Ankush Maruti Shinde . vs State Of Maharashtra on 5 March, 2019

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Bench: M.R. Shah, S. Abdul Nazeer, A.K. Sikri

1

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS. 1008-1009 OF 2007

ANKUSH MARUTI SHINDE AND OTHERS ..APPELLANTS
VERSUS

STATE OF MAHARASHTRA ..RESPONDENT
WITH
CRIMINAL APPEAL NOS. 881-882 OF 2009

STATE OF MAHARASHTRA ..APPELLANT

VERSUS

AMBADAS LAXMAN SHINDE AND OTHERS ..RESPONDENTS
WITH
CRIMINAL APPEAL NOS. 268-269 OF 2019

AMBADAS LAXMAN SHINDE AND OTHERS ..APPELLANTS

VERSUS

STATE OF MAHARASHTRA ..RESPONDENT

JUDGMENT

M.R. SHAH, J.

All these appeals are interlinked, and as such, arise out of the impugned judgment of the Division Bench of the Bombay High Court dated 22.03.2007 passed in Confirmation Case No.2 of 2006 along with Criminal Appeal No. 590 of 2006, and are being disposed of by this common judgment.

1.1 By the impugned judgment, a Division Bench of the Bombay High Court has disposed of the Reference made by the learned 3 rd Ad-hoc Additional Sessions Judge, Nashik (hereinafter referred to as the 'Sessions Court') under Section 366 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') for confirmation of the death sentence.

1.2 The Sessions Court by judgment and order dated 12.06.2006 in Sessions Case No. 43/2004 convicted in all six accused – original accused nos. 1 to 6 for the offences punishable under Sections 395, 302 read with 34 of the IPC, Section 376 (2)(g), Section 307 read with Section 34 of the IPC, Sections 396, 397 and 398 of the IPC.

1.3 The learned Sessions Court sentenced all the accused to death for the offences punishable under Section 302 read with 34 of the IPC. The learned Sessions Court also imposed separate punishments for other offences for which they were convicted. All the convicted accused filed Criminal Appeal No. 590/2006 before the High Court of Bombay against the order of conviction and sentence imposed by the learned Sessions Court. As observed hereinabove, the learned Sessions Court made a reference to the High Court for confirmation of the death sentence, which was registered as Confirmation Case No. 2 of 2006.

1.4 That the High Court, while upholding the conviction and death sentence of original accused nos. 1, 2 & 4, altered the death sentence in respect of original accused nos. 3, 5 & 6 to life imprisonment along with fine. Accused nos. 1, 2 & 4 were also convicted for the offences punishable under Section 376(2)(g) of the IPC and they were sentenced to suffer 10 years rigorous imprisonment. The High Court set aside the conviction and sentence under section 376(2)(g) in respect of accused nos. 3, 5 & 6. The High Court confirmed the conviction of the accused for the offences punishable under Section 307 read with Section 34 of the IPC, Section 397 read with Section 395 of the IPC and Section 396 of the IPC.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the Division Bench of the Bombay High Court, original accused nos. 1, 2 & 4 have preferred Criminal Appeal Nos. 1008-1009 of 2007. The State of Maharashtra has also filed Criminal Appeal Nos. 881-882 of 2009 challenging the alteration of death sentence to life imprisonment in respect of original accused nos. 3,5, & 6 are concerned. The State has also challenged the acquittal of original accused nos. 3, 5 & 6 for the offence punishable under Section 376(2)(g) of the IPC.

2.1 That by judgment and order dated 30.04.2009, this Court dismissed the appeals preferred by original accused Nos. 1, 2 & 4 and allowed the appeals preferred by the State and restored the capital punishment imposed by the learned Sessions Court so far as accused Nos. 3, 5 & 6 are concerned. That the judgment and order dated 30.04.2009 passed by this Court was sought to be reviewed at the instance of the original accused nos. 3, 5 & 6 on the ground that accused nos.3, 5 & 6 had no opportunity to be heard by the Bench, before the appeals filed by the State of Maharashtra for

enhancement of sentence were decided.

2.2 That a three Judge Bench of this Court by its order dated 31.10.2018 allowed the review applications, and recalled the judgment and order dated 30.04.2009 rendered by this Court not only qua accused nos. 3, 5 & 6, but qua other accused also by observing that the evidence is common and the offences relate to the same incident, and therefore, it is appropriate and proper that the judgment dated 30.04.2009 should be recalled in its entirety, in relating to all the six accused. While allowing the review applications, this Court recalled the judgment dated 30.04.2009 and directed the criminal appeals to be restored to the file of this Court and directed that the appeals be placed before the appropriate Bench for hearing afresh. It is to be noted that this Court while restoring the appeals which have been preferred by the original accused nos. 1, 2 & 4 and State of Maharashtra, also granted permission to accused nos. 3, 5 & 6 to file appeals against the judgment of the High Court convicting them, if so advised, and that is how accused nos.3, 5 & 6 have preferred Criminal Appeal Nos. 268-269 of 2019 against the judgment of the High Court convicting them. Hence, all these appeals are now before the Court for a fresh hearing.

3. The prosecution version in nut and shell is as follows:

> On 5/6/2003 Trambak and all his family members as well as the guest Bharat More were chitchatting after dinner and at about 10.30 p.m. seven to eight unknown persons entered his hut and all of them were on banyan and half pant and they started threatening the family members. They demanded money as well as ornaments and Trambak took out Rs. 3000/-from his pocket and handed over to one of them.
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> Some of the gang members forcibly took away the mangalsutra as well as ear-tops and dorley from the person of Vimalabai, ear-tops from the person of Savita and silver rings which were around her feet. From the person of Manoj they removed a silver chain and a wrist watch.
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> Thereafter they went out of the hut and consumed liquor. After some time they re-entered the hut with weapons like knife, axe handle, sickle, spade with handle and yokpin etc., so as to rob the house members and collect more money and ornaments etc. They started beating the family members and Trambak was the first person who received assault. Sandeep and other members of the family told the dacoits to take away whatever they could collect from the house but no family members should be assaulted. At this stage Sandeep was assaulted and so also Shrikant @ Bhurya, Bharat and Manoj. The dacoits did not spare Vimalabai as well. They tied hands and legs of all the family members except Manoj and Vimalabai. As a result of assault Manoj, Trambak, Sandeep, Shrikant and Bharat had fallen unconscious. Three of the dacoits dragged Savita out of the hut and took her to the guava garden. Two of the dacoits then picked up Vimalabai and dragged her towards the well. One of them raped her near the well and then she was taken to the guava garden where Savita was taken. Vimalabai was assaulted and brought back to the hut. After some time the three

dacoits brought Savita back but in naked condition and with injuries on her body. When the dacoits had entered the hut at about 10.30 p.m. the light bulb in the hut was burning and TV was on. The dacoits increased the volume of the tape recorder and after they dropped Savita in the hut, they put on shoes and started walking on the persons lying injured and they thought that all of them were dead. Vimalabai (PW 8) lost her consciousness around 12 O' Clock in the night and till then the dacoits were present in the hut and they left the hut under the belief that all of the victims were dead. However, PW 1 Manoj and his mother PW 8 Vimalabai survived.

3.1 As per the case of the prosecution, in the morning at about 6:30 a.m. on 6.6.2013, one Vishnu Hagwane (PW12), nephew of the landlord reached the spot and had seen the dead bodies. By that time, PW1 – Manoj Satote became conscious. PW1 – Manoj Satote lodged the first information report against unknown persons. The investigating officer started investigation. It appears that at different times, the investigation was carried out by four different officers. The investigating officer recorded the statement of the concerned witnesses including PW1 – Manoj Satote and PW8 – Vimalabai. 3.2 The investigating officer also collected the medical evidence.

The clothes from the five deceased persons, as well as, on the person of Manoj and Vimalabai were seized. From the spot some weapons like wooden handle, spade with handle, yokpin and sickle were also seized. The seized articles were sent for chemical analysis and CA reports from Exhibit 58 to Exhibit 72 were received. That original accused nos. 1 & 2 came to be arrested under arrest panchanamas (Exhibits 44 and 45) on 23.6.2003 by the Crime Branch. According to the prosecution, the police during the course of investigation also got information that some other accused were also involved in a separate crime registered with the police station at Bhokardhan in Jalna district on 19.06.2003 and the police, therefore, filed an application before the competent Court seeking transfer of the accused in Crime No. 74 of 2003 registered with the Bhokardhan police station and finally accused nos. 3 to 5 came to be arrested on 27.06.2003 under arrest panchanamas (Exhibits 53, 54 and 55) after their custody was transferred from the police station at Bhokardhan. That on the arrest of accused nos. 1 to 5 their clothes were seized and they were subjected to medical examination. On medical examination, some injuries were found on accused nos. 1, 2 & 4. The aforesaid accused nos. 1, 2 & 4 were seen to have sustained some injuries within three weeks. Medical certificates were issued by the concerned doctor (Exhibits 133 to 135 and Exhibits 195 & 196). That during the course of the investigation, test identification parade of accused nos. 1 to 5 was held on 25.07.2003 by the Executive Magistrate. In the test identification parade, PW1 – Manoj Satote identified the five accused. PW8 – Vimalabai also identified accused nos. 1, 3, 4 and 5 as the unknown persons who had entered the hut and assaulted the family members. However, she could not identify accused no.2. It appears that thereafter accused no.6 came to be arrested on 07.10.2004 and his test identification parade was held on 9.10.2004. Both PW1 and PW8 identified the said accused also.

3.3 On completion of the investigation and finding prima facie case against the accused, the Investigating officer filed a charge sheet against all the accused for the offences punishable under

Sections 395, 302 read with 34 of the IPC, Section 376 (2)(g), Section 307 read with Section 34 of the IPC, Sections 396, 397 and 398 of the IPC. That the learned Magistrate committed the case to the Court of Sessions, which was numbered as Sessions Case No. 43/2004. 3.4 To prove the case against the accused, the prosecution led oral as well as documentary evidence. The prosecution examined as many as 25 witnesses as under:

PW	Name	Role
1	Manoj Satote	Complainant and Eye Witness, FIR dt. 6.6.2003 Ex. 23
2	Suresh Javare	Inquest Panch, Panchnamas [dt. 6.6.2003 Ex. 25-29 [Co-Panch Raman Ratan Boie] 8.30 am – 11.30 am.
3	Shankar Ghule	Spot Panch for hut, Panchnama dt. 6.6.2003 Ex. 31 11.45 am-12.45 pm.
4	Bharat Bhoir	Spot Panch for hut, Panchnama dt. 6.6.2003 Ex.31
5	Dada Palde	Spot Panch for well, Panchnama dt. 7.6.2003 Ex. 34 [Co-Panch Sandeep Dhule] 8 am-9 am.
6	Raghunath Hagwane	Landlord of Guava Orchard. Panch for Seizure Panchnama for slippers from spot dt. 6.6.2013 Ex. 75 (Co-Panch Kashinath Palande] 12.50 pm – 1.20 pm. Panch for identification of slippers by PW1 dt. 8.6.2003 Ex. 76 [Co-Panch Kashinath Palande] 9 am – 9.45 am.
7	Ibrahim Shaikh	Panchnama for spot dt. 25.6.2003 Article A [Co-Panch Shabbi Khatib] 11 am – 12.30 pm.
8	Vimalbai Satote	Eye Witness
9	Dr. Dattatraya Gadakh	Autopsy Surgeon for Post mortems Notes dt. 6.6.2003 Ex. 81, 86, 89, 91, 93 and Cause of Death Certificates dt. 6.6.2003 Ex. 82, 85, 87, 88, 90, 92, 94, 96, 99, 101.
10	PC Vithal	Carried articles to CA.
11	PN Sonawane	Carried articles to CA.
12	Vishnu Hagwane	Nephew of PW6. First person to reach spot.
13	Ramesh Sonawane	Special Executive Magistrate. Conducted TIP of A6 on 9.10.2004 Ex. 120 [Panchas Chaggan Mag

		Chavan, Rajendra Murlidhar Sarode] 11.30 am – 12 noon. Letters Ex. 118-9, 121. Recorded Dying Declaration of PW8 Ex. 122, 5.20 pm to 6 pm.
14	Sayyad Budhan	Panch for opening and resealing packet containing a chain dt. 22.8.03 Ex. 124-5 [Co-Panch Deepak Ghodke] 12.15 pm – 12.30 pm.
15	Dr. Nalini Shardul	Medical Officer for PW1 and PW8's injuries, Certificate Ex. 129-31.
16	Dr. Satish Shimpi	Medical Officer who examined A3, A4, A5 on 27.6.03, Certificate Ex 133-135
17	PSI Narayan Shinde	Arrested A1 and A2 on 22.6.03, Panchnama for seizure of underwear dt. 24.6.03 Ex. 46-47 [8 am – 8.45 am]. Arrested A6 on 1.10.04.
18	ACP Bhaskarrao Dhus	Investigating Officer
19	Bhimsing Onkar	In charge of Dog Squad, Panchnama dt. 29.6.2003 Ex. 164
20	PI Kashinath Bharate	First Investigating Officer. Recorded Dying Declaration of PW1 Ex. 178 dt. 6.6.03
21	PI Ramesh Patil	Searched houses of A1, A3, A4, A5 on 26.6.03 Panchnamas Ex. 48-52, 183. Arrested A3, A4, A5 dt. 27.6.03 Ex. 53-55, 5.05 am – 5.45 am. Seized chain from house of A5 dt. 26.6.03 Ex. 183 [Panch Shaikh Ilyas and Bhimrao Mhaske] 1.30 – 2.30 pm.
22	PI Shafiuddin Sayyad	Recorded FIR
23	PI Sharad Gavane	Recorded statement of PW8 dt 6.6.03
24	Dr. Vilas Patil	Medical Officer for examination of A1 and A2 dt. 23.6.03 Ex. 195-6
25.	Govind Alhate	Magistrate who had conducted the TIP dt. 25.7.03 for A1-A5 Ex. 224-228, explanation Ex. 229.

3.5 Apart from the aforesaid oral evidence, the prosecution brought on record and relied upon the following documentary evidence:

Sl. No.	Particulars	Exh. No.

1.	Complaint	Exh. 23
2.	Inquest Panchnamas	Exhs. 25 to 29
3.	Spot Panchnamas	Exh. 31 and Exh. 34
4.	Seizure panchnama of slippers	Exh. 75
5.	Identification of slippers by Manoj	Exh. 76
6.	P.M. Notes of deceased Savita	Exh. 81
7.	Advance cause of death certificate of Savita	Exh. 82
8.	Final cause of death certificate of Savita	Exh. 85
9.	P.M. Notes of Trambak	Exh. 86
10.	Advance cause of death certificate of Trambak	Exh. 87
11.	Final cause of death certificate of Trambak	Exh. 88
12.	P.M. Notes of Bhurya	Exh. 89
13.	Final cause of death of Bhurya	Exh. 90
14.	P.M. Notes of Sandip	Exh. 91
15.	Final cause of death certificate of Sandip	Exh. 92
16.	P.M. Notes of Bharat More	Exh. 93
17.	Final cause of death certificate of Bharat	Exh. 94
18.	The opinion of medical officer about Savita	Exh. 107
19.	Medical certificate of Manoj	Exh. 129
20.	Medical certificate of Vimalabai	Exh. 131 and Exh. 132
21.	Medical certificates about the examinations of the Accused	Exh. 133 to 135 and Exh. 195 and 196
22.	Proclamation orders	Exh. 158
23.	Panchnama of the identification by Dog	Exh. 164
24.	Spot map	Exh. 169
25.	C.A. Certificate	Exh. 58 to 72

3.6 That after the closing pursis was submitted by the prosecution, further statement of the accused under Section 313 of the Code was recorded, where they denied having committed any offence, as alleged. 3.7 That thereafter, on appreciation of the evidence on record, both oral as well as documentary, the learned Sessions Court held all the accused nos. 1 to 6 guilty for the offences punishable under Sections 395, 302 read with 34 of the IPC, Section 376 (2)(g), Section 307 read with Section 34 of the IPC, Sections 396, 397 and 398 of the IPC, and sentenced the accused as under:

> "1. The Accused Nos. (1) Ankush Maruti Shinde, (2) Rajya Appa Shinde, (3) Ambadas Laxman Shinde, (4) Raju Mhasu Shinde, (5) Bapu Appa Shinde & (6) Surya alias Suresh s/o Nagu alias Gangaram Sinde are convicted for the offences punishable under sections 395, 302 r.w. 34 of Indian Penal Code, Section 376(2)(g), 307 r.w. 34 of Indian Penal Code, Sections 396, 397 r.w. 395 and Sec. 398 of Indian Penal Code.

2. The offence punishable under section 397 r.w. 395 of Indian Penal Code is proved. It includes offences punishable under sections 395 and 398 of Indian Penal Code, so no separate punishments are given for the same.

3. The Accused Nos. 1 to 6 are convicted for the offence punishable under section 302 r.w. 34 of Indian Penal Code.

They are sentenced to death for the offence punishable under section 302 r.w. 34 of Indian Penal Code. It is directed that they be hanged by their necks till they are dead. The sentence is subject to the confirmation by the Hon'ble High Court.

4. The accused Nos. 1 to 6 are convicted for the offence punishable under section 376(2)(g) of Indian Penal Code and they are sentenced to suffer R.I. for a period of 10 years each with fine of Rs.200/- each.

In default of payment of fine, to suffer further R.I. for a period of 1 month each.

5. The Accused Nos. 1 to 6 are convicted for the offence punishable under section 307 r.w. 34 of Indian Penal Code. They are sentenced to suffer R.I. for 5 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for a period of 1 month each.

6. The Accused Nos. 1 to 6 are convicted for the offence punishable under section 397 r.w. section 395 of Indian Penal Code. They are sentenced to suffer R.I. for a period of 7 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for 1 month each.

7. The Accused Nos. 1 to 6 are convicted for the offence punishable under section 396 of Indian Penal Code. And they are sentenced to suffer R.I. for 10 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for 1 month each.

8. The Accused Nos. 1 to 6 are acquitted of the offence punishable under section 135 of Bombay Police Act.

9. All the sentences to run concurrently."

4. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence imposed by the learned Sessions Court, all the accused preferred Criminal Appeal No. 590/2006 before the High Court. The learned Sessions Court made a reference to the High Court as all the accused were imposed the death sentence. It appears that during the pendency of the aforesaid

appeal and the confirmation case, Criminal Application No. 1 of 2006 was filed by the State of Maharashtra and Criminal Application No. 2 of 2006 was filed by the accused persons before the High Court. By the common order dated 14.11.2006 in both these applications, the High Court issued the following directions:

> "(i) The prosecution be allowed to lead additional evidence of the Sub-Divisional Magistrate who conducted the test identification parade in relation to accused Nos.1 to 5 and all relevant documents pertaining thereto.
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> (ii) The defence be permitted to recall and cross-examine PW-8 in relation to Exh. 122 which is already on record.
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> (iii) In the event contradictions are established on record in the cross-examination of PW-8, the learned Trial Judge should also recall PW-13 for directions of those contradictions, if any.
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> (iv) Since the matter of confirmation is pending, it is desired that the necessary recording of additional evidence be completed before 7th of January, 2007.

List the matter for further orders in relation to hearing on 9th January, 2007. The record may be transmitted to the Trial Court for this purpose." 4.1 Consequently, PW8 and PW13 were further cross-examined by the defence and the prosecution examined one additional witness i.e. Shri Govind Alhate, City Magistrate at Nashik as PW25. He had conducted the TI parade of accused nos. 1 to 5 on 25.07.2003. Through his evidence the additional documents at Exhibits 217 to 229 were brought on record. Exhibits 224 to 228 are the memorandum of TI parade of each of the accused nos. 1 to 5 and Exhibit 229 is the explanation submitted by the Sub-Divisional Magistrate. At this stage, it is required to be noted that before the Sessions Court, the Sub-Divisional Magistrate, who conducted the TI parade on 25.7.2003 was not examined, and therefore the High Court passed the aforesaid order and directed the prosecution to lead additional evidence of Sub-Divisional Magistrate, who conducted the TI parade in relation to accused nos. 1 to 5, conducted on 25.7.2003. That from the cross-examination of PW8 and PW13 and their additional depositions recorded, consequent to the order passed by the High Court in Criminal Application Nos. 1 and 2 of 2006, it was found that PW13 received the requisition for recording the dying declaration of PW8 after she had regained consciousness on 7.6.2003 and she had identified the four accused from the photographs shown to her in File No. 80 out of the three files handed over to him by the police, i.e., File Nos. 70, 76 and 80. It also came on record that PW8 had, in fact, identified four persons from the photographs with name, who are other than accused nos. 1 to 6. That it was found that the prosecution withheld the aforesaid material evidence and suppressed the material fact. Therefore, it was also the case on behalf of the accused before the High Court that the prosecution was not fair and they have suppressed/withheld the material evidence from the Court and, in fact, there was no investigation whatsoever with respect to those four persons, who were identified by PW8. The High Court did not agree with the submission on behalf of the accused and ignored the Exhibit 122 as dying declaration of PW8 – Vimalabai, recorded by the Executive Magistrate, Sonawane on the ground that PW8 subsequently survived, Exhibit 122 cannot be said to be a dying declaration, and

that it could at the most be termed as her previous statement during the course of investigation, and that it cannot be treated as a substantive evidence and at the most it could be used for the limited purpose of corroboration or contradiction of the testimony of its maker and in any case it cannot be admissible under Section 6 or Section 32 of the Evidence Act. That thereafter, considering the material on record and appreciating of evidence, the High Court by the impugned judgment and order confirmed the conviction and sentence imposed upon accused nos. 1, 2 & 4. However, altered the death sentence to life imprisonment in respect of accused nos. 3, 5 & 6. The High Court also acquitted accused nos. 3, 5 & 6 for the offence under Section 376(2)(g) of the IPC. Hence, the present appeals by the original accused as well as the State of Maharashtra, as observed hereinabove.

5. Shri (Dr.) Yug Mohit Chaudhary, learned counsel has appeared on behalf of the original accused and Shri Nishant Katneshwarkar, learned counsel has appeared on behalf of the State of Maharashtra. 5.1 Learned counsel appearing on behalf of the original accused has vehemently submitted that in the facts and circumstances of the case, the courts below have materially erred in convicting the accused. 5.2 It is vehemently submitted by the learned counsel appearing on behalf of the original accused that the incident occurred after 10:30 p.m. at night. The victims were living in a hut made of gunny bags in the Guava Orchard. There was no light facility in the hut. Even as per the case of the prosecution, the accused put off the light and thereafter whatever has happened, the same was in the torchlight. It is submitted therefore that it was very difficult for the witnesses, more particularly PW1 and PW8 to identify the assailants/accused. 5.3 It is further submitted by the learned counsel appearing on behalf of the accused that in the present case the prosecution in support of its case has only relied upon the evidence of identification, and it is on this evidence alone that 6 people have been sentenced to death. It is submitted that though the charge was for rape and murder, there is no forensic evidence corroborating the prosecution case. It is submitted by the learned counsel appearing on behalf of the accused that, in fact, the DNA, finger print evidence and the initial identification made by the victim contradict the prosecution case. It is submitted that there are no recoveries, finger print evidence, CA evidence or DNA evidence linking the accused to the crime. 5.4 It is vehemently submitted by the learned counsel appearing on behalf of the accused that in the present case, the prosecution has relied upon the deposition of two eye witnesses, PW1 and PW8. It is vehemently submitted that as such both the witnesses - PW1 & PW8 are not reliable and their deposition is not trustworthy. It is submitted therefore both the courts below have materially erred in relying upon or considering the deposition of PW1 & PW8, while holding the accused guilty.

5.5 It is further submitted by the learned counsel appearing on behalf of the accused that according to the two eye witnesses, PW1 & PW8, the offence was committed by 7-8 persons. It is submitted however that PW1, as per the deposition of PW12 - nephew of the landlord of Guava Orchard who was the first person to reach the spot, told him that offence was committed by four persons. 5.6 It is further submitted by the learned counsel appearing on behalf of the accused that PW8's entire evidence about the incident and the role played by the different accused persons is an omission and/or it can be said to be an improvement. It is submitted that none of what was stated in the deposition before the Court was stated to the police in the various statements of the said witness that were recorded during investigation and the first time the allegations are made after two and a

half years later during the deposition in Court. It is submitted that when the aforesaid was specifically pointed out by the defence before the learned Sessions Court as well as before the High Court, both the courts below have ignored the same by observing that the omissions/improvements/contradictions are not major which would fatal the case of the prosecution. It is submitted that as such the omissions/improvements/contradictions in the deposition of PW8 are major contradictions/omissions/improvements which would destroy the case of the prosecution and which are fatal to the case of the prosecution.

5.7 It is further submitted by the learned counsel appearing on behalf of the accused that PW8 identified A2 in the court as the person who had taken Savita outside the hut and impliedly raped her. It is further submitted that PW8 was not able to identify him in the TIP. It is submitted that her failure to identify him in the TIP soon after the offence renders her identification in court many years later nugatory. It is submitted that it is on the basis of PW8's statement about A2 being the rapist that he has been given the death penalty by the High Court.

5.8 It is further submitted by the learned counsel appearing on behalf of the accused that there was no light in the hut and the culprits had used torches. It is submitted that it would be highly unlikely that the witnesses could have either been able to get a good look at their faces or even remember them two months later. It is submitted that it is required to be noted that neither PW1 nor PW8 gave details about the description of the culprits – heights, hair, facial features, complexion, beard etc. to the police during the investigation, yet they claim to be able to recognise/identify the accused in the TIP. It is submitted that A1 to A5 were put up in a TIP almost 2 months after the incident and 1 month after the arrest. It is submitted that A6 was put up in a TIP more than one year later and he too is purported to be identified by PW1 & PW8. It is submitted that therefore the accused could not have been convicted on the basis of their being identified by PW1 & PW8 in the TIP, which were conducted after a long time and that too when no specific description was given either by PW1 or PW8 in the FIR and/or in their earlier statements before the police recorded during the investigation.

5.9 It is further submitted by the learned counsel appearing on behalf of the accused that before evidence of identification can be relied upon, the court has to be convinced that there was sufficient light to enable the witness to observe the features of the culprit, and that the witness was in a fit condition to see and remember. It is submitted that in the present case, PW1 & PW8 had fallen unconscious during the incident; PW1 very early when the incident took place, and PW8 a little later. They both had been severely injured and their capacity to observe and notice the features of the assailants would have been severely compromised.

5.10 It is further submitted by the learned counsel on behalf of the accused that the incident occurred at night at 10:30 p.m. The hut was made of gunny bags and its walls were made from stems and plants. There was no door to the hut. There was no electricity meter in the hut. It is submitted that the IO(PW20), who made the spot panchnama, had admitted in his evidence that "there is no mention in the panchnama as to whether there was light or not in the shed (hut)". 5.11 It is further submitted by the learned counsel appearing on behalf of the accused that though PW1 insists that the electric light was on, he also states that the culprits were using battery torches and were

searching in torchlight. He admits that he had told the police that the culprits had switched off the lights when they had started assaulting the victims. It is submitted that even if it is assumed that there was some light, the prosecution case at its highest would show that during the incident the light bulb was burning for a few minutes before it was turned off, and the rest of the incident took place under torchlights carried by the culprits. It is submitted that in these circumstances, neither PW1 nor PW8 would have been able to get a proper look at the persons who committed the offence. According to the learned counsel appearing on behalf of the accused, the following facts would prove that PW1 & PW8 were not able to get a proper look at the persons who committed the offence:

> (i) neither PW1 nor PW8 were able to describe the accused to the police or the clothes worn by them;
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> (ii) no identifying features were given;
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> (iii) during the trial, the clothes seized from the accused were not identified by either PW1 or PW8;
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> (iv) though the weapons of assault were seized from the spot of the offence, these were not shown to PW1 probably because he would not have been able to identify them;
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> (v) even though the age of one of the appellants was 17, and 2 were around 20, PW1 and PW8 told the police that the culprits were aged 25-30 years;
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> (vi) neither PW1 nor PW8 were able to ascribe specific roles to the culprits. The allegations about the commission of the assault were in omnibus terms. PW1 especially does not assign any role to A2, A4, A5 and A6;
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> (vii) most importantly, PW8 has identified an entirely different set of people from the photo albums shown to her soon after the offence. Her evidence during the trial shows that even at the point of time she was convinced that the persons she had identified in the photographs shown to her by the magistrate, which admittedly were of some other persons, were photographs of the accused' and
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> (viii) the aforesaid deficiencies in the testimonies of PW1 & PW8 can only be explained by the insufficiency of light at the time of the incident.

5.12 In so far as the identification of the accused by PW1 & PW8 is concerned, it is vehemently submitted by the learned counsel appearing on behalf of the accused that such an identification is not believable on number of grounds. It is submitted that as such it can be said to be a mistaken identity. It is submitted that PW8 had earlier identified some other persons. It is submitted that on 7.6.2003m i.e. 2 days after the offence, PW8 – Vimalabai identified the photographs of 4 people from a file of notorious criminals shown to her by PW13 – Ramesh Sonawane, Special Executive Magistrate in the hospital as those who committed the offence. The present accused were not among

those four persons identified by PW8 from the photo album. 5.13 It is further submitted by the learned counsel appearing on behalf of the accused that PW8's statement identifying 4 other people on 7.6.2003 is the first identification made less than 2 days after the incident and is closest to the date of incident. This identification was made by PW8 when the images were still fresh in her mind and memory had not faded. The subsequent identification by PW1 and PW8 identifying the present accused occurred on 25.7.2003 which is more than 1 ½ months after the date of incident wherein PW8 failed to identify A2, and attributed an entirely contrary role to A6. It is submitted that the photo identification being first in point of time and close to the date of offence is of great significance. 5.14 It is further submitted by the learned counsel appearing on behalf of the accused that the results of photo identification completely contradict PW8's identification of the accused in TIP and the court. It is submitted that in the light of this contradiction, her TIP identification and court identification are liable to be set aside. It is further submitted, that the identification in the court is a substantive evidence which is materially contradicted by the photo identification and therefore identification in court cannot be relied upon.

5.15 It is further submitted by the learned counsel appearing on behalf of the accused that PW8's identification of 4 other people even contradicts the identification made by PW1 in the TIP and court and therefore renders the same unreliable. It is further submitted that as per PW1's own testimony, he lost consciousness soon after the assailants entered the hut. It is also submitted that PW1 lost consciousness much before PW8.

5.16 It is further submitted by the learned counsel appearing on behalf of the accused that accounting for PW8's earlier identification of 4 persons and subsequent identification of the present 6 accused, PW8 has in all identified 10 people as accused whereas it is the case of the prosecution that only 7 persons have committed the said offence. It is submitted that due to this mistaken identification by PW8, no reliance can be placed on PW8's evidence of identification of the accused. In support of his submission, he has relied upon the decisions of this Court in the cases of Vaikuntam Chandrappa vs. State of Andhra Pradesh, AIR 1960 SC 1340.

5.17 It is further submitted by the learned counsel appearing on behalf of the accused that PW1 in his evidence in court had said that the offence was committed by 7-8 persons. He had said the same thing in his FIR recorded on the day of the offence i.e. on 6.6.2003. However, before recording of the FIR, at the spot of the incident itself, before being taken to hospital, he had told PW12 (the person who discovered the crime) that the offence was committed by 4-5 persons. It is submitted that this huge discrepancy in the number of assailants casts a serious doubt over the reliability of the evidence of PW1 and PW8 that this offence was committed by 7-8 persons. Their subsequent evidence in court about the number of assailants and role played by each of the accused is clearly an improvement and contradicts what they had said earlier.

5.18 It is further submitted by the learned counsel appearing on behalf of the accused that similarly in her testimony in Court, PW8 had said that the offence was committed by 7 persons. In her first statement to the police, she had said that the offence was committed by 7-8 persons. It is submitted that the likelihood of mistaken identification by PW1 and PW8 of the accused is strengthened by the following facts:

(i) PW1 has repeatedly stated that the culprits spoke with them in Hindi. According to him, they were also speaking amongst themselves in Hindi. PW8 has confirmed this. The victims are all Marathi speakers. According to the police investigation, the accused-appellants too hail from Maharashtra and are Marathi speakers. If the accused-appellants were to speak with the victims they would have spoken in Marathi not in Hindi. The fact that the culprits spoke in Hindi clearly indicates that they were not Marathi speakers. This also points to the false implication of the accused-appellants in this offence.

5.19 It is further submitted by the learned counsel appearing on behalf of the accused that as such PW8's entire testimony in the court has the omission and/or improvement. It is submitted that prior to her deposition in court, two statements dated 6.6.2003 and 7.6.2003 were recorded by the police and the magistrate respectively. It is submitted that what is stated by PW8 in the court was not stated by her in her earlier statements, more particularly with respect to how the incident had taken place. It is submitted that this evidence has come for the first time through her deposition in court by way of an improvement amounting to a contradiction. It is submitted that PW8 in her earlier statements, recorded during the investigation, has neither given any details of the assault or of the roles played by different persons. It is submitted that even in the TIP, she did not attribute any role to the persons she identified, and neither did she do so after the TIP in any statement recorded by the police. It is submitted that for the first time PW8 gave any details about the incident for ascribed role to the accused persons, two and a half years later in the court and never before that. It is submitted therefore that her failure to give any information or statement to the police and the two magistrates either about the events occurring during the incident or the role played by the different persons renders her evidence on this point unreliable.

5.20 It is further submitted by the learned counsel appearing on behalf of the accused that in fact PW8 suppressed the material fact from the court when her first deposition was recorded by the learned Sessions Court. It is submitted that PW8 suppressed the material fact from the Court that in fact on 7.6.2003 she was shown the photographs before the executive magistrate and that she identified four persons who are other than the accused who came to be tried. It is submitted that when she was further confronted with the same, in her further cross-examination, which was recorded pursuant to order dated 14.06.2006 passed by the High Court while hearing the Confirmation Case, she turned around and stated that she identified four persons having committed the offence, who were out of the six persons she identified in TIP and before the Court. It is submitted that the same is a material contradiction and it was a case of material suppression and therefore PW8's testimony is not reliable and trustworthy and therefore it would be unsafe to rely upon the deposition of such witness as PW8 and to convict the accused relying upon the deposition of such a witness.

5.21 In so far as A2 is concerned, it is further submitted by the learned counsel appearing on behalf of the accused that though PW8 claimed that A2 had taken Savita out of the hut and raped her and brought her back in a naked condition, she was unable to identify A2 in TIP. It is submitted that her identification in court of A2, unsupported by a previous identification in the TIP cannot be accepted, especially given the light conditions at that time and the fact that she herself became unconscious

during the proceedings. It is submitted that there is no recovery from A2. PW8 is the only one who said that A2 was involved in Savita's rape. It is submitted that it is on the basis of this statement, uncorroborated by a previous TIP, that A2 has been singled out and given the death sentence. It is submitted that as such the learned Sessions Court erred in holding that PW8 identified all the accused in the TIP and identified A6 in the second TIP. It is submitted that it is a clear error as PW8 did not identify A2 in the first TIP.

5.22 In so far as the identification of and role attributed to A6 is concerned, It is further submitted by the learned counsel appearing on behalf of the accused that A6 was put up for identification in the second TIP conducted by PW13 on 7.10.2004. It is submitted that only PW1 deposes to having identified A6 in the second TIP. PW8 does not speak of attending any TIP where she identified A6. It is submitted that PW13's statement that PW8 identified A6 in the second TIP is hearsay and inadmissible as such because PW8 does not mention anything about the second TIP. She says that she was called for a TIP where she identified four persons and that these four persons were present in court out of the six accused persons. 5.23 It is further submitted by the learned counsel appearing on behalf of the accused that PW13, the Special Executive Magistrate conducted the TI parade for A6. It is submitted that he is the same magistrate who earlier recorded PW8's statement on 7.6.2003 where she identified 4 other persons. It is submitted therefore that he had therefore already participated in the investigation prior to this parade. It is submitted that PW13, the executive magistrate, does not mention any precautions taken by him to prevent the witnesses seeing the accused prior to the parade. It is submitted that on the contrary he admits that the parade was held in an open space. It is submitted that TI parade should have been held in a closed room to prevent the witnesses who are outside from seeing the accused being brought to the parade or his place in the line up. It is submitted that there is also no statement that the dummies resembled the accused persons. It is submitted that as such neither PW1 nor PW8 who claimed to be the eye witnesses gave any description with respect to the accused or the persons who committed the offence, and therefore, on what basis dummies were selected is questionable. It is submitted that as such the executive magistrate was required to be selected the dummies himself but he admits that dummies were selected by the police. 5.24 It is further submitted by the learned counsel appearing on behalf of the accused that as per PW13's evidence, PW8 identified A6 as the person who had assaulted her, dragged her daughter out of the hut and raped her. However, in the absence of PW8 having deposed anything about the second TIP or about having identified A6 in any TIP, this evidence of PW13 is inadmissible as hearsay. 5.25 It is further submitted by the learned counsel appearing on behalf of the accused that PW13's statement attributed to PW8 that A6 had dragged Savita outside the hut is contradicted by her oral evidence in court where she says that A1, A2 and A4 dragged Savita outside the hut. The persons who had dragged Savita outside the hut were obviously the same ones who had raped her. In her evidence in court PW8 was quite clear that it was three persons who done this, and she named A1, A2 and A4 as those three. In court, she does not attribute this role to A6. It was on this basis that the High Court upheld their death sentence and distinguished their case from the others whose sentences were commuted. Her statement during the TIP contradicts her statement in court and gives an inconsistent account of the events.

5.26 It is further submitted by the learned counsel appearing on behalf of the accused that if the 'her' refers to PW8 herself, then this role attributed by PW8 to A6 is inconsistent with the role of

PW1 attributes to A6 when he identifies him in the parade, which is that A6 had dragged Savita outside the hut. As mentioned earlier, the persons who dragged Savita outside the hut were the ones who raped her.

5.27 It is further submitted by the learned counsel appearing on behalf of the accused that in court PW1 does not mention Savita being taken outside the hut at all. In fact, his deposition makes it clear that he had fainted and did not witness any assault on Savita. 5.28 It is further submitted by the learned counsel appearing on behalf of the accused that even in the present case the delay in test identification parade is fatal to the case of the prosecution. It is submitted that in the present case, the offence occurred on 5.6.2003, the date of arrest of the accused is 23rd and 27th June, 2003, and the TIP was held on 25.7.2003, i.e., 50 days from the date of the offence and 33 days after the arrest of A1 and A2. It is submitted that there is no explanation forthcoming from the prosecution for the delay in conducting TIP. According to the learned counsel, the most likely explanation is that this period was used by the police to show photographs to PW1 and PW8 so as to make them memorize the feature of the accused.

5.29 It is further submitted by the learned counsel appearing on behalf of the accused that in so far as the TIP in respect of A6 is concerned, the TIP is vitiated on account of delay as A6 was arrested more than one year later and the TIP for A6 was conducted more than one year later.

5.30 It is further submitted by the learned counsel appearing on behalf of the accused that PW8 has admitted that she had come twice or thrice to court prior to her deposition. It is submitted that during these visits, she would have definitely seen the accused persons in the dock and therefore her deposition in court does not have much significance.

5.31 It is further submitted by the learned counsel appearing on behalf of the accused that even otherwise no reliance can be placed upon the deposition of PW8. It is submitted that first of all PW8 does not say anything in her first deposition with respect to her statement recorded by the executive magistrate on 7.6.2003, and that she was shown the photographs from the album and she having identified four persons having committed the offence were other than six accused persons who were tried. It is submitted that it is important to note that PW8 denied in her first deposition that the photographs of the accused were shown to her by the police. It is clear from the evidence that when PW8 denied the suggestion that she was not shown the photographs, she was not telling the truth. It is submitted that when she was called for further cross-examination, pursuant to the order passed by the High Court, she then admitted that , (i) police had shown 4 photographs of the accused persons, and that she herself told that those were the same accused persons of the incident; and (ii) that when my statement was recorded by the magistrate, the persons who I had identified as accused persons were some other persons other than the present accused. It is therefore submitted that the aforesaid is just contrary to what the executive magistrate has recorded in the first statement of PW8 on 7.6.2003. 5.32 It is further submitted by the learned counsel appearing on behalf of the accused that DNA or Forensic evidence will not support the case of the prosecution and/or linked the accused to the crime. It is submitted that though the charge is of rape and murder, there is no forensic evidence corroborating the prosecution case. 5.33 It is further submitted by the learned counsel appearing on behalf of the accused that the case of the prosecution is that the

accused-appellants were consuming liquor at the spot from liquor bottles and from a handi. Empty liquor bottles, a handi and some glasses were seized from the scene of crime. It is submitted that there is no DNA or finger prints on the glass and liquor bottles to connect the appellants with the crime. The IO, PW20 admitted that the finger print report did not implicate the accused. It is important to note that the appellants' DNA samples were collected during the investigation, as admitted by the IO, PW18 and were sent for DNA analysis, but the prosecution never presented the report to the court for the obvious reason that it would have exonerated the appellants. 5.34 It is further submitted that no public hair, DNA, semen or blood of the appellants was found on any of the victims. Samples were collected from the appellants and sent for analysis but the results did not incriminate the appellants. It is submitted that the police seized 14 slippers from the scene of the crime, but the same could not be linked to the appellants by either matching them or making the accused were them. No one identified those slippers as being worn by the appellants or belonging to the appellants.

5.35 It is further submitted by the learned counsel appearing on behalf of the accused - appellants that clothes were seized from the appellants when they were arrested, as well as from the homes during the house searches, but nothing was found to connect the accused with the said crime. It is submitted that footprints were found around the house the next morning when the bodies were discovered, but those finger prints were not matched to the appellants. It is submitted that even the blood found in the nail clippings of Savita, was not connected to the appellants.

5.36 It is further submitted by the learned counsel appearing on behalf of the accused that as such there is no recovery of the cash and/or any of the gold ornaments alleged to have been stolen/looted from the place. It is submitted that as per the prosecution case, Rs.3,000/- in cash were taken from Trambak; a mangalsutra, dorley and ear tops were taken from PW8; anklets and ear tops were taken from Savita; and a watch and chain were taken from PW1 by the culprits. It is submitted that no stolen property was found or recovered from any of the accused.

5.37 It is further submitted by the learned counsel appearing on behalf of the accused that a while metal chain was allegedly seized during the house search of Bhojubai Appa Shinde, the mother of A5 on 26.6.2003. Her signature is also not there on the panchnama. Moreover, the panchnama does not state that the seized property was sealed. It is submitted that the chain is described as "one white metal chain with 30 links, middle link is broken and tied with a string. Value 0". It is submitted that the chain had no special markings on it and was of a mass-produced type that is freely available. The prosecution claimed that this belonged to PW1. PW1 himself admitted that he had not given any description of the chain to the police. A white metal chain is not such an item that could only be possessed by PW1. It is submitted that apart from this chain, nothing was seized or recovered from any of the accused in this case. It is vehemently submitted that had this crime been committed by the accused, surely all the stolen property would have been recovered. The seizure of a commonly available silver chain without any distinctive markings is too feeble a link to be held against the accused.

5.38 It is further submitted by the learned counsel appearing on behalf of the accused that no Magistrate/Special Executive Magistrate/Tehsilder has been examined regarding conducting of the

TIP for the silver chain. No witness has been examined who was present when the chain was identified by PW1. PW14 is the panch before whom the packet containing the chain was opened and then resealed on the very day that PW1 claims he identified it, but PW14 is not a witness to the identification and he does not depose about it. 5.39 It is further submitted by the learned counsel appearing on behalf of the accused that PW8 does not identify the chain. It is not shown to her during her evidence. In Court, PW8 stated "Muddemal article nos. 72 and 40 are the ornaments of Savita". In inquest panchnama dated 6.6.2003 (Exhibit 27) conducted over Savita's dead body, the corpse is described as "on her neck there is a white pearl necklace, and on each of her hands there are 2-2 white metal bangles". These articles, among others, have been seized vide panchnama (Exhibit 42 dated 6.6.2003). It is submitted that it is possible that some of these ornaments seized from Savita's person have been shown to and identified by PW8 during her testimony. 5.40 It is further submitted by the learned counsel appearing on behalf of the accused that in the absence of any recovery or seizure of any kind that connects the appellants to the crime and the prosecution has not been able to adduce any evidence corroborating the identification by PW1 and PW8, the conviction of the accused cannot be sustained based on identification alone. In support of his submission, learned counsel has heavily relied upon the decision of this Court in the case of Iqbal vs. State of Uttar Pradesh (2015) 6 SCC

623. 5.41 It is further submitted by the learned counsel appearing on behalf of the accused that insofar as conviction of the accused under Section 376(2)(g) of the IPC is concerned, the same is based on no evidence. It is submitted that prosecution case is that according to the evidence of PW8, the A1, A2 and A4 dragged the deceased Savita out of the hut and brought her back naked and bleeding by which time she was dead. It is submitted that as per the CA report dated 27.11.2003, no semen was found in the pubic hair, vaginal or uterus swab of deceased Savita. It is submitted that the blood found in the nail clippings of the deceased Savita matched with her own blood group and it could not be proven that the blood group belonged to the accused.

5.42 It is further submitted by the learned counsel appearing on behalf of the accused that PW8 on whose testimony the prosecution is relying upon to convict the accused under Section 376(2)(g) of the IPC failed to identify A2 in the TIP conducted on 25.7.2003 and identified A2 for the first time in court. It is submitted that in the absence of any previous identification of A2, it is extremely dangerous to convict A2 under section 376(2)(g) of the IPC, solely on the basis of identification in court by PW8.

5.43 It is further submitted by the learned counsel appearing on behalf of the accused that while convicting the accused under Section 376(2)(g) of the IPC, the High Court considered the failure of the accused to explain their injuries as an incriminating circumstance against them. It is submitted that mere failure of the accused to explain injuries cannot be held against them if the nature of the injuries are such that they can be caused due to other events. In support of his submission, learned counsel for the accused has heavily relied upon the decision of this Court in the case of Ram Sunder Sen vs. Narender, (2016) 15 SCC 440.

5.44 It is further submitted by the learned counsel appearing on behalf of the accused that one of the reasons the High Court has convicted the accused under Section 376(2)(g) of the IPC is the presence

of injury marks on the accused. The High Court has held that deceased Savita caused these injuries on the accused as a result of resistance. It is submitted that it has come in the evidence of PW16-Dr. Shimpi, who examined A4 that the injuries sustained by A4 could have been caused by labour or agricultural work and the said injuries could be older than three weeks, i.e., before the date of the offence. It is further submitted by the learned counsel appearing on behalf of the accused that even from the arrest memo, it can be seen that and even otherwise the accused are agriculturist labourer and therefore such minor injuries were possible while doing the labour work or agricultural work. It is submitted that therefore non-explanation of the said injuries by the accused in their 313 statement could not have been held to be an incriminating circumstance against the accused. It is submitted therefore that the High Court has committed a grave error in considering the above circumstance against the accused and/or drawing an adverse inference.

5.45 It is further submitted by the learned counsel appearing on behalf of the accused that PW24-Dr. Vilas Appasaheb Patil examined A1 & A2 and stated that the injuries found on them were possible if a person tried to resist another person. It is submitted that merely because the injuries are possible on account of resistance does not mean that the injuries can be considered as conclusively to have been caused during commission of rape. It is submitted that such injuries do not link the present accused with the rape of Savita. 5.46 It is further submitted by the learned counsel appearing on behalf of the accused that even the investigation was not fair and the prosecution suppressed the material facts before the Court. It is submitted by the learned counsel that firstly the prosecution suppressed that on 7.6.2003 the statement/dying declaration of PW8 was recorded aby the executive magistrate and that PW8 was shown the photographs from the album and that she identified 4 persons having committed the offence, who were not the accused who came to be tried. It is submitted by the learned counsel that despite PW8 identified the 4 persons having committed the offence, neither they were arrested nor there was any further investigation with respect to those four persons, who were identified by PW8. It is further submitted, that even the executive magistrate, who even subsequently conducted the TI parade on 25.7.2003 did not say anything in his deposition. It is submitted by the learned counsel that therefore the prosecution has failed to perform its duty insofar as the fair investigation is concerned. It is submitted that the duty of the prosecution is not to get the conviction of some persons, but it is the duty of the prosecution to see that the real culprits are not scot free and the innocent persons are not held guilty. It is submitted that the prosecution owes an obligation to be fair and just. It is submitted by the learned counsel appearing on behalf of the accused that it is the duty of the prosecution to ensure that all material facts are brought on record so that there might not be any miscarriage of justice. It is submitted that the prosecution is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. It is submitted that the expected attitude of the prosecution must be couched in fairness not only to the court, but to the accused as well. It is submitted that even it was the duty of the prosecution to winch it to the fore and make it available to the accused any material which may even help the accused. It is submitted that in the present case, it appears that the prosecution/investigating officer/the executive magistrate deliberately withheld/suppressed the aforesaid material facts from the court. It is submitted that if the investigation would have been conducted even with respect to those four persons who were identified by PW8, in that case the result would have been different. It is submitted that if the fact that PW8 in her statement before the

executive magistrate recorded on 7.6.2003 identified four persons who committed the offence with names and they were other than the present accused, would have come on record, in that case, it would have gone against the prosecution case and more particularly the case on behalf of PW1 & PW8 that there were 7-8 persons who committed the offence. It is submitted that if the aforesaid four persons would have been added, in that case, the accused would have been more than 12 and therefore it would have fatal to the case of the prosecution, and therefore the prosecution/investigating officer had deliberately and wilfully suppressed the aforesaid material fact. 5.47 It is further submitted by the learned counsel that in fact all the accused persons were belonging to nomadic tribes, and in fact, they were arrested by transfer warrant and were forcefully involved in the case, that too after a period one month and only with a view to show that the police has solved the case. It is submitted that otherwise there was no reason to arrest the accused persons by way of transfer warrant, when neither PW1 nor PW8 gave any description of the persons, who committed the offence.

5.48 Making the above submissions, it is prayed to allow the appeals preferred by the accused and acquit them for the offences for which they are convicted.

5.49 Shri (Dr.) Yug Mohit Chaudhary, learned counsel appearing for the accused has further submitted that in view of the above facts and circumstances of the case, the accused are not only to be acquitted, but as they suffered a lot and they are in jail since last 16 years and for no fault of them they are languished in the jail since last 16 years and their valuable years have gone in the jail, all of them are entitled to a reasonable compensation. It is submitted that in fact out of the six accused who were convicted, one of the accused was a juvenile. Till the year 2012 and till he was declared a juvenile and thereafter released, he was under a constant trauma which affected his health, physical as well as mental. In support of the above, he has relied upon a certificate of one Psychiatrist Doctor, Dr. Ashit Sheth. It is further submitted that even other accused who are in jail since last 16 years were also under trauma and under the hanging sword on them and the threat of the death sentence and therefore they remained under constant stress which are affecting their health and life. It is submitted therefore that this is a fit case to exercise the powers under Article 142 of the Constitution of India to award a reasonable compensation.

6. All these appeals preferred by the accused are vehemently opposed by Shri Nishant Katneshwarkar, learned standing counsel for the State of Maharashtra.

6.1 It is submitted by the learned counsel appearing on behalf of the State of Maharashtra that in the present case there are concurrent findings recorded by the learned Sessions Court as well as the High Court holding them guilty for the offences punishable under Sections 395, 302 read with 34 of the IPC, Section 376 (2)(g), Section 307 read with Section 34 of the IPC, Sections 396, 397 and 398 of the IPC. It is submitted that findings recorded by the learned Sessions Court, affirmed by the High Court, are on appreciation of evidence and therefore the same are not required to be interfered with by this Court.

6.2 It is further submitted by the learned counsel for the State of Maharashtra that in the present case the prosecution has been successful in proving the case against all the accused persons by

leading cogent evidence, both oral as well as documentary. It is submitted that in the present case both PW1 & PW8 who are the eye witnesses and who were present at the time of the incident have fully supported the case of the prosecution.

6.3 It is further submitted by the learned counsel for the State of Maharashtra that as such all the accused persons have been identified by PW1 & PW8 in the TIP/before the Court. It is submitted that therefore both the learned Sessions Court as well as the High Court have rightly held the accused guilty, relying upon the deposition of PW1 & PW8 – injured eye witnesses.

6.4 Now insofar as the submission on behalf of the accused with respect to omissions/improvements/contradictions are concerned, it is submitted that as rightly observed by the High Court such omissions/improvements/contradictions are minor and are not as a fatal to the case of the prosecution as a whole. It is submitted therefore that the High Court has rightly ignored such minor contradictions/omissions/improvements, while appreciating the deposition of PW1 & PW8.

6.5 It is further submitted by the learned counsel appearing on behalf of the State that so far as non-disclosure of the factum of recording the statement of PW8 on 7.6.2003 by the executive magistrate and she having identified four persons from the photographs is concerned, it is submitted that as such the said omission will not be fatal to the case of the prosecution as PW1 & PW8 have specifically identified all the accused persons either in the TIP and/or before the Court. It is submitted that merely because some other four persons who might have been identified by PW8 might not have been arrested and/or there was no further investigation qua them, the said benefit cannot be given to the accused in the present case as all the accused persons were identified by PW1 & PW8.

6.6 It is further submitted by the learned counsel appearing on behalf of the State that in the present case one of the articles stolen from the place of the incident was found from the house of the one of the accused and therefore to that extent recovery was made and therefore merely because other articles looted were not found, the recovery of one of the articles cannot be ignored.

6.7 It is further submitted that even some of the accused failed to explain the injuries found on their bodies in their statement under Section 313 of the Code and therefore an adverse inference has rightly been drawn against them and they are rightly convicted. 6.8 It is further submitted by the learned counsel appearing for the State that even the prosecution has been successful in proving that Savita was subjected to rape and it is established and proved by leaving the medical evidence. It is submitted therefore that factum of the rape on the deceased Savita has been established and proved. It is submitted that even the prosecution has been successful in proving the rape on PW8 also.

6.9 It is submitted by the learned counsel that all the six accused have committed a very serious offence and have committed the murder of 5 persons and two ladies were raped and the entire family was finished, their conviction is required to be upheld and all the accused are required to be sentenced to death penalty. Therefore, it is prayed to dismiss the appeals preferred by the accused

and to allow the appeals preferred by the State and to restore the death penalty so far as accused nos. 3, 5 & 6 are concerned.

7. We have heard the learned counsel appearing on behalf of the respective parties at great length.

7.1 At the outset, it is required to be noted that in the present appeals, respective accused were charged for the offences punishable under Sections 395, 302 read with 34 of the IPC, Section 376 (2)(g), Section 307 read with Section 34 of the IPC, Sections 396, 397 and 398 of the IPC. The learned Sessions Court convicted the accused under Sections 395, 302 read with Section 34, Section 376(2)(g), Section 307 read with Section 34, Sections 396, 397 read with Section 395 and Section 398 of the IPC. Over and above the other sentences, all the accused were awarded the death penalty by the learned Sessions Court. The High Court confirmed and conviction and sentence imposed by the learned Sessions Court so far as A1, A2 and A4 are concerned, and even confirmed the death penalty. While maintaining the conviction for the offences punishable under Sections 302 read with 34, 307 read with 34, 397 read with 395 and 396 of the IPC, the High Court acquitted A3, A5 and A6 for the offences punishable under Section 376(2)(g) of the IPC and commuted the death sentence to life imprisonment.

8. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court, both the accused as well as the State of Maharashtra have preferred the present appeals. The accused are before this Court challenging their conviction and sentence imposed by the High Court, and the State of Maharashtra is aggrieved by the impugned judgment and order passed by the High Court insofar as acquitting the original accused nos. A3, A5 and A6 for the offences under Section 376(2)(g) of the IPC and commuting the death sentence to life imprisonment.

9. We have perused and gone through in depth the impugned judgment and order passed by the High Court as well as the judgment and order passed by the learned Sessions Court. We have gone through and considered in detail the evidence on record, both oral as well as documentary.

9.1 As observed hereinabove, and even as per the case of the prosecution, the incident occurred after 10:30 p.m. at night. The victims were living in a hut made by gunny bags in guava orchard. As per the case of the prosecution, the accused committed the murder, robbery as well as the rape of one lady, named Savita and PW8 – Vimalabai. As per the case of the prosecution, the accused stripped the ornaments from the wife and daughter of Trambak, and also took Rs.3,000/- from him. As per the case of the prosecution, A2 raped Savita and took her outside the hut and thereafter she was killed. As per the case of the prosecution, one Trambak was living in the hut in the guava orchard with his family (wife, three sons and one daughter). In the unfortunate incident, Trambak, his daughter Savita, his nephew Bharat, his sons Sandeep and Bhurya died. PW1 & PW8 – son Manoj and Trambak's wife Vimalabai survived. Therefore, according to the prosecution case, PW1 & PW8 were the eye witnesses to the whole incident. Therefore, as such, the case rests on the deposition of these two eye witnesses PW1 & PW8, and they identified the accused either in the TI parade and/or before the Court. Considering the entire material on record, it appears that the prosecution in support of its case has solely relied on the evidence of identification. At this stage, it is required to be noted that though the charge is of rape and murder, there is no forensic evidence corroborating the

prosecution case. Though, as per the case of the prosecution, the accused stripped the ornaments from the wife and daughter of Trambak and took Rs.3,000/- from Trambak, there is no recovery except one broken white metal chain, which was allegedly seized during the house search of Bhojubai Appa Shinde, the mother of A5 on 26.06.2003. The aforesaid in detail shall be discussed hereinbelow.

9.2 As observed hereinabove, the case rests on the deposition of PW1 & PW8 and they identified the accused in the TI parade as well as before the Court. Other than the evidence of PW1 & PW8, there is no other evidence to link the accused to the offence. Looking to the nature of the crime committed in which five persons were killed brutally and one was also raped, and the serious consequence it may have for those convicted, it is necessary that the evidence should be of a very high quality and satisfy the higher burden of proof. Therefore, we have minutely gone through and considered the deposition of PW1 & PW8. We have also minutely considered the deposition of other witnesses, more particularly the deposition of PW13 – special executive magistrate – Ramesh Sonawane, PW12 – Vishnu Hagwane, nephew of the landlord, who was the first person to reach the spot and the deposition of the investigating officer, PW18 – ACP Bhaskarrao Dhus.

9.3 As per the case of the prosecution, which has been believed by the learned Sessions Court as well as the High Court, PW1 & PW8 identified the accused persons in the TI parade as well as before the Court. At this stage, it is required to be noted that PW8 identified A2 in the Court as the person who had taken Savita outside the hut, and raped her. However, she was not able to identify him in the TI parade. The first TI parade was conducted on 25.07.2003. The offence occurred on 5.6.2003; accused nos. 1 to 5 were arrested on 23rd and 27th June, 2003 and the TI parade was held on 25.07.2003, i.e., 50 days from the date of offence and 33 days after the arrest of A1 & A2. It is required to be noted that the accused persons were arrested on transfer warrant. None of the eye witnesses, i.e., PW1 & PW8 were able to give any particulars/description of the accused. Even A6 was arrested more than one year, and the TI parade for A6 was conducted more than one year later. There is no explanation forthcoming from the prosecution for the delay in conducting the TI parade. Therefore, the identification of the accused by PW1 & PW8, which is the sole basis for convicting the accused and awarding the death penalty, is required to be considered very minutely. 9.4 There is very serious doubt whether at the time of incident, there was sufficient light in the hut. Even, according to PW1 & PW8, the culprits had used torches. The incident had occurred at 10:30 p.m. The hut was made of gunny bags and its walls were made from stems and plants. There was no door to the hut. There is no mention in the panchnama as to whether there was light or not in the shed (hut). Though, PW1 has stated that the electric light was on, he also states that the culprits were using battery torches and were searching in torchlight. According to him, he told the police that the culprits had switched off the lights when they had started assaulting the victims. Even if it is assumed that there was some light initially, and the case of the prosecution is believed that during the incident the light bulb was burning for a few minutes before it was turned off, the rest of the incident took place under torchlights carried by the culprits. Under the circumstances, neither PW1 nor PW8 would have been able to get a proper look at the persons who committed the offence. It is required to be considered coupled with the fact that neither PW1 nor PW8 were able to describe the accused to the police or the clothes worn by them. No identifying features were given. In the trial, the clothes seized from the accused were not identified by either PW1 or PW8. Even the age of one of

the accused was 17 and two other accused were around 20 years, PW1 & PW8 told the police that the culprits were aged 25-30 years. Neither PW1 nor PW8 were able to ascribe the specific roles to the culprits. Even, according to the prosecution, PW1 & PW8 had fallen unconscious during the incident. Therefore, the said witnesses were not in a fit condition to see and remember and that is why neither PW1 nor PW8 gave details about the description of the culprits – heights, hair, facial features, complexion, beard, etc. to the police during the investigation. Even PW8's entire evidence about the incident and the role played by different accused persons is an omission/improvement. Whatever is stated by PW8 in her deposition, the same is stated for the first time in her deposition, which was recorded two and a half years later. Whatever is alleged in her deposition in the Court, which was recorded two and a half years later, was not stated to the police/special executive magistrate in her statements that were recorded during the investigation. When the same was pointed out to the courts below, the courts below, more particularly the High Court has not accepted the case of the defence by observing that the omissions are minor omissions. On scanning the entire evidence of PW8, we do not accept the observation of the High Court that the omissions are minor omissions. On considering the deposition of PW8 about the incident and the role alleged to have been played by different accused persons, we are of the opinion that the omissions are major omissions and improvements which are fatal to the case of the prosecution and in any case, it creates reasonable doubt on the trustworthiness and the reliability of PW8.

9.5 Even the identification of the accused by PW1 in the TI parade also creates a serious doubt, apart from the fact that there was a delay in conducting the TI parade, and that there is no explanation by the prosecution in conducting the TI parade belatedly. As observed hereinabove, and for the reasons stated above, it is very doubtful whether PW1 & PW8 could have properly seen the accused. As observed hereinabove, there was no specific description of the accused given by the said two witnesses. There are contradictions with respect to the age of some of the accused. PW1 has categorically stated that the culprits spoke with him in Hindi. According to him, they were also speaking amongst themselves in Hindi. PW8 has also confirmed the same. All the victims are Marathi speakers. The accused also hail from Maharashtra and are Marathi speakers. Therefore, if the accused were to speak with the victims, they would have spoken in Marathi and not in Hindi. Therefore, there is a possibility that the culprits who were speaking in Hindi were not Marathi speakers and they might be outsiders – non-Marathis. 9.6 As observed hereinabove, neither PW1 nor PW8 gave any description to the I.O. and/or to the Sub-Divisional Magistrate who conducted the TI parade. Therefore, on what basis the other dummy persons were brought and were present in TI parade is not forthcoming from the prosecution. There is also no statement that the dummies resembled the accused persons. Though, the special executive magistrate who had conducted the TI parade is required to select the dummy persons, in the present case and even admitted by PW13 – special executive magistrate that dummy persons were selected by the police. Considering the aforesaid facts and circumstances, we are of the opinion that it is not safe to convict the accused solely on the basis of their identification by PW1 & PW8 in the TI parade and/or before the Court.

9.7 As observed hereinabove, except the deposition of PW1 & PW8 and they identified the accused in the TI parade and/or before the Court (which for the reasons stated hereinabove, the conviction cannot rest on such identification), there is no other evidence, either scientific and/or other, corroborating the prosecution case. There is no forensic evidence corroborating the prosecution

case. In fact, the DNA, finger prints evidence and CA evidence do not support the case of the prosecution, and/or link the accused to the crime. The case of the prosecution is that the accused had some liquor at the spot from liquor bottles and from a handi. Empty liquor bottles, a handi and some glasses were seized from the scene of crime. There is no DNA or finger prints on the glass and liquor bottles to connect the accused with the crime. In fact, PW20 – IO has admitted that the finger print report did not implicate the accused. At this stage, it is required to be noted that the accused' DNA samples were collected during the investigation and in fact were sent for DNA analysis, but the prosecution never presented the report to the Court. No pubic hair, DNA, semen or blood of the accused were found on any of the victims. It appears that the samples were collected from the accused and were sent for analysis, but the result did not incriminate the accused. 9.8 As per the case of the prosecution, Rs.3,000/- in cash were taken from Trambak, a mangalsutra, dorley and ear tops were taken from PW8; anklets and ear tops were taken from Savita; and a watch and chain were taken from PW1 by the culprits. However, no stolen property has been found or recovered from any of the accused except a broken white metal chain which was seized during the house search of the mother of A5 on 26.06.2003. However, her signature is not there on the panchnama. The panchnama also does not state that the seized property was sealed. The chain was described as "one white metal chain with 30 links, middle link is broken and tied with a string. The value of the same was stated to be zero". The chain had no special markings on it and the same is freely available. Though the prosecution claimed that the said chain belongs to PW1, PW1 had admitted that he has not given any description of the chain to the police. Barring this chain, nothing was seized or recovered from any of the accused. Therefore, the seizure of a commonly available white metal silver chain without any distinctive markings would be a weak piece of evidence to hold the accused guilty.

9.9 Apart from the above, on considering the entire deposition of PW8, we are of the opinion that PW8 who claims to be an eye witness, she is not a reliable and trustworthiness witness. Her entire testimony in Court is full of material omissions/contradictions/improvements. Prior to her deposition in Court, her two statements dated 6.6.2003 and 7.6.2003 were recorded by the police and the magistrate respectively. The entire description of incident given by PW8 in the Court has not been stated by her in her earlier statements. This evidence has come for the first time during the deposition in Court by way of an improvement. In her earlier statements, PW8 has never given any details of the assault or the roles played by different persons during the incident. Even in the TI parade, she did not attribute any role to the persons she identified. The first time PW8 gave any details about the incident or ascribed the roles to the accused persons was two and a half years later in the Court and never before that. Her failure to give any statement to the police and the two magistrates either about the events occurring during the incident or the roles played by different persons render her evidence unreliable. When in her cross-examination, she was confronted with such omissions/improvements, she has taken only one thing that she told this to the police but she does not know why the police did not record the same. However, the same is not corroborated by any other evidence, more particularly the deposition of the IO and/or the magistrates. Therefore, it is unsafe to rely upon the deposition of PW8 and to convict the accused. It is also required to be noted that even according to PW8, she was subjected to rape, however, the prosecution has miserably failed to prove the rape on her by leading cogent evidence, more particularly the forensic evidence. Therefore, to that extent also she is not reliable.

9.10 There is one another reason why PW8 is not to be believed on the ground that she is unreliable and not trustworthy. It is required to be noted that on 7.6.2003, i.e, two days after the incident, her statement was recorded by PW13 – Ramesh Sonawane – Special Executive Magistrate in the hospital. PW13 was called by the investigating officer to record her dying declaration. It has come on record that her dying declaration/statement was recorded on 7.6.2003, i.e., two days after the incident, PW8 identified photographs of four people from album of notorious criminals as those who committed the offence. Admittedly, the present accused are not amongst those four persons identified by PW8 from the photo album. It is required to be noted that in her deposition she had not stated anything about her statement recorded by PW13 on 7.6.2003 and she identified the photographs of four people from album of notorious criminals shown to her. Therefore, to that extent, there is also a suppression of material fact by PW8. In fact, the aforesaid was withheld by the prosecution during the trial. Only during hearing of the appeal before the High Court, it came to the light and therefore pursuant to the order passed by the High Court she was recalled and when she was confronted with the above, very surprisingly, she stated that four persons who were identified by her were the same persons out of the present accused. However, such a stand is just contrary to the deposition of PW13 – special executive magistrate. What is stated by her in her deposition when she was recalled pursuant to the order passed by the High Court is not corroborated by other evidence. On the contrary, PW13 – special executive magistrate in his further evidence has categorically stated as under:

> "It is true that I was called on 7.6.03 by P.I of Crime Branch to civil hospital Nashik to record the dying declaration of Vimalbai Trambak Satote. Accordinglhy, I have gone to civil hospital Nashik. After reaching to civil hospital, I had taken the letter of PI Crime Branch. I am having the Xerox copy of that letter. Today I am producing the same. Police had given me the file nos. 70, 76, 80 and I was requested to see whether that lady can identify the accused from that file. I was given those files by the same person who had given me the letter. I had asked that lady whether she could identify the accused, if photographs shown to her and she told that she could identify. Therefore, I had shown her the photographs from all the three files. She had identified the 4 persons as the accused present. Witness volunteers that at that time, it came to my notice that the lady was much frightened. All the four photographs were from file No.80. The names were written below all those four photographs. They are 1. Gautam Hari Kale, R/o Zapwadi Shiv, TQ Nawasa, Dist. Ahmednagar, 2. Shivaji @ Shivlya Bhosale R/o Tarwand Muktapur Shiwar, TQ Nevasa, Dist – Ahmednagar 3. Khandya Rama Chavan R/o Bhendala Shiwar, TQ Gangapur, Dist. Aurangabad, 4. Suresh Sitaram Kale, R/o Kasarakada, Karkhana Shiwar, TQ Ashti, Dist. Beed. These persons had entered her house and had committed theft of Rs.3,000/- is told by the lady. That lady had not stated that she could identify the accused persons. Prior to recording the statement of that lady, said lady was got examined from Dr. Yuvraj Pawar, that she was conscious to give the statement. The statement was read over to that lady after it was recorded. It was understood by her. I had asked whether the said statement was as per her narration. She had replied in affirmative. I had obtained her thumb impression on the said statement. I myself had obtained her thumb impression. After completion of recording of the statement of that lady, she

> had got again examined from the medical officer, that she was in a condition to give the statement. Medical officer had signed on both certificate in my presence. I had not taken any noting that said lady was frightened (The ld. A.P.P. has taken the objection that the witness voluntarily had made the statement that the lady was frightened; therefore, such question cannot be asked in cross examination). I had not written so in my notes. It is not true to say that I was directed to state that said lady was frightened, before coming to court for giving evidence." 9.11 Thus, the deposition of PW8 is full of contradictions/omissions and improvements and that she has not stated true and correct facts.

Therefore, she is not a reliable witness who can be believed. When the aforesaid was pointed out to the High Court by the defence, the High Court unfortunately has not accepted the case of the defence by observing that the statement of PW8 recorded by PW13 – special executive magistrate recorded on 7.6.2003 cannot be said to be a dying declaration and it can be said to be a mere statement which can be used only for corroboration and contradiction. Therefore, even as per the High Court also, her statement dated 7.6.2003 recorded by PW13 in which she identified altogether 4 other persons with names can be used for the purpose of contradiction. As observed hereinabove, the contradictions are material contradictions and that as such she has also suppressed the material fact from the Court. 9.12 Even otherwise, for the reasons stated hereinafter, it appears that there was no fair investigation by the investigating agency/prosecution. Prosecution has suppressed the material fact from the Court. Neither the investigating officer nor even the PW13 – special executive magistrate initially stated anything about recording of the statement of PW8 on 7.6.2003 and she having identified four persons from the album of the photographs of the notorious criminals. In fact, it came to the light during the course of hearing of the appeal before the High Court, and PW8 and PW13 were recalled as per the directions of the High Court. Nothing is on record whether those four persons, who were identified by PW8 on 7.6.2003, were ever arrested and/or any investigation was carried out qua them. It is required to be noted that PW8 identified those four persons immediately after the incident. None of the accused in the present case are those who were identified by PW8 before the Special Executive Magistrate on 7.6.2003. Therefore, when PW8 identified four persons having committed the offence on 7.6.2003, her memory was fresh and it ought to have been given more weightage than her identifying the accused persons after a long delay. Thus, it appears that the investigation was not fair and in fact there was suppression of material fact from the court by the prosecution.

10. It has to be uppermost kept in mind that impartial and truthful investigation is imperative. It is judiciously acknowledged that fair trial includes fair investigation as envisaged by Articles 20 & 21 of the Constitution of India. The role of the police is to be one for protection of life, liberty and property of citizens, that investigation of offences being one of its foremost duties. That the aim of investigation is ultimately to search for truth and to bring the offender to book. 10.1 Apart from ensuring that the offences do not go unpunished, it is the duty of the prosecution to ensure fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the court for just determination of the truth so that due justice prevails. It is the responsibility of the investigating agency to ensure that every investigation is fair and does not erode the freedom of an individual, except in accordance with law. One of the established facets of a just,

fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Cr.PC.

10.2 Nothing is allowed by the law which is contrary to the truth. In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudences of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human rights at a much higher pedestal and the accused is presumed to be innocent till proven guilty. The alleged accused is entitled to fair and true investigation and fair trial and the prosecution is expected to play a balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the Constitutional mandate contained in Articles 20 and 21 of the Constitution of India. 10.3 As observed by this Court in the case of V.K. Sasikala v. State represented by Superintendent (2012) 9 SCC 771, though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5), in every situation where some of the seized papers and the documents do not support the prosecution case and, on the contrary, support the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself.

10.4 Even in a case where the public prosecutor did not examine the witnesses who might have supported the accused, this Court in the case of Darya Singh v. State of Punjab AIR 1965 SC 328 has observed that the prosecution must act fairly and honestly and must never adopt the device of keeping back from the Court only because the evidence is likely to go against the prosecution case. It is further observed that it is the duty of the prosecution to assist the court in reaching to a proper conclusion in regard the case which is brought before it for trial. It is further observed that it is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but, normally he ought to have examined all the eye-witnesses in support of his case. It is further observed that it may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness box. It is further observed that if at the trial it is shown that the persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the accused and may, in a proper case, record the failure of the prosecution to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

10.5 Murder and rape is indeed a reprehensive act and every perpetrator should be punished expeditiously, severely and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt.

10.6 The prosecution/investigating agency is expected to act in an honest and fair manner without hiding anything from the accused as well as the Courts, which may go against the prosecution. Their ultimate aim should not be to get conviction by hook or crook.

11. Applying the aforesaid principles to the facts of the case on hand, we are of the opinion that there was no fair and honest investigation and even prosecution tried to suppress the material fact from the court. In the present case, the investigating officer, PW13 – special executive magistrate and even PW8 – injured eye witness suppressed from the court the material fact of the statement of PW8 recorded on 7.6.2003, recorded by PW13 -special executive magistrate in which she specifically identified four persons who have committed the offence from the album of the photographs of the notorious criminals. Thus, special executive magistrate being an independent witness was supposed to state the correct facts before the court. At this stage, it is required to be noted that PW13 – Ramesh Sonawane – Special Executive Magistrate is the same Special Executive Magistrate who conducted the TI parade subsequently.

11.1 Even the conduct on the part of the investigating officer in suppressing the aforesaid fact from the court is required to be condemned. It appears that in fact the investigating officer and the prosecution deliberately withheld the aforesaid fact from the court. According to PW1 & PW8, there were 7-8 persons who committed the offence. Though, PW12 – Vishnu Hagwane, nephew of the landlord – first person to reach the spot clearly stated in his deposition that PW1 told him that four persons were the assailants and committed the offence. Be that as it may, according to PW1 & PW8 and even according to the prosecution, there were 7-8 persons who committed the offence. PW8 identified four persons on 7.6.2003 from the album of the photographs of notorious criminals whose names were specifically noted as per the statement of PW8. None of the accused in the present case are out of those four persons identified by PW8 on 7.6.2003. Therefore, if those four persons who were identified by PW8 as other than the accused in the present case are added in the present case, it can be said that there were 12 persons/assailants who committed the offence and therefore the prosecution case that there were 7-8 persons would fail and that is why the aforesaid fact seems not to have been stated by the investigating officer and the same was suppressed by him deliberately and wilfully. Even the investigation also does not seem to be fair and honest investigation. From the statement of PW8 recorded by the special executive magistrate recorded on 7.6.2003 in which she identified four named persons from the album of the photographs of notorious criminals, nothing is on record whether those four persons were arrested or not or any further investigation was carried out with respect to those four persons. It is to be noted that none of the accused in the present case are out of those four persons who were identified by PW8 on 7.6.2003, i.e., immediately after the incident. The investigating officer ought to have conducted an investigation on that line and ought to have arrested those four persons and ought to have conducted the investigation qua those four persons. On the contrary, the accused in the present case were arrested after a period of one and a half months and that too on transfer warrants, though there was no description of the accused given by either PW1 or PW8. A6 was arrested after a period of one and a half year. It is to be noted that all the accused persons are nomadic tribes coming from the lower strata of the society and are very poor labourers. Therefore, in the facts and circumstances of the case, false implication cannot be ruled out since it is common occurrence that in serious offences sometime innocent persons are roped in. At the cost of the repetition, it is to be noted that there is no explanation whatsoever why those four persons who were identified by PW8 on 7.6.2003 were neither arrested nor there was any investigation qua them. Therefore, there is a serious lapse on the part of the investigating agency, which has affected the fair investigation and fair trial, and therefore, we are of the opinion that the same is violative of fundamental rights of the accused

guaranteed under Articles 20 & 21 of the Constitution of India.

12. In view of the above and for the reasons stated above, the conviction and sentence imposed by the High Court cannot be sustained. The prosecution has failed to prove the case against the accused beyond reasonable doubt. Therefore, we have no other alternative, but to acquit the accused for the offences for which they are convicted.

13. At the same time, we cannot loose sight of the fact that five persons have been killed/murdered, out of whom even one lady was raped. Therefore, it is the duty of the Court to see that the real culprits are booked and are punished. The Court cannot shut its eyes to the aforesaid fact that five persons have been killed/murdered and that there is no fair investigation and because of the lapse on the part of the prosecution/investigating agency in not conducting any investigation qua those four persons who were identified by PW8 on 7.6.2003 before the special executive magistrate. The benefit of the lapse in investigation and/or unfair investigation cannot be permitted to go to the persons who are real culprits and in fact who committed the offence. As observed hereinabove, unfortunately, there was no investigation at all with respect to those four persons who were identified by PW8 in her statement on 7.6.2003. It has come on record and as observed hereinabove, those four persons who were identified by PW8 on 7.6.2003, which was just after two days' of the incident, were other than the appellants – six persons who came to be tried. Therefore, we are of the opinion that this is a fit case for further investigation under Section 173(8) of the Code of Criminal Procedure qua those four persons, who were identified by PW8 on 7.6.2003, the reference of whom is in the statement recorded by PW13.

14. Now so far as the submission and prayer on behalf of the accused, not only to acquit them, but to award an adequate compensation is concerned, it deserves consideration. From the above facts and circumstances of the case, it has emerged that there was no fair investigation and fair trial and the fundamental rights of the accused guaranteed under Articles 20 & 21 of the Constitution of India have been infringed. The investigation is not fair and honest. There is no investigation at all qua the four persons who were identified by PW8 on 7.6.2003. On the contrary, the accused in the present case were nomadic tribes and falsely implicated and are roped in. Except one, all of them are in jail since last 16 years. All were facing the hanging sword of death penalty. Out of six accused persons, one was subsequently found to be a juvenile. As per the report of Dr. Ashit Sheth, a Psychiatrist, who examined one of the accused – Ankush Maruti Shinde, who was subsequently found to be a juvenile, he has clearly opined that he has lived under sub-human conditions for several years. He was kept in isolation in solitary confinement with very restricted human contact and under perpetual fear of death. He was only allowed to meet his mother, and that too only infrequently. He was not even allowed to mix with other prisoners. Therefore, all the accused remained under constant stress and in the perpetual fear of death. As they were facing the death penalty, they might not have availed any other facilities of parole, furlon etc. All of them who were between the age of 25-30 years (and one of the accused was a juvenile) have lost their valuable years of their life in jail. Their family members have also suffered. Therefore, in the facts and circumstances of the case, and in exercise of our powers under Article 142 of the Constitution of India, we direct the State of Maharashtra to pay a sum of Rs.5,00,000/- to each of the accused by way of compensation, to be deposited by the State with the learned Sessions Court within a period of four weeks from today and on such deposit, the

same be paid to the concerned accused on proper identification. The learned Sessions Court is directed to see that the said amount shall be used for their rehabilitation. At the cost of the repetition, it is observed that the aforesaid compensation is awarded to the accused and in the peculiar facts and circumstances of the case and in exercise of powers under Article 142 of the Constitution of India.

15. Before parting with the present order, we strongly deprecate the conduct on the part of the investigating agency and the prosecution. Because of such lapses, and more particularly in not conducting the investigation insofar as those four persons who were identified by PW8 on 7.6.2003, the real culprits have gone out of the clutches of the law and got scot free. At this stage, the decision of this Court in the case of State of Gujarat v. Kishanbhai (2014) 5 SCC 108 is required to be referred to, in which this Court has directed in paragraphs 22 and 23 as under:

> "22. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore essential that every State should put in place a procedural mechanism which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance of the above purpose, it is considered essential to direct the Home Department of every State to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilised for crystallising mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/prosecution officials course-
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> content drawn from the above consideration. The same should also constitute course-content of refresher training programmes for senior investigating/prosecuting officials. The above responsibility for preparing training programmes for officials should be vested in the same Committee of senior officers referred to above. Judgments like the one in hand (depicting more than ten glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course-content will be reviewed by the above Committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the Standing Committee while examining failures, in unsuccessful prosecution of cases. We further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, they would not be able to feign innocence when they are made liable to suffer departmental action for their lapses.

> 23. On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy.

Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the official concerned may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly, we direct the Home Department of every State Government, to formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months." 15.1 Murder and rape is indeed a reprehensive act and every perpetrator should be punished. Therefore, considering the observations made by this Court in the case of Kishanbhai (supra), referred to hereinabove, we direct the Chief Secretary, Home Department, State of Maharashtra to look into the matter and identify such erring officers/officials responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, real culprits are out of the clutches of law and because of whose lapses the case has resulted into acquittal in a case where five persons were killed brutally and one lady was subjected to even rape. Therefore, we direct the Chief Secretary, Home Department, State of Maharashtra to enquire into the matter and take departmental action against those erring officers/officials, if those officers/officials are still in service. The instant direction shall be given effect to within a period three months from today.

16. With the above observations and directions, and in view of the above and for the reasons stated above, the criminal appeals preferred by the accused are hereby allowed, and all the accused are hereby acquitted for the offences for which they were tried. They shall be released forthwith, if not required in any other case. Consequently, the appeals filed by the State of Maharashtra for enhancement of sentence qua A3, A5 and A6 stand dismissed.

17. The prosecution is directed to conduct further investigation under Section 173(8) of the Code of Criminal Procedure qua those four persons who were identified by PW8 – an injured eye witness on 7.6.2003 from the album of photographs of notorious criminals with their names, i.e., immediately after the incident, whose particulars and names are mentioned in the statement of PW8 recorded by PW13 on 7.6.2003, so that real culprits should not go unpunished in a crime in which five persons were killed brutally and one lady was even subjected to rape.

.....J.
[A.K. SIKRI]

.....J.
[S. ABDUL NAZEER]

NEW DELHI;
MARCH 05, 2019.

.....J.
[M.R. SHAH]