CASE NO.:
Appeal (crl.) 454 of 2006

PETITIONER:
Swamy Shraddananda @ Murali Manohar Mishra

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 18/05/2007

BENCH:
S.B. Sinha

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

1. Appellant herein was convicted and sentenced to death for committing murder of his wife on or about 28.05.1991 at their residential house situate at 81, Richmond Road, Bangalore. The deceased was earlier married to one Akbar Khaleeli who was in the diplomatic service in the Government of India. She had four daughters. The deceased along with her children in the year 1983 visited the Maharaja of Rampur. There she was introduced to the appellant. Appellant at the relevant time was assisting the Rampur royal family. In regard to the management of her landed properties, the deceased sought for his assistance. She had inherited huge properties including House No. 81, Richmond Road, Bangalore from her mother. She had inherited some other properties during her marriage. Some litigations in respect of the said properties had been going on.

2. Mr. Khaleeli on his assignment as diplomat of Iran went to the said country. The deceased together with her daughters started living at Bangalore. Appellant came there. He was also staying in the same house. The deceased desired for a son and she was made to believe by the appellant that he was capable of blessing her with a son. Akbar Khaleeli and the deceased separated in the year 1985. The deceased thereafter married the appellant on 17.04.1986. They started living together at the said house. She had executed a General Power of Attorney and a Will in his favour. However, despite her marriage with the appellant, the deceased was maintaining her relationship with her parents and daughters. Mrs. Sabah Khaleeli, second daughter of the deceased (PW-5) had all along been in touch with her.

3. It is not in dispute that from 28.05.1991, the deceased was not seen. PW-5 had been trying to contact her on phone. She was informed by the appellant that the deceased had gone to Hyderabad. In June 1991, when contacted, she was informed that her mother had gone to Kutch to attend a wedding. A week thereafter it was informed to her that the deceased had been lying low owing to some income tax problems. She, being exasperated with the said explanations, came down to Bangalore. She did not find her mother there. She was told that the deceased being pregnant had gone to United States of America for delivery of the child. She was told to have been admitted in Roosevelt Hospital. She made verifications thereabout through her acquaintances and came to know that no such woman had ever been admitted to the said hospital. Appellant being confronted thereto, informed her that the deceased had gone to London as she had wanted to keep it as a secret. However, in 1992, when she met the accused at Mumbai, noticed the passport of her mother lying in the room of the hotel which confirmed that the deceased had not visited USA or London as represented to her by the appellant on earlier occasions.

4. She ultimately informed the Ashok Nagar Police Station by giving a written complaint about missing of her mother. A missing complaint was registered on 10.06.1992. No serious effort, however, was made to find out the whereabouts of the deceased. PW-5 approached the higher authorities

resulting in the investigation of the matter being entrusted to the Central Crime Branch. Apprehending arrest, Appellant obtained anticipatory bail with a condition that he would attend the police between 6 p.m. to 8 p.m. on every Monday and shall also make him available to the police. He applied for relaxation of the said condition and by an order dated 3.12.1993, it was directed that the appellant shall appear before the police authorities on every Monday once in three months.

5. The investigation was entrusted to one C. Veeraiaha (PW-37). He suspected the appellant herein. He was interrogated on 28.03.1994, whereupon he made a voluntary statement which was marked as Ex. P-175. He stated in great details as to the manner in which he had killed his wife and disposed of her dead body. He also disclosed as to how a wooden box of size 2 x 7 x 2 was made, a pit was dug and how the dead body was buried there. He narrated that how with the help of Raju he had put the box into the pit covered with mud and on the next day with the help of some masons brought by the said Raju kadapa stone slabs were put on the pit and the adjacent land and cemented the place.

6. In the said statement, he stated:

"If I am taken I will show the place where the wooden box was prepared and the person who prepared it, the persons who transported the box and the people who helped in digging out the pit and the crow bar, spade, pan used for digging pit, the cement bags and the spot where Shakerah is buried and I exhume the dead body of the deceased and show you. The statement what all I had earlier given to Ashoknagar Police was a false statement given intentionally just to escape myself."

7. An Executive Magistrate Syed Ejaj Ahmad (PW-3) was called for exhumation of the dead body. He asked a doctor to conduct exhumation proceeding. On 30.03.1994, Dr. Nissar Ahmed (PW-14) came to the place of occurrence for the said purpose. Appellant was asked as to whether he was ready to show the spot as per his earlier statement. The entire proceeding of exhumation of the dead body was video-graphed. It took place at about 10.30 a.m. on the said day. Appellant with a chalk piece marked the spot. Coolies accompanying the party as per instructions of the appellant himself, dug the earth of the said place whereupon a box was noticed. The plank of the lid of the wooden box was removed. A bed, a nighty, pillow and bed sheets were recovered. Channaiah who had come along with Dr. Nissar Ahmed removed the scalp, skull and hairs of the head which were detached from the skull and other bone pieces. He also removed the pieces of the bones. Another Doctor Shri Thiruvanakkarasu also came there. They joined the bones and fixed the skull and mandible in orderly manner. It was found to be that of a human skeleton. The mother of the deceased Smt. Gauhar Taj Namazie identified a ring which was embedded with red stone and two other black rings as belonging to the deceased. The nighty which was recovered was identified to be belonging to the deceased by the maid servant who had been working in the house.

8. The post mortem examination commenced at 4.45 p.m. on 30.03.1994 which ended at about 6 p.m.

9. Appellant was, thereafter, charged for commission of murder of his wife. Before the learned Trial Judge, 39 prosecution witnesses were examined. There was no eye-witness to the occurrence. The prosecution was based on circumstantial evidence.

10. The learned Trial Judge, as noticed hereinbefore, found the appellant guilty of commission of offence under Sections 302 and 201 of the Indian Penal Code and sentenced him to death.

11. Appellant preferred an appeal before the High Court. A reference was also made by the learned Judge in terms of Section 366 of the Code of Criminal Procedure.

12. The circumstances which were found to be existing by the High Court for proving commission of the offence are said to be :

"(a) Motive \026 Murder for gain
(b) The deceased Shakereh was last seen alive in May 1991 when she was residing at No. 81, Richmond Road, Bangalore along with accused and his wife.
(c) Strange conduct of the accused after 28-5-91
(d) A wooden box (MO.5) was got prepared and brought to the house by the accused.
(e) Discovery of the wooden box containing a skeleton and feminine articles buried in the backyard of the said house of the accused and the deceased in furtherance of information furnished by the accused.
(f) Fixing the identity of the skeleton as that of the deceased with the help of skull and the admitted undisputed photograph of Mrs. Shakereh by photo Super-imposition method.
(g) Fixing the identity of the skeleton as that of the deceased on the basis of DNA finger printing.
(h) Identifying some of the articles like MOs. 5, 6, 8, 11 to 17 along with the skeleton in the box as belonging to the deceased.
(i) The last circumstance put forth i.e., the attempt of the accused to mislead or to give false explanation."

13. Before the High Court, a contention was raised that before imposition of sentence, the appellant had not been granted adequate opportunity to make a representation as was mandatorily required under Sub-section (2) of Section 235 of the Code of Criminal Procedure, 1973. The High Court gave the appellant an opportunity of being heard. Before the High Court, the appellant accepted that he was instrumental in burying the dead body stating:

"The accused submitted that he is innocent and has been illegally convicted. He submitted that as the family members of the deceased (parents and daughters) had filed number of cases against the deceased, she was mentally depressed and was taking number of sedative pills/ drugs; that she died naturally in May 1991 and as he feared adverse consequences, especially repercussions from her family members and community people, he buried her body in the backyard of his house without informing anybody. He submitted that though this fact was not stated by him in the trial court, as he could not bear it any more and after thinking over the matter for the last few years, he has decided to come out with this truth. He submitted that as he is innocent, his conviction be set aside and he be acquitted. So far as the sentence is concerned, he submitted that as now he is 61 years old and suffering from serious ailments like diabetes, hypertension and hernia and as he is in custody for the last 11 years, mercy be shown to him by reducing the capital punishment, if ever the court decides to convict him."

14. The High Court, however, affirmed the judgment of conviction and sentence.

15. Mr. Alok Vagrecha, learned counsel appearing on behalf of the appellant raised the following contentions in support of this appeal:

(i) A First Information Report having been already lodged by PW-5, a second report by the Investigating Officer \026 PW-37 lodged on 28.03.1994 (Ex. P-171) was illegal.
(ii) The purported recovery of the wooden box containing some articles and the bones which were not admissible in evidence under Section 27 of the Indian Evidence Act as the location of the dead body was already known, the purported statement made by the appellant (Ex. P 175) being wholly inadmissible in evidence, consequent recovery of the dead body would also be inadmissible. In this connection our attention has been drawn to the fact that the appellant was given an opportunity to have the services of a lawyer during interrogation.
(iii) If the prosecution case is true that the appellant had administered sedative to the deceased on 28.05.1991 in the afternoon, the courts below should have also taken into consideration that in view of the statement of the investigating officer that the appellant at about the same time on 28.05.1991 was found to be in the company of one Rekha Handa, a former Miss India, the prosecution case must be held to have not been proved as against the appellant.
(iv) A Will and General Power of Attorney having already been executed by the deceased, the appellant could not have any motive to kill her.
(v) The purported circumstances on the basis whereof the judgment of conviction and sentence have been rendered does not complete all the links in the chain as there had been (a) no recovery of drug; (b) motive had not been proved; and (c) there was no proof that she died of poisoning.
(vi) The purported recovery of drug on 31.03.1994 by the Investigating Officer was wholly inadmissible in evidence.
(vii) The High Court having recorded that the deceased did not meet any violent death, the impugned judgment cannot be sustained and in any event the death sentence should not have been imposed.
(viii) The High Court committed a serious illegality in relying upon the statement made by the appellant before it as being confession of his guilt although the same was meant to be used for the purpose of hearing on the question of sentence only.

16. Mr. Sanjay R. Hegde, learned counsel appearing on behalf of the State, on the other hand, supported the judgment. The learned counsel would contend that the court while analyzing the evidences brought on records should keep in mind the following facts:
(a) The deceased was a beautiful woman. She had a husband and four daughter
(b) She was an owner of huge property
(c) She met her death at the age of 40 years.
(d) Appellant although could enjoy all the luxuries of life, he had greed for more money and, therefore, hatched a plan to murder the deceased wherefor he got prepared a wooden box, took advantage of temporary absence of the two old servants and at the opportune moment administered sedative to the deceased.
(f) Despite her death, he had been operating the bank account which was a joint account and had been acting on the basis of the General Power of Attorney.
(g) He kept to PW-5 at dark although she had been constantly making enquiry in regard to the whereabouts of the deceased for one and half years.
(h) The manner in which the dead body was found categorically shows the vicious mind of the appellant as the bed-sheet was found on her face, her jewelery was found on the top of the body, the deceased had nighty on her person and, thus, it was essentially principally a planned murder.
17. We have not doubt that the death of the deceased was homicidal in nature. The identity of the dead body has also been established. The circumstances in which the deceased married the appellant have also not been disputed. Their marriage was proved by PW-8 T.H.

Lokeshminarayana. Appellant also did not deny or dispute that he had been living with the deceased at all material times at 81, Richmond Road, Bangalore. It has furthermore not been disputed that she had not been seen on and from 28.05.1991.

18. We have noticed hereinbefore the circumstances which are said to have been found by the courts below. The law in this behalf is now no longer res integra.

19. In Sharad Birdhichand Sarda v. State of Maharashtra [AIR 1984 SC 1622], this Court held:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

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

20. In regard to the circumstantial evidence in a case of death by poisoning, this Court opined:

"So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:
(1) there is a clear motive for an accused to administer poison to the deceased,
(2) that the deceased died of poison said to have been administered,
(3) that the accused had the poison in his possession,
(4) that he had an opportunity to administer the poison to the deceased."

[See also Aloke Nath Dutta & Ors. v. State of West Bengal 2006 (13) SCALE 467]

21. We may proceed to consider the matter keeping in view the aforementioned legal principle in mind.

22. Dr. Nissar Ahamed who examined himself as PW-14 in his evidence proved the exhumation of the dead body. It, as noticed hereinbefore, was conducted by the Taluka Magistrate PW-3. Upon removal of the detached skull, mandible, carpal and tarsal, palm and bones from the pit of feet, all the said bones were assembled on plastic paper. A Human skeleton was formed. There was a foul smell. According to him, all the bones were intact. The skeleton was that of a human body. In the post mortem examination, it was found:

"Decomposed and Skeletanised body removed from the wooden box described. The body was removed in piece meal from the box as the bones were easily coming out from the joints and body was assembled in anatomical position which consists of skull with black hair measuring 25" long."

It was further noticed:

"The bones one below the other are: Skull bone with mandible, two clavicles, two scapulae, bones of upper limbs and lower limbs, vertebral column, pelvis and carple and tarsal bones. The decomposed tissue were greish white in colour emitting foul smell. All bones were intact skull shows female characteristic feature, articulate well with were each other. Skull suture completely obliterated endocrenaly, partially obliterated exocreinaly. All teeth erupted showed attrition. The stature was calculated from long bones and average taken from the bones.
Right Femur \026 46 cms.
Right Tibia \026 39 cms.
Left Humorus \026 32.5 cms and estimated stature is 5'4" to 5'6"
Four Pieces of body of sternum fused."

23. All the internal organs were found to be decomposed and liquefied. He, however, reserved his opinion in regard to the cause of death pending chemical analysis. The doctor preserved skull and mandible for super imposition and visera and hair for chemical analysis report and bone marrow hair and soft tissues for DNA Fingerprinting.

24. PW-14 on the basis of the said FSL report formed his opinion that the cause of death cannot be furnished as the percentage/ amount of Chlodiazepoxide consumed had not been furnished. In regard to the effect of Chlordizaepoxide on human body, however, his opinion was as under:

"The effect of Chlordiazopoxide on human body depends upon the dosage. They are weight gain, as a result of increase appetite, anxiety, nausea, vertigo, impaired sexual function, menstrual irregularities, skin rashes, agramlocytosis etc."

In regard to the effect of over dose of the said medicine, it was stated:

"Effects of over dose are rare, as the drug has got remarkable safety margins. A few deaths have been reported at doses greater than 700 mgs as per the literature. The symptoms are respiratory and cardiovascular, dis-function due to the suppression of higher centers in the brain."

25. PW-14 in his cross-examination opined that the death of the deceased was homicidal. According to him, if the deceased had consumed only one or two tablets of Equibrom and her body was put in a box and lid was closed suddenly, an unexpected death may occur due to natural causes also. It is not a case where the dead body was not identified to that of the deceased. Blood sample of PW-5 was taken. Blood samples of Mirza Gulam Hussain Namazie and Gauhar Taj Begum Namazie had also been taken. PW-20 Srimannarayan, Chief Medical Officer of Bowring Hospital, in his evidence, spoke about the result of the DNA analysis in regard to taking of the blood samples.

26. The bones were sent for DNA test to Hyderabad Forensic Science Laboratory through Forensic Science Laboratory, Bangalore. The test was conducted by Dr. Laljit Singh, Scientist, who was examined as PW-24. According to him, he and Dr. G.V. Rao (PW-17), another scientist in Hyderabad together carried the process of DNA isolation and testing from Exs. A to D, i.e., from blood of the father, teeth of the deceased, hair of the deceased and blood of the mother in two tests being Polymerase Chain Reaction (PCR) and HLA DQ typing both the tests confirmed that the deceased was the offspring of the said Mirza Gulam Hussain Namazie and Gauhar Taj Begum Namazie.

27. PW-17 Dr. G.V. Rao categorically stated that in carrying out DNA fingerprinting they followed the same procedure as in the case of blood samples received earlier which were examined. He proved the report prepared by him and Dr. Laljit Singh on 4.10.1995 which was marked as Ex. P-155.

28. PW-1 Dr. T.R. Kumari was an Assistant Director of Forensic Science Laboratory. She gave her opinion on 15.09.1994 which was marked as Ex. P-125 stating:

"1. Presence of Clonazepam was detected in article no. I(a) & I(b).
2. Presence of Alprazolam was detected in article No. I(b) & I(f).
3. Presence of Diazepam was detected in article No. I(c).
4. Presence of Chlodizepoxide was detected in No. I(e), III & IV.
5. No poison was detected in article No. I(h)."

29. Dr. T.R. Kumari (PW-1) conducted the Photo Superimposition Method Test on the skull, which was marked as MO-1 along with the admitted photograph of the deceased, which was marked as MO-3. According to the said witness, anthropometric characters or land marks of the skull and the superimposed admitted photographs matched. She prepared a report, which was marked as Ex.P-2. Her qualification as an expert to conduct the said test is not in doubt. Even otherwise, she holds a Ph.D. degree in Forensic Science. She has been awarded a medal for her research work by the Madras Forensic Society of India. She has also undergone special training in photo superimposition and has submitted a number of papers thereon. Her report as also the report of PW-17 are relevant evidences.

30. The qualification of the expert has not been questioned before us. The learned counsel appearing on behalf of the appellant has not raised any contention which would point out that the methodology conducted by the experts in carrying out the study was in any manner unscientific or raised any suspicion as regards the correctness thereof.

31. It is borne out from the records that even the photographs were brought by PW-1 before the trial court. Identify of the skull vis-‘-vis the other parts of the body, thus, categorically goes to show that the same was that of the deceased, Smt. Shakereh.

32. It has also not been seriously disputed that the deceased was last seen in the company of the company of the appellant. The fact that she had not been seen alive from May, 1991 also stands fully established.

33. We will hereinafter notice the circumstances which existed in

establishing the commission of the crime.

34. PW-5 Sabah Khaleeli, was the daughter of the deceased through her first husband. She in her deposition categorically stated that she had spoken to her mother on 19.04.1991. She was not available on phone from May, 1991 onwards. Gauhar Namazee (PW-25) was the mother of the deceased. She in her deposition stated that she had last seen the deceased on 13.04.1991. She had not been cross-examined on the said point. It is also not disputed that PW-18 and PW-19, who were husband and wife, were engaged by the deceased. They saw the deceased in the company of the appellant in the morning of 28.05.1991, for the last time. The said witnesses were staying in a servant quarter in the said premises. PW-18 was working as gardener-cum-handyman; whereas PW-19 was working as maid servant, since 1988. They stated in unison that they had seen the deceased at about 07.30 A.M. on that day. According to PW-19, she went to the kitchen to prepare tea for the couple and kept the tea cups on the dining table. She in no uncertain terms stated that the cups of tea were taken by the appellant to the bed-room where the deceased was reading a newspaper. PW-19 while sweeping the house was called by the deceased and was instructed to clean the articles kept in the showcase instead of sweeping. They, however, received a telegram at about 10.00 a.m. whereby they were informed that the sister-in-law of PW-19 was sick at Gudisuvarapally in the State of Andhra Pradesh. They sought for leave and some money. They were permitted to leave Bangalore and were asked to collect the requisite amount after some time. They came back to their quarters and started packing their goods. At about 1.30 p.m. they went back to the house. PW-18, however, was said to have been asked by the appellant herein to shift a wooden box kept in the guest house to the bed room before leaving. They together with some others took a large wooden box from the guest house and kept the same inside the bed room, where they found the deceased sleeping on the bed. They were thereafter paid a sum of Rs.1,200/- towards their salary and additional sum of Rs.500/- towards travelling expenses. They left for their home. They came back after a couple of days, but did not find the deceased. The said two witnesses in their depositions corroborated each other.

35. We have noticed hereinbefore that the appellant had applied for grant of anticipatory bail in July, 1992 i.e. after the missing complaint was filed by PW-5. In the said application for bail, the appellant himself disclosed that the deceased had left for unknown destination in the month of May, 1991, allegedly because of her agitated mental condition.

36. If it is proved that the deceased died in an unnatural circumstance in her bed room, which was occupied only by her and her husband, law requires the husband to offer an explanation in this behalf. We, however, do not intend to lay down a general law in this behalf as much would depend upon the facts and circumstances of each case. Absence of any explanation by the husband would lead to an inference which would lead to a circumstance against the accused.

37. We may, however, notice that recently in Raj Kumar Prasad Tamarkar v. State of Bihar & Anr. [2007 (1) SCALE 19 : JT 2007 (1) SC 239], this Court opined :

"Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same."

This legal position would appear from a decision of this court in Nika Ram v. The State of Himachal Pradesh [AIR 1972 SC 2077] wherein it was held:

"It is in the evidence of Girju PW that only the accused and Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle of the accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of

occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p.m., while Poshu Ram, (PW 7) saw the accused and the deceased at their house on the evening of the day of occurrence. The accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the accused, according to plan PM, consists of one residential room one other small room and a varandah. The correctness of that plan is proved by A. R. Verma overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt."

In Trimukh Maroti Kirkan v. State of Maharashtra [JT 2006 (9) SC 50], the law is stated in the following terms:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime\005"

38. We have noticed hereinbefore as to why the investigation was taken over by the Central Crime Branch. As the interrogation of the appellant, while in custody of the police, revealed the possibility of the deceased having been buried in the backyard of her residential house, the Investigating Officer requested the Sub-Divisional Magistrate to conduct exhumation proceedings, who in turn, authorized the Taluka Executive Magistrate (PW-3) to do so. Confession of the accused was not admissible in evidence. What was admissible only was that part of the confession leading to the discovery of fact in terms of Section 27 of the Indian Evidence Act. The proceedings were conducted in the presence of the accused, which were videographed and marked as MO-18. The learned Trial Judge as also the learned Judges of the High Court had the benefit of watching the said videograph. The High Court in its impugned judgment recorded :

"The videograph and the inquest proceeding disclose that a large wooden box was found buried in the backyard of the house of the accused and the deceased and contained a skeleton. The videograph recording which is not disputed by the accused, clearly discloses and shows that it was the accused who was pointing out the exact spot to be dug up in the big backyard and in fact marked the area with a chalk. The videograph further showed that the backyard flooring was of well laid Cuddapah stones property cemented. In such a situation, in our view, nobody except the person who buried the box could have the knowledge of its burial."

39. Discovery of the last remains of the deceased was a relevant fact, which was, thus, admissible in evidence. Appellant had pinpointed the exact place which was to be dug up. He marked the exact area. He also made an

oral statement that the box was buried beneath the area so marked, location whereof showed that it was a big area, flooring of which had been well plastered with cement having Cuddapah stone slabs. The video showed that the slabs had been laid there much earlier and were not of recent origin.

40. In Aloke Nath Dutta (supra), in regard to applicability of Section 26 and Section 27 of the Indian Evidence Act, it was stated :

"The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act."

41. Pulukuri Kottayya v. King Emperor [AIR 1947 PC 67] is an authority for the proposition that "fact discovered" envisaged under Section 27 of the Indian Evidence Act, 1872, embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given in that behalf must relate distinctly to that effect, stating :

"The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as related distinctly to the fact thereby discovered may be proved."

It was further observed :

"In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact."

"Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant."

42. An attempt was made by the Bombay High Court to take a different view in Shri Shankar Gopal Patil & Others v. The State of Maharashtra [2000 (5) Bom. CR 360].

43. The legal proposition propounded in Pullukuri Kottaya (supra) has been considered by this Court in Jaffar Hussain Dastagir v. State of Maharashtra [(1969) 2 SCC 872], Shamshuk Kanwar v. State of U.P. [(1995) 4 SCC 430] and State of Maharasthra v. Damu [(2000) 6 SCC 269], wherein this Court reiterated it with approval.

44. The learned counsel appearing on behalf of the appellant, in our opinion, was not correct to contend that only because the investigating team

having regard to the purported confession made by the appellant had already known that a dead body had been buried in the house, Section 27 of the Evidence Act would not be attracted. In his statements before the investigating officer, he made a confession; but what was admissible in evidence his only that part which would come within the purview of Section 27 of the Evidence Act and not the rest. The court while analyzing the evidence and appreciating the same cannot take note of confession made before the police.

45. The prosecution case must rest on the other materials brought before the court. It is also not permissible to start with the confession and find corroborative evidence thereof and come back to the confession again for the purpose of arriving at a conclusion of guilt.

46. What was, therefore, relevant for the purpose of Section 27 of the Evidence Act was that at the instance of the appellant himself a particular place which had been pin pointed by him had been dug and remains of a body and other articles were recovered.

47. The various circumstances leading to the pointing out the guilt of the appellant and appellant alone have been enumerated by us hereinbefore. From our discussions, it is evident that each of the circumstances had been established, the cumulative effect whereof would show that all the links in the chain are complete and the conclusion of the guilt is fully established.

48. We are not oblivious of the fact that there is a material difference distance between 'may be' and 'must be' and furthermore in a case of this nature the evidence must be considered with more than ordinary care lest the shocking nature of crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. [See Kashmira Singh v. State of Madhya Pradesh - AIR 1952 SC 159].

49. The question, however, is as to whether in a case of this nature death sentence should be imposed. In Aloke Nath Dutta (supra), this Court had an occasion to consider a large number of decisions taking different views in regard to the interpretation of the words "rarest of rare cases" as adumbrated in Bachan Singh v. State of Punjab [(1980) 2 SCC 684].

50. This Court had also the occasion therein to notice the growing demand in the international fora and in particular the second Optional Protocol to the International Covenants on Civil and Political Rights and the Protocol to the American Constitution on Human Rights abolished that death penalty should be abolished.

51. Recently, the Privy Council in Reyes v. R. [(2002) UKPC 11 : 12 BHRC 219] and Hughes, R. v. (Saint Lucia) [(2002) UKPC 12], noticing the decision of this Court in Mithu v. State of Punjab [(1983) 2 SCR 6903], opined that the mandatory death punishment is unconstitutional. [See also Fox v. The Queen (2002) 2 AC 284, Bowe v. The Queen (2006) 1 WLR 1623 and Coard & Ors. v. The Attorney General (Grenada), (2007) UKPC 7].

52. Abolition of death penalty is not being and, in fact, cannot be advocated; but what requires serious consideration is as to whether the jurisdiction should not be invoked unless there exists an extra-ordinary situation to find that it comes within the purview of "rarest of rare" cases. The approach of the courts should not be to confine its thought process to the identification of a "rare" case. The expression "rarest of rare" case has been evolved by a Constitution Bench of this Court and, thus, demands a meaningful application.

53. It is interesting to note that Bhagwati, J. in Bachan Singh v. State of Punjab [(1982) 3 SCC 24], while expressing his dissenting opinion, noticed as under :

"\005This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented Bench structure of our courts where Benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, sometimes before another sometimes before a third and so on. Professor Blackshield has in his article on Capital Punishment in India published in Volume 21

ot the Journal of the Indian Law Institute\006 pointed out how the practice of Bench formation contributes to arbitrariness in the imposition of death penalty. It is well known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges on Benches which hear capital punishment cases has actually decreased. Most cases are now heard by two-Judge Benches. Professor Blackshield has abstracted 70 cases in which the Supreme Court had to choose between life and death while sentencing an accused for the offence of murder and analysing these 70 cases he has pointed out that during the period April 28, 1972 to March 8, 1976 only 11 Judges of the Supreme Court participated in 10 per cent or more of the cases. He has listed these 11 Judges in an ascending order of leniency based on the proportion for each Judge of plus votes (i.e. votes for the death sentence) to total votes and pointed out that these statistics show how the judicial response to the question of life and death varies from judge to judge. It is significant to note that out of 70 cases analysed by Professor Blackshield, 37 related to the period subsequent to the coming into force of Section 354, sub-section (3) of the Code of Criminal Procedure, 1973. If a similar exercise is performed with reference to cases decided by the Supreme Court after March 8, 1976, that being the date up to which the survey carried out by Professor Blackshield was limited, the analysis will reveal the same pattern of incoherence and arbitrariness, the decision to kill or not to kill being guided to a large extent by the composition of the Bench. Take for example Rajendra Prasad case decided on February 9, 1979. In this case, the death sentence imposed on Rajendra Prasad was commuted to life imprisonment by a majority consisting of Krishna Iyer, J. and Desai, J., A.P. Sen, J. dissented and was of the view that the death sentence should be confirmed. Similarly in one of the cases before us, namely, Bachan Singh v. State of Punjab, when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasam, J. was definitely of the view that the majority decision in Rajendra Prasad case9 was wrong and that is why he referred that case to the Constitution Bench. So also in Dalbir Singh v. State of Punjab, the majority consisting of Krishna Iyer, J. and Desai, J. took the view that the death sentence imposed on Dalbir Singh should be commuted to life imprisonment while A.P. Sen, J. stuck to the original view taken by him in Rajendra Prasad case9 and was inclined to confirm the death sentence, It will thus be seen that the exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the Judges constituting the Bench\005"

54. We are not oblivious of a line of decisions of this Court where the doctrine of proportionality has been applied, even in the matter of awarding death penalty. [See State of Rajasthan v. Kheraj Ram, (2003) 8 SCC 224, Bablu @ Mubarik Hussain v. State of Rajasthan, 2006 (14) SCALE 15 and Shivu and Anr. v. R.G. High Court of Karnataka and Anr. 2007 (3) SCALE 157]

55. In this case we need not go into the correctness or otherwise of the said view. Although it is also not necessary to do so, we may notice some development of law in this regard.

56. Criminal Justice Act 1991 of England famously hailed doctrine of proportionality as the guiding principle. But since the 1991 legislation, field of sentencing has seen much reform and Criminal Justice Act of 2003

presents a fresh set of sentencing objectives. Section 142 of the Act delineates the following as the purposes of sentencing:

"142 Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing-

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences."

57. In this context it, a reference should also be made of the Halliday Report of 2001 (Making Punishments Work) which has some interesting insights to offer on the sentencing structure in England and Wales. In the same vein, a White Paper in 2002 has made a case of reforms and suggested a shift from the proportionality principle.

58. In fine, scholarship on sentencing which has been quite diverse in its prescriptions certainly has consensus on the point that any decision on sentencing aspect would require assessing more than one variables and single minded pursuit of any one sentencing ideal would be discounting on other equally urgent parameters and objectives.

59. We do not have a sentencing policy, unlike some other countries. England has the concept of "guideline judgments" which is considered as a judge managed sentencing model rather than a statute induced one. Section 354 (3) suggests that Indian law furthers statute induced sentencing guidance in part. Therefore it has to be given full colour.

60. We have no practice of referring such matters to superior courts for laying down the guidelines relating to imposition of sentence under various situations. [See The Queen v. Julie McGinley and Michael Monaghan, (2003) NICC 1]

61. In our country, therefore, each case may have to be considered on its own merit.

62. It may be of some interest to note that Furman v. Georgia [408 U.S. 238 (1972)] ruled on the requirement for a degree of consistency in the application of the death penalty.

Justice Stewart held that:

"The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

*** *** ***

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."

63. Justice Brennan while interpreting Eighth Amendment (Amendment VIII: (Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted) of US Constitution observes in

Furman:
"In determining whether a punishment comports
with human dignity, we are aided also by a second
principle inherent in the Clause -- that the State
must not arbitrarily inflict a severe punishment.
This principle derives from the notion that the
State does not respect human dignity when,
without reason, it inflicts upon some people a
severe punishment that it does not inflict upon
others. Indeed, the very words "cruel and unusual
punishments" imply condemnation of the arbitrary
infliction of severe punishments."

64. It is important to refer to Harbans Singh v. Union of India [AIR 1982 SC 849] at this juncture. In that case three people were sentenced to death by the trial court for playing an equal part in jointly murdering a family of four persons. The sentence of all the three was confirmed by the High Court. Each of them moved to the Supreme Court by different Special Leave Petitions before three separate benches. One of the accused's petition was dismissed and he was actually executed. Another's petition was allowed and his death sentence was commuted to life imprisonment. And the petition of the third one was also dismissed. He filed a review petition, which was also dismissed, and the Executive refused clemency. He then moved another petition before the Supreme Court bringing to light this arbitrariness. The Supreme Court recommended the President to commute his sentence. Chandrachud J. while lamenting the death of dead accused said:
"The fate of Jeeta Singh has a posthumous moral
to tell. He cannot profit by the direction which we
propose to give because he is now beyond the
process of human tribunals."

65. Bentham's discourse on determination of minimum punishment and maximum punishment serves as a yardstick in this context. Bentham in his landmark treatise Principles of Penal Law propose to establish a proportion between crimes and punishments. But he cautions against an oracular understanding than an instructive one. We here further go in the details of what doctrine of proportionality holds in the realm of sentencing. The first rule of proportionality mandates:

"The value of the punishment must not be less in
any case than what is sufficient to outweigh that of
the profit of the offence."

While talking of minimum punishment Bentham observes:
"Punishments may be too small or too great; and
there are reasons for not making them too small, as
well as not making them too great. The terms
minimum and maximum may serve to mark the
two extremes of this question, which require equal
attention.
With a view of marking out the limits of
punishment on the side of the first of these
extremes, we may lay it down as a rule:\027
That the value of the punishment must not be less
in any case than what is sufficient to outweigh that
of the profit of the offence.
By the profit of the crime, must be understood not
only pecuniary profit, but every advantage real or
apparent, which has operated as a motive to the
commission of the crime."

66. It is to be appreciated here that statutorily decided minimum sentence takes into account the basic value of the crime and suffice to outweigh the profit of the offence. The moot question relates to parameters to decide the maximum punishment. Setting the trail of caution on the side of

determination of maximum punishment Bentham posits:

"Punishment, whatever shape it may assume, is an evil...
The minimum of punishment is more clearly marked than its maximum. What is too little is more clearly observed than what is too much. What is not sufficient is easily seen, but it is not possible so exactly to distinguish an excess. An approximation only can be attained. The irregularities in the force of temptations, compel the legislator to increase his punishments till they are not merely sufficient to restrain the ordinary desires of men; but also the violence of their desires when unusually excited.
The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined\027antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side therefore, that we should take the most preparations, as on this side there has been shown the greatest disposition to err."

67. On the same point Beccaria in his historic work Of Crimes and Punishments denounced retributive basis of punishment.

"The aim of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise. Punishments, therefore, and the method of inflicting them, should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.

For a punishment to be efficacious, it is enough that the disadvantage of the punishment should exceed the advantage anticipated from the crime; in which excess should be calculate the certainty of punishment and the loss of the expected benefit. Everything beyond this, accordingly, is superfluous, and therefore tyrannical."

68. There is a clear and discernible necessity of caution to set the maximum punishment in an offence. And also by implication there must be intensive and exhaustive inquiry into accused related parameters before employing the maximum sentence by a court of law. Therefore discretion to the judiciary in this respect (to declare the maximum punishment) is of utmost critical and seminal value. Reasons must be detailed setting clearly why any punishment other than the maximum punishment will not suffice. This is a general and age-old rule of sentencing which has been statutorily recognized under section 354(3).

69. Reference to the decision of other jurisdictions and/or the recent trend in the international fora has not been referred to by way of precedents or even a persuasive value but the court in this age cannot afford to put down blinkers on its window to the outside world.

70. It is noteworthy to mention here the Law Commission in its Report of 1967 took the view that capital punishment acted as a deterrent to crime. While it conceded that statistics did not prove these so-called deterrent effects. It also said that figures did not disprove them either.

71. Tracing the judicial view on Death Penalty, one can start with the Jagmohan Singh case (1973) where it agreed with the Law Commission that capital punishment should be retained. But subsequent cases such as those of Ediga Anamma (1974) and Rajendra Prasad (1979) saw dissenting voices being raised in this court. These led to a hearing of the Bachan Singh (1980) case by a Constitutional Bench.

72. In Rajendra Prasad v. State of U.P. [(1979) 3 SCR 646], it was held that the special reasons necessary for imposing a death penalty must relate not to the crime but to the criminal. It could be awarded only if the security of the state and society, public order in the interest of the general public compelled that course.

73. The death penalty was abolished in 1965 in the U.K. Member-states of the European Union cannot have the death penalty. In Canada, after the abolition of the death penalty in 1976, the homicide rate declined. In 2000, there were 542 homicides in Canada \027 16 fewer than in 1998 and 159 fewer than in 1975 (one year prior to the abolition of capital punishment). In 1997, the Attorney-General of Massachusetts said: "there is not a shred of credible evidence that the death penalty lowers the murder rate. In fact, without the death penalty the murder rate in Massachusetts is about half the national average."

74. The South African Constitutional Court unanimously ruled in 1995 that the death penalty for murder violated the country's Constitution. More than 118 countries have abolished the death penalty either in law or practice. The second optional protocol to the International Civil Covenant, which came into force in 1991, mandates the abolition of the death penalty.

75. Whatever may be the "merits", "demerits" or "criticism", one cannot hope for unjustness in society. Deterring or preventive theory may not have any application at all in respect of imposition of death sentence. The law itself mandates that for imposing death sentence, special reasons are to be assigned. Imposition of death punishment is an exception in terms of sub-section (3) of Section 354 of the Code of Criminal Procedure. Whereas for commission of other offences, one or other theory, justly or otherwise may be taken recourse to, a large number of factors are required to be borne in mind for awarding death penalty.

76. In Renuka Bai alias Rinku alias Ratan and Another v. State of Maharashtra [(2006) 7 SCC 442], Balakrishnan, J. (as the learned Chief Justice then was) while imposing a death sentence in a case where the appellants had kidnapped seven children and committed their murder in a most dastardly manner also noticed:

"36\005We have carefully considered the whole aspect of the case and are also alive to the new trends in the sentencing system in criminology\005"
(Emphasis supplied)

77. Similarly in Bhimashya and Ors. v. Smt. Janabi @ Janawwa [2006 (14) SCALE 27], Dr. Pasayat, J. took into consideration the overall global view imparting death penalty.

78. This new trend, thus, must be taken into consideration only for awarding appropriate punishment.

79. We may also note that in Ram Singh v. Sonia & Ors. [2007 (3) SCALE 106] imposition of a death penalty has been upheld in the case where the accused had not only put an end to the life of her step brother and his whole family which included three tiny tots of 45 days, 2 \026 = years and 4 years but also her own father, mother and sister in a very diabolic manner so as to deprive her father from giving the property to her step brother and his family. It was, in the aforementioned extraordinary situation, held:

"\005The fact that murders in question were committed in such a diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mind set which can be amenable for any reformation\005"
(Emphasis supplies)

80. Yet again, another Division Bench of this Court in Shivu (supra) has upheld the death penalty where the accused was charged with Sections 302 and 376 read with Section 34 of the Indian Penal Code. In that case, the repeated attempts were made by two accused aged 20 and 22 years to commit rape on Lakkamma, daughter of one Puttegowda (PW-7). They were caught but only had been admonished. Yet again, they attempted to commit rape on PW-10 who was the daughter of Jayamma (PW-1). The accused persons, however, escaped any punishment even then at the instance of village elders and their family members and instead Panchayat of village elders was called on each occasion and accused were directed to mend their ways. The court found that emboldened by the escapes from punishment in those two incidents, the accused committed rape on the deceased a young girl of hardly 18 years and to avoid detection committed heinous and brutal act of her murder.

81. It would, therefore, appear that cases where death penalty is upheld are those where murder was committed of a large number of persons or by more than one person in a brutal or systematic manner.

82. Bhagwati, J. in his dissenting opinion in Bachan Singh (supra) pointed out one; Aloke Nath Dutta (supra) has also pointed out other instances.

83. With utmost respect, I am of the opinion that the doctrine of proportionality which is often referred to in the judicial pronouncements in regard to the sentencing policy required to be judicially adopted should not apply in a case of imposition of capital punishment. Precedent should not be contrary to Parliamentary law; far less the decision of a Constitution bench of this Court

84. We may, however, notice that the question in regard to the death penalty again came up for consideration before this Court in Acharaparambath Pradeepan & Anr. v. State of Kerala [2006 (13) SCALE 600] and Bishnu Prasad Sinha and Anr. v. State of Assam [2007 (2) SCALE 42] wherein Aloke Nath Dutta (supra) was reiterated.

85. In Bishnu Prasad Sinha (supra), it was observed :

"The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, the appellant No.1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal

Procedure. He accepted his guilt."

(See also Amarjit Singh v. State of Punjab, AIR 2006 SCW 5712)

86. We may, however, hasten to add that no universal rule is meant to be laid down as even in Bishnu Prasad Sinha (supra), the word "ordinarily" has been used. There may be cases and cases where even on circumstantial evidence, a death penalty may be imposed.

87. In Sahdeo & Ors. vs. State of U.P. [(2004) 10 SCC 682], this Court opined :

"As regards the sentence of death imposed on five accused persons by the sessions court, which was confirmed by the appellate court, the counsel for the appellants, Shri Sushil Kumar submitted that in the absence of clear and convincing evidence regarding the complicity of the accused, these appellants could not be visited with the death penalty, while the counsel for the State submitted that this is a ghastly incident in which eight persons were done to death and the death penalty alone is the most appropriate punishment to be imposed. Though it is proved that there was an unlawful assembly and the common object of that unlawful assembly was to kill the deceased persons, there is another aspect of the matter inasmuch as there is no clear evidence by the use of whose fire-arm all the six deceased persons died as a result of firing in the bus. It is also pertinent to note that the investigating agency failed to produce clear and distinct evidence to prove the actual overt acts of each of the accused. The failure to examine the driver and conductor of the bus, the failure to seize the bus and the absence of a proper 'mahzar', are all lapses on the part of investigating agency. Moreover, the doctor who gave evidence before the court was not properly cross-examined regarding the nature of the injuries. Some more details could have been collected as to how the incident might have happened inside the bus. These facts are pointed out to show that the firing may have been caused by the assailants even while they were still standing on the footboard of the bus and some of the appellants may not, in fact, have had an occasion to use the fire-arm, though they fully shared the common object of the unlawful assembly. Imposition of the death penalty on each of the five appellants may not be justified under such circumstances. We take this view in view of the peculiar circumstances of the case and it should not be understood to mean that the accused persons are not to be convicted under Section 302 read with Section 149 and the death penalty cannot be imposed in the absence of various overt acts by individual accused persons. In view of the nature and circumstances of the case, we commute the death sentence imposed on A-1 Sahdeo, A-4 Subhash, A-5 Chandraveer, A-7 Satyapal and A-10 Parvinder to imprisonment for life."

88. In Raju vs. State of Haryana [(2001) 9 SCC 50], it has been opined by this Court :

"However, the next question is whether this

would be a rarest of rare cases where extreme punishment of death is required to be imposed. In the present case, from the confessional statement made by the accused, it would appear that there was no intention on the part of the accused to commit the murder of the deceased child. He caused injury to the deceased by giving two brick blows as she stated that she would disclose the incident at her house. It is true that learned Sessions Judge committed error in recording the evidence of SI Shakuntala, PW 15 with regard to the confessional statement made to her, but in any set of circumstances, the evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick blows which caused her death. There is nothing on record to indicate that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty."

89. It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder.

90. One of the older cases in this league dates back to 1874, Merritt v. State, 52 Ga. 82, 85 (1874) where the Supreme Court of Georgia described the applicable law in Georgia as follows:

"By the penal code of this state the punishment of murder shall be death, except when the conviction is founded solely on circumstantial testimony. When the conviction is had solely on circumstantial testimony, then it is discretionary with the presiding judge to impose the death penalty or to sentence the defendant to imprisonment in the penitentiary for life, unless the jury . . . shall recommend that the defendant be imprisoned in the penitentiary for life; in that case the presiding judge has no discretion, but is bound to commute the punishment from death to imprisonment for life in the penitentiary."

91. Later case of Jackson v. State, 74 Ala. 26, 29-30 (1883) followed the aforementioned case. [Also see S.M. Phillipps, Famous Cases of Circumstantial Evidence with an Introduction on the Theory of Presumptive Proof 50-52 (1875)]

92. In United States v. Quinones, 205 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) the court remarked:

"Many states that allow the death penalty permit a conviction based solely on circumstantial evidence

only if such evidence excludes to a moral certainty every other reasonable inference except guilt."

93. In the instant case, confession before police was taken as a gospel truth. It seems that the judicial mind has a role to play in that behalf in imposition of sentence.

94. Another aspect which needs to be considered as according to the Bachan Singh Rule (that sentencing should involve analysis about the nature of crime as well as the accused) which require consideration, is the effect of two pointers relating to the nature of crime. Firstly, the case does not seem to be an instance of what is called a diabolical murder. We come across cases of murdering wife by burning for non-fulfillment of dowry, preceded by continuous torture. Simon and Ors. v. State of Karnataka [(2004) 2 SCC 694] noting the "all murders are cruel" observation in Bachan Singh (supra) puts the law on death penalty in perspective as:

"The Constitution Bench said that though all murders are cruel but cruelty may vary in its degree of culpability and it is only then the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

95. Second point relates to planning which went into committing the murder. It is agreed that accused deliberately came close to the beautiful and wealthy lady. He must have had his intentions and calculations in that regard. To that extent intention behind the marriage can be imputed. But to infer from that the murder was a pre-planned murder will be going a bit too far as he did not know the opportune date when the servant would be leaving the house. He could not have known the servants would receive a telegram and ask for leave. Without their leaving the place, the plan, if there was any, could not have been executed. This is one weak link in the hypothesis that the murder was meticulously planned.

96. In Kashmir Singh v. State of Himachal Pradesh, [1990 Supp (1) SCC 133] the Court held:

"There was no infirmity in appraisal of the facts and circumstances and the circumstantial evidence by the courts below in arriving at the conclusion that the accused-appellant has committed the crime under Section 302 IPC. But considering the fact that it was not a pre-meditated and cold-blooded murder, and also because the appellant appeared before the Sessions Judge and made a confessional statement, the sentence is converted from death to life imprisonment."

97. Keeping the abovementioned other characteristics of the crime, we now delve into whether this instance can be categorized as a "rarest of rare" murder. The question is whether murder of wife for the purpose of usurping property is a rarest of rare crime statistically. It is not to say that rarest of rare doctrine only has a statistical dimension i.e. incidence of particular type of murder in a given sample; rarest of rare benchmark can also be used in the context of other parameters such a brutality, planning, society's reaction et al. Facets relating to nature of the crime have already been explained in terms of the few parameters mentioned just now. Therefore we attend to the incidence aspect. It can not be conclusively said that murder of wife for usurping property is a particularly rarest of rare incident. It could, of course, be a rare incident.

98. Also it is to be realized that in criminal cases character of accused is immaterial by the mandate of section 53 and 54 of Indian Evidence Act. The same should not factor in the discussions at the sentencing stage. If that be so, bad character of the accused by itself should not be a determinative

factor.

99. In fact, Appellant should not have been heard at that stage. The stage of hearing an accused under Section 235(2) of the Code is after the judgment of conviction is pronounced and not prior thereto. Appellant herein made a confession before the High Court. The High Court took the same into consideration in the main judgment which could not be done. He had been brought before the High Court only for purpose of fulfilling the requirement of sub-section (2) of Section 235 of the Code of Criminal Procedure. His Statement was taken during midst of hearing. He knew the implications thereof. Despite the same, he made a categorical statement that he was responsible for burring the dead body. He gave an explanation, which might not have found favour with the High Court, but the fact that he had made a confession at least accepting a part of the offence could not have been ignored at least for the purpose of imposition of punishment. He is more than 64 years' old. He is in custody for a period of 16 years. The death sentence was awarded to him by the trial court in terms of its judgment dated 20.05.2005. In a situation of this nature, we are of the opinion that imposition of a life imprisonment for commission of the crime under Section 302 shall serve the ends of justice.

100. However, while saying so, we direct that in a case of this nature 'life sentence' must be meant to be 'life sentence'. Such a direction can be given, as would appear from some precedents. {See Subhash Chander v. Krishan Lal and Ors. [(2001) 4 SCC 458]}.

101. Yet again in Ram Anup Singh and Ors. v. State of Bihar [(2002) 6 SCC 686], this Court directed that the accused shall remain in jail for a period of not less than 20 years. [See Prakash Dhawal Khairnar (Patil) v. State of Maharashtra, (2002) 2 SCC 35], Shri Bhagwan v. State of Rajasthan [(2001) 6 SCC 296] and Mohd. Munna etc. v. Union of India & Ors. etc. [(2005) 7 SCC 417].

102. However, before parting with this case, we may notice that a prayer was made by Smt. Sabhah Khaleeli (daughter of the deceased) that the mortal remains of Smt. Shakereh (deceased) including skull are required by the family of the deceased for burial and obsequies ceremony. The High Court has issued such a direction. As the family of the deceased and in particular Smt. Sabah Khaleeli (PW-5) desires to perform burial and other obsequies ceremonies, we direct that the order of the High Court, in this behalf, may be implemented, as expeditiously as possible.

103. For the reasons aforementioned, the appeal is dismissed, subject to the modification in sentence, as directed hereinbefore.