three; size are variable 2cm. x 0.5 cm. to 1.5 cm. x 0.5 cm., depth are also variable. Blood present, eccymosis present.

vii. Perforating wound (Rt.) cheek 2.5 cm. X 0.4 cm. communicated to the oral cavity; blood present. Eccymosis present.

viii. Lower lip having two incised wounds horizontal one above the other having space of 0.5 cm., size is 2.5 cm. X 0.4 cm., the lower one 1.5 cm. x 0.5 cm, blood present, eccymosis present.

ix. Incised wound over the chin, 2 cm. x 0.3 cm., blood present skin deep.

x. Irregular laceration over the left side of temporal region badly crushed; underneath bone fractured, eccymosis present. Dry blood present in the area of 12 cm x 0.5 cm.

xi. Lacerated wound on right side of sub-mandibular region, size 4.6 cm. x 2.8 cm. Horizontal; skin and subcutaneous tissue - Blood present. Eccymosis present.

xii. Lacerated wound just medial to injury no.ii 3.3 cm. x 2 cm., skin & sub-cute deep, tissue torn, eccymosis present.

xiii. Lacerated wound over the left side of ala of nose 0.8 x 0.3 cm vertical, dry blood present.

xiv. Scalp contused at right side parietal region dipose, scalp eccymosed.

xv. Lacerated wound at parieto-temporal region right side coronally placed 6 x 0.5 cm., scalp deep. Hairs are severally smudged with blood.

06. The doctors opined that Chandrakanta died due to shock and hemorrhage because of multiple injuries sustained by her. The viscera was preserved and sealed for chemical

examination. The clothes worn by the deceased were also sealed separately. The seized articles including the clothes worn by the appellant and the deceased as well as the knife and the stone seized from the place of occurrence were sent for forensic examination. The viscera was sent to Forensic Laboratory, Indore, while remaining articles were sent to Forensic Laboratory, Sagar. The Scientific Officer of FSL, Sagar, vide report Ex.P/20 on the basis of DNA profiling opined that blood found on the clothes recovered from the appellant as well as the blood seized from the spot and also found on the clothes worn by the deceased was of same characteristics and of female origin.

07. During the course of investigation, spot map (Ex.P/2) was prepared; a pair of bangles, one ***'kardhani'***, one '***mangalsutra'***, one ***'birchhi'*** (for 3 fingers), a cup of tea, traces of blood lying on the floor, a hair clip, bloodstained piece of stone (***khareda***) having some hairs sticked on it, were seized from the spot, vide seizure memo Ex.P/5. Devnarayan (P.W.4), Patwari of concern area, prepared site map (Ex.P/9). The ornaments recovered from the possession of the appellant were put to identification parade and were duly identified by Anita (P.W.13) - the daughter of deceased Chandrakanta as belongings of the deceased. On the basis of appellant's disclosure made on 28/10/2015, vide disclosure memo (Ex.P/11), a bloodstained knife was recovered by Kulwant Joshi (P.W.18) vide seizure memo (Ex.P/10) on being produced by Kailash lying near the boundary of agricultural field. The knife and stone were sent for opinion to Dr. Deepak

Pipal (P.W.12), who, vide report (Ex.P/5), opined that injuries found on the person of the deceased could have been caused by stone and the knife.

08. After usual investigation, a charge-sheet was laid before the Competent Magistrate, who in turn, committed the case to the Court of Sessions from where, the same was made over for trial to 2nd Additional Sessions Judge, Ujjain. The accused-appellant was charged for offence under Section 302 & 382 ÍPC' for committing murder of Chandrakanta and robbing her of valuable silver and gold ornaments by causing fatal injuries to her. The appellant abjured the guilt and claimed to be tried pleading total innocence. To bring home the charge, the prosecution examined as many as 20 witnesses including Sadanand (P.W.1), Madanlal Pawar (P.W.2), Jagdeesh (P.W.8), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11) - who allegedly chased and apprehended the appellant. Dr. Deepak Pipal (P.W.12) is the autopsy surgeon while Kulwant Joshi (P.W.18) has conducted the investigation. Apart this, documents Ex.P/1 to P/20 were also marked in evidence. None was examined in defence though Ex.D/1 & D/2 - the previous statement of Sadanand (P.W.1) and Madanlal Pawar (P.W.2) were marked during their examination.

09. The appellant in his examination under Section 313 of 'the Code' denied all the incriminating circumstances appearing against him in the prosecution evidence and submitted that he is totally innocent and that on the date of

occurrence he was under the influence of liquor.

10. The learned trial Court on appreciation of evidence found that Chandrakanta's death was homicidal in nature as she died of 15 injuries caused to her. The learned trial Court further found that though there is no ocular evidence that the appellant committed murder of the deceased, however, on the basis of chain of incriminating circumstances, it is proved beyond reasonable doubt that he had committed the murder of Chandrakanta while committing robbery. Accordingly, he was convicted for charges under Section 302, 382 & 397 ÍPC'. The learned trial Court on consideration of facts and circumstances of the case was of the view that the instant case comes within the category of rarest of rare case. Accordingly, capital sentence was imposed against him under Section 302 ÍPC'. Apart that he was further sentenced to 10 years RI with fine of Rs.1000/- under Section 382 ÍPC' and 10 years RI and a fine of Rs.1000/- under Section 397 ÍPC' with default stipulation. The case was referred this Court under Section 366 of 'the Code' for confirmation of the death sentence. The appellant also preferred an appeal challenging the sentence.

11. Challenging the conviction and sentence, the appellant has submitted that the learned trial Court has not appreciated the evidence on record properly and that material omissions, anomalies and contradictions have been ignored. The First Information Report Ex.P/1 was lodged after a delay of four hours and the delay was not explained. It is also contended that the alleged occurrence took place after sunset,

therefore, due to paucity of light, it was not possible to identify the assailants. Lastly, it is submitted that even if he is found guilty, the capital sentence imposed against him is not at all justified in the facts and circumstances of the case because the instant case does not come within the category of rarest of rare case.

12. Per contra, learned counsel for the State has submitted that the learned trial Judge on due consideration of the prosecution evidence available on record has rightly convicted the accused. It is further submitted that the appellant had inflicted as many as 15 injuries by knife and stone piece on the deceased in order to robe her, therefore, the extreme penalty of death sentence is reasonable in the facts and circumstances of the case and that the case comes within the category of rarest of rare cases.

13. Heard the learned counsel for the parties and perused the record.

14. The following points arise for consideration before us:

i. Whether conviction recorded by the learned Trial Court against the appellant is sustainable?

ii. If the aforesaid question is answered in the affirmative, then, obviously, the next question would be whether the extreme penalty of death sentence is justified in the facts and circumstances of the case as well as in the light of various judicial pronouncements of the apex Court?

15. It has come in the testimony of Madanlal Pawar (P.W.2) and Investigating Officer – Kulwant Joshi (P.W.18) that there is no eyewitness of the alleged incident. Thus, the case of the prosecution with regard to complicity of the appellant in the alleged occurrence is based solely on circumstantial evidence. The five golden principles, otherwise known as the ***'Panchsheel'*** with regard to proof of a case based on circumstantial evidence which have been stated by the apex Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622*** are as follows :

> **"(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;**
>
> **(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;**
>
> **(iii) the circumstances should be of a conclusive nature and tendency;**
>
> **(iv) they should exclude every possible hypothesis except the one to be proved; and**
>
> **(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.**"

16. In ***Aftab Ahmed Ansari vs. State of Uttranchal, AIR***

2010 SC 773 equivalent to ***2010 (2) SCC 583*** the apex Court has considered about the mode and manner as well as the approach to be adopted while dealing with a case of circumstantial evidence. The relevant part whereof runs as under :

> "In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". ……... However, in applying this principle, distinction must be made between ***facts called primary or basic*** on the one hand and ***inference of facts to be drawn from them*** on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface

> of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

17. The evidence adduced by the prosecution has to be considered in the light of the aforesaid legal principles so as to examine as to whether the findings arrived at by the learned trial court with regard to proof of the circumstances as well as the fact that the complete chain of circumstances is established exclusively pointing towards the guilt of the accused, are in accordance with the evidence on record and relevant legal principles?

18. The learned trial Court in para-58 of the impugned judgment has taken into consideration the following incriminating circumstances with regard to culpability of the appellant:

> i. That, the appellant, who tried to run away from the spot by jumping out from the window of the house of deceased, on being chased, was apprehended just after the occurrence by Sadanand (P.W.1), Madanlal Pawar (P.W.2), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11) nearby the place of ocurrence.
>
> ii. That, soon after the occurrence, the appellant was found in possession of ornaments of the deceased which were seized by the police vide seizure memo Ex.P/4 and were duly identified by Anita (P.W.13) as belonging to the deceased.
>
> iii. That, on the basis of disclosure made by appellant

under Section 27 of the Evidence Act, vide memo Ex.P/27, on 28/10/2015, the knife used in the alleged occurrence was recovered on 29/10/2015, vide seizure memo Ex.P/10.

iv. That, on DNA profiling the characteristics of blood found on the clothes worn by the appellant, when he was apprehended, and of the blood found on the clothes worn by the deceased, at the time of the occurrence, were identical and of female blood.

19. The learned trial Court on appreciation of evidence found all the aforesaid circumstances proved beyond reasonable doubt against the appellant and further found that the circumstances taken together constitute a chain which exclusively indicates towards the culpability of the appellant in the occurence.

20. Sadanand (P.W.1), Jagdeesh (P.W.8), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11), all residents of Saraswati Nagar, Tarana, have clearly deposed that on the date of occurrence around 7 p.m. on being told by Madanlal Pawar (P.W.2) that cries are coming out from the house of Babulal, they all reached near the main gate of the house of Babulal which was bolted from inside and that in the meantime they came to know that somebody has jumped out from the rear window of the house. All these witnesses have further deposed that they chased the person who was running away from the spot and apprehended him from nearby an agricultural field.

21. Certain omissions have emerged in para-3 of the deposition of Sadanand (P.W.1) with regard to details of

incident which he did not elaborate in his statement Ex.D/1 recorded under Section 164 of 'the Code', however, the same are in-consequential, because as regards substantive facts, his testimony has remained intact. It has been denied by this witness that he and other persons have not apprehended the appellant just after the occurrence. There is nothing to disbelieve him in that behalf. Madanlal Pawar (P.W.2), Jagdish (P.W.8), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11) all have corroborated Sadanand (P.W.1) as regards the fact that all of them apprehended the accused just after the occurrence. Nothing has emerged during the cross-examination of these witnesses to indicate that they have enmity, illwill or animosity against the accused/appellant and are interested in falsely implicating him in this case. Apart this, it has not been suggested to any of the witnesses that they were not present on the spot. The testimony of each of these witnesses had stood the test of cross-examination. No material omission or contradiction has emerged about the basic facts of the case and their evidence is consistent, convincing and worthy of reliance, therefore, the same deserves to be accepted and on the basis thereof it is proved beyond reasonable doubt that the appellant was found running away from the place of occurrence and after being chased by the aforesaid witnesses, was apprehended from the nearby a agricultural field, therefore, finding recorded by the learned trial Court in this regard cannot said to be against the evidence on record.

22. The next circumstance is with regard to recovery of

ornaments of the deceased from the appellant soon after he was apprehended. Sadanand (P.W.1) in this regard has stated that a pair of tops, a pair of silver ***'payal',*** a mobile phone and driving licence of the appellant along with the clothes worn by him were recovered by the police, vide seizure memo Ex.P/4 just after the incident. Other witnesses namely Madanlal Pawar (P.W.2), Jagdeesh (P.w.8), Rajesh Kharetiya (P.W.10) and Sumit Dikshit (P.W.11) have corroborated Sadanand (P.W.1) on this point. The evidence in this behalf further stands corroborated by testimony of Kulwant Joshi (P.W.18) who is said to have effected seizure of the aforesaid articles, vide seizure memo Ex.P/4 and has clearly deposed in this regard in para-4 of his statement. The ornaments were put to identification parade and were identified by Anita (P.W.13) – the daughter of the deceased. In identification proceedings conducted by Maicale Tirki (P.W.17), the Executive Magistrate, vide Ex.P/13 on 25th November, 2015 Anita (P.W.13) has denied that the ornaments were shown to her prior to the test identification. She has also clearly stated that no police officer was present at the time of the identification proceedings. She has further identified Article-C – tops and Article-A – Payal during her examination in the Court. Nothing has emerged in the cross-examination of Anita (P.W.13), so as to discredit her. Apart that no motive has been attributed by defence to Anita (P.W.13) and the other witnesses to falsely implicate the appellant. Thus, the evidence of these witnesses which stands corroborated with contemporaneous documents Ex.P/4, and Ex.P/13 is quite reliable, inspiring and trustworthy, therefore, it cannot be said

that learned trial Court has committed any error in arriving at the conclusion that the ornaments Article-A, Article-B tops were recovered soon after the occurrence from the possession of the appellant.

23. The appellant has not been able to satisfactorily explain as to how he came in the possession of the ornaments. Thus, the logical inference will be that he robbed them from the deceased, as alleged by the prosecution. Hence, the finding recorded by the learned trial Court in this behalf is unassailable.

24. The third circumstance pertains to recovery of bloodstained knife, vide recovery memo Ex.P/10 on 29/10/2015 on the basis of disclosure statement, allegedly, made by the appellant, vide memo ex.P/10 on 28/10/2015 to Kulwant Joshi (P.W.18) in presence of panch witnesses namely Sumit Dikshit (P.W.11) and Ritesh Dikshit (not examined). Sumit Dikshit (P.W.11) in para-2 has simply deposed that the appellant on his interrogation by police at the Police Station disclosed that he had assaulted Chandrakanta by knife and ***'SILABATA'*** . Obviously, this witness has not stated that the appellant made disclosure to the effect that the knife used in the occurrence has been thrown by him behind Saraswati Colony, therefore, testimony of Kulwant Joshi (P.W.18) that the appellant made a disclosure to that effect, vide Ex.P/11 is not supported by Sumit Dikshit (P.W.11). Apart this, it is noticeable that though disclosure was allegedly made on 28.10.2015 the recovery, vide memo Ex.P/10 was made after almost 20 hours, which appears to be

quite unreasonable, because as per alleged disclosure made by the appellant, the knife was thrown at a nearby place, therefore, not immediately taking step to find out and recover the same appears to be quite unreasonable and in absence of corroboration by Sumit Dikshit (P.W.11) the proceedings with regard to disclosure and seizure of the knife become quite doubtful, therefore, it is not established beyond reasonable doubt that the knife was recovered on the basis of disclosure made by the appellant and that the same is a connecting piece of evidence. The learned trial Court has not adverted to the aforesaid aspects of the evidence, therefore, to that extent the finding recorded by the learned trial Court cannot be upheld.

25. The last and the most important and clinching circumstance is the presence of blood on the ***'KURTA'*** and pant of the appellant which on DNA profiling completely matched with the blood found on the clothes worn by the deceased. The shirt, pant and ***'KURTA'*** worn by the deceased were recovered, vide Ex.P/4 on 28/10/2015 just after the incident. These clothes were sent to Forensic Laboratory, Sagar along with the clothes of the deceased (saree, petticoat, blouse and undergarments) which was found on the person of the deceased at the time of post-mortem. The Forensic Expert, vide report Ex.P/21, has clearly opined that the DNA characteristics of blood found on Article – B (kurta), Article-D (pant), Article-F (clothes of the deceased) were identical. This evidence, which is quite clinching and trustworthy, clearly indicates that the blood of the deceased was found on the pant and ***'KURTA'*** of the appellant which she was wearing

at the time he was apprehended. The appellant has not come forward with any expectation as to how the blood of the deceased came on his pant and ***'KURTA'***. The identical finding recorded by the learned trial Court, therefore, is to be accepted.

26. After excluding the evidence with regard to alleged disclosure based recovery of knife, the remaining three circumstances when taking together unerringly indicate towards the fact that the appellant has committed the murder of Chandrakanta after robbing her of the ornaments article A & B worn by her. The chain of circumstances is so complete and of such nature that there can be no other inference apart from the aforesaid, therefore, it cannot be said that the learned trial Court has committed any error in recording a finding of guilt against the appellant for offences under Section 302, 382 & 397 ÍPC' for committing murder of Chandrakanta and robbing of her jewellery and by assaulting her with deadly weapons. The conviction recorded by the learned trial Court for the aforesaid offences cannot be said against the evidence, hence, deserves to be upheld.

27. As regards sentence, the law with regard to imposition of capital sentence has been discussed by this Court (Bench at Indore) in CRRFC No.1/2016, and vide order dated 20th July, 2016, it has been held as under:-

> **“38.** Before adverting to relevant facts and circumstances of the case it is necessary to peep into the law with regard to imposition of

death penalty.In ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684*** (Constitution Bench) and ***Machhi Singh v. State of Punjab, (1983) 3 SCC 470*** , the apex Court has dealt with the principles regarding imposition of the extreme penalty of capital sentence . In ***Bachan Singh (supra),*** their lordships of the Supreme Court while upholding the constitutional validity of the penalty of death for murder had laid down the guidelines in the matter of sentencing a person under Section 302 of IPC. The apex Court observed :

"201. ..... As we read Sections 354(3) and 235 (2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, ***the Court must pay due regard both to the crime and the criminal.*** What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why; it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments."

39. In ***Dilip Premnarayan Tiwari & Anr. v. State of Maharashtra, 2010 Cri LJ 905***, the apex Court, has held:

"All murders are foul, however, the degree of brutality, depravity and diabolic nature, differ in each case. It has been held in the earlier decisions of this Court which we may not repeat that the circumstance under which the murders took place, differ from case to case

and there cannot be a straight-jacket formula for deciding upon the circumstances under which the death penalty is a must".

40. In ***Shankar Kisanrao Khade vs. State of Maharashtra, (2013) 5 SCC 546,*** the apex Court, after a detailed and exhaustive analysis of the case law on the point, has culled out the legal position as under:

"49. In ***Bachan Singh and Machhi Singh*** cases, this Court laid down various principles for awarding sentence:

"Aggravating circumstances – (Crime test)

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

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

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

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

5. Hired killings.

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

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

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful

discharge of his duty under Section 43 Code of Criminal Procedure.

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

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

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

12. When there is a cold blooded murder without provocation.

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

Mitigating Circumstances: (Criminal test)

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

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

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

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

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to

> such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
> 6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained
> manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
> 7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

28. Therefore, the issue of sentencing needs to be examined in the light of the aforesaid legal position.

29. From the facts and circumstances which have emerged from the evidence on record, it cannot be said that the appellant had earlier committed identical nature of offence nor it can be said that he committed the offence to create a sense of fear in public at large. Though, it is found that the appellant had committed robbery, but then it is neither a case of hired killing nor involving in-human torture to the victim, though, it cannot be denied that the deceased was assaulted repeatedly. Further, it was not a case where murder of entire family or innocent persons was attempted. Thus, it cannot be said that the murder was shocking to the judicial conscience but also to the social conscience. It has been found that the weapon of assault - knife and ***'SILBATA',*** were taken from inside of the house of the deceased, therefore, again it cannot be said that it was a planned or cold blooded murder.

Thus, by and large aggravating circumstances are not present in the instant case. As regards mitigating circumstances the appellant is a young man of 35 years. It is not the case of the prosecution that he is a habitual offender and beyond reform and that may indulge in identical nature of crime again. Therefore, all these factors can be taken as mitigating circumstances.

30. The law is settled that life imprisonment is a rule and death sentence is an exception. On a careful analysis of the aggravating and mitigating circumstances, this Court is of the considered opinion that simply because the appellant committed murder while committing robbery, it cannot be said that it is a rarest of the rare cases calling upon for imposition of extreme penalty of capital sentence. In our view it is not a case where alternative option of inflicting life imprisonment is foreclosed or that such punishment will be disproportionate. The learned trial Court has not adverted to the aforesaid set of circumstances in a systematic manner, therefore, we are not an agreement with the view taken by the learned trial Court that this case falls in the category of rarest of rare cases and extreme penalty of capital sentence is called for.

31. In view of the aforesaid, the conviction recorded against the appellant for offences under Section 302, 382 & 397 ÍPC' is hereby affirmed as regards the sentence. The death sentence is unserved is negative and, therefore, discharged. Resultantly, Criminal Appeal No.996/16 stands partly

allowed. Maintaining the conviction the sentence of death is modified to life imprisonment with fine of Rs.1,000/-. Conviction and sentence for offence under Sections 302, 382 & 397 ÍPC' are maintained.

32. The learned trial Court shall, accordingly, issue a revised warrant of sentence in respect of the appellant who is in jail. He is directed to suffer the sentence as modified herein above.

(S.C. Sharma)
Judge

(Ved Prakash Sharma)
Judge

Soumya