SUPREME COURT OF INDIA

DIPAK MISRA, J., ASHOK BHUSHAN, J. & R.BANUMATHI, J.

CRIMINAL APPEAL NOs. 607-608 OF 2017
(ARISING OUT OF S.L.P.(CRIMINAL) NOs. 3119-3120 OF 2014)

MUKESH & ANR. ……..Appellants

.Vrs.

STATE OF NCT OF DELHI & ORS. ……...Respondents

WITH

CRIMINAL APPEAL NOs. 609-610 OF 2017
(ARISING OUT OF S.L.P.(CRIMINAL) NOs. 5027-5028 OF 2014)

VINAY SHARMA & ANR. ……..Appellants

.Vrs.

STATE OF NCT OF DELHI & ORS. ……Respondents

(A) PENAL CODE, 1860 – S.302

Death penalty – In "Rarest of rare" cases – Test to determine – Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, court must award death penalty.

In this case the accused-appellants may not be hardened criminals but on the date of occurrence they not only brutally raped the prosecutrix one after the other in the moving bus but also in most inhuman and unfeeling manner inserted iron rod in her vagina and rectum taking out her internal organs and thrown out the prosecutrix and her friend naked with serious injuries from the running bus and tried to run the bus over them and ultimately the prosecutrix died due to sepsis with multi organ failure.

Moreover, the motive of the appellants for the crime was apparent because immediately after the prosecutrix and her friend entered into the bus, the accused persons did not allow other passengers to board the bus, switched off the lights, robbed their belongings, forcibly disrobed the prosecutrix, committed sex, anal sex, forced her to perform oral sex and caused injuries all over her body by way of bite marks – They have also made possible efforts to destroy the evidence by washing the bus, cloths of the deceased etc.

The above acts itself demonstrate the mental perversion and inconceivable brutality of the appellants – It is a 'tsunami' of shock in the minds of the collective and destroyed humanity – This incident has not only brought shock waves but also creates a fear Psychosis in the

society and as such falls within the category of "rarest of rare case", where the question of any other punishment is "unquestionably foreclosed" – Held, the above crime was extremely brutal, barbaric and diabolic in nature and it shocks not only judicial conscience but also the conscience of the society – The High Court has correctly confirmed the death penalty and this Court sees no reason to differ with the same.

(Paras 355, 356, 357)

(B) PENAL CODE, 1860 – S.120-B

Criminal conspiracy – Meeting of minds of two or more persons to commit an offence is sine qua non to constitute the offence of criminal conspiracy – However, to prove the same by direct evidence is not possible – Held, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused persons.

In this case after the prosecutrix and her friend (P.W.1) boarded the fateful bus at 9 PM on 16.12.2012, the accused persons did not allow any other passenger to board, switched off the lights, some of them picked up quarrel with P.W.1 and assaulted him and others committed rape on the prosecutrix and inserted iron rod in her vagina and thrown them out of the running bus – The chain of circumstances infer that, the accused persons seeing the prosecutrix and her friend alone formed an agreement to commit heinous offence against her so all the parties to the conspiracy are liable for the acts of each other – Held, there was unity of object among the accused persons to commit rape and destroy the evidence – This court affirmed the findings of the courts below with regard to conviction of all the accused persons U/s. 120-B I.P.C. and section 302 read with section 120-B I.P.C.

(Paras 303 & 100, 101, 102)

(C) PENAL CODE, 1860 – S.376 (2) (g) Explanation-1

Where a woman is raped by one or more persons in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape and all of them shall be liable to be punished U/s. 376(2) I.P.C – As per Explanation 1, by operation of deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group committed rape in furtherance of the common intention.

Prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not

necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused.

In this case, the sharing of common intention and the jointness in commission of rape is established by the presence of all the accused persons in the bus. (Paras 102, 103, 104)

(D) PENAL CODE, 1860 – S.302
r/w section 235 (2) Cr.P.C.

Death sentence – No opportunity of hearing given to the accused persons – Constitutional validity – Held, hearing of the accused on the question of sentence is sine qua non U/s. 235(2) Cr.P.C. – Court ought to consider aggravating and mitigating circumstances before arriving at a decision. (Para 110)

(E) CRIMINAL PROCEDURE CODE, 1973 – Ss.53A, 164A
r/w section 45 & 46, Evidence Act

Expert opinion on DNA Profiling – Scientific evidence in rape and murder case – DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or cloths etc. recovered from the accused or from witnesses.

In this case the DNA Profile generated from blood stained cloths of the accused persons, bus, iron rod etc are found consistent with the DNA Profile of the prosecutrix and P.W.1 – Likewise the DNA Profile generated from the breast swab of the prosecutrix was found consistent with the DNA Profile of the accused-Akshay – Held, the DNA report and the findings thereon being scientifically accurate clearly establish the link involving the accused persons in the incident.
(Paras 213 to 229)

(F) CRIMINAL PROCEDURE CODE, 1973 – Ss.53A, 164A

Scientific evidence – Rape and murder case – Odontology report i.e. bite mark analysis report – Photographs of bite marks found on the body of the prosecutrix – P.W.71 examined and found at least three bite marks were caused by accused Ram Singh where as one bite mark has been identified to have been caused by accused Akshay – Held, Odontology report which links accused Ram Singh and accused Akshay, strengthened the prosecution case as to their involvement.
(Para 238)

(G) CRIMINAL PROCEDURE CODE, 1973 – S.154

F.I.R. – Whether non-mentioning of the names of the accused persons in the F.I.R. is fatal to the prosecution case ? Held, No.

F.I.R. is not an encyclopedia of the entire case – It may not and need not contain all the details – It may be sufficient if there appears broad facts of the prosecution case – Naming of the accused therein may be important but not naming of the accused in the F.I.R. may not be a ground to doubt its contents, if the statement of the witness is found to be trustworthy – However, the court after examining the entire factual scenario, has to determine whether a person has participated in the crime or has been falsely implicated – Moreover, the involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the F.I.R. as some times the person who furnishes the first information may be fresh with the facts but failed to reproduce the entire story and missed even important details.

In this case after brutal gang rape in the moving bus, the prosecutrix and her friend (P.W.1) were thrown out of the bus with serious injuries and they were rescued by P.W.72 and admitted in the Hospital at 11.05 PM on 16.12.2012 and statement of P.W.1 was recorded at 3.45 am on 17.12.2012 which culminated into recording of F.I.R. at 5.40 am on the same day – P.W.1 though clearly stated about the overtact has not mentioned the names of the accused persons in the F.I.R. – In such a traumatic condition it would not have been possible to recall and narrate the entire incident at one instance – Held, it cannot be said that merely because the names of the accused persons are not mentioned in the F.I.R. it raises serious doubt about the prosecution case. (Paras 54 to 62)

(H) CRIMINAL PROCEDURE CODE, 1973 – S.154

F.I.R. – Delay in lodging F.I.R. at police station or complaint in court is normally viewed by Courts with suspicion as there is possibility of concoction of evidence against an accused – In the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution – So it is the duty of the prosecution to explain the delay satisfactorily and even a long delay can be condoned if the informant has no motive for implicating the accused.

In this case for the admission of P.W.1 and the Prosecutrix in the Hospital and for completion of procedure some time must have taken – Held, there was no delay in lodging the F.I.R.

(Paras 46 to 53)

(I) CRIMINAL PROCEDURE CODE, 1973 – Ss.235(2), 354(3)

Death sentence – Court not only state special reasons U/s. 354(3) Cr.P.C. but also hear the accused in person U/s. 235(2) Cr.P.C.

on the question of sentence – While hearing on the question of sentence the court must consider the age, background, prior criminal antecedents if any, possibility of reformation if any and other relevant factors of the accused – The Court while considering imposition of appropriate punishment should not only keep in view the rights of the criminals but also the rights of the victim and society at large as protection of the society and deterring the criminal is the avowed object of law – Held, while determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. (Paras 111 to 116)

(J) CRIMINAL PROCEDURE CODE, 1973 – Ss.235(2), 354(3)

Death sentence – Accused persons were not heard in person on the question of sentence – Non-compliance of the mandate of section 235(2) Cr.P.C. – Trial court as well as the High Court failed to follow such mandate – Option available for the appellate Court is, either to send back the case to the trial court to comply with section 235(2) Cr.P.C. or in order to avoid delay, allow the accused-appellants to produce materials before it in terms of section 235(2) Cr.P.C. for its consideration.

In this case owing to the order passed by the Apex Court the appellants filed their affidavits and submissions stating that they are young, poor, without any criminal background and they have maintained good behaviour in the Jail which cannot be said to be as mitigating circumstance in their favour to take the case out of the category of "rarest of rare cases" – Held, when the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. (Paras 144, 145)

(K) EVIDENCE ACT, 1872 – S.9

T.I. Parade – Identification of the accused either in T.I. Parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established – Even if there is no previous T.I. Parade, the Court may appreciate the dock identification as being above board and more than conclusive.

In the present case, the informant (P.W.1), apart from identifying the accused persons in T.I. Parade, has also identified all of them in Court – Held, the T.I. Parade is not dented.

(Paras 137 to 145)

(L) EVIDENCE ACT, 1872 – S.11

Prosecution established the presence of the accused persons on the spot – Accused persons took the plea of alibi – Burden of proof is heavy on the accused to establish the same by positive evidence.

In this case accused persons raised the plea of alibi in their section 313 Cr.P.C. statements but failed to establish the same – Held, plea of alibi taken by the accused persons appears to be after thought and the same may be read as an additional circumstance against them. (Para 254)

(M) EVIDENCE ACT, 1872 – S.27

Leading to discovery – First requisite condition to utilize section 27 of the Act in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody – So there must be a discovery of fact not within the knowledge of the police officer and such disclosure should be free from any element of compulsion – It is not the confessional part which is admissible but only the information or part of it, which relates distinctly to the fact discovered by means of the information furnished – Information conveyed in the statement to the police ought to be dissected if necessary so as to admit only such information in evidence.

In this case articles belonging to the informant and the victim were recovered from the accused persons while they were in police custody – Witnesses deposed with regard to the recoveries have remained unshaken – No explanation has come on record from the accused persons, explaining as to how they had got into possession of the said articles – Held, the above incriminating circumstances are proved against the accused persons. (Paras 130 to 136)

(N) EVIDENCE ACT, 1872 – S.27

Leading to discovery – Provision U/s. 27 of the Act prescribed two limitations to determine, how much of the information received from the accused can be proved against him :

(i) The information must be such as the accused has caused discovery of the fact, i.e., the fact must be the consequence, and the information is the cause of its discovery;

(ii) **The information must "relate distinctly" to the fact discovered.** (Para 75)

(O) EVIDENCE ACT, 1872 – S.32

Dying declaration – It can be oral or in writing – Admissibility – If a dying declaration is found to be voluntary and made in a fit mental condition, without being tutored, the same can be relied upon even without any corroboration.

Generally, great sanctity attached to the words of a dying man as truth sits on his/her lips – Moreover, a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person – Dying declaration is an important piece of evidence, which if found veracious and voluntary by the Court, could be the sole basis for conviction. (Paras 173, 175)

(P) EVIDENCE ACT, 1872 – S.32

Dying declaration by nods and gestures – Admissibility – It is not only admissible in evidence but also possesses evidentiary value, if proper care is taken at the time of recording the statement – The only caution the court ought to take is that whether the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods.

In this case P.W.30, the Metropolitan Magistrate who recorded the dying declaration of the Prosecutrix first satisfied himself about the mental alertness and fitness of the victim and recorded the dying declaration by putting simple questions and answers by way of multiple choice by noticing her gestures and by her own writing.
(Paras 185 to 188)

(Q) EVIDENCE ACT, 1872 – S.32

Dying declaration through gestures – Whether videography of the dying declaration is compulsory ? Held, it is only required as a measure of caution and in case it is not taken care of, the effect of it would not be fatal for the case and does not, in any circumstance, compel the court to completely discard that particular dying declaration. (Para 185)

(R) EVIDENCE ACT, 1872 – S.32

Multiple dying declarations – Where there are more than one dying declaration and some inconsistencies are noticed or alleged, the court has to examine the nature of inconsistencies as to whether they are material or not – Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration – Mere, omission on the part of the prosecutrix to state the entire factual

details of the incident in her very first dying declaration does not make her subsequent dying declarations unworthy, especially when her statements are duly corroborated by other prosecution witnesses including the medical evidence.

In this case 1st dying declaration of the prosecutrix was recorded after her admission in the hospital at 11.05 pm on 16.12.2012 – The 2nd declaration was recorded at 9.10 pm on 21.12.2012 and 3rd declaration was recorded at 1 pm on 25.12.2012 – Defence alleged that in the 1st declaration the prosecutrix had not stated about the insertion of iron rod into her vagina and other details of the accused persons – A victim who has just suffered a ghastly and extremely frightening incident cannot be expected to immediately come out of the state of shock and state the finest details of the incident – Held, all the three dying declarations are consistent with each other and well corroborated with other evidence. (Paras 180 to 189)

(S) EVIDENCE ACT, 1872 – S.45

Finger print analysis – Gang rape in moving bus – Prosecution tried to establish the presence of the accused persons in the offending bus – Experts from CFSL lifted chance finger prints from the concerned bus and took finger/palm and foot prints of the accused persons from jail – After comparing, the chance prints of accused Vinay Sharma were found in the bus in question – Held, the above report incontrovertibly proves that accused Vinay was present in the bus at the time of incident – However the other chance prints were found to be unfit for comparison or different from specimen print.

(Paras 231, 232)

(T) EVIDENCE ACT, 1872 – S.65-B

Scientific investigation – CCTV footage – Admissibility of computer generated electronic record in evidence – Once it is proved before the Court through the testimony of experts that the photographs and the CCTV footage are not tampered with, there is no reason to perceive the same with the lens of doubt.

In this case P.W.25 produced CCTV footage in two CDs which corroborate the version of P.W.1 that he and the victim were present at Saket Mall on the date of occurrence till 8.57 PM – The certificate U/s. 65B of the Act with respect to the said footage was proved by P.W.26 who is the CCTV operator at Select City Mall – Likewise, P.W.67 has also proved the CCTV footage in respect of the bus involved in the incident. (Paras 97 to 100)

(U) CRIMINAL TRIAL – Appreciation of evidence – Gang rape in the moving bus – P.W.1 was the sole eye witness who accompanied the victim on the fateful day – His evidence challenged on the ground that he is an interested witness – Testimony of P.W.1, accorded special status in law as he sustained injury in that incident, which shows that he was present in the bus – His presence further confirmed by the DNA analysis – His evidence is unimpeachable in character, even the roving cross-examination by the defence has not eroded his credibility – So the evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution – It is to be weighed whether he was present or not and he is telling the truth or not – The trial court as well as the High Court found his evidence credible and trustworthy and this court finds no reason to take a different view.

(Paras 78 to 90)

(V) CRIMINAL TRIAL – Sentence – Duty of the Court – The maxim "Let hundred guilty persons be acquitted, but not a single innocent be convicted" – A judge does not preside over a criminal trial merely to see that no innocent man is punished but to see that a guilty man does not escape – It is also very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal – So the society suffers by wrong convictions and it equally suffers by wrong acquittals – Duty of the court to make efforts to find out the truth, for which it is created so that no innocent man should be punished and no person committing an offence should get scot-free. (Paras 86 to 89)

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M/s.Rajat Joseph, Shyamal Kumar
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Mr. Sanjay R. Hegde, Sr.Adv.
(Learned amicus curiae appointed by the Court)

Date of Judgment : 15. 05 2017

JUDGMENT

DIPAK MISRA, J. **[*FOR HIMSELF AND ASHOK BHUSHAN, J.*]**

The cold evening of Delhi on 16th December, 2012 could not have even remotely planted the feeling in the twenty-three year old lady, a para-medical student, who had gone with her friend to watch a film at PVR Select City Walk Mall, Saket, that in the next few hours, the shattering cold night that was gradually stepping in would bring with it the devastating hour of darkness when she, alongwith her friend, would get into a bus at Munirka bus stand to be dropped at a particular place; and possibly could not have imagined that she would be a prey to the savage lust of a gang of six, face brutal assault and become a playful thing that could be tossed around at their wild whim and her private parts would be ruptured to give vent to their pervert sexual appetite, unthinkable and sadistic pleasure. What the victims had not conceived of, it all happened, as the chronology of events would unroll. The attitude, perception, the beastial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide. The death took place at a hospital in Singapore where she had been taken to with the hope that her life could be saved.

2. The friend of the girl survived in spite of being thrown outside the bus along with the girl and the attempt of the accused-appellants to run over them became futile as they, by their slight movement, could escape from being crushed under the bus, and the appellants left them thinking that they were no more alive. Lying naked, as the clothes were removed from their bodies, they shouted for help and as good fortune would have it, the night patrolling vehicle, a motor cycle, arrived and the said man, Raj Kumar, PW-72, gave the shirt to the boy and contacted the control room from which a Bolero patrol van came and they brought a bed sheet and tore it into two parts and gave a piece to each of the victims so that they could cover themselves and feel civil. The PCR van took the victims to the Safdarjung Hospital where treatment commenced.

3. The present case is one where there can be no denial that the narrative is long, the investigation has been cautious and to bring home the charge, modern and progressive scientific methods have been adopted. Mr. Siddharth Luthra, learned senior counsel for the respondent-State, has made indefatigable endeavour to project that the investigation is flawless and exemplary; and Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel for the appellants, have severely criticized it as faulty on many a score and that it is completely biased; and Mr. Sanjay R. Hegde, learned senior counsel, the friend of the Court, in his own way, has highlighted that the

investigation is not only flawed but also unreliable which deserves chastisement and warrants rejection. Many facets of the investigation that pertain to recording of dying declaration, recording of statements of witnesses under Section 161 of the Code of Criminal Procedure (CrPC), the medical examination, holding of the test identification parade, the manner and method of search and seizure and the procedure of arrest have been seriously commented upon. That apart, criticism is advanced from many a spectrum to strengthen the stance that it does not meet the standard and test determined by law. Needless to say, the factual score and the investigation have to withstand the test of reliability and acceptability. The appreciation of evidence brought on record requires to be appositely scrutinized to adjudge the fact whether the appellants are guilty of their culpability or there has been public pressure, as alleged, to falsely implicate the appellants or to treat them as guinea pigs to save others and accept the hypothesis that the prosecution has booked them at the instance of some political executives or to save a situation which a disturbed society perceives as a collective catastrophe on the paradigm of social stability and to sustain its faith in the investigation to keep the precept of rule of law alive. In essence, the submission is that the whole exercise, namely, investigation and trial, has been carried out with the sole purpose for the survival of the prosecuting agency. We have stated in the beginning that Mr. Sharma and Mr. Singh appearing for the appellants commenced their submission with all the vehemence and sensitivity at their command to strike at the root of the prosecution branding it as suspicious, absolutely unreliable, apathetic to the concept of individual dignity and engaged in maladroit effort to book the vulnerable and the innocent so as to disguise and cover their inefficiency to catch the real culprits. In the course of our deliberation, we shall dwell upon the same and keenly scrutinize the justifiability of the aforesaid criticism.

The Prosecution Narrative

4. Presently, we shall advert to the exposition of facts. The prosecution case, as projected, is that on 16.12.2012, the deceased, 'Nirbhaya' (not her real name), had gone with her friend, the informant, PW-1, to the PVR situated in Select City Walk Mall, Saket to watch a movie. After the show was over, about 8:30 p.m., they took an auto and reached Munirka bus stand wherefrom they boarded a white coloured chartered bus [DL-1P-C-0149, Ext.P1] which was bound to Dwarka/Palam Road, as a boy in the bus was calling for commuters for the said destination. As per the version of the informant, PW-1, the friend of the prosecutrix, the bus had yellow and green lines/stripes and the word "Yadav" was written on it. After both of them had entered the bus, they noticed that six persons were already inside the bus, four in the cabin of the driver and two behind the driver's cabin. The deceased and the informant sat on the left side in the row of two-seaters and paid the fare of twenty rupees as demanded. Before they could get the feeling of a safe journey (though not a time-consuming journey), a feeling of lonely suffocation and a sense of danger barged in, for the accused persons did not allow anyone else to board and the bus

moved and the lights inside the bus were put off. With the lights being put off, the darkness and the fear of the unexpected darkness ruled. A few minutes later, three persons (who have been identified as accused Ram Singh, Akshay and a young boy, who has been treated as a juvenile in conflict with law) came out of the driver's cabin and started to abuse PW-1. The young companion of the deceased raised opposition to the abuse that led to an altercation which invited the other two who were sitting outside the driver's cabin to join. The spirit to oppose and the duty to save the prosecutrix had to die down and perilously succumb to the assault by the accused persons with the iron rods that caused injuries to his head, both the legs and other parts of the body and the consequence was that he fell on the floor of the bus to hear the painful cries of the lady who, he knew, was being treated as an object, an article for experimentation and prey to the pervert proclivity of the six but could do nothing except to hear unbearable cries made in agony and pain. His spirit was dead, and bound to.

5. As the prosecution story further unfurls, the two accused persons, namely, Pawan and Vinay, pinned the young man down and robbed the victims of their mobiles besides robbing the informant of his purse carrying a Citi Bank credit card, ICICI Bank Debit Card, his identity card issued by his employer-company, metro card, a sum of rupees one thousand, his Titan Watch, a golden ring studded with jewels and a silver ring studded with pearl, black colour Hush Puppies shoes, black colour Numero Uno jeans, a grey colour pullover and a brown colour blazer. As per the version of the prosecution, PW-1 was carrying two mobiles and the prosecutrix was carrying only one, and the accused snatched away all the three mobiles.

6. The overpowering was not meant to satisfy the avarice. As the accusations proceed, after the informant was overpowered, as it could only have a singular result, the accused persons, namely, Ram Singh, Akshay and the Juvenile in Conflict with Law (JCL) took the prosecutrix to the rear side of the bus and she was raped by them, one after the other.

7. After committing rape, the accused Ram Singh (since deceased), accused Akshay and the JCL came towards the informant, PW-1, and nailed him down; then the accused Vinay and accused Pawan went to the rear side of the bus and committed rape on the prosecutrix, one by one. PW-1 noticed that earlier the bus was moving at fast speed but after sometime, he felt that the speed of the bus was reduced and he saw that the accused Mukesh, who was driving the bus, came near him and hit him with the rod and he also went to the rear side of the bus and raped the prosecutrix. The prosecutrix was brutally gang raped by the accused one after the other and she was also subjected to unnatural sex. Her private parts and her internal organs were seriously injured by inserting iron rod and hand in the rectal and vaginal region. As per PW-1, he had heard the cries of the prosecutrix like "chod do, bachao". PW-1 could hear the prosecutrix shouting in a loud oscillating voice. The prosecutrix was carrying a grey colour purse having an Axis Bank ATM card and other belongings. The accused persons robbed her of her belongings and stripped

her. They also took away the clothes of the informant while beating him with iron rods. The accused were exhorting that both the victims be not left alive. The accused then tried to throw both the informant and the prosecutrix out of the moving bus from its rear door but could not open it and so, they brought them to the front door and threw them out of the moving bus at National Highway No. 8, Hotel Delhi 37, Mahipalpur flyover by the side of the road.

8. As indicated earlier, the prosecutrix and PW-1 were noticed by PW-72, Raj Kumar, who heard the voice of 'bachao, bachao' from the left side of the road near a milestone opposite to Hotel Delhi 37. PW-72 saw PW-1 and the prosecutrix sitting naked having blood all around. Immediately thereafter, PW-72, Raj Kumar, informed PW-70, Ram Pal, who was in the Control Room, requesting him to call PCR. PW-70, Ram Pal, of EGIS Infra Management India (P) Limited, dialed 100 No. and even asked his other patrolling staff to reach the spot.

9. About 10:24 p.m., PW-73, H.C. Ram Chander, who was in charge of PCR van Zebra 54, received information about the incident and the lying of victims in a naked condition near the foot of Mahipalpur fly over towards Dhaula Kuan opposite GMR Gate. PW-73 reached the spot and found the victims. He got the crowd dispersed and brought a bottle of water and a bedsheet from the nearby hotel and tore the same into two parts and gave it to both the victims to cover themselves.

Travel to the Safdarjung Hospital

10. About 11:00 p.m., PW-73 took the victims to Safdarjung Hospital, New Delhi. On the way to the hospital, the victims gave their names to him and informed that they had boarded a bus from Munirka and that after some time the occupants had started misbehaving and had beaten the boy and taken the girl (prosecutrix) to the rear side of the bus and committed rape on her. Thereafter, they had taken off the clothes of the victims and thrown them naked on the road. While leaving the informant, PW-1, in the casualty where he was examined by PW-51, Dr. Sachin Bajaj, and his MLC, Ext. PW-51/A, was drawn up, PW-73 took the prosecutrix to the Gynae ward and got her admitted there. The MLC of the prosecutrix,PW- 49/B, was prepared by PW-49, Dr. Rashmi Ahuja.

11. PW-49, Dr. Rashmi Ahuja, recorded the history of the incident as told to her by the prosecutrix and noted the same in Exhibit PW-49/A. As per the version narrated by the prosecutrix to her, it was a case of gang rape in a moving bus by 4-5 persons when the prosecutrix was returning after watching a movie with the informant. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. The prosecutrix remembered intercourse two times and rectal penetration also. She was also forced to have unnatural oral sex but she refused. All this continued for half an hour and then she was thrown off from the moving bus along with her friend.

12. The following external injuries were noted by Dr. Rashmi Ahuja in Ex. PW-49/A:

a) Bruise over left eye covering whole of the eye

b) Injury mark (abrasion) at right angle of eye

c) Bruise over left nostril involving upper lip

d) Both lips edematous

e) Bleeding from upper lip present

f) Bite mark over right cheek

g) Left angle of mouth injured (small laceration)

h) Bite mark over left cheek

i) Right breast bite marks below areola present

j) Left breast bruise over right lower quadrant, bite mark in inferior left quadrant

Per abdomen:

i) Guarding & rigidity present

Local examination:

a) Cut mark (sharp) over right labia present

b) A tag of vagina (6 cm in length) hanging outside the introitus

c) There was profuse bleeding from vagina

Per vaginal examination:

i) A posterior vaginal wall tear of about 7 to 8 cm

Per rectal examination:

i) Rectal tear of about 4 to 5 cm., communicating with the vaginal tear.

13. As the evidence brought on record would show, 20 samples of the prosecutrix were taken and sealed with the seal of the hospital and handed over to PW-59, Inspector Raj Kumari.

Registration of FIR and the progress thereon

14. At this juncture, it is necessary to state that after the victims were rescued, the informant, PW-1, Awninder Pratap, gave his first statement to the police at 3:45 a.m. on 17.12.2012 which culminated into the recording of the FIR at 5:40 a.m. being FIR No. 413/2012 dated 17.12.2012, PS Vasant Vihar under Section 120B IPC and Sections 365/366/376(2)(g)/377/307/302 IPC and/or Sections 396/395 IPC read with Sections 397/201/412 IPC. It was thereafter handed over to S.I. Pratibha Sharma, PW-80, for investigation.

15. On the same night, i.e., 16/17.12.2012, the prosecutrix underwent first surgery around 4:00 a.m. The prosecutrix was operated by PW-50, Dr. Raj Kumar

Chejara, Safdarjung Hospital, New Delhi and his surgery team comprised of Dr. Gaurav and Dr. Piyush. OT notes have been exhibited as Ex.PW-50/A and Ex.PW-50/B. The second and third surgeries were performed on 19.12.2012 and 23.12.2012 respectively.

16. During the period the prosecutrix was undergoing surgeries one after the other, and when all were concerned about her progress of recovery, the prosecution was carrying out its investigation in a manner that it thought systematic. The first and foremost responsibility of the prosecution was to find out, on the basis of the information given, about the accused persons. That is how the prosecution story uncurtains.

17. On 17.12.2012, supplementary statements of PW-1 were recorded by PW-80, SI Pratibha Sharma. Based on the description of the bus given by PW-1, the offending bus bearing No. DL-1PC-0149 was found parked in Ravi Das Jhuggi Camp, R.K. Puram, New Delhi. PW-80 along with PW-74, SI Subhash Chand, and PW-65, Ct. Kripal Singh, went to the spot and found accused Ram Singh sitting in the bus. On seeing the police, Ram Singh got down from the bus and started running. The police intercepted Ram Singh and he was arrested and interrogated.

18. Personal search was conducted on Ram Singh and his disclosure statement, Ex. P-74/F, was recorded by PW-74 and his team. Based on his disclosure statement, PW-74, Investigating Officer, SI Subhash Chand, seized the bus, Ex. P1, vide Seizure Memo Ex. PW- 74/K. PW-74 seized the seat cover of the bus of red colour and its curtains of yellow colour. On the bus, 'Yadav' was found written on its body with green and yellow stripes on it. The Investigating Officer also seized the key of the bus, Ex. P-74/2, vide Seizure Memo Ex. PW-74/J. The documents of the bus were also seized. The disclosure statement of Ram Singh, Ex. PW-74/F, led to the recovery of his bloodstained clothes, iron rods and debit card of Asha Devi, the mother of the prosecutrix. PW-74, Investigating Officer, also recovered ashes and the partly unburnt clothes lying near the bus which was seized vide Memo Exhibit No. PW-74/M and Unix Mobile Phone with MTNL Sim, Ex. P-74/5, vide Memo Ex. P/74E. The Investigating Officer prepared the site plan of the place where the bus was parked and from where the ashes were found.

The arrest of the accused persons and seizure of articles

19. The arrest of accused, Ram Singh, also led to the arrest of two other accused persons, namely, accused Vinay Sharma and accused Pawan @ Kaalu. On 18.12.2012, accused Mukesh was apprehended from village Karoli by PW-58, SI Arvind Kumar, and was produced before PW-80, SI Pratibha Sharma**.** At the instance of accused Mukesh Singh, a Samsung Galaxy Trend DUOS Blue Black mobile belonging to the informant was recovered. On 23.12.2012, at his instance, PW-80 prepared the route chart of the route where Mukesh drove the bus at the time of the incident, Ex PW-80/H. Besides that, he got recovered his bloodstained clothes from the garage of his brother at Anupam Apartment, Saidulajab, Saket, New Delhi.

He opted to undergo Test Identification Parade. In the Test Identification Parade conducted by PW-17, Sandeep Garg, Metropolitan Magistrate, PW-1, identified accused-Mukesh.

20. Accused Pawan was apprehended and arrested about 1:15 p.m. on 18.12.2012 vide memo Ex.PW-60/A; his disclosure, Ex.PW-60/G, was recorded and his personal search was conducted vide memo Ex.PW-60/C. In his disclosure statement, Pawan pointed out Munirka bus stand where the prosecutrix and PW-1 boarded the bus and memo Ex.PW-68/I was prepared. He also pointed at the spot where PW-1 and the prosecutrix were thrown out of the bus and memo Ex.PW-68/J was prepared in this regard.

21. Accused Vinay Sharma got recovered his bloodstained clothes, PW-1's Hush Puppies leather shoes and the prosecutrix's mobile phone, Nokia Model 3110 of black grey colour. Further recoveries were made pursuant to his supplementary disclosure. Similarly, accused Pawan Kumar got recovered from his jhuggi his bloodstained clothes, shoes and also a wrist watch make Sonata and Rs. 1000/- robbed from PW-1.

22. On 21.12.2012, accused Akshay was also arrested from Village Karmalahang, PS Tandwa, Aurangabad, Bihar. His disclosure statement was recorded. He led to his brother's house in village Naharpur, Gurgaon, Haryana and got recovered his bloodstained clothes. A ring belonging to PW-1, two metro cards and a Nokia phone with SIM of Vodafone Company was also recovered from Akshay. Akshay also opted to undergo TIP and was positively identified by PW-1. The mobile phones of the accused persons were seized and call details records with requisite certificates under Section 65-B of Indian Evidence Act were obtained by the police.

23. After getting arrested, all the accused were medically examined. The MLCs of all the accused persons show various injuries on their person; viz., in the MLC, Ex.PW-2/A, of accused Ram Singh, PW-2, Dr. Akhilesh Raj, has opined that the injuries mentioned at point Q to P-1 could possibly be struggle marks. Similar opinions were received in respect of other accused persons. PW-7, Dr. Shashank Pooniya, has opined that the injuries present on the body of accused Akshay were a week old and were suggestive of struggle as per MLC, Ex.PW-7/A. MLC, Ex.PW-7/B, pertaining to accused Pawan shows that he had suffered injuries on his body which were simple in nature. The MLC, Ex.PW-7/C, of accused Vinay Sharma proved that he too suffered injuries, simple in nature, 2 to 3 days old, though injury No. 8 was claimed to be self inflicted by the accused himself.

Further treatment of the victim and filing of chargesheet

24. While the arrest took place, as indicated earlier, the victim underwent second and third surgeries on 19.12.2012 and 23.12.2012 respectively. The second surgery was performed on the prosecutrix on 19.12.2012 by PW-50, Dr. Raj Kumar

Chejara, along with his operating team consisting of Prof. Sunil Kumar, Dr. Pintu and Dr. Siddharth. Dr. Aruna Batra and Dr. Rekha Bharti were present along with the anaesthetic team. The clinical notes, Ex.PW-50/C, and notes prepared by the Gynaecology team, Ex.PW-50/D, can be referred to in this regard. The prosecutrix was re-operated on 23.12.2012 for peritoneal lavage and placement of drain under general anaesthesia and the notes are exhibited as Ex.PW-50/E.

25. As the condition of the prosecutrix did not improve much, the prosecution thought it appropriate to record the statements of the prosecutrix. The said statements have been conferred the status of dying declaration. As is noticeable from the evidence, PW-49 also deposed that certain exhibits were collected for examination such as outer clothes, i.e., sweater, sheet covering the patient; inner clothes, i.e., Sameej torned; dust; grass present in hairs, dust in clothes; debris from in between fingers; debris from nails; nail clippings; nail scrapings; breast swab; body fluid collection (swab from saliva); combing of pubic hair; matted pubic hair, clipping of pubic hair; cervical mucus collection; vaginal secretions; vaginal culture; washing from vaginal; rectal swab; oral swab; urine and oxalate blood vial; blood samples, etc.

26. On 21.12.2012, on being declared fit, the second dying declaration was recorded by PW-27, Smt. Usha Chaturvedi, Sub-Divisional Magistrate. This dying declaration is an elaborate one where the prosecutrix has described the incident in detail including the insertion of rods in her private parts. She also stated that the accused were addressing each other with names like, "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay".

27. On 25th December, 2012, at 1:00 p.m., PW-30, Shri Pawan Kumar, Metropolitan Magistrate, went to the hospital to record the dying declaration of the prosecutrix. The attending doctors opined that the prosecutrix was not in a position to speak but she was otherwise conscious and responded by way of gestures. Accordingly, PW-30 put questions in such a manner as to enable her to narrate the incident by way of gestures or writing. Her statement, Ex.PW-30/D, was recorded by PW-30 in the form of dying declaration by putting her questions in the nature of multiple choice questions. The prosecutrix gave her statement/dying declaration through gestures and writings, Exhibit PW-30/D, the contents of which will be discussed later.

28. At this juncture, the cure looked quite distant. The health condition was examined on 26th December 2012 by a team of doctors comprising of Dr. Sandeep Bansal, Cardiologist, Dr. Raj Kumar Chejara, Dr. Sunil Kumar, Dr. Arun Batra and Dr. P.K. Verma and since the condition of the prosecutrix was critical, it was decided that she be shifted abroad for further treatment and fostering oasis of hope on 27th December, 2012, she was shifted to Mt. Elizabeth Hospital, Singapore, for her further treatment. The hope and expiration became a visible mirage as the prosecutrix died on 29th December, 2012 at Mt. Elizabeth Hospital, Singapore. Dr.

Paul Chui, PW-34, Forensic Pathologist, Health Sciences Authority, Singapore, deposed that her exact time of death was 4:45 a.m. on 29th December, 2012. The death occurred at Mt. Elizabeth Hospital and the cause of her death was sepsis with multiple organ failure following multiple injuries. The original post mortem report is Ex. PW-34/A and its scanned copy is Ex.PW-34/B; the Toxicology Report dated 4th January, 2013 is Exhibit PW-34/C. In the post-mortem report, Ex.PW-34/A, besides other serious injuries, various bite marks have been observed on her face, lips, jaw, rear ear, on the right and left breasts, left upper arm, right lower limb, right upper inner thigh (groin), right lower thigh, left thigh lateral and left leg lower anterior.

29. It is apt to note here that during the course of investigation (keeping in mind that the vehicle was identified), the investigating agency went around to collect the electronic evidence. A CCTV footage produced by PW-25, Rajender Singh Bisht, in a CD, Ex.PW-25/C-1 and PW-25/C-2, and the photographs, Ex.PW-25/B-1 to Ex.PW-25/B-7, were collected from the Mall, Select City Walk, Saket to ascertain the presence of PW-1 and the prosecutrix at the Mall. The certificate under Section 65-B of the Indian Evidence Act, 1872 (for short, "Evidence Act") with respect to the said footage is proved by PW-26, Shri Sandeep Singh, vide Ex.PW-26/A. Another important evidence is the CCTV footage of Hotel Delhi 37 situated near the dumping spot. The said footage showed a bus matching the description given by the informant at 9:34 p.m. and again at 9:53 p.m. The said bus had the word "Yadav" written on one side. Its exterior was of white colour having yellow and green stripes and its front tyre on the left side did not have a wheel cap. The description of the bus was affirmed by PW-1's statement. The CCTV footage stored in the pen drive, Ex.P-67/1, and the CD, Ex.P-67/2, were seized by the I.O. vide seizure memo Ex.PW-67/A from PW-67, Pramod Kumar Jha, the owner of Hotel Delhi 37. The same were identified by PW-67, Pramod Jha, PW-74, SI Subhash, and PW-76, Gautam Roy, from CFSL during their examination in Court. PW-78, SHO, Inspector Anil Sharma, had testified that the said CCTV footage seized vide seizure memo Ex.PW-67/A was sent to the CFSL through S.I. Sushil Sawaria and PW-77, the MHC(M). Thereafter, on 01.01.2013, the report of the CFSL was received.

30. As the prosecution story would further undrape, in the course of investigation, the test identification parade was carried out. We shall advert to the same at a later stage.

31. We had indicated in the beginning that the investigating team had taken aid of modern methods to strengthen its case. The process undertaken, the method adopted and the results are severely criticized by the learned counsel for the appellants to which we shall later on revert to but presently to the steps taken by the investigating agency during investigation. With the intention to cover the case from all possible spheres and to establish the allegations with the proof of conclusivity and not to give any chance of doubt, the prosecution thought that it was its primary

duty to ascertain the identity of the accused persons; and for the said purpose, it carried out DNA analysis and fingerprint and bite mark analysis.

Collection of samples and identity of accused persons

32. The blood sample of the informant was collected by Dr. Kamran Faisal, PW-15, Safdarjung Hospital, on 25.12.2012 and was handed over to SI Pratibha Sharma, PW-80, vide seizure memo Ex.PW-15/A by Constable Suresh Kumar, PW-42. Similarly, as mentioned earlier, PW-49, Dr. Rashmi Ahuja, had collected certain samples from the person of the prosecutrix which are reflected in Ex.PW-49/A from point B to B. All the samples were collected by Inspector Raj Kumari, PW-59, vide seizure memo Ex.PW-59/A and were handed over to PW-80, SI Pratibha Sharma, at Safdarjung Hospital in the morning of 17.12.2012. Also the samples of gangrenous bowels of the prosecutrix were taken on 24.12.2012 and were handed over to SI Gajender Singh, PW-55, who seized the same vide seizure memo Ex.PW-11/A. All the samples were deposited with the MHC(M) and were not tampered with in any manner. A specimen of scalp hair of the prosecutrix was also taken on 24.12.2012 by Dr. Ranju Gandhi, PW-29, and was handed over to PW- 80, SI Pratibha Sharma, vide seizure memo Ex.PW-29/A.

33. The accused were also subjected to medical examination and samples were taken from their person which were sent for DNA analysis.

34. DNA analysis was done at the behest of PW-45, Dr. B.K. Mohapatra, Sr. Scientific Officer, Biology, CFSL, CBI, and Biological Examination and DNA profiling reports were prepared which are exhibited as Ex. PW-45/A-C. The report, after analysing the DNA profiles generated from the known samples of the prosecutrix, the informant, and each of the accused, concluded that:

> "An analysis of the above shows that the samples were authentic and established the identities of the persons mentioned above beyond reasonable doubt."

35. On 17.12.2012 and 18.12.2012, a team of experts from the CFSL went to Thyagraj Stadium and lifted chance prints from the bus in question, Ex.P-1. On 28.12.2012, PW-78, Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL, for taking digital palm prints and foot prints of all the accused persons vide his letter Ex.PW-46/C. Pursuant to the said request made by PW-78, Inspector Anil Sharma, the CFSL, on 31.12.2012, took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, PW-46, Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI submitted his report Ex.PW-46/D. In the report, the chance prints of accused Vinay Sharma were found to have matched with those on the bus in question.

36. Bite mark analysis was also undertaken by the investigative team to establish the identity and involvement of the accused persons. PW-66, Asghar Hussain, on the instructions of the I.O., S.I. Pratibha Sharma, had taken 10 photographs of different parts of the body of the prosecutrix at SJ Hospital on 20.12.2012 between 4:30 p.m. and 5:00 p.m. which were marked as Ex.PW-66/B (Colly.) [10 photographs of 5" x 7" each] and Ex.PW-66/C (Colly.) [10 photographs of 8" x 12" each]. PW-66 also proved in Court the certificate provided by him in terms of Section 65-B of the Evidence Act in respect of the photographs, Ex. PW-66/A. Thereafter, PW-18, SI Vishal Choudhary, collected the photographs and the dental models from Safdarjung Hospital on 01.01.2013 and duly deposited the same in the malkhana after he, PW-18, had handed them over to the S.H.O. Anil Sharma, PW-78. The same were later entrusted to S.I. Vishal Choudhary, PW-18 on 02.01.2013, which is proved vide RC No.183/21/12 and exhibited as Ex.PW-77/V. PW-71, Dr. Ashith B. Acharya, submitted the final report in this regard which is exhibited as Ex. PW-71/C. In the said report, he has concluded that at least three bite marks were caused by accused Ram Singh whereas one bite mark has been identified to have been most likely caused by accused Akshay.

37. It is seemly to note here that on completion of the investigation, the chargesheet came to be filed on 03.01.2013 under Section 365/376(2)(g)/377/307/395/ 397/302/396/412/201/120/34 IPC and supplementary chargesheet was filed on 04.02.2013.

Charge and examination of witnesses, conviction and awarding of sentence by the trial court

38. After the case was committed to the Court of Session, all the accused were charged for the following offences:

1. u/s 120-B IPC;
2. u/s. 365 / 366 / 307 / 376 (2)(g) IPC / 377 IPC read with Section 120-B IPC;
3. u/s. 396 IPC read with Section 120-B IPC and /or;
4. u/s. 302 IPC read with Section 120-B IPC;
5. u/s. 395 IPC read with Section 397 IPC read with 120-B IPC;
6. u/s. 201 IPC read with Section 120-B IPC and;
7. u/s. 412 IPC.

During the course of trial, accused Ram Singh committed suicide and the proceedings qua him stood abated vide order dated 12.10.2013.

39. It is worthy to mention here that in order to bring home the charge, the prosecution initially examined 82 witnesses and thereafter, the statements of the accused persons were recorded and they abjured their guilt. Accused Pawan Gupta @ Kaalu examined Lal Chand, DW-1, Heera Lal, DW-2, Ram Charan, DW-3, Gyan

Chand, DW-4, and Hari Kishan Sharma, DW-16, in support of his plea. Accused Vinay Sharma examined Smt. Champa Devi, DW-5, Hari Ram Sharma, DW-6, Kishore Kumar Bhat, DW-7, Sri Kant, DW-8, Manu Sharma, DW-9, Ram Babu, DW-10, and Dinesh, DW-17, to establish his stand. Accused Akshay Kumar Singh @ Thakur examined Chavinder, DW-11, Sarju Singh, DW-12, Raj Mohan Singh, DW-13, Punita Devi, DW-14, and Sarita Devi, DW-15. As the factual matrix would reveal, subsequently three more prosecution witnesses were examined and on behalf of the defence, two witnesses were examined.

40. Learned Sessions Judge, vide judgment dated 10.09.2013, convicted all the accused persons, namely, Akshay Kumar Singh @ Thakur, Vinay Sharma, Mukesh and Pawan Gupta @ Kaalu under Section 120B IPC for the offence of criminal conspiracy; under Section 365/366 IPC read with Section 120B IPC for abducting the victims with an intention to force the prosecutrix to illicit intercourse; under Section 307 IPC read with Section 120B IPC for attempting to kill PW-1, the informant; under Section 376(2) (g) IPC for committing gang rape with the prosecutrix in pursuance of their conspiracy; under Section 377 IPC read with Section 120B IPC for committing unnatural offence with the prosecutrix; under Section 302 IPC read with Section 120B IPC for committing murder of the helpless prosecutrix; under Section 395 IPC for conjointly committing dacoity in pursuance of the aforesaid conspiracy; under Section 397 IPC read with Section 120B IPC for the use of iron rods and for attempting to kill PW-1 at the time of committing robbery; under Section 201 IPC read with Section 120B IPC for destroying of evidence and under Section 412 IPC for the offence of being individually found in possession of the stolen property which they all knew was a stolen booty of dacoity committed by them.

41. After recording the conviction, as aforesaid, the learned trial Judge imposed the sentence, which we reproduce:

> "(a) The convicts, namely, convict Akshay Kumar Singh @ Thakur, convict Mukesh, convict Vinay Sharma and convict Pawan Gupta @ Kaalu are sentenced to death for offence punishable under Section 302 Indian Penal Code. Accordingly, the convicts to be hanged by neck till they are dead. Fine of Rs.10,000/- to each of the convict is also imposed and in default of payment of fine such convict shall undergo simple imprisonment for a period of one month.
>
> (b) for the offence under Section 120-B IPC I award the punishment of life imprisonment to each of the convict and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;
>
> (c) for the offence under Section 365 IPC I award the punishment of seven years to each of the convict and fine of Rs.5000/- to each of them. In

default of payment of fine simple imprisonment for one month to such convict;

(d) for the offence under Section 366 IPC I award the punishment of seven years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(e) for the offence under Section 376(2)(g) IPC I award the punishment of life imprisonment to each of the convict person with fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(f) for the offence under Section 377 IPC I award the punishment of ten years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(g) for the offence under Section 307 IPC I award the punishment of seven years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(h) for the offence under Section 201 IPC I award the punishment of seven years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(i) for the offence under Section 395 read with Section 397 IPC I award the punishment of ten years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;

(j) for the offence under Section 412 IPC I award the punishment of ten years to each of the convict person and fine of Rs.5000/- to each of them. In default of payment of fine simple imprisonment for one month to such convict;"

42. Be it noted, the learned trial Judge directed the sentences under Sections 120B/365/366/376(2)(g)/ 377/201/395/397/412 IPC to run concurrently and that the benefit under Section 428 CrPC would be given wherever applicable. He further recommended that appropriate compensation under Section 357A CrPC be awarded to the legal heirs of the prosecutrix and, accordingly, sent a copy of the order to the Secretary, Delhi Legal Services Authority, New Delhi, for deciding the quantum of compensation to be awarded under the scheme referred to in sub-section (1) of Section 357A CrPC. That apart, as death penalty was imposed, he referred the matter to the High Court for confirmation under Section 366 CrPC.

The view of the High court

43. The High Court, vide judgment dated 13.03.2014, affirmed the conviction and confirmed the death penalty imposed upon the accused by expressing the opinion that under the facts and circumstances of the case, imposition of death penalty awarded by the trial court deserved to be confirmed in respect of all the four convicts. As the death penalty was confirmed, the appeals preferred by the accused faced the inevitable result, that is, dismissal.

Commencement of hearing and delineation of Contentions

44. As we had stated earlier, the grievance relating to the lodging of FIR and the manner in which it has been registered has been seriously commented upon and criticized by the learned counsel for the appellants. Mr. Sharma, learned counsel for the appellants - Mukesh and Pawan Kumar Gupta, and Mr. Singh, learned counsel for the appellants – Vinay Sharma and Akshay Kumar Singh, have stressed with all the conviction at their command that when a matter of confirmation of death penalty is assailed before this Court, it is the duty of this Court to see every aspect in detail and not to treat it as an ordinary appeal.

45. As the argument commenced with the said note, we thought it appropriate to grant liberty to the learned counsel for the appellants to challenge the conviction and the imposition of death sentence from all aspects and counts and to dissect the evidence and project the irregularities in arrest and investigation. Learned counsel for the parties argued the matter for considerable length of time and hence, we shall deal with every aspect in detail.

Delayed registration of FIR

46. The attack commences with the registration of FIR and, therefore, we shall delve into the same in detail. PW-57, ASI Kapil Singh, the Duty Officer at P.S. Vasant Vihar, New Delhi, on the intervening night of 16/17.12.2012, received information about the incident. He lodged DD No.6-A, Ex.PW-57/A, and passed on the said DD to PW-74, SI Subhash Chand, who was on emergency duty that night at P.S. Vasant Vihar. Immediately thereafter, PW-57, ASI Kapil Singh, received yet another information qua admission of the prosecutrix and of the informant in Safdarjung Hospital and he lodged DD No.7-A, Ex.PW-57/B, and also passed on the said DD to SI Subhash Chand.

47. PW-74, SI Subhash Chand, then left for Safdarjung Hospital where he met PW-59, Inspector Raj Kumari, and PW-62, SI Mahesh Bhargava. PW-59, Inspector Raj Kumari, handed over to him the MLC and the exhibits concerning the prosecutrix as given to her by the treating doctor and PW-62, SI Mahesh Bhargava, handed over to him the MLC of the informant. PW-74, SI Subhash Chand, then recorded the statement, Ex.PW-1/A, of the informant at 1:30 a.m. on 17.12.2012 and made his endorsement, Ex.PW-74/A, on it and he gave the *rukka* to PW-65, Ct.

Kripal Singh, for being taken to P.S. Vasant Vihar, New Delhi and to get the FIR registered. PW-65, Ct. Kripal Singh, then went to P.S. Vasant Vihar, New Delhi and at 5:40 a.m. and gave the *rukka* to PW-57, ASI Kapil Singh, the Duty Officer, who, in turn, recorded the FIR, Ex.PW-57/D, made endorsement, Ex.PW-57/E, on the *rukka* and returned it to PW-65, Ct. Kripal Singh, who then handed it to PW-80, SI Pratibha Sharma, at P.S. Vasant Vihar to whom the investigation was entrusted.

48. SI Subhash Chand, PW-74, deposed that the statement of the informant might have been recorded around 3:45 a.m. although PW-1 deposed that his statement was recorded at 5:30 a.m. It was submitted that the original statement was recorded by HC Ram Chander, PW-73, and the investigation process had already begun around 1:15 a.m. and the subsequent information from the informant which is stated to be the first information was, in fact, crafted after the investigating agency decided on a course of action. It is submitted by the learned counsel for the appellants that the delay in the FIR raises serious doubts.

49. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused.

50. In the present case, after the occurrence, the prosecutrix and PW-1 were admitted to the hospital at 11:05 p.m.; the victim was admitted in the Gynaecology Ward and PW-1, the informant, in the casualty ward. PW-74, SI Subhash Chand, recorded the statement of PW-1 at 3:45 a.m. After PW-1 and the prosecutrix were taken to the hospital for treatment, the statement of PW-1 was recorded by PW-74, SI Subhash Chand, at 1:37 a.m. and the same was handed over to PW- 65, Constable Kripal Singh, to PW-57, Kapil Singh. In the initial stages, the intention of all concerned must have been to save the victim by giving her proper medical treatment. Even assuming for the sake of argument that there is delay, the same is in consonance with natural human conduct.

51. In this case, there is no delay in the registration of FIR. The sequence of events are natural and in the present case, after the occurrence, the victim and PW-1 were thrown out of the bus at Mahipalpur in semi-naked condition and were rescued by PW-72, Raj Kumar, and PW-70, Ram Pal, both EGIS Infra Management India (P) Limited employees. The victim was seriously injured and was in a critical condition and it has to be treated as a natural conduct that giving medical treatment to her was of prime importance. The admission of PW-1 and the victim in the hospital and the completion of procedure must have taken some time. PW-1 himself was injured and was admitted to the hospital at 11:05 p.m. No delay can be said to have been caused in examining PW-1, the informant.

52. In the context of belated FIR, we may usefully refer to certain authorities in the field. In ***Ram Jag and others v. State of U.P.***[1] , it was held as that witnesses cannot be called upon to explain every hour's delay and a commonsense view has to be taken in ascertaining whether the first information report was lodged after an undue delay so as to afford enough scope for manipulating evidence. Whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution."

53. In ***State of Himachal Pradesh v. Rakesh Kumar***[2], the Court repelled the submission pertaining to delay in lodging of the FIR on the ground that the first endeavour is always to take the person to the hospital immediately so as to provide him medical treatment and only thereafter report the incident to the police. The Court in the said case further held that every minute was precious and, therefore, it is natural that the witnesses accompanying the deceased first tried to take him to the hospital so as to enable him to get immediate medical treatment. Such action was definitely in accordance with normal human conduct and psychology. When their efforts failed and the deceased died they immediately reported the incident to the police. The Court, under the said circumstances ruled that in fact, it was a case of quick reporting to the police. Judged on the anvil of the aforesaid decisions, we have no hesitation in arriving at the conclusion that there was no delay in lodging of the FIR.

Non-mentioning of assailants in the FIR

54. An argument was advanced assailing the FIR to the effect that the FIR does not contain: (i) the names of the assailants either in the MLC, Ex.PW-51/A, or in the complaint, Ex.PW-1/A, (ii) the description of the bus and (iii) the use of iron rods.

55. As far as the argument that the FIR does not contain the names of all the accused persons is concerned, it has to be kept in mind that it is settled law that FIR is not an encyclopedia of facts and it is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance. In this context, reference to certain authorities would be fruitful.

56. In ***Rattan Singh v. State of H.P.***[3], the Court, while repelling the submission for accepting the view of the trial court took note of the fact that there had been omission of the details and observed that the criminal courts should not be fastidious

[1] (1974) 4 SCC 201 = AIR 1974 SC 606 , [2] (2009) 6 SCC 308 [3] (1997) 4 SCC 161

with mere omissions in the first information statement since such statements can neither be expected to be a chronicle of every detail of what happened nor expected to contain an exhaustive catalogue of the events which took place. The person who furnishes the first information to the authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing there from. Some may miss even important details in a narration. Quite often, the police officer, who takes down the first information, would record what the informant conveys to him without resorting to any elicitatory exercise. It is voluntary narrative of the informant without interrogation which usually goes into such statement and hence, any omission therein has to be considered along with the other evidence to determine whether the fact so omitted never happened at all. The Court also referred to the principles stated in ***Pedda Narayana v. State of A.P.***[4]; ***Sone Lal v. State of U.P.***[5]; ***Gurnam Kaur v. Bakshish Singh***[6].

57. In ***State of Uttar Pradesh v. Naresh and others***[7], reiterating the principle, the Court opined that it is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has been falsely implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from the same. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. For the aforesaid purpose reliance was placed upon ***Rotash v. State of Rajasthan***[8] and ***Ranjit Singh v. State of M.P.***[9]

58. In ***Rotash*** (supra) this Court while dealing with the omission of naming an accused in the FIR opined that:

> "14. …. We, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity. Even assuming that PW 1 did not name him in the first information report, we do not find any reason to disbelieve the statement of Mooli Devi, PW 6. The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case. PW 6 received as many as four injuries."

[4] (1975) 4 SCC 153 [5] (1978) 4 SCC 302 [6] 1980 Supp SCC 567 [7] (2011) 4 SCC 324
[8] (2006) 12 SCC 64 [9] (2011) 4 SCC 336

59. While dealing with a similar issue in ***Animireddy Venkata Ramana*** **v.** ***Public Prosecutor***[10], the Court held as under:

> "13. … While considering the effect of some omissions in the first information report on the part of the informant, a court cannot fail to take into consideration the probable physical and mental condition of the first informant. One of the important factors which may weigh with the court is as to whether there was a possibility of false implication of the appellants. Only with a view to test the veracity of the correctness of the contents of the report, the court applies certain well-known principles of caution.""

Thus, apart from other aspects what is required to be scrutinized is that there is no attempt for false implication, application of principle of caution and evaluation of the testimonies of the witnesses as regards their trustworthiness.

60. In view of the aforesaid settled position of law, we are not disposed to accept the contention that omission in the first statement of the informant is fatal to the case. We are disposed to think so, for the omission has to be considered in the backdrop of the entire factual scenario, the materials brought on record and objective weighing of the circumstances. The impact of the omission, as is discernible from the authorities, has to be adjudged in the totality of the circumstances and the veracity of the evidence. The involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the FIR.

61. In his statement recorded in the early hours of 17.12.2012, PW-1 stated about going to the Select City Walk Mall, Saket alongwith the prosecutrix and boarding the bus. He has also stated about the presence of four persons sitting in the cabin of the bus and two boys sitting behind the cabin and clearly stated about the overt act. He has broadly made reference to the accused persons and also to the overt acts. There are no indications of fabrication in Ex.PW-1/A.

62. The victim and PW-1 were thrown out of the bus and after some time they were admitted to the hospital. Both the injuries on PW-1's person and the gruesome acts against the victim must have put him in a traumatic condition and it would not have been possible for him to recall and narrate the entire incident to the police at one instance. It cannot be said that merely because the names of the accused persons are not mentioned in the FIR, it raises serious doubts about the prosecution case.

Appreciation of the evidence of PW-1

63. Having dealt with the contention of delay in lodging of the FIR and omission of names in the FIR on the basis of the first statement of PW-1, we may now proceed to appreciate the evidentiary value to be attached to the testimony of PW-1 and the contentions advanced in this regard.

[10] (2008) 5 SCC 368

64. As per the evidence of PW-1, he alongwith the prosecutrix, on the fateful day about 3:30 p.m., took an auto from Dwarka, New Delhi to Select City Walk Mall, Saket, New Delhi, where they watched a movie till about 8:30 p.m. and, thereafter, left the Mall. As they could not get an auto for Dwarka, they hired an auto for Munirka intending to take a bus (route No. 764) thereon. About 9:00 p.m. when they reached Munirka bus stand they boarded a white colour chartered bus and JCL was calling for commuters to Dwarka/Palam Mod. While boarding the bus, PW-1 noted that the bus had "Yadav" written on its side; had yellow and green lines/stripes; the entry gate was ahead of its front left tyre; and its front tyre was without a wheel cover. After boarding, he saw that besides the boy (JCL) who was calling for passengers and the driver, two other persons were sitting in the driver's cabin and two persons were seated inside the bus on either side of the aisle. After the bus left the Munirka bus stand, the lights inside the bus were turned off. Then accused Ram Singh, accused Akshay Thakur and the JCL (all three identified later) came towards PW-1 and verbally and physically assaulted him. When PW-1 resisted them, accused Vinay and accused Pawan were called along with iron rods and all the accused persons started hitting PW-1 with the iron rods. When the prosecutrix attempted to call for help, PW-1 and the prosecutrix were robbed of their possessions.

65. PW-1 was immobilized by accused Vinay and accused Pawan Kumar; while others, viz., accused Ram Singh, Akshay and the JCL took the prosecutrix to the rear side of the bus where after PW-1 heard the prosecutrix shout out "chod do, bachao" and her cry. After the above, three accused committed the heinous act of raping the prosecutrix, accused Vinay and Pawan then went to the rear side of the bus while the other three pinned down PW-1. Thereafter, accused Mukesh (originally driving the bus) hit PW-1 with the rod and went to the rear side of the bus. PW-1 also heard one of the accused saying "mar gayee, mar gayee". After the incident, PW-1 and the prosecutrix were dragged to the front door (because the rear door was jammed) and were pushed out of the moving bus opposite Hotel Delhi 37. After being thrown outside, the bus was turned in such a manner as to crush both of them but PW-1 pulled the prosecutrix and himself out of the reach of the wheels of the bus and saved their lives.

66. The statement of the informant, PW-1, was recorded by PW-74 in the early hours of 17.12.12 and Ex.PW-1/A is the complaint. In his chief examination, PW-74 deposes that he had given the complaint (*rukka*) to Ct. Kripal Singh and sent him to the police station at 5:10 a.m. which thereby leaves the time of recording the informant's statement inconclusive. Even if the version of PW-74 was to be relied upon and the informant's statement had been recorded by 5:10 a.m., DD entry which forms Ex.PW-57/C records that till 5:30 a.m., no punishable offence has been reported to have occurred and information of well-being had been recorded despite the fact that previous DD entries had been recorded on the basis of telephonic conversations between police officers at the hospital, the scene of crime and the

control room (both DD entries 6A and 7A had been recorded on the basis of phone conversations). The first supplementary statement was recorded around 7:30 a.m., on 17.12.2012 specifically with respect to the bus in question. In this statement, Ex. PW-80/D1, PW-1 merely gives a generic description of the bus. However, unlike in Ex. PW-1/A, in his supplementary statement, the informant states that the bus was white in colour with stripes of yellow and green, that there were 3 x 2 seats and that if he remembered anything else, he would reveal the same. At this time, the investigating agency had neither seized the bus nor arrested the accused; the statement of the informant is, therefore, silent on specific details about the same. PW's second supplementary statement, Ex.PW-80/D3, was recorded around noon on 17.12.2012 in which the informant, for the first time since the time of the incident, revealed details about the bus in which the crime allegedly occurred (that there was the word "Yadav" written on the side, that the front wheel cover was missing), and also revealed the names of the accused (Ram Singh, one Thakur, one Mukesh/Ramesh, Vinay and Pawan).

67. The learned amicus curiae, Mr. Hegde, submitted that at every stage, PW-1 made improvement in his statements. It was submitted that when PW-1 was confronted with the omissions Ex.PW-1/A, Ex.PW-8/D1 and Ex. PW-80/D3, he stated that he was unable to talk at the time of recording of his statement due to injury to the tongue. It was submitted that as per Ex.PW-51/A, he sustained only simple injury and it does not state that PW-1 suffered injury to his tongue. It was further contended that the process of improving and embellishing the informant's statement did not end with recording his statement under Section 161 CrPC. On 19.12.2012, the informant made a statement under Section 164 CrPC before the Metropolitan Magistrate, Saket Courts. This statement is the most comprehensive and contains details which had been discovered by the prosecution by then such as the names of all the accused (including the name of the JCL for the first time) and details from inside the bus (colour of the seats and curtains). It was contended that the improved version of PW-1 renders his evidence unreliable and merely because he is an injured witness, his evidence cannot be accepted.

68. It is urged by Mr. Hegde, learned amicus curiae, that inconsistencies and omissions amounting to contradiction in the testimony of PW-1 make him an untrustworthy and unreliable witness. The inconsistencies pointed out by the learned amicus curiae pertain to the number of assailants, the description of the bus and the identity of the accused. As regards the omission, it is contended by him that the said witness had not mentioned about the alleged use of rod in the FIR. He has further submitted that though he has stated that he had been assaulted by the iron rods as per his subsequent statement, yet the said statement is wholly unacceptable since he had sustained only simple injuries.

69. Mr. Hegde, in his further criticism of the evidence of PW-1, has put forth that the effort of the prosecution had been to highlight the consistencies instead of explaining the inconsistencies. That apart, submits Mr. Hegde, that the witness has

revealed the story step by step including the gradual recognition of the identity of the accused in tandem with the process of investigation and in such a situation, his testimony has to be looked with suspicion.

70. Mr. Sharma, learned counsel for the appellants - Mukesh and Pawan Kumar Gupta, and Mr. Singh, learned counsel for the appellants – Vinay Sharma and Akshay Kumar Singh, submit that the omissions in the statement of PW-1 amount to contradictions in material particulars and such contradictions go to the root of the case and, in fact, materially affect the trial or the very case of the prosecution. Therefore, they submit that the testimony of PW-1, who is treated as a star witness, is liable to be discredited. Reliance has been placed on the authorities in ***State Represented by Inspector of Police v. Saravanan & another***[11], ***Arumugam v. State Represented by Inspector of Police, Tamil Nadu*** [12], ***Mahendra Pratap Singh v. State of Uttar Pradesh***[13]and ***Sunil KumarSambhudayal Gupta (Dr.) and others v. State of Maharashtra***[14].

71. The authorities that have been commended by Mr. Sharma need to be appositely understood. In ***Arumugam*** (supra), the Court was dealing with the issue of acceptance of the version of interested witnesses. It has referred to ***Dalip Singh v. State of Punjab***[15], ***State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh***[16], ***Lehna v. State of Haryana***[17], ***Gangadhar Behera and others v. State of Orissa***[18] and ***State of Rajasthan v. Kalki and another***[19] and opined that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

72. In ***Saravanan*** (supra), reiterating the principle, the Court held:

> "18. …. it has been said time and again by this Court that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."

73. In ***Mahendra Pratap Singh*** (supra), the Court referred to the authority in ***Inder Singh and another v. State (Delhi Administration)20*** wherein it has been held thus:

[11] (2008) 17 SCC 587 : AIR 2009 SC 152 ,[12] (2008) 15 SCC 590 :AIR 2009 SC 331, [13] (2009) 11 SCC 334, [14] (2010) 13 SCC 657 : JT 2010 (12) SC 287, [15] AIR 1953 SC 364, [16] (1974) 3 SCC 277 [17] (2002) 3 SCC 76, [18] (2002) 8 SCC 381, [19] (1981) 2 SCC 752 , [20] (1978) 4 SCC 161

"2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect."

In the circumstance of the case, the Court, analyzing the evidence, opined:

"62. From the above discussion of the evidence of the eyewitnesses including injured witnesses, their evidence does not at all inspire confidence and their evidence is running in conflict and contradiction with the medical evidence and ballistic expert's report in regard to the weapon of offence, which was different from the one sealed in the police station. The High Court has, in our opinion, disregarded the rule of judicial prudence in converting the order of acquittal to conviction."

74. In ***Sunil Kumar Sambhudayal Gupta*** (supra), while dealing with the issue of material contradictions, the Court held:

"30. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially after the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan*)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide *State of Rajasthan v. Rajendra Singh*[21].)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt." (Vide *Mahendra Pratap Singh v. State of U.P.*)" And again:

"35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so." (See *Syed Ibrahim* v. *State of A.P.*[22] and *Arumugam* v. *State*)

[21] (2009) 11 SCC 106 , [22] (2006) 10 SCC 601

75. Mr. Luthra, learned senior counsel appearing for the respondent-State, on the other hand, has disputed the stand of the appellants as regards the discrepancies in the statement of PW-1. According to him, the evidence of PW-1 cannot be discarded on grounds which are quite specious. The circumstances in entirety are to be appreciated. He has placed reliance on the appreciation of the trial court and contended that the appreciation and analysis are absolutely impeccable. The relied upon paragraph is as follows:

> "The complainant PW1 in his deposition had corroborated his complaint Ex.PW1/A; his statement Ex.PW80/D-1 recorded under section 161 Cr.P.C; his supplementary statement Ex.PW80/D-3 and his statement Ex.PW1/B recorded under section 164 CrPC; qua his visit to Select City Mall, Saket; then moving to Munirka in an auto; boarding the bus Ex.P1; the incident; throwing them out of the moving bus and attempt of accused to overrun the victims by their bus.
>
> It was argued by the Ld. Defence counsel that during his cross examination PW1 was confronted with his statement Ex. PW1/A qua the factum of not disclosing in it the user of iron rods; the description of bus, the name of the assailants either in MLC Ex. PW51/A or in his complaint Ex.PW1/A. However, I do not consider such omissions as fatal as it is a settled law that FIR is not an encyclopedia of facts. The victim is not precluded from explaining the facts in his subsequent statements. It is not expected of a victim to disclose all the finer aspects of the incident in the FIR or in the brief history given to the doctor; as doctor(s) are more concerned with treatment of the victims. More so the victim who suffers from an incident, obviously, is in a state of shock and it is only when we moves in his comfort zone, he starts recollecting the events one by one and thus to stop the victim from elaborating the facts to describe the finer details, if left out earlier, would be too much.
>
> Thus if PW1 had failed to give the description of the bus or of iron rods to the doctor in his MLC Ex. PW51/A or in his complaint Ex. PW1/A it shall not have any fatal effect on the prosecution case. What is fatal is the material omissions, if any."

76. The evidence of PW-1 is assailed contending that he is not a reliable witness. During the cross-examination, his evidence was assailed contending that Ex.PW-1/A is replete with contradictions and inconsistencies. Taking us through the evidence, Mr. Singh has submitted that in his first statement, Ex.PW-1/A, there were lot of omissions and contradictions and the improvements in his subsequent statements render the evidence wholly untrustworthy. The appellants, in an attempt to assail the credibility of the testimony of PW-1, *inter alia*, raised the contentions: (i) Non-disclosure of the use of iron rod and (ii) the names of the assailants in the

MLC in Ex. PW-51/A or in Ex.PW-1/A. However, the trial court held these assertions as non-fatal to PW-1's testimony:

> "... It is not expected of a victim to disclose all the finer aspects of the incident in the FIR or in the brief history given to the doctor; as doctor(s) are more concerned with treatment of the victims. More so the victim who suffers from an incident, obviously, is in a state of shock and it is only when we move in his comfort zone, he starts recollecting the events one by one and thus to stop the victim from elaborating the facts to describe the finer details, if left out earlier, would be too much."

77. The contentions assailing the evidence of PW-1 does not merit acceptance, for at the time when he was first examined his friend (the prosecutrix) was critically injured and he was in a shocked mental condition. The evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution. It is to be weighed whether he was present or not and whether he is telling the truth or not.

78. The informant, PW-1, in his deposition, has clearly spoken about the occurrence and also corroborated his complaint, Ex.PW-1/A. The evidence of PW-1 is unimpeachable in character and the roving cross-examination has not eroded his credibility. It is necessary to mention here that PW-1 was admitted in the casualty ward of Safdarjung Hospital. As he was injured, he was medically examined by Dr. Sachin Bajaj, PW-51, and as per the evidence, Ext.PW-51/A, the following injuries were found on his body:

(a) 1cm X1 cm size clean lacertated wound over the vertex of scalp (head injury);
(b) 0.5 X 1 cm size clean lacerated wound over left upper leg;
(c) 1X 0.2 cm size abrasion over right knee.

79. The injuries found on the person of PW-1 and the fact that PW-1 was injured in the same occurrence lends assurance to his testimony that he was present at the time of the occurrence along with the prosecutrix. The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight. In ***Mano Dutt and another v. State of Uttar Pradesh***[23], it was held as under:

> "31. We may merely refer to *Abdul Sayeed* v. *State of M.P.24* where this Court held as under:
>
> "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been

[23] (2012) 4 SCC 79

injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide *Ramlagan Singh* v. *State of Bihar*[25], *Malkhan Singh* v. *State of U.P.*[26], *Machhi Singh* v. *State of Punjab*[27], *Appabhai* v. *State of Gujarat* [28], *Bonkya* v. *State of Maharashtra*[29], *Bhag Singh v. State of Punjab*[30], *Mohar* v. *State of U.P.*[31], *Dinesh Kumar* v. *State of Rajasthan*[32], *Vishnu* v. *State of Rajasthan*[33], *Annareddy Sambasiva Reddy* v. *State of A.P.*[34] and *Balraje* v. *State of Maharashtra*[35].]

29. While deciding this issue, a similar view was taken in ***Jarnail Singh* v. *State of Punjab***[36] where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

'28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In ***Shivalingappa Kallayanappa* v. *State of Karnataka***[37] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P.* v. *Kishan Chand*[38] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan* v. *State of Haryana*[39]. Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness

[24] (2010) 10 SCC 259 , [25] (1973) 3 SCC 881 , [26] (1975) 3 SCC 311, [27] (1983) 3 SCC 470 , [28] 1988 Supp SCC 241 [29] (1995) 6 SCC 447, [30] (1997) 7 SCC 712 , [31] (2002) 7 SCC 606 , [32] (2008) 8 SCC 270, [33] (2009) 10 SCC 477[34] (2009) 12 SCC 546 , [35] (2010) 6 SCC 673 , [36] (2009) 9 SCC 719, [37] 1994 Supp (3) SCC 235 , [38] (2004) 7 SCC 629 , [39] (2006) 12 SCC 459

> will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."
>
> To the similar effect is the judgment of this Court in *Balraje* (supra)."

80. As is manifest from the evidence, S.I. Pratibha Sharma, PW-80, recorded the First Supplementary Statement under Section 161 CrPC of the informant, PW-1, Awninder Pratap Singh about 7:30 a.m. on 17.12.2012. Thereafter, PW-1, the informant, took PW-80, S.I. Pratibha Sharma, to the spot from where he and the prosecutrix had boarded the bus.

81. Apart from the injuries sustained, the presence of PW-1 is further confirmed by the DNA analysis of:

> 1. the bloodstained mulberry leaves and grass that were collected from the spot in Mahipalpur where they were thrown off the bus; (Ex.74/C)
>
> 2. the blood stains on Vinay's jacket (Ex.68/2) (as per Seizure Memo Ex. 68/3), Pawan's sweater (Ex. P.68/6) (as per Ex. PW68/F) and Akshay's jeans (Ex P.68/6) tying them to the incident; (from the trial court judgment); and
>
> 3.the unburnt cloth pieces belonging to PW-1 that were recovered alongwith the ashes of the prosecutrix's clothing (Ex. PW74/M).

82. The trial court judgment was fortified by the decisions of this Court in ***Pudhu Raja and another v. State Represented by Inspector of Police40, Jaswant Singh v. State of Haryana41*** and ***Akhtar and others v. State of Uttaranchal[42]*** on the law of material omissions and contradictions. Concurringly, the High Court too observed that the defence had failed to demonstrate from the informant's testimony such discrepancies, omissions and improvements that would have caused the High Court to reject such testimony after testing it on the anvil of the law laid down by this Court:

> "325. ...Their throbbing injuries and the rigors of the weather coupled with the state of their minds must have at that point of time brought forth their instinct of survival and self preservation. The desire to have apprehended their assailants and to mete out just desserts to them could not have been their priority. ..."

83. In this context, we may fruitfully reproduce a passage from ***State of U.P. v. M.K. Anthony[43]***:

[40] (2012) 11 SCC 196 , [41] (2000) 4 SCC 484 , [42] (2009) 13 SCC 722 , ,[43] (1985) 1 SCC 505 ,

> "10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. …"

84. In ***Harijana Thirupala v. Public Prosecutor, High Court of A.P.***[44], it has been ruled that:

> "11. …. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses."

85. In ***Ugar Ahir v. State of Bihar***[45], a three-Judge Bench held:

> "7. The maxim *falsus in uno*, *falsu in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinize the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

86. In ***Krishna Mochi v. State of Bihar***[46], the Court ruled that:

> "32. …. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal

[44] (2002) 6 SCC 470 , [45] AIR 1965 SC 277 , [46] (2002) 6 SCC 81

on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time".

87. In ***Inder Singh*** (supra), Krishna Iyer, J. laid down that:

"Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes."

88. In the case of ***State of U.P. v. Anil Singh***[47], it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

89. In ***Mohan Singh and another v. State of M.P.***[48], this Court has held:

"11. The question is how to test the veracity of the prosecution story especially when it is with some variance with the medical evidence. Mere variance of the prosecution story with the medical evidence, in all cases, should not lead to the conclusion, inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which courts are created. To search it out, the courts have been removing the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit, to find out the truth. It means on one hand, no innocent man should be punished but on the other hand, to see no person committing an offence should get scot-free. If in spite of such effort, suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. For this, one has to comprehend the

[47] 1988 (Supp.) SCC 686 , [48] (1999) 2 SCC 428

> totality of the facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of eyewitnesses including the medical evidence, of course, after excluding those parts of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans (sic), clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt."

90. Keeping the aforesaid aspects in view, we shall now proceed to test the submission of the learned counsel for the appellants and the learned amicus curiae on the issue whether the testimony of PW-1 deserves acceptance being reliable or not. It is no doubt true that in the earlier statement of PW-1, that is, Ex.PW-1/A, there are certain omissions; but the main thing to be seen is whether the omissions go to the root of the matter or pertain to insignificant aspects. The evidence of PW-1 is not to be disbelieved simply because there were certain omissions. The trial Court as well as the High Court found his evidence credible and trustworthy and we find no reason to take a different view.

91. The case of the prosecution is attacked contending that PW-1 is a planted witness and that he keeps on improving his version. It is submitted that PW-1 is not reliable as had he been present at the time of occurrence, he would have endeavoured to save the victim and the nature of injuries as mentioned in Ex. PW-51/A on the person of PW-1 raises serious doubt about his presence at the time of occurrence.

92. The prosecutrix and PW-1 were surrounded and attacked by at least six accused persons. As narrated by PW-1, he was pinned down by two of the assailants while the others committed rape on the prosecutrix on the rear side of the bus. The accused persons were in a group and were also armed with iron rods. PW-1 was held by them. It would not have been possible for PW-1 to resist the number of accused persons and save the prosecutrix. The evidence of PW-1 cannot be doubted on the ground that he had not interfered with the occurrence. The improvements made in the supplementary statement need not necessarily render PW-1's evidence untrustworthy more so when PW-1 has no
reason to falsely implicate the accused.

93. Learned counsel for the State has highlighted that the version of PW-1 is absolutely consistent and the trial court as well as the High Court has correctly relied upon his testimony. He has drawn our attention to the version of PW-1 in the FIR, the statement recorded under Section 164 CrPC and his testimony before the trial

court. We have given anxious consideration and perused the FIR, supplementary statements recorded under Section 164 CrPC and appreciated the evidence in court and we find that there is no justification or warrant to treat the version of the witness as inconsistent. The consistency is writ large and the witness, as we perceive, is credible.

94. Mr. Luthra, learned senior counsel, further contested the argument advanced on behalf of the appellants as regards the discrepancies so far as PW-1 is concerned. As regards the items stolen, it is recorded in the FIR that the accused persons stole the informant's Samsung Galaxy Mobile phone bearing 7827917720 and 9540034561 and his wallet containing Rs.1000, ICICI debit card, Citi Bank Credit Card, ID Card, one silver ring, one gold ring and took off all his clothes, i.e., khakhi coloured blazer, grey sweater, black jeans, black Hush Puppies shoes and they also stole the prosecutrix's mobile phone with number 9818358144. His statement recorded under Section 164 Cr PC states that the accused snatched the Samsung Galaxy S-Duos Mobile, one more mobile phone of Samsung, one purse with Rs. 1000, one Citibank credit card, ICICI Debit Card, Company I-Card, Delhi Metro Card and also snatched black jeans, one silver ring, one gold ring, Hush Puppies shoes. They also snatched the prosecutrix's Nokia mobile phone and grey colour purse and both the wrist watches. Before the trial court, he deposed that they snatched both the rings, shoes, purse containing cards and cash, socks and belt; they took off all his clothes and left him in an underwear; the accused had also taken off all the prosecutrix's clothes and snatched all her belongings including grey purse containing Axis bank card. PW-1 also identified Hush Puppies shoes, Ex. P-2, Sonata watch, Ex. P-3, metro card, Ex. P-5, Samsung Galaxy Duos, Ex. P-6, and currency notes, Ex. P-7. As regards the weapon of assault, in the FIR and in the Section 164 statement, "rod" was recorded as weapon of assault and in his testimony before the trial court, PW-1 deposed that the weapon of assault was "iron rods". So far as throwing from the bus is concerned, it is recorded in the FIR that the other accused persons told the driver to drive the bus at a fast speed and then tried to throw the informant from the back door of the bus, however, the back door of the bus did not open. Then they threw both the informant and the prosecutrix from the moving bus near NH 8 Mahipalpur on the side of the road. His statement recorded under Section 164 CrPC states that the bus driver was driving the bus at a fast speed on being told by the other accused and he heard them saying that the girl had died and to throw her off the bus. They then took the informant and the prosecutrix to the rear door of the bus but could not open the door and, therefore, dragged them to the front door of the bus and threw them out. The bus driver turned the bus in such a manner after throwing them, that if the informant had not pulled the prosecutrix, then the bus would have run over her. PW-1 has deposed before the trial court that he heard one of the accused saying "*mar gayee, mar gayee*"; the accused were exhorting that the informant and the prosecutrix should not be left alive; the accused persons pulled the informant near the rear door and put the prosecutrix on him. The

rear door was closed, so they dragged both the informant and the prosecutrix to the front door; they were thrown off opposite Hotel Delhi 37; after they were thrown, the accused persons turned the bus and tried to crush them under the wheels. As regards the naming/description of the accused, the FIR recorded that the accused were aged between 25-30 years; one of them had a flat nose and was the youngest; one of them wore a red banian and they were wearing pant and shirt; and the accused were named as Ram Singh, Thakur, Mukesh, Vinay and Pawan. In the statement, it was recorded that he saw a dark coloured man who was being called "Mukesh, Mukesh"; he over-heard them calling each other as Ram Singh, Thakur; and the other three were addressing each other Pawan and Vinay and taking the name of JCL. In his testimony, it is recorded that he identified A-2, Mukesh, as Driver, A-1, Ram Singh, and A-3, Akshay, as persons sitting in the driver's cabin and identified A-4, Vinay, and A-5, Pawan, as persons sitting in the bus.

95. As regards the minor contradictions/omissions, the trial court has placed reliance upon ***Pudhu Raja*** (supra) and ***Jaswant Singh*** (supra) and treated the version of PW-1 as reliable. The testimony of PW-1 has been placed reliance upon by both the Courts and on an anxious and careful scrutiny of the same, we do not perceive any reason to differ with the said view.

96. As we find, the trial court has come to the conclusion that the incident has been aptly described by PW-1, the injured. The injuries on his person do show that he was present in the bus at the time of the incident. His presence is further confirmed by the DNA analysis. Suffice it to say for the present, the contradictions in the statement, Ex.PW-1/A, are not material enough to destroy the substratum of the prosecution case. From the studied analysis of the evidence of PW-1, it is the only inevitable conclusion because the appreciation is founded on yardstick of consideration of totality of evidence and its intrinsic value on proper assessment.

Recovery of the bus and the CCTV footage

97. The endeavour of the prosecution was to first check the route and get a clue of the bus. For the aforesaid purpose, the CCTV footage becomes quite relevant. The story starts from the Select City Walk Mall, Saket and hence, we have to start from there. As per the case of the prosecution, the informant and the prosecutrix had gone to Select City Walk Mall, Saket to see a film. The CCTV footage produced by PW-25, Rajender Singh Bisht, in a CD, Ex.PW-25/C-1 and PW-25/C-2, and the photographs, Ex.PW-25/B-1 to Ex.PW- 25/B-7, are evident of the fact that the informant and the prosecutrix were present at Saket till 8:57 p.m. The certificate under S ection 65B of the Evidence Act with respect to the said footage is proved by PW-26, Shri Sandeep Singh, vide Ex.PW-26/A. The informant as well as the prosecutrix gave brief description of the entire incident in their MLCs which led the investigating team to the Hotel near Delhi Airport where the prosecutrix and the informant were dumped after the incident. PW-67, Pramod Kumar Jha, the owner of the Hotel at Delhi Airport, was examined by the investigating officers regarding the

present incident. He handed over the pen drive containing the CCTV footage, Ex.P-67/1, and the CD, Ex.P-67/2 to the I.O. which were seized vide seizure memo Ex.PW-67/A. The CCTV footage and the photographs were identified by PW-67, Pramod Jha, PW-74. SI Subhash Chand, and Gautam Roy, PW-76, from CFSL during their examination in Court. The CCTV footage twice showed a white coloured bus having yellow and green stripes at 9:34 p.m. and again at 9:53 p.m. The bus exactly matched the description of the offending bus given by the informant. It had the word "Yadav" written on one of its sides and its front tyre on the left side did not have a wheel cap. PW-78, the S.H.O., Inspector Anil Sharma, has further deposed that the said CCTV footage seized vide seizure memo Ex.PW-67/A was sent to the CFSL through SI Sushil Sawariya, PW-54, on 02.01.2013, and this part of the testimony of PW-78 is corroborated by the testimony of PW-54, SI Sushil Sawaria, and PW-77, the MHC(M). Thereafter, on 03.01.2013, the report of the CFSL was received. In fact, the trial court had assured itself of the correct identification of the bus by playing the said CCTV footage shown in the pen drive, Ex.PW-67/1, and the CD, Ex.PW-67/2, during the cross-examination of PW-67, Pramod Jha.

98. Learned counsel Mr. Singh has asserted that bus, Ex. P-1, has been falsely implicated in the present case as is evidenced from the recovery of the CCTV footage. In an attempt to discredit the CCTV footage, he pointed out that only the CCTV recording alleged to be of this bus was recorded and not of all other white buses that had 'Yadav' written on them. The learned counsel for the defence subsequently maintained that the CCTV footage cannot be relied upon as the same has been tampered with by the investigating officers.

99. PW-76, Gautam Roy, HOD, Computer Cell, Forensic Division, has testified that on 02.01.2013, he had received two sealed parcels sealed with the seal of PS and the seals tallied with the specimen seals provided. He marked the blue coloured pen drive found in parcel No.1 as Ex.1 and the Moser Baer CD found in the second parcel as Ex.2. He further testified that both the exhibits were played by him in the computer and the bus was seen twice, at 9:34 p.m. and 9:54 p.m. He had photographed all these three by freezing the pen drive and the CD and these photographs were compared by him with the photographs taken by the photographer, PW-79, P.K. Gottam, which he had summoned. The witness testified that he had prepared the three comparison charts in this regard as Ex.PW-76/B, PW-76/C and PW-76/D, and his detailed report as Ex.PW-76/E. The footage taken in a CD and pen drive was sealed in PW-67's presence and as the recording was automatic data being fed on regular basis into the hard disk, the question of tampering with the same could not arise. PW-79, P.K. Gottam, from CFSL, CBI, has stated in his examination that he took photographs of the bus bearing No.DL-1P-C-0149 parked at Thyagraj Stadium, INA, New Delhi from different angles on 17.12.2012 and 18.12.2012 and handed over the same to PW-76. The said

photographs were marked as B1 in Ex.PW-76/B; as C1 and C2 in Ex.PW-76/C; and as D1 in Ex.PW-76/D. He has deposed as to the genuineness of the photographs by deposing that the software used for developing the photographs was tamper proof.

100. Once it is proved before the court through the testimony of the experts that the photographs and the CCTV footage are not tampered with, there is no reason or justification to perceive the same with the lens of doubt. The opinion of the CFSL expert contained in the CFSL report marked as Ex.PW-76/E authenticates that there was no tampering or editing in both the exhibits, Ex.P-67/1 and Ex.P- 67/2, and that a bus having identical patterns as the one parked at Thyagraj Stadium is seen in the CCTV footage, which includes the word "Yadav" written on one side, "back side dent (left)" and absence of wheel cover on the front left side. The contents of the report is also admitted to be true by its author, PW-76, Gautam Roy. Quite apart from that, it is perceptible that the High Court, in order to satisfy itself, had got the CCTV footage played during the hearing and found the same to be creditworthy and acceptable.

101. As the narrative proceeds, the next step was to find out the bus. The identity of the bus in the CCTV footage was known and the said knowledge could propel the prosecution to move for recovery. We may start from the beginning. The bus, Ex. P-1, bearing registration No. DL-1P-C-0149, is the vehicle alleged to have been involved in the incident. PW-74, SI Subhash Chand, on 17.12.2012, along with PW-1, the informant, and PW-80, WSI Pratibha Singh, went to Munirka bus stand from where the victims had boarded the alleged bus, Ex. P-1, and then to Mahipalpur to the spot where both the victims were thrown off the bus on 16.12.2012. After the collection of exhibits from the spot, PW-74 and PW-80 went to the hotels opposite the spot having CCTV cameras installed and amongst those was Hotel Delhi 37. At the said hotel, the informant/PW-1 identified the bus they had boarded in the CCTV footage of the road and the relevant footage of the recording was taken in a pen drive and CD and was handed over to the Investigating Officer as Ex. PW-67/A. Later in the day, secret information was received by PW-80 that the alleged bus was parked at Sector 3, R.K. Puram. PW-74 accompanied PW-80 and PW-65, Ct Kripal Singh, to Ravidass Camp where a bus matching the description given by PW-1 was parked near the Gurudwara. It was white in colour with 'Yadav' written on the side. When the police approached the bus, A-1, Ram Singh, got down from it and started to run; he was later apprehended in a chase by PW-74 and PW-65. From A-1, the fitness certificate, PUC and other documents regarding the registration of the vehicle DL-1PC-0149 were seized as Ex. PW-74/I, PW-74/J and PW-74/K. The entry door of the bus was ahead of the front wheel and the wheel cap was missing from the front tyre. After recovery of the burnt clothes at the behest of A1, he was sent to the police station with PW-65. PW-42, Ct. Suresh Kumar, was called to the spot and he drove the bus to Thyagraj Stadium around 5:45 p.m. on the same day. An inspection of the bus was conducted inside the stadium and the CFSL team lifted Ex. PW-74/P.

Thereafter, PW-32, SI Vishal Chaudhary, and PW-33, SI Vikas Rana, were called from police station Kotla Mubarakpur to guard the bus.

102. Mr. Singh has raised the following issues with respect to the identification and recovery of the alleged bus:

> 1. CCTV footage was not properly examined to check all possible buses plying on the said route;
>
> 2. The bus was taken to Thyagraj Stadium instead of the Police Station to avoid the media and to better facilitate the planting of evidence; and
>
> 3. PW-81, Dinesh Yadav, owner of the Bus was in judicial custody for 6 months before his examination in the Court and he was so detained in custody to bring pressure upon him.

103. Mr. Singh has made bald allegation that the bus, Ex P-1, was falsely implicated and that all the DNA evidence recovered therefrom was actually planted. He contends that the bus, Ex. P-1, was sent to Thyagraj Stadium instead ofthe concerned Police Station, PS Vasant Vihar, with the deliberate intention of avoiding the media attention so that the evidence could be planted easily. This argument is in furtherance of his false implication theory. He has, however, provided no further specific assertions to cast a doubt in our mind that the police has planted the evidence in the bus.

104. Mr. Luthra, in his turn, relying on the decision of the Delhi High Court in ***Manjit Singh v. State***[49], has placed statistics before us pointing to the paucity of physical space in police stations across the city. In ***Manjit Singh*** (supra), the High Court had ordered the Delhi Police to furnish data regarding case properties with the Police. The High Court noted that there was an accumulation of "2,86,741 case properties including 25,547 vehicles, out of which as many as 2,479 properties are lying in public places outside the police stations". Given the state of affairs, the submission put forth by Mr. Luthra is acceptable. There is dearth of space inside the police stations in Delhi and the use of Thyagraj Stadium as parking lot in the present case does not necessarily mean that there was any *mala fide* intention on the part of the investigating agency without any specific assertion to advance the said bald allegation.

105. It may also be noted that on 17.12.2012, PW-42, Ct. Suresh Kumar, drove the bus from Ravidass Camp to Thyagraj Stadium around 5:45 p.m. along with PW-74 and PW-80. About 6:15 p.m., PW-32, SI Vishal Chaudhary, along with Ct. Amit, both of PS Kotla Mubarakpur, were sent to Thyagraj Stadium where on the instructions of PW-80, SI Pratibha, PW-32, guarded the bus till 8:00 a.m. the next day. On 18.12.2012, he handed over the charge of guarding the bus to PW-33, SI Vikas Rana, PS Kotla Mubarakpur, and he guarded the bus till 8:30 p.m., until after[49]

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the CFSL team left. Thus, the criticism as regards the parking of the bus at Thyagraj Stadium and not at the Police Station pales into insignificance.

Reliability of the testimony of PW-[81] (the owner of the bus)

106. Having dealt with the recovery of the bus, it is necessary to dwell upon the contention put forth by the learned counsel for the appellants which pertains to the acceptability and reliability of the testimony of PW-81, Dinesh Yadav. The principal contention in this regard is that PW-81, Dinesh Yadav, the owner of the bus, was in judicial custody and, therefore, his version in the court is under tremendous pressure as he was desirous of getting a bail order to enjoy his liberty. Highlighting this aspect, it is urged by Mr. Sharma and Mr. Singh, learned counsel for the appellants, that the testimony of the said witness deserves to be totally discarded.

107. PW-81, Dinesh Yadav, is a transporter and owns 8 to 10 buses including Ex. P-1. He runs the buses under the name 'Yadav Travels'. He was examined by the prosecution to prove that A-1, A-2 and A-3 are connected with the bus, Ex. P-1. In his examination, PW-81 admitted that the word 'Yadav' is written across Ex. P-1 and that it is white in colour with yellow stripes. PW-81 stated that A-1, Ram Singh (since deceased), was the driver of the said bus in December 2012, A-3, Akshay Kumar Singh, was his helper and the bus was usually parked by A-1, Ram Singh, in R.K. Puram, near his residence. The bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students in the morning and also to a Company, M/s Net Ambit, Sector 132, Noida, to take its employees from Delhi to Noida. On 17.12.2012, the bus went from Delhi to Sector 132, Noida to take the staff of M/s Net Ambit to their office and PW-81 was informed by A-1, Ram Singh, or A-2, Mukesh, that the bus was checked at the DND toll plaza on their route to Noida.

108. Learned counsel Mr. Singh has asserted that PW-81 was kept in judicial custody to obtain a statement favourable to the prosecution in the present case. In this aspect, it is noted that PW-81 also stated that he was kept in judicial custody. The arrest was, owever, not made in the present case; it was in connection with another case in relation to providing incorrect address to the Transport Authority. He was lodged in jail in case FIR No. 02/2013 of PS Civil Lines under Sections 420, 468, 471 IPC. PW-81 had provided his friend's address as his own at the time of registration and was arrested on a complaint made by the Transport Authority. He was named in the charge-sheet in the present case and was cited as a witness at serial No. 36 but was dropped by the prosecution on 28.05.2013. Later on, his examination was sought by way of an application under Section 311 CrPC. The application was allowed by the trial court order dated 03.07.2013 on the ground that he was the owner of the bus and his examination was necessary to prove as to whom he had handed over the custody of the bus on the night of the incident, i.e., 16.12.2012. It is limpid from the deposition of PW-81 that he was in judicial custody for a separate

offence and, therefore, it is difficult to accede to the argument advanced by Mr. Singh that he was under pressure to support the version of the prosecution.

109. Apart from the above, the prosecution, in order to place A-1 as the driver of the bus, Ex. P-1, has examined PW-16, Rajeev Jakhmola. PW-16, Manager (Admn) of Birla Vidya Niketan School, Pushp Vihar, handled their transport. In his examination, he stated that PW-81, Dinesh Yadav, had provided the school with 7 buses on contract basis including Ex. P-1 and that A-1, Ram Singh, was its driver. He also submitted a copy of Ram Singh's Driving Licence to the Police along with the copy of the agreement of the school with the owner of the bus, copy of the RC, copy of the fitness certificate, certificate of third party technical inspection, pollution certificate, two copies of certificate–cum-policy schedule (Insurance), copy of certificate of training undergone by accused Ram Singh, copy of permit and list of the transporters, collectively as Ex. PW-16/A.

110. Thus, according to the prosecution, from the evidence of PW-16, Rajeev Jakhmola, and PW-81, Dinesh Yadav, it stands proved that the bus in question was routinely driven by Ram Singh. When an argument was raised before the High Court over the veracity of PW-81's testimony, it recorded as under:

> "270. We are constrained to say that there is no substance in the aforesaid contention of Mr. Sharma for the reason that PW-81 Dinesh Yadav, the owner of the bus bearing registration No.DL1PC-0149, in which the offence was committed, has categorically stated in his cross-examination that bus Ex.P-1 was being used for ferrying the students in the morning and thereafter as a chartered bus for taking the officials of M/s. Net Ambit from Delhi to Noida. He further stated in cross-examination that on 17.12.2012, the bus took the staff of M/s. Net Ambit from Delhi to Sector 132, Noida, UP. Quite apparently, therefore, accused Ram Singh as disclosed by him had thrown the SIM card nearabout the bus stand of Sector 37, where according to PW-44 Mohd. Zeeshan, it was found at the noon hour. Since it is not in dispute that accused Ram Singh was the driver of the bus and this fact stands fully established by the evidence on record, Noida was possibly found by him to be the safest destination to dispose of the SIM card."

111. The aforesaid analysis commends our approval because we, having analysed the said aspect on our own, have arrived at the same conclusion. There is no trace of doubt that the testimony of the said witness withstands close scrutiny and there is no reason to treat it with any kind of disapproval. That apart, the evidence of PW-16 corroborates the testimony of the owner of the bus.

Personal search and statements of disclosure leading to recovery

112. Learned counsel for the appellants have seriously questioned the arrest of the accused persons and the recoveries made pursuant to the said arrest. It is the stand of the prosecution that pursuant to the arrest of all the accused A-1 to A-5,

there were disclosure statements recorded under Section 27 of the Evidence Act which led to recoveries of incriminating articles such as objects belonging to the victims as also objects which have been linked orally or scientifically (such as through DNA profiling) to the prosecutrix and PW-1. These material objects recovered are used to link the convicts with the crime and corroborate the version of the eye witness PW-1 and the dying declaration of the deceased victim.

113. First, we shall refer to the arrest of Ram Singh and the recoveries made at his instance. As already stated, on 17.12.2012, PW-80, SI Pratibha Sharma, had spotted accused Ram Singh sitting in the offending bus, Ex. P1, which was parked at Ravidass Camp, R.K. Puram, New Delhi. On seeing the police, Ram Singh got down from the bus and started running. He was chased and instantly arrested at 4:15 p.m. vide memo Ex.PW-74/D and subsequently, his personal search was conducted vide memo Ex.PW-74/E and his disclosure Ex.PW-74/F was recorded. Notably, Ram Singh has led to several important discoveries and seizures from inside the bus.

114. Accused Mukesh was apprehended on 18.12.2012 from village Karoli, Rajasthan, by a team headed by PW-58, SI Arvind. He produced accused Mukesh before PW-80, SI Pratibha Sharma, the Investigating Officer, at Safdarjung Hospital in muffled face alongwith a mobile, Samsung Galaxy Duos, Ex.P-6, seized by her vide memo Ex.PW-58/A. The accused was arrested at 6:30 p.m. on 18-12-2012 by her vide memo Ex.PW-58/B and his personal search was conducted vide memo Ex.PW-58/C. The accused pointed the Munirka bus stand vide memo Ex.PW-68/K and the dumping spot vide memo Ex.PW-68/L. This Samsung Galaxy phone was identified to be that of PW-1, the informant.

115. On 23.12.2012, accused Mukesh led the police to Anupam Apartment, garage No. 2, Saidulajab, Saket, New Delhi, and got recovered a green colour T-shirt, Ex.P-48/1, on which the word "play boy" was printed; a grey colour pant, Ex.P-48/2, and a jacket, Ex.P-48/3, of bluish grey colour, all seized vide memo Ex.PW-48/B. The Investigating Officer also prepared the site plan, Ex.PW-80/I, of the place of recovery. On 24.12.2012, accused Mukesh also got prepared a route chart Ex.PW-80/H.

116. On 18.12.2012, accused Ram Singh led the Investigating Officer to Ravidass Camp and pointed towards his associates, namely, accused Vinay and accused Pawan. Accused Pawan was apprehended and arrested about 1:15 p.m. vide memo Ex.PW-60/A; his disclosure, Ex.PW-60/G, was recorded and his personal search was conducted vide memo Ex.PW-60/C. Accused Pawan Gupta pointed out the Munirka bus stand and a pointing out memo Ex.PW-68/I was prepared. He also pointed the dumping spot and memo Ex.PW-68/J was prepared in this regard.

117. On 19.12.2012, from accused Pawan Gupta, PW-80, got effected the following recoveries:

(a)Wrist watch Ex.P3 seized vide memo Ex.PW-68/G;

(b) Two currency notes of denomination of Rs.500/- Ex.P-7 colly were seized vide memo Ex.PW-68/G;

(c) Clothes worn by the accused at the time of the incident seized vide memo Ex.PW-68/F; and

(d)Black coloured sweater having grey stripes with label Abercrombie and Fitch Ex.P-68/6 and a pair of coca-cola colour pants Ex.P-68/7 colly;underwear having elastic labeled Redzone Ex.-68/8 and a pair of sports shoes with Columbus inscribed on them as Ex.P-68/9.

It may be stated here that Sonata wrist watch, Ex. P3,was identified as that of PW-1.

118. On 18.12.2012, about 1:30 p.m., accused Vinay Sharma was arrested in front of Ravidass Mandir, Main Road, Sector-3, R.K. Puram, New Delhi vide arrest memo Ex.PW-60/B; and his disclosure Ex.PW-60/H was also recorded. He pointed out the Munirka bus stand from where the victims were picked up vide memo Ex.PW-68/I and he also pointed out Mahipalpur Flyover, the place where the victims were thrown out of the moving bus vide pointing out memo Ex.PW-68/J. On 19.12.2012, he led to the following recoveries:

(a) Hush Puppies shoes Ex.P-2 seized vide memo Ex.PW-68/C; and

(b)Nokia mobile phone Ex.P-68/5 of the prosecutrix seized vide memo Ex.PW-68/D.

Hush Puppies shoes, Ex. P2, were identified to be that of PW-1, the informant. Nokia Mobile Phone, Ex. P-68/5, was identified to be that of the prosecutrix.

119. On 19.12.2012, pursuant to his supplementary disclosure statement Ex.PW-68/A, the following recoveries were made by the accused vide seizure memo Ex.PW-68/B:

(a) One blue coloured jeans having monogram of Expert Ex.P-68/1;

(b) A black coloured sports jacket with white stripes and a monogram of moments as Ex.P-68/3 and a pair of rubber slippers as Ex.P-68/4.

120. During the personal search of Vinay Sharma, the following article was recovered:

(a) Nokia mobile phone with IMEI No. 35413805830821418 belonging to the accused, which was returned to him on superdari vide order dated 4-4-2013

121. On 21.12.2012, about 9:15 p.m., accused Akshay Kumar Singh @ Thakur was arrested from village Karmalahang, P.S. Tandwa, District Aurangabad, Bihar vide memo Ex.PW-53/A and on 21.12.2012 and 22.12.2012, his disclosures, Ex.PW-53/I and Ex.PW-53/D, respectively were recorded. On 22.12.2012, he got effected the following recoveries from the residence of his brother, Abhay, from the rented house of one Tara Chand, village Naharpur, Gurgaon, viz;

i. Blood stained jeans (Ex.P-53/3) worn by the accused at the time of the incident, recovered from a black bag (Ex.P-53/2)

ii. A blue black coloured Nokia mobile phone (Ex.P-53/1)

iii. Blood-stained red coloured banian (vest).

122. On 27.12.2012, he got recovered the informant's Metro card Ex.P-5 and the informant's silver ring, Ex.P-4, from House No. 1943, 3rd Floor, Gali No.3, Rajiv Nagar, Sector-14, Gurgaon, Haryana.

123. Learned counsel for the appellants and learned amicus, Mr. Hegde, have vehemently criticized the arrest and recoveries that have been made or effected. It is urged by Mr. Sharma that the appellant Mukesh was not in custody when the recovery took place and additionally, he was not produced before the nearest Magistrate within twenty-four hours from the time of detention. Mr. Luthra, in his turn, would submit that the said accused was formally arrested at Delhi and, thereafter, the recovery on the basis of his disclosure took place. Mr. Singh, learned counsel, contended that the disclosure statements which have been recorded by the police do tantamount to confessional statements relating to the involvement and commission of the crime. This argument requires to be squarely dealt with. For appreciating the said submission, it is necessary to appreciate the inter-se relationship between the accused persons and thereafter dwell upon the process of the arrest and judge the acceptability on the anvil of the precedents in the field.

124. As the evidence brought on record would show, the accused persons were known to each other. Mukesh, A-2, and deceased Ram Singh, A-1, were brothers. According to the testimony of Dinesh Yadav, PW-81, Ram Singh was the driver of the bus and A-3, Akshay, was working as a helper in the bus. The same is manifest from the Attendance Register, Ex. P-81/2, seized vide Ex. PW-80/K and the Driving License of A-1, Ram Singh, Ex. P-74/4, seized vide Ex. PW-74/1. From the testimony of PW-13, Brijesh Gupta, and PW-14, Jiwant Shah, it is evident that Ram Singh and Mukesh were brothers. From the evidence of Champa Devi, DW-5, mother of Vinay, A-4, it is quite clear that Vinay, Pawan, A-5, and Ram Singh, A-1, were known to each other. Mukesh, in his statement under Section 313 CrPC, has admitted that he and Ram Singh are brothers. A-3, Akshay, in his statement under Section 313 CrPC, has admitted that he was working with Ram Singh in the bus, Ex.

P-1, as a helper. He has also admitted that he knew Ram Singh and there had been altercation on 16.12.2012 with A-1, Ram Singh. A-5, Pawan, in his statement under Section 313 CrPC, admitted that he was a witness to the quarrel between A-4, Vinay, and A-1, Ram Singh. From the aforesaid evidence, it is luminous that all the accused persons were closely associated with each other.

125. Having dealt with this facet, we shall now proceed to meet the criticism advanced by the learned counsel for the appellants with regard to the recoveries and the disclosure statements that led to the discoveries.

126. Assailing the acceptability of the arrest and the disclosure statements leading to the recoveries, Mr. Sharma and Mr. Singh have contended that the materials brought on record cannot be taken aid of for any purpose since the items seized have been planted at the places of recovery and a contrived version has been projected in court. That apart, it is submitted that the recoveries are gravely doubtful inasmuch as the prosecution has not seized all the articles from one accused on one occasion but on various dates. We have cleared the maze as regards the arrest and copiously noted the manner of arrest of the accused persons and their leading to recoveries. Be it noted, recovery is a part of investigation and permissible under Section 27 of the Evidence Act. However, Mr. Sharma has raised a contention that this Court should take note of the fact that Section 27 of the Evidence Act has become a powerful weapon in the hands of the prosecution to rope in any citizen. The said submission, as we perceive, is quite broad and specious. It is open to the defence to find fault with recovery and the manner in which it is done and its relevance. It is not permissible to advance an argument that Section 27 of the Evidence Act is constantly abused by the prosecution or that it uses the said provision as a lethal weapon against anyone it likes. In the instant case, we have noted how the recoveries have been made and how they have been proved by the unimpeachable testimony of the prosecution witnesses.

127. Mr. Luthra, learned senior counsel appearing for the State, would submit that in the present case, the material objects recovered serve as links to corroborate and they have been used as the law permits. In this regard, he has filed a chart which we think it appropriate to reproduce for better appreciation of the said aspect. It is as follows:

"S. No.	Accused	Time of Arrest	Place of Arrest	Voluntary Disclosure	Personal Items Recovered	Recovery of Items belonging to PW1	Recovery of Items belonging to Prosecutrix
1	RamSingh	4.15 P.M., 17.12.12	Ravi Dass Camp	Ex. PW 74/F Pursuant to the disclosure statement - rod	T-Shirt-DNA and brown colour chappal-DNA **(Ex. PW-74/L)** UNIX mobile phone with MTNL Sim Iron Rods **(Ex. PW-74/G)** Documents of Bus **(Ex.PW 74/I)** Bus Keys **(Ex. PW-75/J)** Bus **(Ex. PW-74/K)**	Partly unburnt clothes (the DNA profile of the Complainant was found to match those found on these clothes.) **(Ex. PW-74/M)**	Debit Card in the name of Asha Devi **(Ex. PW-74/H)**
2	Mukesh	6.30 P.M., 18.12.12	Apprehended in Karoli, Rajasthan formally arrested at Safdarjung Hospital	Ex.PW-60/I	A green T-shirt-DNA, a grey pant and a bluish-grey jacket **(Ex.PW-48/B)**	Samsung Galaxy Duos **(Ex.PW-58/A)**	Samsung Galaxy identified as that of PW-1
3	Akshay	9:15 P.M., 21.12.12	Karmala-han g, Tandwa, Aurangabad	Ex.PW53/I AND Ex.PW53/ D	Blood-Stained Jeans and Black Bag Blue Black coloured Nokia mobile phone	Metro Card Silver Ring	
4	Vinay	1:15 P.M. 18.12.12	In front of Ravidass Mandir	Ex. PW 60/H Ex.PW 68/A	Blue jeans, Black Sports jacket with white stripes, rubber slippers, black full-sleeved t-shirt **(Ex. PW-68/B)** Nokia mobile phone	Hush Puppies Shoes **(Ex. PW-68/C)** Nokia mobile phone **(Ex.PW-68/D)**	Hush-Puppies shoes identified as that of PW-1, Nokia mobile phone identified as that of prosecutri x
5	Pawan	1:30 P.M., 18.12.12	In front of Ravidas Mandir	Ex. PW 60/G	Black sweater having grey stripes, Coca-cola colour pants, under- wear having elastic labeled Redzone, A pair of sports shoes **(Ex. PW-68/F)**	Wrist watch **(Ex. PW-68/G)**, Two currency notes of denomination of Rs.500/- (says in disclosure that he got Rs.1000 as a part of the loot) **(Ex. PW-68/G)**	Sonata Wrist watch identified byPW-1 as belonging to him

128. Having reproduced the chart, now we shall refer to certain authorities on how a statement of disclosure is to be appreciated. In ***Pulukuri Kottaya v. Emperor***[50], it has been observed:

> "[I]t is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a

[50] AIR 1947 PC 67

person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed *A*', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

129. In ***Delhi Administration v. Bal Krishan and others***[51], the Court, analyzing the concept, use and evidentiary value of recovered articles, expressed thus:

"7. ... Section 27 of the Evidence Act permits proof of so much of the information which is given by persons accused of an offence when in the custody of a police officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Under Sections 25 and 26 of the Evidence Act, no confession made to a police officer whether in custody or not can be proved as against the accused. But Section 27 is by way of a proviso to these sections and a statement, even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against the accused in the circumstances stated in Section 27…."

130. In ***Mohd. Inayatullah v. State of Maharashtra***[52], dealing with the scope and object of Section 27 of the Evidence Act, the Court held:

"12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the *first* condition necessary for bringing this section into operation is the *discovery of a fact*, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The *second* is that the discovery of such fact must be deposed to. The *third* is that at the time of the receipt of the information the accused must be in police custody. The *last* but the most important condition is that only "so much of the information" as relates *distinctly* to the fact *thereby* discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the *direct* and

[51] (1972) 4 SCC 659 , [52] (1976) 1 SCC 828

> *immediate* cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.
>
> 13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan* v. *Crown*[53]; *Rex* v. *Ganee*[54]). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya* v. *Emperor*; *Udai Bhan* v. *State of Uttar Pradesh*[55]).

131. Analysing the earlier decisions, in ***Anter Singh v. State of Rajasthan***[56], the Court summed up the various requirements of Section 27 as follows:

> "(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
>
> (2) The fact must have been discovered.
>
> (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
>
> (4) The person giving the information must be accused of any offence.
>
> (5) He must be in the custody of a police officer.
>
> (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
>
> (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

132. In ***State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru***[57], the Court referred to the initial prevalence of divergent views and approaches and the same being put to rest in ***Pulukuri Kottaya*** case (supra) which has been described as *locus classicus*, relying on the said authority, observed:

> "120. To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council's decision has

[53] AIR 1929 Lah 344, [54] AIR 1932 Bom 286, [55] AIR 1962 SC 1116, [56] (2004) 10 SCC 657 ,[57] (2005) 11 SCC 600

not been questioned in any of the decisions of the highest court either in the pre-or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State."

133. Explaining the said facet, the Court proceeded to state thus:

"121. The first requisite condition for utilizing Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates *distinctly to the fact thereby discovered* that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in *Kottaya case*:

"clearly the extent of the information admissible must depend on the exact nature of the fact discovered"

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said:

"*Normally* the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.""

134. Expatriating the idea further, the Court proceeded to lay down:

> "121. …. We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words:
>
> "If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."
>
> Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court:
>
> "In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. *It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge*, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed *A*' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."
>
> (emphasis supplied)
>
> 122. The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus:

"… About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya."

The Privy Council held that:

"14. The whole of that statement *except* the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible."

(emphasis supplied)

There is another important observation at para 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words:

"Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.""

135. In the instant case, the recoveries made when the accused persons were in custody have been established with certainty. The witnesses who have deposed with regard to the recoveries have remained absolutely unshaken and, in fact, nothing has been elicited from them to disprove their creditworthiness. Mr. Luthra, learned senior counsel for the State, has not placed reliance on any kind of confessional statement made by the accused persons. He has only taken us through the statement to show how the recoveries have taken place and how they are connected or linked with the further investigation which matches the investigation as is reflected from the DNA profiling and other scientific evidence. The High Court, while analyzing the facet of Section 27 of the Evidence Act, upheld the argument of the prosecution relying on ***State, Govt. of NCT of Delhi v. Sunil and another***[58], ***Sunil Clifford Daniel v. State of Punjab***[59], ***Ashok Kumar Chaudhary and others v. State of Bihar60***, and ***Pramod Kumar v. State (Government of NCT of Delhi)***[61].

136. On a studied scrutiny of the arrest memo, statements recorded under Section 27 and the disclosure made in pursuance thereof, we find that the recoveries of articles belonging to the informant and the victim from the custody of the accused persons cannot be discarded. The recovery is founded on the statements of

[58] (2001) 1 SCC 652 , [59] (2012) 11 SCC 205 , [60] (2008) 12 SCC 173 , [61] (2013) 6 SCC 588

disclosure. The items that have been seized and the places from where they have been seized, as is limpid, are within the special knowledge of the accused persons. No explanation has come on record from the accused persons explaining as to how they had got into possession of the said articles. What is argued before us is that the said recoveries have really not been made from the accused persons but have been planted by the investigating agency with them. On a reading of the evidence of the witnesses who constituted the investigating team, we do not notice anything in this regard. The submission, if we allow ourselves to say so, is wholly untenable and a futile attempt to avoid the incriminating circumstance that is against the accused persons.

Test Identification Parade and the identification in Court

137. Now, we shall deal with the various facets of test identification parade. Upon application moved by PW-80, SI Pratibha Sharma, Investigating Officer, PW-17, Sandeep Garg, Metropolitan Magistrate, conducted the Test Identification Parade (TIP) for the accused Ram Singh (since deceased), who refused to participate in the TIP proceedings on the ground that he was shown to the witnesses in the police station. Since accused Ram Singh died during the trial, neither the trial court nor the High Court delved into this aspect regarding the refusal of accused Ram Singh to participate in the TIP proceedings.

138. On 19.12.2012, PW-17, Sandeep Garg, Metropolitan Magistrate initiated TIP proceedings for accused Vinay and Pawan, but they refused to participate in the TIP. In the TIP proceedings, the Metropolitan Magistrate has recorded the following:-

> "……..accused Pawan Kumar @ Kalu and accused Vinay, both refused to participate in the TIP proceedings and stated that they had committed a horrible crime. I recorded their refusal and gave certificate."

139. Vinay and Pawan refused to participate in the TIP proceedings without giving any reason whatsoever. TIP of accused Mukesh was conducted on 20.12.2012 at Tihar Jail by PW-17, Sandeep Garg, in which PW-1, Awninder Pratap, identified accused Mukesh. In his testimony, the informant, PW-1, has identified his signature at point 'A' in TIP proceedings with respect to the accused Mukesh, Ex.PW-1/E. The High Court has pointed out that there was no serious challenge to the TIP proceedings of accused Mukesh in the cross-examination of the Metropolitan Magistrate, PW-17, or even the Investigating Officer, PW-80. TIP of accused Akshay was conducted on 26.12.2012 at Central Jail No.4, Tihar Jail, where the informant, PW-1, identified accused Akshay. PW-1 identified his signature at point 'A' in the TIP proceedings of accused Akshay marked s Ex.PW-1/F. The accused Mukesh and Akshay were already identified in the TIP proceedings by the informant. Test Identification Proceedings corroborate and lend assurance to the dock identification of accused Mukesh and Akshay by the informant, PW-1.

140. Criticizing the TIP, it is urged by the learned counsel for the appellants and Mr. Hegde, learned amicus curiae, that refusal to participate may be considered as circumstance but it cannot by itself lead to an inference of guilt. It is also argued that there is material on record to show that the informant had the opportunity to see the accused persons after they were arrested. It is necessary to state here that TIP does not constitute substantive evidence. It has been held in ***Matru alias Girish Chandra v. State of Uttar Pradesh***[62] that identification test is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines.

141. In ***Santokh Singh v. Izhar Hussain and another***[63], it has been observed that the identification can only be used as corroborative of the statement in court.

142. In ***Malkhansingh v. State of M.P.***[64], it has been held thus:

> "7. … The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. …"

And again:

> "16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. …"

143. In this context, reference to a passage from ***Visveswaran v. State represented by S.D.M.***[65] would be apt. It is as follows:

> "11. … The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. …"

144. In ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)***[66], the Court, after referring to ***Munshi Singh Gautam v. State of M.P.***[67], ***Harbhajan Singh v. State of J & K***[68] and ***Malkhansingh*** (supra), came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.

[62] (1971) 2 SCC 75,[63] (1973) 2 SCC 406, [64] (2003) 5 SCC 746 ,[65] (2003) 6 SCC 73

145. In the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in Court. On a careful scrutiny of the evidence on record, we are of the convinced opinion that it deserves acceptance. Therefore, we hold that TIP is not dented.

Admissibility and acceptability of the dying declaration of the prosecutrix:

146. At this stage, it would be immensely seemly to appreciate the acceptability and reliability of the dying declaration made by the prosecutrix.

147. The circumstances in this case, as is noticeable, makes the prosecution bring in three dying declarations. Mr. Sharma and Mr. Singh have been extremely critical about the manner in which they have been recorded and have highlighted the irreconcilable facets. In quintessence, their submission is that the three dying declarations have been contrived and deserve to be kept out of consideration. Mr. Hegde, learned friend of the Court, contends that the dying declarations do not inspire confidence, for variations in them relate to the number of assailants, the description of the bus, the identity of the accused and the overt acts committed by them. It is contended that the three dying declarations made by the prosecutrix vary from each other and the said variations clearly reveal the inconsistencies and the improvements in the dying declarations mirror the improvements that are brought about in PW-1's statements and the progress of the investigation.

148. he sudden appearance of the name 'Vipin' in the third dying declaration after the recording of Akshay's disclosure statement where he mentions a person named Vipin is alleged to be indicative of the fact that the dying declaration is, in fact, doubtful. It is contended that the prosecution has failed to explain 'Vipin', his connection with the crime and his elimination from the case. The vapourisation of Vipin has to be considered against the backdrop of repeated assertions by the prosecution that every word of the three dying declarations is correct, consciously made and worthy of implicit belief. Learned senior counsel has also submitted that apart from the inconsistencies, the numerous procedural irregularities in the recording of the declarations make it suspicious. In this regard, lack of an independent assessment of the mental fitness of the prosecutrix, while recording the second dying declaration, has been highlighted. The multiple choice questions in the third and final dying declaration are being nomenclatured as leading questions and it is asserted that they have not been satisfactorily explained by the prosecution. Further, the evidence by the doctors does not ure the impropriety of lack of an independent assessment by the SDM while recording her second dying declaration.

149. It is submitted that if at all any dying declaration is to be relied on, it should only be the first dying declaration made on 16.12.2012 and recorded by PW-49, Dr. Rashmi Ahuja, and the said dying declaration only states that there were 4 to 5

[66] (2010) 6 SCC 1 ,[67] (2005) 9 SCC 631 ,[68] (1975) 4 SCC 480

persons on the bus. It is further stated that the prosecutrix was raped by a minimum of 2 men and that she does not remember intercourse after that. It is, therefore, unsafe to proceed on the assumption that all six persons on the bus committed rape upon the prosecutrix within a span of 21 minutes.

150. Keeping the aforesaid criticism in view, we proceed to analyse the acceptability and reliability of the dying declarations. Firstly, when the prosecutrix was brought to the Gynae Casualty about 11:15 p.m., she gave a brief account of the incident to PW-49, Dr. Rashmi Ahuja, in her MLC on 16.12.2012. PW-49, Dr. Rashmi Ahuja, has deposed that on the night of 16.12.2012 about 11:15 p.m., the prosecutrix was brought to the casualty by a PCR constable and that she gave a brief history of the incident. PW-49, Dr. Rashmi Ahuja, recorded the same in her writing in the Casualty/GRR paper, i.e., Ex. PW-49/A.

151. In the instant case, as per the history told by the prosecutrix to Dr. Rashmi Ahuja, it was a case of gang rape in a moving bus by 4-5 persons when the prosecutrix was returning after watching a film with her friend. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. She remembers intercourse two times and rectal penetration also. She was also forced to suck their penis but she refused. All this continued for half an hour and then she was thrown off from the moving bus with her friend. We have already stated about the injuries which were noted by Dr. Rashmi Ahuja in Ex.PW-49/A.

152. The relevant statement of the prosecutrix in the Medico Legal Expert, Ex.PW49/A, reads as under:

> "… she went to watch movie with her boyfriend, Awnidra: she left the movie at 8:45 PM and was waiting for bus at Munirka Bus stop where a bus going to Bahadurgarh, stopped and both climbed the bus at around 9 PM. At around 9:05-9:10 PM, around 4-5 people in the bus started misbehaving with the girl, took her to the rear side of bus while her boyfriend was taken to the front of bus, where both were beaten up badly. Her clothes were torn over and she was beaten up, slapped repeatedly over her face, bitten over lips, cheeks, breast and Mons veneris. She was also kicked over her abdomen again and again. She was raped by at least minimum of two men, she does not remember intercourse after that. She had rectal penetration. They also forced their penis into her mouth and forced her to suck which she refused and was beaten up instead. This continued for half hour and she was then thrown away from the moving bus with her boyfriend. She was taken up by PCR Van and brought to GRR. She has history of intercourse with her boyfriend about two months back. (willfully)"

153. PW-49, Dr. Rashmi Ahuja, had noticed number of injuries on the person of the prosecutrix and the same were noted in Ex. PW- 49/B as under:

"Responding to verbal commands	bruise over Rt eye covering whole of the abrasion at Rt angle of eye
Hairs had grasses in her Hairs	bruise over left nostril involving upper lip
Her wrapping sheet soaked in blood	Both lips edematous bleeding from upper lip present
P-116/min radial feeble	Bite mark over right chick & left chick present
BP 100/60 mmhg, RR 18/min Both upper limbs unremarkable	Left angle of mouth injured (laceration)
Left breast-bruise over Rt lower introits Quadrant bite mark in inferior	Both ears unremarkable Rt breast-bite mark below areola present
Quadrant P/A Guarding present L/E cut mark (sharp) over Rt labia	A tag torn vagina hanging outside P/S bleeding P/V ++
L/E cut mark (sharp) over rt. Labia present rest labia major aid uninora	P/V posterior vagina wall tear of about 7-8 cms.
	P/R Rectal tear of about 4 cm communicating with Vagina"

154. PW-50, Dr. Raj Kumar Chejara, and the surgery team operated the prosecutrix in the intervening night of 16/17.12.2012 and the operative findings have also been earlier noted.

155. PW-50, Dr. Raj Kumar Chejara, has proved the OT notes as Ex.PW-50/A bearing the signature of Dr. Gaurav and his own note in this regard is Ex.PW-50/B. As per his opinion, the condition of the small and large bowels were extremely bad for any definitive repair. After performing the operation, the patient was shifted to ICU. The first surgery was damage control surgery and it was expected that unhealthy bowel would be there.

156. The second surgery was performed on 19.12.2012 by him along with his operating team consisting of Prof. Sunil Kumar, Dr. Pintu and Dr. Siddharth. From the gynaecological side, Dr. Aruna Batra and Dr. Rekha Bharti were present along with anaesthetic team. The findings were as under:

> "Abdominal findings:
>
> 1. Rectum was longtitudinally torn on anterior aspect in continuation with perineal tear. This tear was continuing upward involving sigmoid colon, descending colon which was splayed open. The margin were edematous. There were multiple longitudinal tear in the mucosa of recto sigmoid area. Transverse colon was also torn and gangrenous. Hepatic flexture, ascending colon & caecum were gangrenous with multiple perforations at many places. Terminal ileum approximately one and a half feet loosely hanging in the

abdominal cavity, it was avulsed from its mesentry and was non-viable. Rest of the small bowel was non-existent with only patches of mucosa at places and borders of the mesentry was contused. The contused mesentry borders initially appeared (during 1st surgery) as contused small bowel.

2. Jejunostomy stoma was gangrenous for approximately 2cm.

3. Stomach and duodenum was distended but healthy."

157. Dying Declaration was recorded by SDM, Smt. Usha Chaturvedi, PW-27, on 21.12.2012. The medical record of the prosecutrix shows that the prosecutrix was not found fit for recording of her statement until 21st December, 2012 about 6:00 p.m. when the prosecutrix was declared fit for recording statement by PW-52, Dr. P.K Verma. PW-52 had examined the prosecutrix and found her to be fit, conscious, oriented and meaningfully communicative for making statement vide his endorsement at point 'A' on application, Ex.PW-27/DB. The second dying declaration, Ex.PW-27/A, was recorded by PW-27, Smt. Usha Chaturvedi, SDM. This dying declaration is an elaborate one where the prosecutrix has described the incident in detail including the act of insertion of rod in her private parts. She also stated that the accused were addressing each other with names like,*"*Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay*"*.

158. The relevant portion of the dying declaration Ex. PW-27/A recorded by PW-27, SDM, is extracted below:

"Q.1. What is your name, your father's name and your residential address?

Ans. My name is prosecutrix and my father name is Sh. ……. and we reside at ……..

Q.2 Do you study or work some where?

Ans. I have completed my BPT (Bachelor of Physiotherapy).

Q.3 On which date and place, the incident occurred?

Ans. This happened on 16.12.12 in the midst of at about 9:00-9:15 p.m.

Q.4 Where had you gone on that day and how did you reach the place of occurrence?

Ans. I had gone to watch the movie i.e. "Life of Pi" 6.40-8.30 p.m. to Select City Mall, Saket on the day of incident along with my friend Sh. Awninder S/o. Sh. Bhanu Pratap, R/o House No.14, Bair Sarai, New Delhi-16. We took an Auto Rikshaw from there and reached Munirka.

Q.5 How did you go further?
Ans. After that, I saw white colored bus whose conductor had been calling the passengers of Palam Mor and Dwarka. I had to go to Dwarka, Sec-1.

That is why both of us, I and my friend boarded the bus and gave twenty rupees (Rs. 20/-) at the fare of Rs.10/- per passenger.

Q.6. Were there passengers inside the bus?

Ans. When I entered the bus there were 6-7 passengers. Assuming them to be passenger, we sat outside the cabin of the bus.

Q.7 Provide the detailed information about the bus?

Ans. The bus was of the white colour and the seats were of the red colour. Yellow coloured curtains were fixed. The glasses of the bus were black and were closed. I could see outside from inside but nothing could be seen inside from outside. In one row of the bus there were two seats and in the other row, there were three seats.

Q,8 After entering the bus, did you suspect anything seeing the people occupying the seats there?

Ans. I had suspected (something amiss) but the conductor had already taken the (fare) money and the bus had started. So, I kept sitting there.

Q.9 What did happen afterwards? Please inform in detail.

Ans. After five minutes when the bus climbed the bridge of Malai Mandir, the Conductor closed the door of the bus and switched off the light inside the bus. And they came to my friend and started hitting and beating him. Three four (3-4) people caught hold of him and the remaining people dragged me to the rear portion of the bus and tore off my clothes and took turns to rape me. They hit me on my stomach with an iron rod and bit me on my whole body. Prior to that, they snatched from me and my friend all our articles i.e. mobile phone, purse, credit card, debit card, watches, etc. All six of the persons committed oral, vaginal, anal rape on me. These people inserted the iron rod into my body through my vagina and rectum and also pulled it out. They extracted the internal private part of my body through inserting hand and iron rod into my private parts and caused hurt to me. Six persons kept committing rape on me for approximately one hour by turns. The drivers kept changing in the moving bus so that they can rape me. ……. PW-27 Usha Chaturvedi, SDM, when examined and recorded the dying declaration of prosecutrix come off in her dying declaration she state as under:"

159. The clinical notes, Ex.PW-50/C, and notes prepared by the gynaecology team were proved as Ex.PW-50/D. The gynaecological notes were prepared on actual examination of the patient on the operation table during the surgery. PW-50 further operated the prosecutrix on 23.12.2012 for peritoneal lavage and placement of drain under general anaesthesia and his notes are Ex.PW-50/E.

160. Statement of the prosecutrix was recorded by PW-30, Pawan Kumar, Metropolitan Magistrate, vide Ex.PW-30/D. On 24.12.2012, an application for recording the statement of the prosecutrix under Section 164 CrPC was moved by the Investigating Officer, which is exhibited as Ex.PW-30/A and, thereafter, the learned Metropolitan Magistrate fixed the date for recording of the statement as 25.12.2012 at 9:00 a.m. at Safdarjung Hospital vide his endorsement at Point "P" to "P-1" on Ex. PW-30/A. On 25.12.2012, PW-28, Dr. Rajesh Rastogi, at 12:40 p.m., declared the prosecutrix fit for recording statement through gestures. She was found conscious, oriented, co-operative, comfortable and meaningfully communicative to make a statement through non-verbal gestures.

161. On 25.12.2012, the prosecutrix's statement, Ex.PW-30/D, under Section 164 CrPC was recorded by PW-30, Pawan Kumar, Metropolitan Magistrate, in the form of questions by putting her multiple choice questions. This statement was made through gestures and writings. The statement recorded by PW-30 which ultimately became another dying declaration reads as under:

> "25/12/2012 at 01.00 p.m. at ICU Safdarjung Hospital. Statement of Prosecutrix (Name and Particulars withheld) As opined by the attending doctors the Prosecutrix is not in position to speak but she is otherwise conscious and oriented and responding by way of gestures, so I am putting question in such a manner so as to enable to narrate the incident by way of gesture or writing.
>
> Ques. : When and at what time the incident happened?
>
> 1. 20/12/2012 2. 13/12/2012 3. 16/12/2012
>
> **Ans : 16/12/12 (by writing after taking time)**
>
> Ques.: Have you seen the staff of the bus?
>
> 1. Yes 2. No
> **Ans.: 1 yes by gesture (nodding her head)**
>
> Ques.: Have you seen those people at that time?
>
> 1. Yes 2. No
> **Ans.: 1**
>
> Ques.: By which article they have given beatings? (answer by writing)
>
> **Ans.: By iron rod which was long.**
>
> Ques.: What happened of your belongings means mobile etc.?
>
> 1. Fell down 2. Snatched by them 3. Don't know
>
> **Ans.: 2**
> Ques.: Besides rape where and how did you get the injuries? (tried to answer by writing)

Ans.: Head, face, back, whole body including genital parts (by gesture indication)

Ques.: By which names they were addressing to each other? (tried answer by writing)
Ans.: 1. Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju.

Ques.: What did they do after rape?

1. Left at home 2. Threw at unknown place 3. Gotdown at some other bus stop.

Ans: 2" As per Ex. PW-30/D, this answer was written by the prosecutrix in her own hand.

162. On 26.12.2012, the condition of the prosecutrix was examined and it was decided to shift her abroad for further treatment. Notes in this regard are Ex.PW-50/F bearing the signatures of Dr. Raj Kumar, Dr. Sunil Kumar, Dr. Aruna Batra and Dr. P.K. Verma.

163. The prosecutrix died at Mount Elizabeth Hospital, Singapore on 29.12.2012 at 4:45 a.m. The cause of death is stated as sepsis with multi organ failure following multiple injuries, as is evincible from Ex.PW-34/A.

164. Learned counsel for the appellants have objected to the admissibility of the dying declarations available on record mainly on the ground that they are not voluntary but tutored. It is argued that the second and third dying declarations are nothing but a product of tutoring and are non-voluntary and the only statement recorded is the MLC, Ex.PW49/A and Ex. PW49/B, prepared immediately after the incident, wherein the prosecutrix has neither named any of the accused nor mentioned the factum of iron rod being used by the accused persons and the act of the accused in committing unnatural offence. It is further alleged that the prosecutrix could not have given such a lengthy dying declaration running upto four pages on 21.12.2012 as she was on oxygen support. PW-27 has deposed that the prosecutrix was on oxygen support at the time of recording the second dying declaration. It is further contended that it must be taken into account that ever since the prosecutrix was admitted to the hospital, she was continuously on morphine and, thus, she could not have gained consciousness. The second dying declaration has been further assailed on the ground of being recorded at the behest of SDM, PW-27, instead of a Magistrate and that too after a delay of nearly four days. The third dying declaration, Ex.PW-30/D, recorded by the Metropolitan Magistrate, PW-30, on 25.12.2012 through gestures and writings is controverted by putting forth the allegations of false medical fitness certificate and absence of videography.

165. Another argument advanced by the learned counsel raising suspicion on the genuineness of the second and third dying declarations is that the dates on which the

dying declarations were recorded have been manipulated. The counsel asseverated that the second dying declaration, i.e., Ex.PW-27/A, purported to have been recorded by PW-27 on 21.12.2012 was, in fact, recorded on the previous day as evidenced from the overwriting of the date in Ex. PW-27/B. The counsel also pointed to the overwriting of the date in the third dying declaration, i.e., Ex. PW-30/C, recorded by PW-30. It is propounded by them that the date was modified thrice in order to fit in the fake chain of circumstances contrived by the prosecution.

166. Resisting the said submissions, Mr. Luthra, learned senior counsel for the State, astutely contended that all the three dying declarations recorded at the instance of the prosecutrix are consistent and well corroborated by medical evidence as well as by PW-1's testimony, and other scientific evidence. The prosecutrix's first statement, Ex. PW-49/A, given to PW-49 was only a brief account of the heinous act committed on her and in that state of shock, nothing more could be legitimately expected of her. Only after receiving medical attention, she was declared fit to record statement and on 21.12.2012, PW-52 had examined the prosecutrix and found her to be fit, conscious, oriented and meaningfully communicative for making statement vide his endorsement at point 'A' on application Ex.PW-27/DB. PW-27, Smt. Usha Chaturvedi, SDM, recorded her statement in which the prosecutrix described the incident in detail and also named the accused persons. In fact, PW-27 has also deposed before the court that the prosecutrix was in a fit mental condition to give the statement on 21.12.2012. Moreover, the prosecutrix's third statement, Ex.PW-30/D, which was recorded in question-answer form through gestures and writings by PW-30, Pawan Kumar, Metropolitan Magistrate, is consistent with the earlier two dying declarations and that adds to the credibility and conclusively establishes reliability.

167. In the first dying declaration made to PW-49, Dr. Rashmi Ahuja, recorded in Ex.PW-49/A and in MLC, Ex.PW-49/B, due to her medical condition, though the prosecutrix broadly described the incident of gang rape committed on her and injuries caused to her and PW-1, yet she failed to vividly describe the incident of inserting iron rod, etc. As soon as the prosecutrix was brought to the hospital, she gave a brief description of the incident to PW-49, Dr. Rashmi Ahuja. As it appears from the record, the prosecutrix had lost sufficient quantity of blood due to which she was drowsy and could only give a brief account of the incident and injuries caused to her and the informant. Even though the prosecutrix has given only a brief account of the occurrence, yet she was responding to verbal command and hence, the same is natural and trustworthy and furthermore, Ex. PW-49/A is also consistent with the other dying declarations.

168. By virtue of the second dying declaration recorded as Ex.PW-27/A on 21.12.2012 about 9:10 p.m. by the SDM, Smt. Usha Chaturvedi, the exact details of the incident and the injuries caused to the prosecutrix have come on record. The learned SDM has satisfied herself that the prosecutrix was fit to make the statement.

While recording the dying declaration of the prosecutrix, Ex.PW-27/A, Dr. P.K Verma, PW-52, had found her conscious, oriented and meaningfully communicative vide his endorsement at point 'A' on the application, Ex.PW-27/DB. It was only thereafter that PW-27, Smt. Usha Chaturvedi, SDM, recorded the statement, Ex.PW-27/A, of the prosecutrix. The prosecutrix not only signed it but even wrote the date and time in this statement. She narrated the entire incident specifying the role of each accused; gang rape/unnatural sex committed upon her; the injuries caused in her vagina and rectum by use of iron rod and by inserting of hands by the accused; description of the bus, robbery and lastly throwing of both the victims out of the moving bus, Ex.P1, in naked condition at the footfall of Mahipalpur flyover.

169. As it appears from the record, PW-27, after recording the statement of the prosecutrix, as contained in Ex.PW-27/A, forwarded the statement alongwith the forwarding letter, Ex. PW-27/B, to the ACP, Vasant Vihar undersigned by herself. Ex. PW-27/A, which contains the statement of the prosecutrix, is duly signed by the prosecutrix on all the pages and also signed by PW-27, SDM. PW-27 has certified in Ex.PW-27/A that the signature of the prosecutrix was obtained in her presence at 9:00 p.m. on 21.12.2012 after which she has signed the same. No overwriting of date is evidenced in Ex.PW-27/A. However, so far as the forwarding letter, i.e., Ex.PW-27/B, is concerned, the date mentioned by PW-27 after putting her signature is overwritten as 21.12.2012. When cross-examined on this aspect, PW-27 has stated that she had herself overwritten the date and, thus, overruled the possibility of any falsification of the document at the behest of the investigating team. PW-27 explained the overwriting of date as a 'human error' and the same has been rightly construed by the trial court and accepted by the High Court as a complete explanation. The relevant statement of PW-27 is as under:

> "It is correct that in Ex.PW27/B there is an over writing on the date under my signature. VOL: It was a human error. The statement was recorded on 21-12-2012, so for all purpose this date will be 21-12-2012."

170. Agian on 25.12.2012 on an application, Ex.PW-28/A, though Dr. P.K Verma, PW-52, opined that the prosecutrix was unable to speak as she was having endotracheal tube, i.e, in larynx and trachea and was on ventilator, yet PW-28, Dr. Rajesh Rastogi, declared her to be conscious, oriented and meaningfully communicative through non-verbal gestures and fit to give statement. PW-30, Pawan Kumar, Metropolitan Magistrate, also satisfied himself qua fitness and ability of the prosecutrix to give rational answers by gestures to his multiple choice questions. The opinion of the doctors obtained prior to recording of the statements, Ex.PW-27/A and Ex.PW-30/D-1, as also the observations made by the SDM and Metropolitan Magistrate qua her fitness cannot be disregarded completely on the basis of surmises of the learned counsel for the appellants.

171. Adverting to the third dying declaration, Ex.PW-30/C, we are able to appreciate that PW-30, after recording the statement of the prosecutrix, has signed the document. The date mentioned therein is overwritten as 25.12.2012. However, in the forwarding note to the investigating officer which is contained in continuation of the prosecutrix's statement annexed as Ex. PW-30/C, the signature and date mentioned by PW-30 is very clear and no overwriting is visible. Be it noted, PW-30 was never cross-examined on the aspect of overwriting of the date in Ex.PW-30/C. The learned counsel has, for the first time, raised this issue before us merely to substantiate his suspicion of manipulation on the part of the prosecution. We hold that pointing at insignificant errors is inconsequential so far as cogent evidence produced by the prosecution stand on a terra firma. It is beyond human prudence to discard the detailed and well signed statements of the prosecutrix, in spite of clear date put by herself, merely because PW-30 erred at one point of time in correctly recording the date. Moreover, the testimony of PW-52, Dr. P.K. Verma, who was incharge of the ICU and in whose supervision the entire treatment and recording of statements by the prosecutrix was done, cannot be discarded on account of meagre technical errors.

172. Another line of argument developed by the learned counsel is that there has been failure on the part of the prosecutrix to disclose the names of any of the accused persons in the brief history given by her to the doctor in MLC, Ex.PW-49/A, and so, her dying declarations, Ex.PW-27/A and Ex.PW-30/D-1, where she had given the names of the accused persons, are tutored versions and cannot form the basis of conviction. This argument, however, is completely unjustified in the light of the medical condition of the prosecutrix when she was brought to the hospital. As per the records, the prosecutrix was brought to the hospital in a state of sub-consciousness and sheer trauma. In her MLC, Ex.PW-49/B, her condition is described as drowsy responding only to verbal commands and hence, not completely alert due to the shock and excessive loss of blood. The prosecutrix was declared fit to make statements, Ex.PW-27/A and Ex.PW-30/D-1, only when she was operated thrice. Her dying declarations, Ex.PW-27/A and Ex.PW-30/D-1, also stand corroborated by the medical evidence as well as the testimony of PW-1.

173. A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration. However, the court, while admitting a dying declaration, must be vigilant towards the need for *'Compos Mentis Certificate'* from a doctor as well as the absence of any kind of tutoring. In ***Laxman v. State of Maharashtra***[69], the law relating to dying declaration was succinctly put in the following words:

[69] (2002) 6 SCC 710

> "3. … A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

174. The legal position regarding the admissibility of a dying declaration is settled by this Court in several judgments. This Court, in ***Atbir v. Government of NCT of Delhi***[70], taking into consideration the earlier judgment of this Court in ***Paniben v. State of Gujarat***[71] and another judgment of this Court in ***Panneerselvam v. State of Tamil Nadu***[72], has exhaustively laid down the following guidelines with respect to the admissibility of dying declaration:

> "22. (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
>
> (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
>
> (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
>
> (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
>
> (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

175. It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various other tests. In a case where there are more than one dying declaration, if some inconsistencies are noticed between one and the other, the court has to examine the nature of inconsistencies as to whether they are material or not. The court has to examine the contents of the dying declarations in the light of the various surrounding facts and circumstances. In ***Shudhakar v. State of Madhya Pradesh***[73], this Court, after referring to the landmark decisions in ***Laxman*** (supra) and ***Chirra Shivraj v. State of Andhra Pradesh***[74], has dealt with the issues arising out of multiple dying declarations and has gone to the extent of declining the first dying declaration and accepting the subsequent dying declarations. The Court found that the first dying declaration was not voluntary and not made by free will of the deceased; and the second and third dying declarations were voluntary and duly corroborated by other prosecution witnesses and medical evidence. In the said case, the accused was married to the deceased whom he set ablaze by pouring kerosene in the matrimonial house itself. The smoke arising from the house attracted the neighbours who rushed the victim to the hospital where she recorded three statements before dying. In her first statement given to the Naib Tehsildar, she did not implicate her husband, but in the second and third statements, which were also recorded on the same day, she clearly stated that the accused poured kerosene on her and set her on fire. The accused was convicted under Section 302 IPC. In this regard, the Court made the following observations:

"21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the

[73] (2012) 7 SCC 569 ,[74] (2010) 14 SCC 444

> deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the court in such matters."

176. Recently, a two-Judge Bench of this Court in ***Sandeep and another v. State of Haryana***[75] was faced with a similar situation where the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the Judicial Magistrate lacked certain information given earlier. After referring to the two dying declarations, this Court examined whether there was any inconsistency between the two dying declarations. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between the two dying declarations and non-mention of certain features in the dying declaration recorded by the Judicial Magistrate does not make both the dying declarations incompatible.

177. In this regard, it will be useful to reproduce a passage from ***Babulal and others v. State of M.P.***[76] wherein the value of dying declaration in evidence has been stated:

> "7. … A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (*nemo moriturus praesumitur mentire*). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. …"

178. Dealing with oral dying declaration, a two-Judge Bench in ***Prakash* and another *v. State of Madhya Pradesh***[77] has ruled thus:

[75] (2015) 11 SCC 154 : (2015) 2 SCR 1999 SC , [76] (2003) 12 SCC 490 , [77] (1992) 4 SCC 225

> "11. … In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with. …"

179. In ***Vijay Pal v. State (Government of NCT of Delhi)***[78], after referring to the Constitution Bench decision in ***Laxman*** (supra) and the two-Judge Bench decisions in ***Babulal*** (supra) and ***Prakash*** (supra), the Court held:

> "22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW 1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.
>
> 23. It is contended by the learned counsel for the appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in *Mafabhai Nagarbhai Raval* v. *State of Gujarat*[79] wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.
>
> 24. In *State of M.P.* v. *Dal Singh*[80], a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible."

180. In the case at hand, the first statement of the prosecutrix was recorded by PW-49, Dr. Rashmi Ahuja, on the night of 16.12.2012 and the second statement was recorded by the SDM on 21.12.2012 after a delay of five days. In the present facts

[78] (2015) 4 SCC 749 , [79] (1992) 4 SCC 69, [80] (2013) 14 SCC 159,

and circumstances of the case, we do not find that there is any inconsistency in the dying declarations to raise suspicion as to the genuinity and voluntariness of the subsequent dying declarations. The prosecutrix had been under constant medical attention and was reported to be fit for giving a statement on 21.12.2012 only. On the night of the incident itself, she underwent first surgery conducted by PW-50, Dr. Raj Kumar Chejara, Surgical Specialist, Department of Surgery, Safdarjung Hospital, New Delhi and his surgery team comprising of himself, Dr. Gaurav and Dr. Piyush, and the prosecutrix was shifted to ICU. The second surgery was performed on her on 19.12.2012. Ex.PW-50/C, OT notes dated 19.12.2012 show that the prosecutrix was put on ventilation after the surgery. Considering the facts and circumstances and the law laid down above, a mere omission on the part of the prosecutrix to state the entire factual details of the incident in her very first statementdoes not make her subsequent statements unworthy, especially when her statements are duly corroborated by other prosecution witnesses including the medical evidence.

181. The contention that no dying declaration could have been recorded on 21.12.2012 as the prosecutrix was administered morphine does not hold good as PW-52, Dr. P.K. Verma, has deposed that morphine was injected at 6:00 p.m. on 20.12.2012 and its effect would have lasted for only 3-4 hours. PW-52 has denied that the prosecutrix was unconscious and had difficulty in breathing at the time when she made the statement to PW-27, SDM, on 21.12.2012.

182. Yet another objection raised by the learned counsel for the appellants concerning the medical fitness of the prosecutrix, while recording the third dying declaration is that when PW-30, Metropolitan Magistrate, Pawan Kumar, recorded the dying declaration of the prosecutrix, she was not in a position to speak as per the endorsement made by PW-52, Dr. P.K. Verma, and, therefore, no weight could be attached to the dying declaration recorded by PW-30. In this regard, reliance is placed upon Ex.PW-30/B1. This contention was raised before the High Court as well as the trial court and while considering the contention, we find that:

> "On 25.12.2012, application [Ex.PW-30/B] moved by P.W.-80 S.I. Pratibha Sharma between 9:30 a.m. to 10:00 a.m. seeking opinion regarding fitness of prosecutrix to get statement recorded. Pw-52 Dr. P.K. Verma examined the prosecutrix and opined at 12:35 p.m. that "patient has endotracheal tube in place (i.e. in her larynx and trachea) and was on ventilator and hence she could not speak".

183. PW-28, Dr. Rajesh Rastogi, opined vide Ex.PW-28/A at 12:40 p.m. on 25.12.2012 that the prosecutrix was conscious, cooperative, meaningfully communicative through non-verbal gestures, oriented and fit to give statement. PW-28, Dr. Rajesh Rastogi, examined the prosecutrix around 12 noon and finished it by 12:00-12:30 p.m. On 25.12.2012 at 12:35 p.m., Dr. P.K. Verma had endorsed on the

document Exhibit PW-30/B that the victim could not speak as she had endotracheal tube in place (that is, in larynx and trachea) and was on ventilator. However, subsequently, at 12:40 p.m. on the same day, PW-28, Dr. Rajesh Rastogi, had endorsed on the said document, Ex.PW-30/B, to the effect that the victim was conscious, cooperative, meaningfully communicative, oriented, responding through non-verbal gestures and fit to give statement. The learned counsel contended that it is inconceivable that the prosecutrix who was on life support system at 12:35 p.m. could be opined to be conscious, cooperative and fit to give statement within five minutes, i.e., at 12:40 p.m.

184. The said contention, as we find, has been appropriately dealt with by both courts below by adverting to the depositions of PW-52, Dr. P.K. Verma, and PW-28, Dr. Rajesh Rastogi. Regarding the fit mental condition of the prosecutrix and as to the different endorsements made by PW-52, Dr. P.K. Verma, and PW-28, Rajesh Rastogi, PW-52 was questioned suggesting that the prosecutrix was not in a fit mental condition to give the dying declaration. PW-52 has clearly deposed in his cross-examination that he had never endorsed that the victim was unfit to give statement at 12:35 p.m., rather he had said that she was on ventilator and hence, could not speak. The aforesaid explanation of PW-52, Dr. P.K. Verma, who was incharge of the ICU in Safdarjung Hospital at the relevant time makes it limpid that even though the prosecutrix was not able to speak, yet she was conscious and oriented and was in a position to make the statement by gestures.

185. The contention that the third dying declaration made through gestures lacks credibility and that the same ought to have been videographed, in our view, is totally sans substance. The dying declaration recorded on the basis of nods and gestures is not only admissible but also possesses evidentiary value, the extent of which shall depend upon who recorded the statement. In the instant case, the dying declaration was recorded by PW-30, Mr. Pawan Kumar, Metropolitan Magistrate. A perusal of the questions and the simple answers by way of multiple choice put to the prosecutrix is manifest of the fact that those questions and answers were absolutely simple, effective and indispensable. The dying declaration recorded by PW-30, Ex.PW-30/D, though by nods and gestures and writings, inspires confidence and has been rightly relied upon by the trial Court as well as the High Court. Videography of the dying declaration is only a measure of caution and in case it is not taken care of, the effect of it would not be fatal for the case and does not, in any circumstance, compel the court to completely discard that particular dying declaration.

186. In ***Meesala Ramakrishan v. State of A.P.***[81], this Court, while admitting the dying declaration made through gestures, made the following observations:

> "20. … that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational

[81] (1994) 4 SCC 182

attainment, what gestures and nods were made, what were the questions asked — whether they were simple or complicated — and how effective or understandable the nods and gestures were."

187. In ***B. Shashikala v. State of A.P.***[82], it was observed that:

> "13. The evidence of PW 8 is absolutely clear and unambiguous as regards the manner in which he recorded the statement of the deceased with the help of PW 4. It is also evident that he also has knowledge of Hindi although he may not be able to read and write or speak in the said language. His evidence also shows that he has taken all precautions and care while recording the statement. Furthermore, he had the opportunity of recording the statement of the deceased upon noticing her gesture. The court in a situation of this nature is also entitled to take into consideration the circumstances which were prevailing at the time of recording the statement of the deceased."

188. Appreciating the third dying declaration recorded on the basis of gestures, nods and writings on the base of aforesaid pronouncements, we have no hesitation in holding that the dying declaration made through signs, gestures or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the court ought to take is that the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods. In thepresent case, this caution was aptly taken, as the person who recorded the prosecutrix's dying declaration was the Metropolitan Magistrate and he was satisfied himself as regards the mental alertness and fitness of the prosecutrix, and recorded the dying declaration of the prosecutrix by noticing her gestures and by her own writings.

189. Considering the facts and circumstances of the present case and upon appreciation of the evidence and the material on record, in our view, all the three dying declarations are consistent with each other and well corroborated with other evidence and the trial court as well as the High Court has correctly placed reliance upon the dying declarations of the prosecutrix to record the conviction.

Insertion of the iron rod:

190. Presently, we shall advert to the contentions raised as regards the use of iron rod for causing recto-vaginal injury. The case of the prosecution is that the accused, in most inhumane and unfeeling manner, inserted iron rod in the rectum and vagina of the rosecutrix and took out the internal organs of the prosecutrix from the vaginal and anal opening while pulling out the said iron rod. They also took out the internal organs of the prosecutrix by inserting iron rod in the vagina of the prosecutrix thereby causing dangerous injuries. Two iron rods, Ex.P-49/1 and Ex.P-49/2, were

[82] (2004) 13 SCC 249

recovered vide seizure memo Ex.PW-74/G by the Investigating Officer, PW-80, at the instance of accused Ram Singh (since deceased). As per Ex.PW-49/A, the internal injuries sustained by the victim were like vaginal tear, profused bleeding from vagina, rectal tear communicating with vaginal tear and other injuries.

191. PW-50, Dr. Raj Kumar Chejara, and the surgery team operated the prosecutrix in the intervening night of 16/17.12.2012 and the operative findings are as under:

> a. collection of around 500ml of blood in peritoneal cavity
> b. stomach pale,
> c. duodenum contused
>
> d. jejunum contused & bruised at whole of the length and lacerated & transected at many places. First transaction was 5cm away from DJ junction. Second one was 2 feet from the DJ, after that there was transaction and laceration at many places. Jejunal loop was of doubtful viability. Lieum – whole lieum was totally contused and it was of doubtful viability. Distanl lieum was completely detached from the mesentry till ICJ (ileocaecal junction). It was completely devascularized.
>
> e. Large bowel was also contused, bruised and of doubtful viability. Descending colon was lacerated vertically downward in such a manner that it was completely opened.
>
> f. Sigmoid colon & rectum was lacerated at many places. Linearlyu, mucosa was detached completely at places, a portion of it around 10cm was prolapsing through perineal wound.
>
> g. Liver and spleen was normal.
>
> h. Both sides retro peritoneal (posterior wall of the abdomen) haematoma present.
>
> i. Mesentry and omentum was totally contused and bruised.
>
> j. Vaginal tear present, recto vaginal septum was completely torn.

192. PW-80, SI Pratibha Sharma, the Investigating Officer, deposed before the trial court that accused Ram Singh had led her inside the bus, Ex.P1 and had taken out two iron rods from the shelf of the driver's cabin. One of the rods, 59 cm in length, was primarily used for changing punctured tyres; it was hooked from one end and chiseled from the other. It also had multiple serrations on both the ends. The other rod was of silver colour, hollow and 70 cm long. This rod formed part of a hydraulic jack and was used as its lever, Ex.PW49/G. The rods were blood stained and the recovered rods were sealed with the seal of PS and were deposited in the Malkhana. On 24.12.2012, the said iron rods along with the sample seal were sent to

CFSL, CBI for examination through SI Subhash, PW-74, vide RC No. 178/21/12, proved as Ex.PW-77/R. The DNA report prepared by Dr. B.K. Mohapatra, PW-45, suggests that the DNA profile developed from the bloodstains from both the iron rods is consistent with the DNA profile of the prosecutrix.

193. Mr. Sharma, learned counsel for the appellants, has countered the prosecution case on the use of iron rods. He has drawn support from the medical records and the testimony of the witnesses as also the prosecutrix to assert the aforesaid submission. He submits that the prosecution has fabricated the story as regards the use of iron rods only to falsely implicate all the accused in the death of the prosecutrix. The defence has refuted the use of iron rods by the accused on the ground that the informant as well as the prosecutrix did not mention about the use of iron rods in their first statements. The main contention of the accused is that the prosecutrix herself, in her first statement given to Dr. Rashmi Ahuja, PW-49, Ex. PW-49/A, failed to disclose the use of iron rods. He relies on the absence of the words 'iron rods' in Ex.PW-49/A to fortify this submission. He contends that as recorded by PW-49, the prosecutrix was in a fit state of mind for she even gave her residential address after undergoing the traumatic experience, but she failed to mention that the accused persons also used the iron rods on her, a fact that would have had a bearing on her treatment.

194. The aforesaid proponement is not sustainable as MLC, Ex.PW49/A, of the prosecutrix suggests that she was brought to the hospital in a traumatized state with grievous injuries and she was cold and clammy, i.e., whitish (due to vasoconstriction) and had lost a lot of blood. As per Ex.PW-49/A, the prosecutrix was sure of intercourse to have been committed twice along with rectal penetration whereafter she did not remember intercourse. It is worthy to note that she was oscillating between consciousness and unconsciousness at the time of the incident and there was loss of lot of blood by the time she had reached the hospital which is evident from Ex. PW49/B-MLC. A victim who has just suffered a ghastly and extremely frightening incident cannot be expected to immediately come out of the state of shock and state the finest details of the incident. The subsequent dying declarations of the prosecutrix corroborated by the medical evidence cannot be disregarded merely on the ground that the use of iron rods is not substantiated by the prosecutrix's first statement.

195. The gravity and hideousness of the injuries caused to the prosecutrix, as has already been discussed above, clearly shows the use of iron rods by the accused. The injuries caused to the prosecutrix by incessantly and abominably injuring her private parts using the concerned iron rods were so grave that death was the inevitable consequence. As already noted, both the iron rods, Ex.P-49/1 and Ex.P-49/2, were recovered at the instance of accused Ram Singh from inside the concerned bus. The DNA profile developed from the blood stains obtained from the iron rods is also consistent with the DNA profile of the prosecutrix. In s uch circumstances, merely

because the finger prints of the accused were not obtained from the iron rods, it cannot be concluded that the accused were not linked with the concerned iron rods. Accused Ram Singh himself had the iron rods recovered to the Investigating Officer. Furthermore, the dying declaration of the prosecutrix, which is highly reliable, clearly establishes the horrendous use of iron rods by the accused persons.

196. The iron rods were sent for forensic examination to the CFSL. The DNA profile developed from the blood stains obtained from the iron rods recovered at the instance of accused Ram Singh was found to be of female origin and were found to be consistent with the DNA profile of the prosecutrix. Hence, the factum of insertion of iron rods in the private parts of the prosecutrix is also fortified by the scientific evidence.

197. PW-1, in his chief examination, deposed that he was severely assaulted by the accused with iron rods on his head and the rest of his body. It is submitted that as per MLC of PW-1, Ex.PW-51/A, the nature of injuries sustained by PW-1 were simple. It is contended that if PW-1 was beaten with the iron rod in the manner alleged by him, he would have sustained more serious injuries. It is canvassed that PW-1 sustained only simple injuries which leads to an inference that the iron rod was not used in the manner stated by the prosecution. Of course, as per Ex.PW-51/A, PW-1 sustained simple injuries but as seen from Ex.PW-51/A, there was also nasal bleeding from his nose and PW-1 was also vomiting. Merely because the injuries sustained by PW-1 were opined to be of simple nature, the use of iron rods cannot be doubted.

198. Learned counsel for the appellants further stressed on the point that PW-1 neither in his MLC, Ex. PW-51/A, nor in his complaint, Ex.PW1/A, mentioned the use of iron rod; the description of bus or the names of the accused. In this regard, it has to be kept in mind that the purpose of FIR is mainly to set the criminal law in motion and not to lay down every minute detail and the entire gamut of the evidence relating to the case and, therefore, non-mention of use of iron rods in the FIR does not remotely create a dent in the case of the prosecution. When the subsequent statements of the prosecutrix well corroborated by the medical evidence are available, it is completely immaterial that the statement of PW-1 does not mention the use of iron rods. Thus, PW-1's omission to state the factum of use of iron rods in his complaint or MLC is not fatal to the case of the prosecution.

199. It is apposite to state here that non-mention of the use of iron rods in PW-1's statement has been a ground for giving rise to suspicion of his testimony. We find it difficult to comprehend as to how PW-1 could have been aware of any use of iron rods against the prosecutrix. PW-1 was being held by the accused towards the front of the bus, while the prosecutrix was being raped at the rear side of the bus and the lights of the bus also had been turned off. His statement in his complaint, Ex.PW-

1/A, that he heard the prosecutrix shouting and crying and that her voice was oscillating is consistent with the narration of facts as also the medical records.

200. The second statement of the prosecutrix recorded in Ex.PW-27/A by PW-27, Smt. Usha Chaturvedi, has detailed the account of the entire incident specifying the role of each accused; gang rape/unnatural sex committed upon her; and the injuries caused in her vagina and rectum by use of iron rod and by inserting of hands by the accused are mentioned. This statement, in fact, bears the date and signature of the prosecutrix and records that the accused committed gang rape on her, inserted iron rod in the vagina and through anal opening causing injuries to the internal organs of the prosecutrix. The subsequent statement of the prosecutrix also affirms the above facts. That apart, as per the medical opinion Ex.PW-49/G given by PW-49, the recto-vaginal injury of the prosecutrix could be caused by the rods recovered from the bus.

Anatomy argument

201. Learned counsel for the appellants also submitted that if the rods purported to be used had actually been inserted through the vagina, it would have first destroyed the uterus before the intestines were pulled out. It was submitted that there were no rods related injuries in her uterus and medical science too does not assist the prosecution in their claim that the iron rods were used as a weapon for penetration. Mr. Sharma placed reliance on:

> 1. the first OT notes, Ex. PW-50/A that were made following the first operation of the prosecutrix on 17.12.2012 and where the following was recorded:
>
> "uterus, B/L tubes and ovaries seen and healthy"
>
> 2. the case sheet of the operation conducted on 19.12.2012, presented as Ex. PW- 50/D, wherein the following was recorded:
> "Gynae findings
>
> ... Cx, vaginal vault and ant vaginal wall (H) ..."
>
> 3. the post-mortem report, Ex. PW-34/A, that was prepared in Mount Elizabeth Hospital, Health Science Authority, Singapore, by the Autopsy doctor, Dr. Paul Chui on 29.12.2012 and where the following was recorded:
>
> "Uterus, Tubes and Ovaries Uterus, tubes and ovaries were present in their normal anatomical positions. The uterus measured 8cm x 5cm x 3.5cm. Thin fibrinopurulent adhesions were present on the serosal surfaces of the uterus and the adnexae. Cervix appeared normal and the os was closed. There were no cervical erosions and no haemorrhages on the intra-vaginal aspect of the cervix. Cut sections showed thin endometrium and normal myometrium. Tubes were normal. Both ovaries were normal in size. Cut sections of both

ovaries showed corpus lutea, the largest of which was present in the right ovary."

The learned counsel for the appellants submit that that if the doctors in the surgery team did not find the uterus damaged, then it cannot be claimed that the rod was inserted in her private parts and intestines were pulled out.

202. The aforesaid submission can be singularly rejected without much discussion on the foundation that a question to that effect was not put to the doctors in their respective cross-examinations. However, instead of summary rejection, we shall deal with it for the sake of our satisfaction and also to meet the contention. While it may be so that the uterus, tubes and the cervix were not damaged, that does not mean that the intestines could not have been damaged as they have been. It stands to reason based on common understanding and medical science to allay this contention. First, it is nowhere the stance that the rod was inserted only through the vagina. The prosecutrix herself had stated in her dying declarations that she was raped through the vagina as also the anus, Ex. PW-27/A. The anus is directly connected to the intestines via the rectum and, thus, deep penetration by use of a rod or other long object could have caused injuries to the bowels/intestines.

203. To appreciate the above contention, it is necessary to understand the anatomy and position of the uterus. We may profitably refer to the following excerpts from ***'Gray's Anatomy: Descriptive and Applied', 34th Edn. [Orient Longman Publication]*** at pages 1572 and 1579:

> "THE UTERUS: The uterus, or womb, is a hollow, thick-walled, muscular organ situated in the lesser pelvis between the urinary bladder in front and the rectum behind. Into its upper part the uterine tubes open one on each side, while below, its cavity communicates with that of the vagina. When the ova are discharged from the ovaries, they are carried to the uterine cavity through the uterine tubes. If an ovum be fertilized it embeds itself in the uterine wall and is normally retained in the uterus until prenatal development is completed, the uterus undergoing changes in size and structure to accommodate itself to the needs of the growing embryo. After parturition the uterus returns almost to its former condition, though it is somewhat larger than in the virgin state. For general descriptive purposes the adult virgin uterus is taken as the type form.
>
> In the virgin state the uterus is flattened from before backwards and is pear-shaped, with the narrow end directed downwards and backwards. It lies between the bladder below and in front, and the sigmoid colon and rectum above and behind, and is completely below the level of the pelvic inlet.
>
> The long axis of the uterus usually lies approximately in the axis of the pelvic inlet (p.440), but as the organ is freely movable its position varies

with the state of distension of the bladder and rectum. Except when much displaced by a distended bladder, it forms almost a right angle with the vagina, since the axis of the vagina correspond to the axes of the cavity and outlet of the lesser pelvis (p. 440)" (at page 1572)

"THE VAGINA: The vagina is a canal which extends from the vestibule, or cleft between the labia minora, to the uterus, and is situated, behind the bladder and urethra, and in front of the rectum and anal canal; it is directed upwards and backwards, its axis forming with that of the uterus an angle of over ninety degrees, opening forwards ..." (at page 1579)

"And 'A Fascimile: Gray's Anatomy' (at page 723) [Black Rose Publications]

"**THE VAGINA"**

Relations: Its anterior surface is concave, and in relation with the base of the bladder, and with the urethra. Its *posterior surface is convex, and connected to the anterior wall of the rectum*, for the lower three-fourths of its extent...."

The aforesaid excerpts establish that the vagina and uterus are almost at right angles to each other and the rectum is only separated by a wall of tissue. The pelvic cavity as set forth in the diagram in the book supports the same.

204. The exhibits relating to injuries may be noted. OT notes from 17.12.2012 and 19.12.2012 read as under:

"OT Notes:

PW 50/B: Call received from Dr. Gaurav and Dr. Piyush at approx. 4.00 a.m. from noty OT.

Immediately reached OT and reviewed the details of internal injury (as mentioned in OT notes) the condition of the small and large bowel extremely bad for any definitive repair. The condition explained to the mother of the patient and the police officials present. Case discussed with Dr. S.K. Jain. Int. I/C telephonically."

205. The operative findings which are seen from the examination done by the Gynaecologist and the Surgeons are:

"Perineal

Abdominal findings: Rectum is longitudinally torn on anterior aspect in continuation with tear.

This tear is continuing upward involving sigmoid colon descending colon which is splayed open. The margins are edematous.

There are multiple longitudinal tear in the mucosa of rectosigmoid area. Transverse colon was also torn and gangrenous.

Hepatic flexure ascending colon and caecum were gangrenous and multiple perforation at many places.

Terminal item approximately 1½ feet loosely hanging in the abdominal cavity. It was avulsed from its mesentery and was nonviable.

Rest of small bowel was nonenlistend with only patens of mucosa at places and border of the mesentery was contused. This contused mesentery border initially appeared (during first surgery) as contused small bowel.

Jejunostomy stoma was gangrenous for approximately 2 cm.

Stomach and duodenum was distended but healthy. Surgical Procedure:

Resection of gangrenous terminal ileum, caecum, appendix,
ascending colon, hepatic flexure and transverse colon was done.

Resection of necrotic jejunal stoma with closure of duodenojejunal flexure in two layers by 3-0 viaeny.

Diverting lateral tube dudoenostomy (with 18F Folley's catheter) brought through right flank.

Tube gastrostomy was added as another decompressive measures
(28 size apotere tube was used) Tube gastrostomy was brought and from previous jejunostomy site.

Abdominal drain placed in pelvis.

Rectal sheath closed by using No. 1 prolene interrupted sutures.

Skin closed by using 1-0 nylone.

Perineal wound packed with Betadine soaked gauze piece.

T-Bandage applied

ASD done for abdominal wound.

Patient tolerated procedure and was shifted back to ICU-I.

Post OP Advise

1. NPO
2. CRTA
3. IVF as per CVP and output by ICU team.
4. Injection menopenum Limezolid to be continued as before.
5. Injection metronidazole 100ml IV TDS.

6. Injection Pantoprozole 20 mg IV OD
7. Strict I/O charting.
8. Rest of the treatment as advised by ICU team."

206. From the nature of the injuries noted in the OT Notes, the rectum was longitudinally torn and transverse colon was torn. From the Post-Mortem Certificate, the uterus was found in position (no injuries to uterus). If the rod was inserted in the vagina, having regard to the fact that the injury within the vagina was only in the posterior surface, it indicates that the rod was pushed inside with a downward force and not upward (which could have resulted in injury to the uterus) and it perhaps tunnelled its way through the vagina into the rectal cavity and the bowels. Therefore, merely because no injuries to the uterus of the victim were noticed, that does not lead to the conclusion that iron rod was not used. Thus, the submission that has been raised with immense enthusiasm and ambition to create a concavity in the case of the prosecution on this score deserves to be repelled and we do so.

Analysis of evidence pertaining to DNA

207. Having dealt with the aspect pertaining to insertion of rod, it is apposite to advert to the medical evidence and post mortem report. We have, while dealing with other aspects, referred to certain aspects including DNA analysis of medical evidence but the same requires to be critically dealt with as the prosecution has placed hevy reliance upon it.

208. DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope 'ladder'.

209. The nature and characteristics of DNA had been succinctly explained by Lord Justice Phillips in ***Regina v. Alan James Doheny & Gary Adams***[83]. In the above case, the accused were convicted relying on results obtained by comparing DNA profiles obtained from a stain left at the scene of the crime with DNA profiles obtained from a sample of blood provided by the appellant. In the above context, with regard to DNA, the following was stated by Lord Justice

Phillips:

> "Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 ofwhich lie tightly coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different

[83] 1997 (1) Criminal Appeal Reports

sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor C.J. in the case of Deen (transcript:December 21, 1993), so we shall gratefully adopt his description.

"The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.""

210. In the United States, in an early case ***Frye v. United States***[84], it was laid down that scientific evidence is admissible only if the principle on which it is based is substantially established to have general acceptance in the field to which it belonged. The US Supreme Court reversed the above formulation in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***[85] stating thus:

"11. Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed.Rule Evid.201.

13. This is not to say that judicial interpretation, as opposed to adjudicative fact finding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral… In the endless process

[84] 54 App. D.C. 46 (1923) , [85] 113 S.CT. 2786 (1993)

of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B.Cardozo, The nature of the Judicial Process 178, 179 (1921)."

211. The principle was summarized by Blackmun, J., as follows:

> "To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especiallyRule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.
>
> The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion."

212. After the above judgment, the DNA Test has been frequently applied in the United States of America. In ***District Attorney's Office for the Third Judicial District et al. v. William G. Osborne86***, Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows:

> "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure-usually but not always through legislation.
>
> … … ….
>
> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue."

213. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like

several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the mendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

214. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must. Section 53A sub-section (2) as well as Section 164(A) sub-section (2) are to the following effect:

"**Section 53A**. **Examination of person accused of rape by Medical Practitioner.-**

(1) … … … …

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, And

(v) other material particulars in reasonable detail.

Section 164A. Medical Examination of the victim of rape.-

(1) … … … …

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the woman and of the person by whom she was brought;

(ii)the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail."

215. This Court had the occasion to consider various aspects of DNA profiling and DNA reports. K.T. Thomas, J. in ***Kamti Devi (Smt.) and another v. Poshi Ram***[87], observed:

> "10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in ontemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. …"

216. In ***Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh***[88], a two-Judge Bench had explained as to what is DNA in the following manner:

> "41. Submission of Mr Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means: "Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine."
>
> There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken.
>
> 42. Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross-examination, PW 46 had stated as under:
>
> "If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.""

217. In ***Santosh Kumar Singh v. State Through CBI***[89], which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held thus:

> "71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being

[87] (2001) 5 SCC 311 , [88] (2009) 14 SCC 607 , [89] (2010) 9 SCC 747

scientifically accurate and an exact science as held by this Court in *Kamti Devi v. Poshi Ram* (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9."

218. In ***Inspector of Police, Tamil Nadu v. John David***[90], a young boy studying in MBBS Course was brutally murdered by his senior. The torso and head were recovered from different places which were identified by the father of the deceased. For confirming the said facts, the blood samples of the father and mother of the deceased were taken which were subject to DNA test. From the DNA, the identification of the deceased was proved. Paragraph 60 of the decision is reproduced below:

"60. … The said fact was also proved from the DNA test conducted by PW 77. PW 77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of PW1 and Baby Ponnusamy was found in the recovered parts of the body and that therefore they should belong to the only missing son of PW 1."

219. In ***Krishan Kumar Malik v. State of Haryana***[91], in a gang rape case when the prosecution did not conduct DNA test or analysis and matching of semen of the appellant-accused with that found on the undergarments of the prosecutrix, this Court held that after the incorporation of Section 53-A in CrPC, it has become necessary for the prosecution to go in for DNA test in such type of cases. The relevant paragraph is reproduced below:

"44. Now, after the incorporation of Section 53-A in the Cr.P.C w.e.f 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."

220. In ***Surendra Koli v. State of Uttar Pradesh and others***[92]***,*** the appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl. Para 12 is reproduced below:-

[90] (2011) 5 SCC 509 , [91] (2011) 7 SCC 130 , [92] (2011) 4 SCC 80

> "12. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The doctors at AIIMS have put the parts of the deceased girls which have been recovered by the doctors of AIIMS together. These bodies have been recovered in the presence of the doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible under Section 27 of the Evidence Act."

221. In ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra***[93], the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay. The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. The Court observed:

> "333. It is seen above that among the articles recovered from *Kuber* were a number of blankets, shawls and many other items of clothing. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA profiling and, excepting Imran Babar (deceased Accused 2), Abdul Rahman Bada (deceased Accused 5), Fahadullah (deceased Accused 7) and Shoaib (deceased Accused 9), the rest of six accused were connected with various articles found and recovered from the *Kuber*. The appellant's DNA matched the DNA profile from a sweat stain detected on one of the jackets. A chart showing the matching of the DNA of the different accused with DNA profiles from stains on different articles found and recovered from the *Kuber* is annexed at the end of the judgment as Schedule III."

222. In ***Sandeep v. State of Uttar Pradesh***[94], the facts related to the murder of pregnant paramour/girlfriend and unborn child of the accused. The DNA report confirmed that the appellant was the father of the unborn child. The Court, relying on the DNA report, stated as follows:

> "67. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the appellant Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused."

[93] (2012) 9 SCC 1 , [94] (2012) 6 SCC 107

223. In ***Rajkumar v. State of Madhya Pradesh***[95], the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

> "8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (PW1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the appellant."

224. In ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another***[96], the appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the appellant was not the biological father of the child. The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate. The pertinent observations are extracted below:

> "19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.
>
> 20. As regards the authority of this Court in *Kamti Devi*, this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act." The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in

[95] (2014) 5 SCC 353 , [96] (2014) 2 SCC 576

> none of the cases referred to above, this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents."

From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.

225. In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA, fingerprint and bite mark analysis.

226. Various samples, for the purpose of DNA profiling, were lifted from the person of the prosecutrix; the informant; the accused, their clothes/ articles; the dumping spot; the iron rods; the ashes of partly burnt clothes; as well as from the offending bus. PW-45, Dr. B.K. Mohapatra, analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt.

227. After establishing the identities of each of the accused persons, the informant and the prosecutrix through DNA analysis, the DNA profiles generated from the remaining samples, where the identity of biological material found thereon needed to be ascertained, were matched with the DNA profiles of the prosecutrix, the informant and the accused, generated earlier from known samples. Such an analysis cogently linked each of the accused with the victims as also with the crime scene. A summary of the findings in the report submitted by PW-45, Dr. B.K. Mohapatra, is as under:

"S.No. 1	**Accused**	**DNA EVIDENCE**
	Rama Singh	Rectal swab from the prosecutrix contained DNA of male origin, which was found consistent with the DNA developed from the blood sample of this accused. DNA profile developed from the blood stains from the underwear, T-shirt and slippers of this accused was found consistent with the DNA of the prosecutrix
2	Mukesh	DNA profile developed from the blood stains from the pants, T-shirt and jacket of this accused was found consistent with the DNA of the prosecutrix.
3.	Akshay	Breast swab of the prosecutrix contained DNA of male origin which was found consistent with the DNA of this accused. DNA profile developed from the blood stains from the jeans of this accused was found consistent with the DNA of the prosecutrix.
4	Vinay	DNA profile developed from the blood stains from the underwear, jacket and slippers of this accused was found consistent with the DNA of the prosecutrix.
5	Pawan	DNA profile developed from the blood stains from the sweater and shoes and slippers of this accused was found consistent with the DNA of the prosecutrix."

228. Further, a summary of the DNA analysis of the biological samples lifted from the material objects such as the bus, the iron rods, and the ash and unburnt pieces of clothes is also worth producing here:

"Serial No.	**Identity of the victim**	**Findings of DNA Analysis**
1.	Informant	i. The DNA profile developed from burnt clothes pieces was found to be of male origin and was consistent with the DNA profile of complainant. ii. The bunch of DNA profile developed from hair and blood stained pieces of paper recovered from the bus was found consistent with the DNA profile of complainant. iii. The DNA profile developed from blood stained dried leaves collected from the place where both the victims were thrown matched with the DNA profile of complainant.
2	Prosecutrix	i. The DNA profile developed from blood stains from both the iron rods recovered at the instance of accused Ram Singh from bus was of female origin and was consistent with the DNA profile of prosecutrix. ii. The DNA profile developed from blood stains from curtains of the bus matched with the DNA profile of prosecutrix. iii. The DNA profile developed from blood stains from seat covers was found consistent with the DNA profile of prosecutrix. iv. DNA profile developed from blood stains from the bunch of the hair recovered from floor of the bus below sixth row seat, blood stains prepared from the roof of the bus near back gate, blood stains prepared from the floor of the bus near back gate, blood stains taken from side of back stairs of the bus, and blood stains taken from the inner side of the back door of the bus was found consistent with the DNA profile of prosecutrix.

229. PW-45, Dr. B.K. Mohapatra, has clearly testified in his cross-examination that all the experiments conducted by him confirmed to the guidelines and methodology documented in the Working Procedure Manuals of the laboratory which have been validated and recommended for use in the laboratory. He further added that once a DNA profile is generated, its accuracy is 100%. The trial court and the High Court have consistently noted that the counsel for the defence did not raise any substantial ground to challenge the DNA report during the cross-examination of PW-45. In such circumstances, there is no reason to declare the DNA report as inaccurate, especially when it clearly links the accused persons with the incident.

230. Mr. Sharma, learned counsel appearing for appellants - Mukesh and Pawan Kumar Gupta, submitted that in the insant case, the DNA test cannot be treated to be accurate, for there was blood transfusion as the prosecutrix required blood and when there is mixing of blood, the DNA profiling is likely to differ. It is seemly to note, nothing had been put to the expert in his cross-examination in this regard. As the authorities relating to DNA would show, if the quality control is maintained, it is treated to be quite accurate and as the same has been established, we are compelled to repel the said submission of Mr. Sharma.

The evidence relating to finger print analysis:

231. Next aspect that is required to be adverted is the evidence of fingerprint analysis adduced by the prosecution to establish the identity of the accused persons. By virtue of the finger print analysis, the prosecution has tried mainly to establish the presence of the accused in the offending bus. On 17.12.2012 and 18.12.2012, a team of experts from the CFSL had lifted chance finger prints from the concerned bus, Ex.P-1, at Thyagraj Stadium. On 28.12.2012, PW-78, Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL for taking digital palm prints and foot prints of all the accused persons vide his letter Ex.PW-46/C. Pursuant to the said request made by PW-78, Inspector Anil Sharma, the CFSL on 31.12.2012 took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, PW-46, Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI, submitted his report, Ex.PW-46/D.

232. As per the report, Ex.PW-46/D, the result of the aforesaid examination of the Finger Print Division of the CFSL, CBI, New Delhi was that the chance prints of accused Vinay Sharma were found on the bus in question. The relevant portion of the report is as under:

> "RESULT OF EXAMINATION:
> 1. The chance print marked as Q.1 is identical with left palmprint specimen of Vinay Sharma S/o Sh.Hari Ram Sharma marked here as LPS-28 on the slip marked here as S.28 (Matching ridge characteristics have been found in

their relative positions in the chance palmprint and specimen palm print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure-1)

II. The chance print marked as Q.4 is identical with right thumb impression of Vinay Sharma S/o Sh.Hari Ram Sharma marked here as RTS-23 on the slip marked here as S.23 (Matching ridge characteristics have been found in their relative positions in the chance print and specimen finger print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure-2)."

The above report incontrovertibly proves that accused Vinay was present in the bus at the time of the incident. Be it noted, the other chance prints were found to be unfit for comparison or different from specimen print.

The Odontology report

233. Now, we shall analyse the Odontology report. In today's world, Odontology is a branch of forensic science in which dental knowledge is applied to assist the criminal justice delivery system. S. Keiser-Nielsen, an authority on Forensic Odontology defines the basic concept of Forensic
Odontology in the following words:

"A. Forensic odontology is that branch of odontology which in the interests of justice deals with the proper handling and examination of dental evidence and with the proper evaluation and presentation of dental findings. Only a dentist can handle and examine dental evidence with any degree of accuracy; therefore, this field is above all a dental field."

234. Professor Neilsen, elaborating on Forensic Odontology, further states:

"B. There are three reasons for considering forensic odontology a well-defined and more or less independent subject:1) it has objectives different from those at which conventional dental education aims; 2) forensic dental work requires investigations and considerations different from those required in ordinary dental practice; and 3) forensic dental reports and statements have to be presented in accordance with certain legal formalities in order to be of value to those requesting aid.

The area of forensic Odontology consists of three major fields of activity:1) the examination and evaluation of injuries to teeth, jaws, and oral tissues from various causes: 2) the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator; and 3) the examination of dental remains (whether fragmentary or complete, and including all types of dental restoration) from unknown persons or bodies for the purpose of identification."

235. In the instant case, the prosecution has relied upon the odontology report, i.e., bite mark analysis report prepared by PW-71, Dr. Ashith B. Acharya, to link the incident with the accused persons. The Odontology report links accused Ram Singh and accused Akshay with the crime in question.

236. Dr. K.S. Narayan Reddy, in his book, Medical Jurisprudence and Toxicology (Law, Practice and Procedure), Third Edition, 2010, Chapter VIII page 268, has extensively dealt with human bites, their patterns, the manner in which they should be lifted with a swab and moistened with sterile water and the manner in which such swabs need to be handled is delineated along with their usefulness in identification. The High Court has also referred to the same. It is as follows:

> "They are useful in identification because the alignment of teeth is peculiar to the individual. Bite marks may be found in materials left at the place of crime e.g., foodstuffs, such as cheese, bread, butter, fruit, or in humans involved in assaults, when either the victim or the accused may show the marks, usually on the hands, fingers, forearms, nose and ears."

237. After making the aforesaid observations, the author dwells upon the various methods used for bite mark analysis including the photographic method, which method was utilized in the instant case. The photographic method is described as under:

> "Photographic method: The bite mark is fully photographed with two scales at right angle to one another in the horizontal plane. Photographs of the teeth are taken by using special mirrors which allow the inclusion of all the teeth in the upper or lower jaws in one photograph. The photographs of the teeth are matched with photographs or tracings of the teeth. Tracings can be made from positive casts of a bite impression, inking the cutting edges of the front teeth. These are transferred to transparent sheets, and superimposed over the photographs, or a negative photograph of the teeth is superimposed over the positive photograph of the bite. Exclusion is easier than positive matching."

238. In the present case, the photographs of bite marks taken by PW-66, Shri Asghar Hussein, of different parts of the body of the prosecutrix were examined by PW-71, Dr. Ashith B. Acharya. The photographs depicted the bite marks on the body of the prosecutrix. The said bite marks found on the body of the victim were compared with the dental models of the suspects. The analysis showed that at least three bite marks were caused by accused Ram Singh, whereas one bite mark has been identified to have been most likely caused by accused Akshay. An excerpt from the report, Ex. PW- 71/C, of PW-71, Dr. Ashith B. Acharya, has been extracted by the High Court. It reads thus:

> "..... There is absence of any unexplainable discrepancies between the bite marks on Photograph No. 4 and the biting surfaces of one of the accused

person's teeth, namely Ram Singh. Therefore, there is reasonable medical certainty that the teeth on the dental models of the accused person named Ram Singh caused the bite marks visible on Photograph No 4; also the bite marks on Photograph Nos.1 and 2 show some degree of specificity to this accused person's teeth by virtue of a sufficient number of concordant points, including some corresponding unconventional/ individual characteristics. Therefore, the teeth on the dental models of the accused person with the name Ram Singh probably also caused the bite marks visible on Photograph Nos.1 and 2.....

x x x x x The comparison also shows that there is a concordance in terms of general alignment and angulation of the biting surfaces of the teeth of the lower jaw on the dental models of the accused person with the name Akshay and the corresponding bite marks visible on Photograph No.5. In particular, the comparison revealed concordance between the biting surface of the teeth on the lower jaw of the dental models of the accused person with the name Akshay and the bite mark visible on Photograph No.5 in relation to the rotated left first incisor whose mesial surface pointed towards the tongue. Overall, the bite mark shows some degree of specificity to the accused person's teeth by virtue of a number of concordant points, including one corresponding unconventional/ individual characteristic. There is an absence of any unexplainable discrepancies between the bite mark and the biting surfaces of this accused person's teeth. Therefore, the teeth on the dental models of the accused person with the name Akshay probably caused the bite marks visible on Photograph No.5."

239. Be it noted, the present is a case where the victim's body contained various white bite marks. Bite mark analysis play an important role in the criminal justice system. Advanced development of technology such as laser scanning, scanning electron microscopy or cone beam computed tomography in forensic odontology is utilized to identify more details in bite marks and in the individual teeth of the bite. Unlike fingerprints and DNA, bite marks lack the specificity and durability as the human teeth may change over time. However, bite mark evidence has other advantages in the criminal justice system that links a specific individual to the crime or victim. For a bite mark analysis, it must contain abundant information and the tooth that made the mark must be quite distinctive.

240. Bite marks in skin are photographed in cases where the suspect is apprehended. A thorough dental combination is administered after dental examination of the suspect. Final comparison of the details of the original mark with the dentation of the suspect is done by experts.

241. The bite marks generally include only a limited number of teeth. The teeth and oral structure of the accused are examined by experts and, thereafter, bite marks are compared and reports are submitted. Forensic Odontology is a science and the

most common application of Forensic Odontology is for the purpose of identification of persons from their tooth structure.

242. Forensic Odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which have been utilized by courts in the administration of justice. In the case at hand, the report is wholly credible because of matching of bite marks with the tooth structure of the accused persons and there is no reason to view the same with any suspicion. Learned counsel for the appellants would only contend that the whole thing has been stage-managed. We are not impressed by the said submission, for the evidence brought on record cogently establish the injuries sustained by the prosecutrix and there is consistency between the injuries and the report. We are not inclined to accept the hypothesis that bite marks have been managed.

Acceptability of the plea of alibi

243. Presently, we shall deal with the plea of alibi as the same has been advanced with immense conviction. It is well settled in law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution. In this context, we may usefully reproduce a few paragraphs from ***Binay Kumar Singh v. State of Bihar***[97]:

> "22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (*a*) given under the provision is worth reproducing in this context:
>
> 'The question is whether *A* committed a crime at Calcutta on a certain date. The fact that, on that date, *A* was at Lahore is relevant."
>
> 23. The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place

[97] (1997) 1 SCC 283

> of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. …"
>
> [underlining is ours]

244. The said principle has been reiterated in ***Gurpreet Singh v. State of Haryana***[98], ***Shaikh Sattar v. State of Maharashtra***[99], ***Jitender Kumar v. State of Haryana***[100] and ***Vijay Pal*** (supra).

245. We had earlier indicated that in their Section 313 CrPC statements, the accused have advanced the plea of alibi. Accused Pawan Kumar Gupta @ Kaalu has taken the plea of alibi stating, inter alia, that throughout the evening of 16.12.2012 till late night, he was in the DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi, watching a musical event organised in connection with Christmas Celebration and that he was never in the bus, Ex.P1, and had not committed any offence with the prosecutrix or with the informant.

246. Before coming to the defence evidence led by him, we may refer to the answers given by him in response to the questions put to him in his statement under Section 313 CrPC wherein he has admitted that mobile No. 9711927157 belongs to him. He further stated that he had consumed liquor in the evening of 16.12.2012 and had accompanied accused Vinay Sharma to the musical event at DDA District Park where he took more liquor and fell unconscious and was later brought to his house by his father and uncle. He stated that he went out in the evening of 16.12.2012 and saw a quarrel between accused Vinay Sharma and accused Ram Singh (since deceased). Then he returned to his jhuggi. After sometime, he came out of his jhuggi and saw accused Vinay Sharma, his sister, mother and others going to a musical party and so, he also went with them and took more liquor in the party and even lost his mobile phone. Strangely enough, in his supplementary statement recorded on 16.08.2013 under Section 313 CrPC, he stated that he was present in the said party with his family members and friends and that a video clip was prepared by one Ram Babu, DW-13, and that he does not remember if he had accompanied accused Vinay Sharma to the said park on that evening. It is in contradiction to the stand taken by him in his earlier statement recorded under Section 313 CrPC.

98 (2002) 8 SCC 18 , 99 (2010) 8 SCC 430 , 100 (2012) 6 SCC 204

247. Accused Pawan examined his father, DW-2, Shri Hira Lal Ram, who deposed that on 16.12.2012 about 7:15 p.m., when he came to his house, he was informed by his daughter that accused Pawan had gone to DDA District Park, Hauz Khas. It is in contradiction to the deposition made by the other defence witnesses who have said that accused Vinay Sharma and his family members had left Ravi Dass Camp, Sector-3, R.K. Puram, New Delhi, about 8:00/8:30 p.m. and that accused Pawan had accompanied them. Accused Pawan also said so in his initial statement under Section 313 CrPC.

248. DW-4, Shri Gyan Chand, the maternal uncle of accused Pawan, deposed that he brought accused Pawan Gupta @ Kaalu to the jhuggi from the DDA District Park and saw one Ram Charan warming his hands on a bonfire just outside his jhuggi who came and asked him about the wellbeing of accused Pawan. Ram Charan, DW-3, however, deposed that about 8:30/9:00 p.m., he was sitting inside his jhuggi with its door open and he saw accused Pawan being brought by his uncle in drunken state. This is yet again in contradiction to what has been deposed by the other defence witnesses who said that accused Pawan Gupta and accused Vinay Sharma had rather left Ravi Dass Camp, Sector-3, R.K. Puram, New Delhi about 8:00/8:30 p.m. for the DDA District Park.

249. DW-16, a shopkeeper of the locality, had deposed that he had seen the vehicle of Shri Gyan Chand about 9:00/9:30 p.m. on 16.12.2012 when accused Pawan Gupta was brought in drunken condition and was taken to his jhuggi. Initially, he failed to mention if Shri Hira Ram was accompanying Shri Gyan Chand.

250. Though the witnesses have also deposed about the taking away of accused Pawan by 3/4 persons on 17.12.2012, yet that plea too is in contradiction to the arrest memo Ex.PW-60/A wherein the accused is stated to have been arrested on 18.12.2012 about 1:15 p.m. at the instance of accused Ram Singh (since deceased).

251. Hence, there exist contradictions in the statements of the defence witnesses produced on behalf of accused Pawan Gupta (a): qua the timing when the accused had left his jhuggi at Ravi Dass Camp on the fateful night of 16.12.2012 inasmuch as some of the witnesses deposed that accused Pawan left for DDA District Park at 8:00/8:30 p.m. and some others deposed that they saw him being brought to his jhuggi about 8:30/9:00 p.m.; (b) qua the fact if DW-2 had gone with DW-1 to the park to fetch his son; and (c) qua the fact if accused Pawan went to the park with accused Vinay Sharma or not.

252. Accused Akshay Kumar Singh @ Thakur, in his statement under Section 313 CrPC, stated that he was not in Delhi on the fateful night and that on 15.12.2012, he had left Delhi for his village in Mahabodhi Express on the ticket of his brother, Abhay, along with his brother's wife and nephew. He produced certain witnesses in his defence. DW-11, Shri Chavinder, an auto driver from his village, deposed that he had brought accused Akshay Kumar Singh @ Thakur and his family

members from Anugrah Narayan Railway Station, District Aurangabad, Bihar to his native village Karmalahang, P.S. Tandwa, in his own auto on 16.12.2012 at 10:00 a.m. It is interesting to note that he does not remember about any other passenger/native who shared his auto on that day. DW-13, Sh. Raj Mohan Singh, the father-in-law of the accused, deposed that when he reached accused Akshay's house, he found his son-in-law being implicated in a rape case allegedly committed on 16.12.2012. It probably shows that DW-13 had gone to meet Akshay Kumar Singh @ Thakur only when he had come to know about his implication in the rape case and when accused Akshay Kumar Singh @ Thakur was on the run. It is an admitted fact that the Chowkidar of P.S. Tandwa had met father-in-law of the accused on 20.12.2012 and had informed him about the implication of accused Akshay for the first time. If it was so, then DW-13, Shri Raj Mohan, must have visited the house of accused Akshay Kumar Singh @ Thakur either on 20.12.2012 or on 21.12.2012.

253. DW-12, DW-14 and DW-15 are all relatives of accused Akshay Kumar Singh @ Thakur and, as observed by both the courts, they tried to wriggle him out of the messy situation, as is the natural instinct of the family members. However, it is to be seen that during the evidence of DW-14, wife of accused Akshay Kumar Singh @ Thakur, she was interrupted from answering by accused Akshay from behind on more than one occasion. Similarly, DW-15, the sister-in-law of the accused, who had allegedly accompanied the accused to her native village, mysteriously, was not aware as to why her husband Abhay who was to accompany her on 15.12.2012 to the native village did not accompany her. She was not aware of the reason which made her husband stay behind in Delhi. Being the wife, she was expected to know this, at least.

254. While weighing the plea of *'alibi'*, the same has to be weighed against the positive evidence led by the prosecution, i.e., not only the substantive evidence of PW-1 and the dying declarations, Ex.PW-27/A and Ex.PW-30/D-1, but also against the scientific evidence, viz., the DNA analysis, finger print analysis and bite marks analysis, the accuracy of which is scientifically acclaimed. Considering the inconsistent and contradictory nature of the evidence of '*alibi'* led by the accused against the positive evidence of the prosecution, including the scientific one, we hold that the accused have miserably failed to discharge their burden of absolute certainty qua their plea of '*alibi'*. The plea taken by them appears to be an afterthought and rather may be read as an additional circumstance against them.

255. In response to the questions put to him in his statement under Section 313 CrPC, accused Vinay had admitted that mobile No. 8285947545, Ex.DW10/1, belongs to his mother and its SIM was lost prior to 16.12.2012 and that on 16.12.2012, at 9:30 p.m., his friend Vipin had taken his phone to the DDA District Park and had returned it the next morning without SIM card and memory card.

256. In response to question No. 221, he stated that about 8:00/8:30 p.m., he went to see accused Ram Singh and he had a scuffle/exchange of fist blow and then he returned to his jhuggi. Thereafter, he left for musical party with his sister, mother and others. He did not say if his father had accompanied them. He also told that about 11:30 p.m., he had returned to his jhuggi.

257. It is worthy to note that the prosecution had proved the Call Detail Record, Ex.PW-22/B, of the phone of accused Vinay Sharma, having SIM No. 8285947545, admittedly in the name of his mother, Smt. Champa Devi, but in the possession of accused Vinay Sharma in the evening of 16.12.2012 and allegedly snatched by one Vipin in the said music party and returned to him in the morning of 17.12.2012 without SIM card and memory card. The Call Detail Record Ex.PW-22/B does show that the accused had been making calls to one particular number, viz., 8601274533 from 15.12.2012 till 20:19:37 of 17.12.2012. The authenticity of the CDR is proved under Section 65-B of the Indian Evidence Act. If the accused was not having a SIM card in his phone No. 8285947545, then how could he have called from this SIM on 15.12.2012, then on 16.12.2012 and in the morning of 17.12.2012 till about 8:23:42 p.m.

258. The accused rather said that his SIM and memory card were not in his phone when it was returned by his friend Vipin and that the phone was not with him at 9:55:21 when it registered a call for 58 seconds and when his location was found near IGI Airport, i.e., the road covered by the Route Map, Ex.PW-80/H, where the bus, Ex.P1, was moving on that night. Further, if as per accused Vinay Sharma he had no memory card and SIM card in his mobile phone, then the question of making of a video clip from his mobile phone by his friend DW-10, Shri Ram Babu, does not arise. Even his personal search memo Ex.PW-60/D does not show that the said mobile phone, when seized, had any memory card in it. The intention of the accused appears to be to wriggle himself out of explaining the receipt of call on his mobile at 9:55 p.m. on 16.12.2012.

259. After referring to the decision in ***Ram Singh and others v. Col. Ram Singh101***, the trial Court has held that accused Vinay had miserably failed to prove the authenticity of the video clip in terms of the above judgment. The accused had failed to show if DW-10, Ram Babu, aged 15 years, was ever competent to record the clip and how such device was preserved. Admittedly by him, the memory card was not in the phone when returned to him by his friend, Vipin. It is also not shown in the seizure memo Ex.PW-60/D that the mobile, Ex.DW-10/1, was seized along with memory card. Thus, it raises a doubt as to how and by whom this memory card was later inserted in his phone, Ex.DW-10/1, and how and when the video clip was taken and whether there was any tampering, etc. and thus, the compliance of Section 65-B of the Indian Evidence Act was mandatory in these circumstances to ensure the purity of the evidence and in its absence, it would be difficult to rely upon such evidence.

[101] 1985 (Supp.) SCC 611

260. Even otherwise, in the alternative, the properties of mobile Ex.DW-10/1 show the timing of the video clip as 8:16 p.m. of 16.12.2012 which is patently false because as per the defence witnesses, accused Vinay Sharma with his family had left Ravi Dass Camp at 8:00/8:30 p.m. and as per Smt. Champa Devi, DW-5, it takes about one hour on foot to reach the DDA District Park and, thus, even if we believe their theory, then also accused Vinay Sharma and accused Pawan Gupta @ Kaalu were not in the park at 8:16 p.m. on 16.12.2012.

261. Vinay Sharma's mother, Smt. Champa Devi, DW-5, deposed that her son, accused Vinay Sharma, had gone to meet accused Ram Singh (since deceased), about 8:00 p.m. on 16.12.2012 and he had a quarrel with Ram Singh, he was beaten and then the accused returned to his jhuggi. Thereafter, accused Vinay Sharma accompanied her to DDA District Park, Hauz Khas, Opposite IIT Gate, New Delhi to watch a musical programme and stayed in the park till late in the night. His mother does not speak if her husband had also accompanied her to the said DDA District Park but DW-6 deposed that his son had returned about 8:00 p.m. after the quarrel and then they had gone to the said DDA District Park. DW-7, Shri Kishore Kumar Bhat, also deposed that about 8:00/8:30 p.m., he was in his jhuggi when the father of accused Vinay Sharma with his children came to his jhuggi and they all went to DDA District Park. He has also stated that a musical programme was organized by St. Thomas Church, Sector-2, R.K. Puram, New Delhi, in the said DDA District Park, Hauz Khas, on that night.

262. DW-9, Shri Manu Sharma, deposed that he went with accused Vinay Sharma to reason with accused Ram Singh (since deceased) but accused Vinay Sharma had stated that his brother had accompanied him to meet accused Ram Singh (since deceased). Further, DW-9, Manu Sharma, stated that he had accompanied accused Vinay Sharma to the musical event but accused Vinay Sharma did not say so.

263. Hence, as per the statement of accused Vinay Sharma (under Section 313 CrPC) and as per the statements of the defence witnesses, accused Vinay Sharma and his family with accused Pawan Gupta @ Kaalu had left Ravi Dass Camp about 8:15 p.m. to 8:30 p.m. and as per DW-5, Smt. Champa Devi, it takes about an hour to reach the DDA District Park, Hauz Khas, on foot, so even according to them, they allegedly reached the park about 9:15 p.m. or 9:30 p.m. Thus, from this angle too, the video clip showing the accused in the park on 16.12.2012 about 8:16 p.m. appears to have been tampered.

264. PW-83, Shri Angad Singh, the Deputy Director (Horticulture), DDA, had deposed that no such permission was ever granted by any authority to organize any such function in the evening of 16.12.2012 in the said DDA District Park, Hauz Khas, New Delhi and that no function was ever organized in the park on 16.12.2012 by anyone. PW-84, Father George Manimala of St. Thomas Church, as also PW-85,

Brother R.P. Samual, Secretary, Ebenezer Assembly Church, deposed that their Church(es) never organized any musical programme/event in the DDA District Park, Hauz Khas, in the evening of Sunday, i.e., on 16.12.2012. Rather, they deposed that on Sundays, there is always a mass prayer in the church and there is no question of organizing any programme outside the Church premises and that even otherwise, they have their own space/lawn within the Church premises where they can hold such type of programmes/functions.

265. Though Shri Singh, learned counsel for the respective appellants, tried to press upon a document, Ex.PW-84/B, a programme pamphlet of St. Thomas Church wherein it was mentioned that the Church was holding programmes of "Carol Singing" from 10.12.2012 to 23.12.2012 at 7:00 p.m. at public places, yet in view of the categorical denial by PW-84 and PW-85 that any such programme was organized by the Church on 16.12.2012 in the DDA District Park, opposite IIT Gate, Hauz Khas, New Delhi, the plea has no substance.

266. It is settled in law that while raising a plea of '*alibi*', the burden squarely lies upon the accused person to establish the plea convincingly by adducing cogent evidence. The plea of '*alibi'* that accused Vinay Sharma and accused Pawan Gupta @ Kaalu had attended the alleged musical programme in the evening of 16.12.2012 in the DDA District Park, Hauz Khas, opposite IIT Gate, New Delhi, has been rightly rejected by the trial court which has been given the stamp of approval by the High Court.

Criminal conspiracy

267. The next aspect that we intend to address pertains to criminal conspiracy. The accused persons before us were charge-sheeted for the offence of criminal conspiracy within the meaning of Section 120A IPC apart from other offences. The trial court found all the accused guilty of the offence under Section 120B IPC and awarded life imprisonment alongwith a fine of Rs. 5,000/- to each of the convicts. The High Court has also affirmed their conviction under Section 120B after recording concurrent findings.

268. Before analysing the present facts with reference to Section 120A IPC in order to find out whether the charge of criminal conspiracy is proved in respect of each of the accused, it is pertinent to note the actual nature and purport of Section 120A IPC and allied provisions. Section 120A IPC as contained in Chapter V-A defines the offence of criminal conspiracy. The provision was inserted in the IPC by virtue of Criminal Law (Amendment) Act, 1913. Section 120A IPC reads as under:

> "120A. Definition of criminal conspiracy:- When two or more persons agree to do, or cause to be done,- (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an

offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

269. Section 120B being pertinent is reproduced below:

"**120B. Punishment of criminal conspiracy** –

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

270. The underlying purpose for the insertion of Sections 120A and 120B IPC was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. The criminal thoughts in the mind when take concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means than even if nothing further is done an agreement is designated as a criminal conspiracy. The proviso to Section 120A engrafts a limitation that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

271. By insertion of Chapter V-A in IPC, the understanding of criminal conspiracy in the Indian context has become akin to that in England. The illegal act may or may not be done in pursuance of an agreement but the mere formation of an agreement is an offence and is punishable. The law relating to conspiracy in England has been put forth in ***Halsbury's Laws of England (vide 5th Ed. Vol.25, page 73)*** as under:

"73. Matters common to all conspiracies. There are statutory common law offences of conspiracy. The essence of the offences of both statutory and common law conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated

> by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

272. The English law on 'conspiracy' has been succinctly explained by Russell on Crimes (12th Ed. Vol. 1 page 202) in the following passage:

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough."

273. Coleridge J. in ***R. v. Murphy***[102] explained 'conspiracy' in the following words:

> "… I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so to carry it into execution. This is not necessary, because in any cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'had they this common design, and did they pursue it by these common means the design being unlawful?"

274. Lord Brampton of the House of Lords in ***Quinn v. Leatham103*** had aptly defined conspiracy which definition was engrafted in Sections 120A and 120B IPC. Following was stated by the House of Lords:

> "'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus

[102] (1837) 173 ER 502

contra actum, capable of being enforced, if lawful; and punishable of for a criminal object, or for the use of criminal means'."

275. A perusal of the above shows that in order to constitute an offence of criminal conspiracy, two or more persons must agree to do an illegal act or an act which if not illegal by illegal means. This Court on several occasions has explained and elaborated the element of conspiracy as contained in our penal law. In ***Noor Mohammad Mohd. Yusuf Momin vs State of Maharashtra***[104], this Court has observed:

> "Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107, I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence."

276. In ***E.G. Barsay v. State of Bombay***[105], the following was stated:

> "…… The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

277. A three-Judge Bench in ***Yash Pal Mittal v. State of Punjab***[106] had noted the ingredients of the offence of criminal conspiracy and held:

> "10. The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia,

[103] (1901) AC 495 , [104] AIR 1971 SC 885, [105] AIR 1961 SC 1762 , [106] (1977) 4 SCC 540

> are preparation or causing to be prepared spurious passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation, as we find, the other offences described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge under Section 120-B IPC as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court.
>
> 11. The principal object of the criminal conspiracy in the first charge is thus "cheating by personation", and without achieving that goal other acts would be of no material use in which any person could be necessarily interested. That the appellant himself does not personate another person is beside the point when he is alleged to be a collaborator of the conspiracy with that object. We have seen that some persons have been individually and specifically charged with cheating by personation under Section 419 IPC. They were also charged along with the appellant under Section 120-B IPC. The object of criminal conspiracy is absolutely clear and there is no substance in the argument that the object is merely to cheat simpliciter under Section 417, IPC."

278. Certainly, entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is essential to the offence of criminal conspiracy as has been rightly emphasized by this Court in ***Kehar Singh and Ors. v. State (Delhi Administration)***[107]. In the said case, the court further stressed upon the relevance of circumstantial evidence in proving conspiracy as direct evidence in such cases is almost impossible to adduce.

279. In the said case, K. Jagannatha Shetty, J., in his concurring opinion, has also elaborated the concept of conspiracy to the following effect:

> "274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120-A and 120-B IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

[107] (1988) 3 SCC 609

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition:

"Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties 'actually came together and agreed in terms' to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was 'a tacit understanding between conspirators as to what should be done'."

276. I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard."

280. In ***Saju v. State of Kerala***[108], explaining the concept of conspiracy, this Court stated the following:

"7. To prove the charge of criminal conspiracy the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120-B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available…

[108] (2001) 1 SCC 378

> 10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established."

281. In ***Mir Nagvi Askari v. Central Bureau of Investigation***[109], this Court reiterated the various facets of 'criminal conspiracy' and laid down as follows:

> "60. Criminal conspiracy, it must be noted in this regard, is an independent offence. It is punishable separately. A criminal conspiracy must be put to action; for so long as a crime is generated in the mind of the accused, the same does not become punishable. Thoughts even criminal in character, often involuntary, are not crimes but when they take a concrete shape of an agreement to do or caused to be done an illegal act or an act which is not illegal, by illegal means then even if nothing further is done, the agreement would give rise to a criminal conspiracy.
>
> 61. The ingredients of the offence of criminal conspiracy are:
>
> (*i*) an agreement between two or more persons;
> (*ii*) an agreement must relate to doing or causing to be done either (*a*) an illegal act;
> (*b*) an act which is not illegal in itself but is done by illegal means.
>
> Condition precedent for holding the accused persons to be guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of the fact which must be established by the prosecution viz. meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means.
>
> 62. The courts, however, while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same. The manner and circumstances in which the offences have been committed and the accused persons took part are relevant. For the said purpose, it is necessary to prove that the propounders had expressly agreed to it or caused it to be done, and it may also be proved by adduction of circumstantial evidence and/or by necessary implication. (See *Mohd. Usman Mohammad Hussain Maniyar* v. *State of Maharashtra*[110].)

282. In ***Pratapbhai Hamirbhai Solanki v. State of Gujrat and another***[111], this Court explained the ingredients of 'criminal conspiracy' as under:

[109] (2009) 15 SCC 643 ,[110] (1981) 2 SCC 443 , [111] (2013) 1 SCC 613

"21. At this stage, it is useful to recapitulate the view this Court has expressed pertaining to criminal conspiracy. In *Damodar* v. *State of Rajasthan*[112], a two-Judge Bench after referring to the decision in *Kehar Singh* v. *State (Delhi Admn.)* and *State of Maharashtra* v. *Som Nath Thapa*[113], has stated thus:

"*15.* … The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not (*sic**) sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or a series of acts, he would be held guilty under Section 120-B of the Penal Code, 1860."

22. In *Ram Narayan Popli* v. *CBI*[114] while dealing with the conspiracy the majority opinion laid down that:

"*342.* … The elements of a criminal conspiracy have been stated to be: (*a*) an object to be accomplished, (*b*) a plan or scheme embodying means to accomplish that object, (*c*) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (*d*) in the jurisdiction where the statute required an overt act.

" It has been further opined that:

"*342.* … The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. … no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design."

[112] (2004) 12 SCC 336 , [113] (1996) 4 SCC 659, [114] (2003) 3 SCC 641

The two-Judge Bench proceeded to state that:

> "*342.* … For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means."
>
> 23. In the said case it has been highlighted that in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused."

283. As already stated, in a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the *sine qua non* but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, it is also relevant to note that conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity. In ***K. R. Purushothaman v. State of Kerala***[115], the Court has made the following observations with regard to the formation and rescission of an agreement constituting criminal conspiracy:

> "To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary ondition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing

[115] (2005) 12 SCC 631

circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

284. After referring to a catena of judicial pronouncements and authorities, a three-Judge Bench of this Court in ***State through Superintendent of Police, CBI/SIT v. Nalini and others***[116] summarised the principles relating to criminal conspiracy as under:

"Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

"1. Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

[116] (1999) 5 SCC 253

4. Conspirators may, for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that

"this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its ccomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the graham of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime."

285. The rationale of conspiracy is that the required objective manifestation of disposition of criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interest of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators. An agreement of this kind can

rarely be shown by direct proof; it must be inferred from the circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that they would together accomplish the unlawful object of the conspiracy. [See: ***Firozuddin Basheeruddin and others v. State of Kerala***[117]]

286. In ***Suresh Chandra Bahri v. State of Bihar***[118], this Court reiterated that the essential ingredient of criminal conspiracy is the agreement to ommit an offence. After referring to the judgments in ***Noor Mohd. Mohd. Yusuf Momi*** (supra) and ***V.C. Shukla v. State (Delhi Admn.)***[119], it was held in ***S.C. Bahri*** (supra) as under:

> "[A] cursory look to the provisions contained in Section 120-A reveals that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A IPC, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in Section 120-B since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because otherwise the whole purpose may be frustrated and it is common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn."

287. From the law discussed above, it becomes clear that the prosecution must adduce evidence to prove that:

[117] (2001) 7 SCC 596 , [118] 1995 Supp (1) SCC 80, [119] (1980) 2 SCC 665

(i) the accused agreed to do or caused to be done an act;

(ii) such an act was illegal or was to be done by illegal means within the meaning of IPC;

(iii) irrespective of whether some overt act was done by one of the accused in pursuance of the agreement.

288. In the case at hand, the prosecution has examined PW-82 to prove the charges of conspiracy and for further identification of all the accused persons in the bus on the date of the incident. He has also been presented to support the prosecution case that immediately preceding the fateful incident, all the accused persons had, in execution of their conspiracy, been robbing/merry-making with passengers on the road.

289. The defence has controverted the testimony of PW-82 on several aspects which has already been discussed before. It has been alleged that Ram Adhar, PW-82, is a planted witness who was brought in by the investigators to fill the lacunae, if any, in their investigation and to further make a strong case against the accused persons. The defence has further denied the presence of accused Mukesh at the scene of the crime. Accused Vinay and accused Akshay have also raised the plea of alibi which has been dealt with separately by us. Regardless of the fact that we have found the testimony of PW-82 to be creditworthy, even if the same is not taken into account for the purpose of establishing that the accused acted in concert with each other to commit heinous offences against the victim, the testimony of PW-1 coupled with the dying declarations of the prosecutrix irrefragably establish the charge under Section 120B against all the accused persons.

290. First of all, in order to prove the presence of all the accused on board the bus where the entire incident took place, the prosecution has relied upon the testimony of PW-1, PW-82, PW-16 and, most importantly, the dying declarations of the prosecutrix.

291. As per the records, PW-82 has testified to the effect that on the date of the incident, about 8:30 p.m., he had boarded the concerned bus from Munirka Bus Stand, New Delhi, on noticing that the conductor of the bus sought commuters for Khanpur. However, he was later informed that he would be dropped at Nehru Place instead of Khanpur. When PW-82 tried to get down the bus, he was wrongfully confined, attacked by the persons inside the bus who robbed him of his belongings, viz., Rs.1500/- in cash and a mobile phone, and he was then thrown out of the moving bus. During the trial, PW-82 has identified all the four accused persons, viz., Akshay Kumar Singh @ Thakur, Pawan Gupta, Vinay Sharma and accused Mukesh, present in the concerned bus at the time of the incident. PW-82 had lodged the complaint on 18.12.2012 on the basis of which FIR No. 414 of 2012 was registered at P.S. Vasant Vihar, New Delhi under Sections 365, 397, 342 IPC.

292. Learned senior counsel for the State, Mr. Luthra, has submitted that PW-82 had been examined to establish the conduct of the accused on the aspect of conspiracy and also to establish the identity of the accused persons before the trial court. It was further submitted that PW-82, Ram Adhar, identified all the four accused in the court, namely, Akshay Kumar Singh @ Thakur, Pawan Gupta, Vinay Sharma and Mukesh besides two others present inside the bus and also identified Mukesh as driving the bus and stated that others took him inside the bus and robbed him and attacked him.

293. The contention of the appellants is that the testimony of PW-82 is not bereft of doubt for several reasons, namely, a) delay in lodging FIR, b) non-examination of Sanjiv Bhai as a witness, c) he has stated that he heard the person with the burnt hand say "Mukesh, tez chalao", d) apart from that, he does not mention that he heard the names of any of the accused, and e) he had not visited a doctor/hospital despite stating that he had injuries on his face which prevented him from registering an FIR.

294. Regarding the alleged incident of attack on PW-82 by the accused, it was submitted that the said case against the accused ended in conviction and the same is pending in appeal. In respect of the credibility of the testimony of PW-82 as to the commission of the offence, we are not inclined to take into account the evidence of PW-82 except on one limited aspect, that is, the presence of the accused in the bus, Ex.P1, on the night of 16.12.2012 since PW-82's presence in the bus on the night of 16.12.2012 is admitted. In his statement under Section 313 CrPC, Mukesh-A2 admitted that PW-82 had boarded the offending bus prior to the boarding of the bus by the informant and the victim. The relevant portion of his statement is extracted as under:

> "Q.211: It is in evidence against you that PW82 Shri Ram Adhar deposed that on 16.12.2012 after finishing his carpenter's work at a shop at Munirka till about 8:30 PM, he boarded a white colour bus from sabji Market across the road of my work place. The helper of the bus was calling the passenger by saying "khanpur-khanpur". As PW82 boarded the bus, one of the occupants told him that the bus is going to Nehru Place. As PW82 tried to get down, one person whose one limb was having burn injuries, gave beating to him. The other person pulled him inside the bus towards the back side and they all gave beating to him and removed his belongings i.e. one mobile with two sims and Rs.1500/-. The sim card numbers were 9999095739 and 9971612554. What do you have to say?
>
> Ans: It is correct that PW82 Shri Ram Adhar had boarded the bus Ex.P1 on 16.12.2012 prior to the boarding of the bus Ex.P1 by the complainant and the victim. He boarded the bus from Sabji Mandi at Sector-4 on the main road. He went on the back side of the bus but after sometime he was made to deboard the bus at IIT flyover by accused Akshay as he had no money to pay the fare. At that t ime accused Akshay, accused Ram Singh, since

deceased, accused Vinay accused Pawan along with JCL were present in the bus and I was driving it."

[underlining added]

The presence of PW-82 in Ex.P1 bus prior to the boarding of the bus by the informant, PW-1, and the victim and the presence of all the accused in the bus is, thus, established by the prosecution.

295. The evidence of PW-81, Dinesh Yadav, the owner of the offending bus, indicates accused Ram Singh, A-1, (since deceased) as the driver of the bus and Akshay Kumar as the cleaner of the bus which is further shown in the attendance register of the bus exhibited as Ex.PW-80/K. The evidence of PW-81, Dinesh Yadav, is corroborated by the entries made in the attendance register where in the driver's page at Sl. No. 5, the name of accused Ram Singh (since deceased) is written against bus No. 0149 and at Sl.No. 15, the name of Akshay is written as helper against bus No. 0149. As stated earlier, the bus bearing Registration No.DL-1PC-0149 was one of the buses hired by Birla Vidya Niketan School, Pushp Vihar, New Delhi and the fact that the driver of the bus at the relevant time was Ram Singh is sought to be proved by the prosecution through the testimony of PW-16, Rajeev Jakhmola, Manager (Administration) of the said school. The said witness has testified that one Dinesh Yadav, PW-81, had provided seven buses to the school including bus bearing No. DL-1PC-0149 for the purpose of ferrying the children of the school. The driver of this bus was one Ram Singh, son of Mange Lal. The documents relating to the bus including the photocopies of the agreement between the school and the bus contractor, copy of the driving licence of Ram Singh, A-1, and the letter of termination dated 18.12.2012 with "Yadav Travels" were furnished to the Investigating Officer, SI Pratibha Sharma, vide his letter dated 25.12.2012, exhibited as Ex.PW-16/A (colly.). From the evidence of PW-16, Rajeev Jakhmola, it stands proved that the bus in question was routinely driven by Ram Singh (since deceased). The statement of PW-16, Rajeev Jakhmola, is corroborated by the testimony of PW-81, Dinesh Yadav. Significantly, PW-81, Dinesh Yadav, further testified: "This bus was being parked by accused Ram Singh near his house because this bus was attached with the school and also with an office as a chartered bus and that the accused used to pick up the students early in the morning."

296. The testimony of PW-13, Brijesh Gupta, who was an auto driver and also resident of jhuggi at Ravi Dass Camp from where the offending bus was seized is also relevant to prove the presence of the accused in the bus. He stated in his evidence that A-1, Ram Singh (since deceased), is the brother of A-2, Mukesh, and that both resided in the jhuggi at Ravi Dass camp and that Ram Singh used to drive the said bus and park it in the night near his jhuggi. PW-13, in his evidence, deposed that on the night of 16.12.2012, about 11:30 p.m., when he returned to his jhuggi after plying his auto, he saw accused Mukesh, A-2, taking water in some can inside

a white colour bus and washing it from inside. He also noticed some clothes and pieces of curtains being burnt in the fire.

297. In his questioning under Section 313 CrPC, Mukesh, A-2, has admitted that he and A-1, Ram Singh (since deceased), are brothers. He has also admitted that on the night of 16.12.2012, he was driving the bus and that accused Pawan and Vinay Sharma were seated on the backside of the driver's seat, whereas Akshay and Ram Singh were sitting in the driver's cabin. The relevant portion of his statement under Section 313 CrPC reads as under:

> "Q2. It is in evidence against you that PW1 further deposed that they inquired from 4-5 auto rickshaw-walas to take them to Dwarka, but they all refused. At about 9 PM they reached at Munirka bus stand and found a white colour bus on which "Yadav" was written. A boy in the bus was calling for commuters for Dwarka/Palam Mod. PW1 noticed yellow and green line/strips on the bus and that the entry gate of the bus was ahead of its front tyre, as in luxury buses and that the front tyre was not having a wheel cover. What do you have to say?
>
> Ans: I was driving the bus while my brother Ram Singh, since deceased and JCL, Raju was calling for passengers by saying "Palam/Dwarka Mod". Q4: It is in evidence against you that during the course of his deposition, complainant, PW-1 has identified you accused Mukesh to be the person who was sitting on the driver's seat and was driving the bus; PW1 further identified your co-accused Ram Singh (since deceased), and Akshay Kumar to be the person who were sitting in the driver's cabin alongwith the driver; PW-1 had also identified your co-accused Pawan Kumar who was sitting in front of him in two seats row of the bus; PW-1 had also identified your co-accused Vinay Sharma to be the person who was sitting in three seats row just behind the Driver's cabin, when PW1 entered the bus; PW1 has also deposed before the court that the conductor who was calling him and his friend/prosecutrix to board the bus Ex.P1 was not among the accused person being tried in this court.
>
> Ans: Accused Pawan and accused Vinay Sharma were sitting on my back side of the driver's seat and whereas accused Akshay was sitting in the driver's cabin while my brother Ram Singh, since deceased was asking for passengers. Q5: It is in evidence against you that after entering the bus PW1 noticed that seats cover of the bus were of red colour and it had yellow colour curtains and the windows of the bus had black film on it. The windows were at quite a height as in luxury buses. As PW1 sat down inside the bus, he noticed that two of you accused were sitting in the driver's cabin were coming and returning to the driver's cabin. PW1 paid an amount of Rs.20/- as bus fare to the conductor i.e. Rs.10/- per head. What do you have to say?

> Ans: It is correct that the windows of the bus Ex.P1 were having black film on it but I cannot say if the seats of the bus were having red covers or that the curtains were of yellow colour as my brother Ram Singh, since deceased, only used to drive the bus daily and that on that day since he was drunk heavily so I had gone to Munirka to bring him to my house and hence, I was driving the bus on that day. I had gone to Munirka with my nephew on my cycle to fetch Ram Singh since deceased and that the other boys alongwith Ram Singh had already taken the bus from R.K.Puram. I was called by Ram Singh on phone to come at Munirka."

298. A-3, Akshay @ Thakur, in his statement under Section 313 CrPC, has admitted that he was working with A-1, Ram Singh (since deceased), in the offending bus, Ex.P1, as a helper. He has also admitted therein that he had joined A-1, Ram Singh (since deceased), on 03.11.2012. The relevant portion of his statement under Section 313 CrPC is extracted hereunder:

> "Q.210: It is in evidence against you that PW81 Shri Dinesh Yadav is the owner of the bus Ex.P1 and that he has employed accused Ram Singh, since deceased, as the driver of the bus in the month of December, 2012 and you accused Akshay was working as helper in the said bus. Further, he deposed that on 25.12.2012 he hadhanded over the documents relating to the bus to the investigating officer, seized vide memo Ex.PW80/K. The copy of the challan and copy of the notice are collectively Ex.P-81/1 and the register on which "Yadav Travels 2012" is written is Ex.P-81/2. He also identified the driving license Ex.P-74/1 of his driver, accused Ram Singh, since deceased. He further deposed that the bus Ex.P1 used to ply in Birla Vidya Niketan as well as chartered bus and used to take the office-goers from Delhi and drop them at Noida every morning and evening. What do you have to say?
>
> Ans: It is correct that I was working as a helper in the bus Ex.P1. I joined Ram Singh, since deceased as helper on 3.11.2012 but I left the company of Ram Singh on 15.12.2012 at about 10.30 AM and I left for my village at 11:30 am and I went to New Delhi Railway Station and I left Delhi in the train at about 2:30 P.M."

299. DW-5, Smt. Champa Devi, is the mother of Vinay Sharma, A-4. She has stated in her evidence that her son, Vinay Sharma, A-4, who returned home at 4:00 p.m. on 16.12.2012, went in search of A-1 on hearing about the misbehaviour of A-1, Ram Singh (since deceased), with his sister and was able to trace him by 8:00 p.m. and that her son Vinay Sharma, A-4, had quarreled with Ram Singh, A-1. She has deposed in her evidence that her son Vinay Sharma returned bleeding from his mouth and after some time they had left to the DDA District Park to attend a musical programme where they had met A-5, Pawan alias Kaalu, alongwith two others.

300. The prosecution has, thus, established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy is established by the sequence of events and the conduct of the accused. An important facet of the law of conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. Section 10 of the Indian Evidence Act which reads as under is relevant in this context:

> "10. Things said or done by conspirator in reference to common design.- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

301. Section 10 of the Indian Evidence Act begins with the phrase "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence" which implies that if *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common intention is admissible against all. In the facts of the present case, the prima facie evidence of the existence of conspiracy is well established.

302. The informant, PW-1, has also deposed as to the clarity of the entire incident. He has identified all the accused to be present in the bus when he had boarded the same with the prosecutrix. He has maintained that he saw three persons sitting in the driver's cabin who were moving in and out of the cabin. Both the informant and the prosecutrix had sensed some sort of hostility and strangeness in the behaviour of the accused. But, as they had paid for the ticket, they quietly kept sitting. Soon they found that the lights in the bus were put off and the accused Ram Singh (since deceased) and accused Akshay came near them to ask where PW1 was heading with the prosecutrix at that odd time of the evening. PW-1, on objecting to such a query, was beaten and pinned down by the accused. Thereafter, all the accused, one after the other, committed rape and unnatural sex on the prosecutrix using iron rods which has been explicitly described by the prosecutrix herself in her dying declarations recorded by PW-27, Sub-Divisional Magistrate, and PW-30, Metropolitan Magistrate. The relevant portion of the second dying declaration of the prosecutrix as contained in Ex.PW-27/A is as under:

> "Q.09 Iske baad kya hua? Kripya vistaar se bataiye.
> Ans.09 Paanch minute baad jab bus Malai Mandir ke pul par chadi toh conductor ne bus ke darwaze bandh kar diye aur andar ki batiya bujha di aur

> mere dost ke paas akar galiyan dene lage aur marne lage. Usko 3-4 logo ne pakad liya aur mujh ko baki log mujhe bus ke peechey hisey mein le gaye aur mere kapde faad diye aur bari-2 se rape kiya. Lohey ki rod se mujhe mere paet par maara aur poore shareer par danto se kata. Is se pehle mere dost ka saman - mobile phone, purse, credit card & debit card, ghadi aadi cheen liye. But total chhey (6) log the jinhoney bari-bari se oral (oral) vaginal (through vagina) aur pichhey se (anal) balatkar kiya. In logo ne lohe ki rod ko mere shareer ke andar vaginal/guptang aur guda (pichhey se) (through rectum) dala aur phir bahar bhi nikala. Aur mere guptango haath aur lohe ki rod dal kar mere shareer ke andruni hisson ko bahar nikala aur chot pahunchayi. Chhey logo ne bari-bari se mere saath kareeb ek ghante tak balatkar kiya. Chalti huyi bus mein he driver badalta raha taaki woh bhi balatkar kar sake."

303. The chain of events described by the prosecutrix in her dying declarations coupled with the testimonies of the other witnesses clearly establish that as soon as the informant and the prosecutrix boarded the bus, the accused persons formed an agreement to commit heinous offences against the victim. Forcefully having sexual intercourse with the prosecutrix, one after the other, inserting iron rod in her private parts, dragging her by her hair and then throwing her out of the bus all establish the common intent of the accused to rape and murder the prosecutrix. The trial court has rightly recorded that the prosecutrix's alimentary canal from the level of duodenum upto 5 cm of anal sphincter was completely damaged. It was beyond repair. Causing of damage to the jejunum is indicative of the fact that the rod was inserted through the vagina and/or anus upto the level of jejunum. Further, septicemia was the direct result of multiple internal injuries. Moreover, the prosecutrix has also maintained in her dying declaration that the accused persons were exhorting that the prosecutrix had died and she be thrown out of the bus. Ultimately, both the prosecutrix as well as the informant were thrown out of the moving bus through the front door by the accused after having failed to throw them through the rear door. The conduct of the accused in committing heinous offences with the prosecutrix in concert with each other and thereafter throwing her out of the bus in an unconscious state alongwith PW-1 unequivocaly bring home the charge under Section 120B in case of each of them. The criminal acts done in furtherance of the conspiracy is evident from the acts and also the words uttered during the commission of the offence. Therefore, we do not have the slightest hesitation in holding that the trial court and the High Court have correctly considered the entire case on the touchstone of well-recognised principles for arriving at the conclusion of criminal conspiracy. The prosecution has been able to unfurl the case relating to criminal conspiracy by placing the materials on record and connecting the chain of circumstances. The relevant evidence on record lead to a singular conclusion that the accused persons are liable for criminal conspiracy and their confessions to counter the same deserve to be repelled.

Summary of conclusions:

304. From the critical analysis, keen appreciation of the evidence and studied scrutiny of the oral evidence and other materials, we arrive at the following conclusions:

i. The evidence of PW-1 is unimpeachable and it deserves to be relied upon.

ii. The accused persons alongwith the juvenile in conflict with law were present in the bus when the prosecutrix and her friend got into the bus.

iii. There is no reason or justification to disregard the CCTV footage, for the same has been duly proved and it clearly establishes the description and movement of the bus.

iv. The arrest of the accused persons from various places at different times has been clearly proven by the prosecution.

v. The personal search, recoveries and the disclosure leading to recovery are in consonance with law and the assail of the same on the counts of custodial confession made under torture and other pleas are highly specious pleas and they do not remotely create a dent in the said aspects.

vi. The contention raised by the accused persons that the recoveries on the basis of disclosure were a gross manipulation by the investigating agency and deserve to be thrown overboard does not merit acceptance.

vii. The relationship between the parties having been clearly established, their arrest gains more credibility and the involvement of each accused gains credence.

viii. The dying declarations, three in number, do withstand close scrutiny and they are consistent with each other.

ix. The stand that the deceased could not have given any dying declaration because of her health condition has to be repelled because the witnesses who have stated about the dying declarations have stood embedded to their version and nothing has been brought on record to discredit the same. That apart, the dying declaration by gestures has been proved beyond reasonable doubt.

x. There is no justification in any manner whatsoever to think that PW-1 and the deceased would falsely implicate the accused-appellants and leave the real culprits.

xi. The dying declarations made by the deceased have received corroboration from the oral and documentary evidence and also enormously from the medical evidence.

xii. The DNA profiling, which has been done after taking due care for quality, proves to the hilt the presence of the accused persons in the bus and their

involvement in the crime. The submission that certain samples were later on taken from the accused and planted on the deceased to prove the DNA aspect is noted only to be rejected because it has no legs to stand upon.

xiii. The argument that the transfusion of blood has the potentiality to give rise to two categories of DNA or two DNAs is farthest from truth and there is no evidence on that score. On the contrary, the evidence in exclusivity points to the matching of the DNA of the deceased with that of the accused on many aspects. The evidence brought on record with regard to finger prints is absolutely impeccable and the trial court and the High Court have correctly placed reliance on the same and we, in our analysis, have found that there is no reason to disbelieve the same.

xiv. The scientific evidence relating to odontology shows how far the accused have proceeded and where the bites have been found and definitely, it is extremely impossible to accept the submission that it has been a manipulation by the investigating agency to rope in the accused persons.

xv. The evidence brought on record as regards criminal conspiracy stands established. In view of the aforesaid summation, the inevitable conclusion is that the prosecution has proved the charges leveled against the appellants beyond reasonable doubt.

Sentencing procedure and compliance of Section 235(2) CrPC:

305. Now we shall proceed to sentencing. A submission was raised that provisions of Section 235(2) CrPC was not complied with. The said provision reads as follows:

> **"235. Judgment of acquittal or conviction**
>
> (1) …..
>
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

306. While discussing Section 235(2) CrPC, this Court, in ***Santa Singh v. State of Punjab***[120], observed as follows:

> "4. …. the hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same."

307. A three-Judge Bench in ***Dagdu and others v. State of aharashtra***[121] considered the object and scope of Section 235(2) CrPC and held that:

[120] (1976) 4 SCC 190 , [121] (1977) 3 SCC 68

> "79. But we are unable to read the judgment in *Santa Singh* as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question us sentence. The Court, on convicting an accused, must unquestionably hear him on the qustion of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.
>
> 80. Bhagwati, J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is nut abused and turned into an instrument for unduly protracting the proceedings. The material on which the accused proposes to rely may therefore, according to the learned Judge, be placed before the Court by means of an affidavit. Fazal Ali, J., also observes that the courts must be vigilant to exercise proper control over their proceedings, that the accused must not be permitted to adopt dilatory tactics under the cover of the new right and that what Section 235(2) contemplates is a short and simple opportunity to place the necessary material before the Court. These observations show that for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction. The fact that in *Santa Singh* this Court remanded the matter to the Sessions Court does not spell out the ratio of the judgment to be that in every such case there has to be a remand. Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."

308. Mr. Raju Ramachandran, learned amicus curiae, submitted that the sentence passed by the trial court that has been confirmed by the High Court ought to be set aside as they have not followed the fundamental norms of sentencing and have not been guided by the paramount beacons of legislative policy discernible from Section 354(3) and Section 235(2) CrPC. It is urged by him that the import of Section 235 CrPC is not only to hear the submissions orally but also to afford an opportunity to

the prosecution and the defence to place the relevant material having bearing on the question of sentence. Learned amicus curiae would submit that the trial court as well as the High Court has failed to put any of the accused persons to notice on the question of imposition of death sentence; that sufficient time was not granted to reflect on the question of death penalty; that none of the accused persons were heard in person; that the learned trial Judge has failed to elicit those circumstances of the accused which would have a bearing on the question of sentence, especially the mitigating factors in a case where death penalty is imposed; that no separate reasons were ascribed for the imposition of death penalty on each of the accused; and that it was obligatory on the part of the learned trial Judge to individually afford an opportunity to the accused persons. Learned amicus curiae would submit that the learned trial Judge has pronounced the sentence in a routine manner which vitiates the sentence inasmuch as the solemn duty of the sentencing court has not been kept in view. Mr. Ramachandran had emphatically put forth that denial of an individualized sentencing process results in the denial of Articles 14 and 21 of the Constitution of India. Mr. Luthra, learned senior counsel for the respondent-State, submitted that the learned trial Judge had heard the accused persons and there has been compliance with Section 235(2) CrPC and the High Court has appositely concurred with the same.

309. Be it stated, after hearing the learned counsel for the both sides and the learned amicus curiae, the Court, on 03.02.2017, passed the following order:

> "After the argument for the accused persons by Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel were advanced, we thought it appropriate to hear the learned friends of the Court and, accordingly, we have heard Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned senior counsel. It is worthy to note here that Mr. Hegde, learned senior counsel argued on the sustainability of the conviction on many a ground and submitted a written note of submission. Mr. Ramachandran, learned senior counsel, inter alia, emphasized on the aspect of sentence imposed by the trial court which has been confirmed under Section 366 Cr.P.C. While arguing with regard to the imposition of the capital punishment on the accused persons, one of the main submissions of Mr. Ramachandran was that neither the trial court nor the High Court has followed the mandate enshrined under Section 235(2) of the Code of Criminal Procedure. Section 235(2) Cr.P.C. reads as follows:-
>
> "235. Judgment of acquittal or conviction.- (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case. (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."
> Referring to the procedure adopted by the trial court, it was urged by Mr. Ramachandran that the learned trial Judge had not considered the

aggravating and mitigating circumstances, as are required to be considered in view of the Constitution Bench decision in *Bachan Singh vs. State of Punjab*[122], and further there has been a failure of the substantive law, inasmuch as there has been weighing of the mitigating or the aggravating circumstances in respect of each individual accused. Learned senior counsel contended that Section 235(2) Cr.P.C. is not a mere formality and in a case when there are more than one accused, it is obligatory on the part of the learned trial Judge to hear the accused individually on the question of sentence and deal with him. As put forth by Mr. Ramachandran, the High Court has also failed to take pains in that regard. To bolster his submission, he has commended us to the authority in *Santa Singh vs. The State of Punjab*. In the said case, Bhagwati, J. dealt with the anatomy of Section 235 Cr.P.C., the purpose and purport behind it and, eventually, came to hold that:-

"Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon, fashioned by law, for protecting and perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in section 235(2) and so also was the lawyer of the appellant in the High Court unaware of it. No inference can, therefore, be drawn from the omission of the appellant to raise this point, that he had nothing to Say in regard to the sentence and that consequently no prejudice was caused to him."

Thereafter, the learned Judge opined that non-compliance goes to the very root of the matter and it results in vitiating the sentence imposed. Eventually, Bhagwati, J. set aside the sentence of death and remanded the case to the court of session with a direction to pass appropriate sentence after giving an opportunity to the appellant therein to be heard in regard to the question of sentence in accordance with the provision contained in Section 235(2) Cr.P.C. as interpreted by him.

In the concurring opinion, Fazal Ali, J., ruled thus:-

[122] (1980) 2 SCC 684

"The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate, that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? The Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the Court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:

"We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause. It may not be practicable to keep up to the time-limit suggested by the Law Commission with mathematical accuracy but the Courts must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed."

The said decision was considered by a three-Judge Bench in *Dagdu and Others vs. State of Maharashtra* (1977) 3 SCC 68. The three-Judge Bench referred to the law laid down in Santa Singh (supra) and opined that the mandate of Section 235 (2) Cr.P.C. has to be obeyed in letter and spirit. However, the larger Bench thought that *Santa Singh* (supra) does not lay down as a principle that failure on the part of the Court which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford the accused an opportunity to be heard on the question of sentence. Chandrachud, J. (as His Lordship then was) speaking for the Bench ruled thus:-

"The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his

contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."

It is seemly to note here that Mr. Ramachandran has also commended us to a three-Judge Bench decision in *Malkiat Singh and Others vs. State of Punjab* (1991) 4 SCC 341, wherein the three-Judge Bench ruled that sufficient time has to be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. Learned senior counsel has also drawn our attention to a two-Judge Bench decision in *Ajay Pandit alias Jagdish Dayabhai Patel and Another vs. State of Maharashtra* (2012) 8 SCC 43, wherein the matter was remanded to the High Court. Mr. Ramachandran has drawn our attention to paragraph 47 of the said authority. It reads as follows:-

"Awarding death sentence is an exception, nor the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and sychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said purpose, it is necessary that the learned counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr. V.P. Singh should be allowed to visit the jail and communicate with the accused persons and file the requisite affidavits and materials.

At this juncture, Mr. M.L. Sharma, learned counsel has submitted that on many a occasion, he has faced difficulty as he had to wait in the jail to have a dialogue with his clients. Mr. Sidharth Luthra, learned senior counsel has submitted that if this Court directs, Mr. M.L. Sharma and Mr. A.P. Singh,

learned counsel and their associate Advocates can visit the jail at 2.45 p.m. each day and they shall be allowed to enter the jail between 3.00 p.m. to 3.15 p.m. and can spend time till 5.00 p.m. Needless to say, they can commence their visits from 7th February, 2017, and file the necessary separate affidavits and documents. After the affidavits are made ready by the learned counsel for the accused persons, they can intimate about the same to Mr. Luthra, who in his turn, shall intimate the same to the Superintendent of Jail, who shall make arrangement for a Notary so that affidavits can be notarized, treating this as a direction of this Court. Needless to say, while the learned counsel will be discussing with the accused persons, the meeting shall be held in separate rooms inside the jail premises so that they can have a free discussion with the accused persons. Needless to say, they can reproduce in verbatim what the accused persons tell them in the affidavit. The affidavits shall be filed by 23rd February, 2017.

We may hasten to add that after the affidavits come on record, a date shall be fixed for hearing of the affidavits and pertaining to quantum of sentence if, eventually, the conviction is affirmed. The learned counsel for the prosecution, needless to say, is entitled to file necessary affidavits with regard to the circumstances or reasons for sustenance of the sentence. Additionally, the prosecution is given liberty to put forth in the affidavit any refutation, after the copies of the affidavits by the learned counsel for the accused persons are served on him. For the said purpose, a week's time is granted. Needless to say, the matter shall be heard on sentence, after affidavits from both the sides are brought on record. The date shall be given at 2.00 p.m. on 6th February, 2017. For the present, the matter stands adjourned to 4th February, 2017, for hearing.

Let a copy of the order be handed over to Mr. Sidharth Luthra by 4th February, 2017, who shall get it translated in Hindi and give it to the Superintendent of Jail, who in his turn, shall hand over it to the accused persons and, simultaneously, explain the purport and effect of the order.

The Superintendent of Jail is also directed to submit a report with regard to the conduct of the accused persons while they are in custody."

310. After passing of the said order, the hearing continued and on 13.02.2017, the following order was passed:

"Mr. A.P. Singh, learned counsel has concluded his arguments. After his conclusion of the arguments, as per our order, dated 3.2.2017, affidavits are required to be filed by 23.2.2017. Let the affidavits be filed by that date. Mr. Siddharth Luthra, learned senior counsel appearing for the State shall file the affidavit by 2nd March, 2017. Registry is directed to hand over copies of

the affidavits to Mr. K. Parameshwar, learned counsel assisting Mr. Raju Ramachandran, learned senior counsel and Mr. Anil Kumar Mishra-I, learned counsel assisting Mr. Sanjay Kumar Hegde, learned senior counsel (Amicus Curiae).

Mr. Luthra, learned senior counsel shall make arrangements for visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma, learned counsel for the petitioners even on Saturday and sunday. He shall intimate our order to the jail authorities so that they can arrange the visit of Mr. A.P. Singh and Mr. Manohar Lal Sharma on Saturday and Sunday.

Let the matter be listed on 3.3.2017 for hearing on the question of sentence, aggravating and mitigating circumstances on the basis of the materials brought on record by learned counsel for the parties."

311. In pursuance of the aforesaid order, affidavits on behalf of the appellants have been filed. It is necessary to note that the learned counsel for the appellants addressed the Court on the basis of affidavits on 06.03.2017 and the order passed on that date is extracted hereunder:

"Mr. A.P. Singh, learned counsel has filed affidavits on behalf of the three accused persons, namely, Pawan Kumar Gupta, Vinay Sharma and Akshay Kumar Singh and Mr. M.L. Sharma, learned counsel has filed the affidavit on behalf of Mukesh. Be it noted, Mr. A.P. Singh, learned counsel has filed the translated version of the affidavits and Mr. Manohar Lal Sharma, learned counsel has filed the original version in Hindi as well as the translated one.

At this juncture, Mr. Raju Ramachandran, learned senior counsel who has been appointed as Amicus Curiae to assist the Court, submitted that two aspects are required to be further probed to comply with the order dated 3.2.2017 inasmuch as this Court has taken the burden on itself for compliance of Section 235(2) of the Code of Criminal Procedure. Learned senior counsel would point out that the affidavit filed by Mukesh does not cover many aspects, namely, socio-economic background, criminal antecedents, family particulars, personal habits, education, vocational skills, physical health and his conduct in the prison.

Mr. Manohar Lal Sharma, learned counsel submits that a report was asked for from the Superintendent of Jail with regard to the conduct of the accused persons while they are in custody, but the same has not directly been filed by the Superintendent of Jail.

Mr. Siddharth Luthra, learned senior counsel for the respondent-State, would, per contra, contend that he has filed the affidavit and the affidavit contains the report of the Superintendent of Jail.

In our considered opinion, the Superintendent of Jail should have filed the report with regard to the conduct of the accused persons since they are in custody for almost four years. That would have thrown light on their conduct. Let the report with regard to their conduct be filed by the Superintendent of Jail in a sealed cover in the Court on the next date of hearing.

As far as the affidavit filed by Mukesh is concerned, Mr. Sharma, learned counsel stated that he will keep the aspects which are required to be highlighted in mind and file a further affidavit within a week hence.

The direction issued on the earlier occasion with regard to the visit of jail by the learned counsel for the parties shall remain in force till the next date of hearing. Let the matter be listed at 2.00 p.m. on 20.3.2017. The report of the Superintendent of Jail, as directed hereinabove, shall be filed in Court on that date."

312. Thereafter, the matter was heard on 20.03.2017 and the following order came to be passed:

"Mr. M.L. Sharma, learned counsel has filed an additional affidavit of the petitioner, Mukesh and Mr. A.P. Singh, learned counsel has filed affidavits for the petitioners, Pawan Kumar Gupta, Vinay Kumar Sharma, and Akshay Kumar Singh.

Mr. Siddharth Luthra, learned senior counsel has produced two sealed covers containing the reports submitted by Superintendent of the Central Jail No.2 and the Superintendent of Central Jail No.4 in respect of the petitioners who are in the respective jails. Two sealed covers are opened in presence of the learned counsel for the parties. They be kept on record.

Registry is directed to supply a copy of the aforesaid reports to Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel for the petitioners. Registry shall also supply a copy thereof to Mr. K. Parameshwar, learned counsel assisting Mr. Raju Ramachandran, learned Amicus Curiae and Mr. Anil Kumar Mishra-I, learned counsel assisting Mr. Sanjay R. Hegde, learned Amicus Curiae. A copy of the report shall also be handed over to Ms. Supriya Juneja, learned counsel assisting Mr. Siddharth Luthra, learned senior counsel, for he does not have a copy as the reports have been produced before us in the sealed covers.

Mr. Siddharth Luthra, learned senior counsel prays for and is granted three days time to file a status report and argue the matter."

Delineation as regards the imposition of sentence

313. Be it noted, we have heard the learned counsel appearing for the parties, Mr. Luthra, learned senior counsel for the respondent-State, Mr. Ramachandran and Mr.

Hegde on the question of sentence. Before we advert to the principles for imposition of sentence, we think it appropriate to deal with the affidavits filed by the accused. For the sake of convenience, it is necessary to make a summary of the affidavits.

314. Accused Mukesh, A-2, filed his statement, written in his own hand-writing in Hindi, denying his involvement in the occurrence and pleading innocence. He stated that on 17.12.2012, he was picked up from his house at Karoli, Rajasthan and brought to Delhi where the police tortured him and threatened to kill him. Therefore, he acted as per the direction of the police and V.K. Anand, Advocate. He further stated that he is uneducated and poor, but not a criminal and if he is acquitted, he would go back to Karoli, Rajasthan and would take care of his parents.

315. Accused Akshay Kumar Singh, A-3, has stated that he hails from a naxal affected area in District Aurangabad, Bihar and due to poverty, he could not continue his studies beyond 9th class. He has stated that his aged father Shri Saryu Singh and mother, Smt. Malti Devi, are dependent on him. He has further stated that he is married to Punita Devi since 2010 and they have a son, now aged about six years. He further stated that due to poverty and lack of adequate opportunity in home town, he came to Delhi in the month of November 2012 to earn his livelihood. To maintain his dependants which include his parents, wife and child, he started working as a cleaner in the concerned bus at a wage of Rs.50/- per day. He reiterated his plea of alibi asserting that he had left Delhi on 15.12.2012 in Mahabodhi Express accompanied by his sister-in-law, Sarita Devi, and went to his native place Karmalahang where he was arrested. He further stated that after his confinement in Tihar Jail, he has been maintaining good behaviour and is working hard as a labourer in the prison to maintain his family.

316. Accused Vinay Sharma, A-4, in his affidavit stated that he was born in Kapiya Kalan, Tehsil Rudra Nagar, District Basti, Uttar Pradesh and that his parentsused to work as labourers and that his family is very poor. The accused stated that he used to take care of his grandfather who was a religious saint and up to July, 2012, he was studying at his native place in Uttar Pradesh and only after July, 2012, he came to Delhi to pursue his further studies. He has stated that he got himself admitted to the University of Delhi, School of Open Learning, Delhi and to earn his livelihood, he worked as a part-time instructor in gym and also as a seasonal waiter in hotels and marriage ceremonies at night. Accused Vinay Sharma further stated that he has to take care of his ailing parents and also his younger sisters and younger brother, who are totally dependent on him. In his affidavit, he reiterated his plea of alibi asserting that on the fateful day, he had participated in the Christmas celebration and was enjoying there with his family. The accused has further stated that he has no criminal antecedents and after his confinement in Tihar Jail, he has maintained good behaviour and has also organized various musical programmes and his paintings are displayed in Tihar Jail.

317. Accused Pawan Gupta, A-5, filed his affidavit stating that he comes from a very poor family where his father used to sell fruits on the road for their living. He further stated that he is a resident of Cluster Jhuggi Basti and was assisting his father in selling fruits on a cart. The accused also illustrated the ailing condition of his family stating that his parents are heart patients and his mother is a handicapped person suffering from BP and thyroid. He also stated that his younger sister, Dimple Gupta, was under depression on account of the false implication of her brother in the present case and could not tolerate humiliation by the society and she has committed suicide on 09.02.2013. Apart from that, he has to look after his dependant parents and two other sisters, one married and the other unmarried and aged 17 years, and one younger brother. On behalf of accused Pawan Gupta, fervent plea was made that he has no prior criminal antecedent and after being confined to Central Jail, Tihar, he is trying to reform himself into a better person.

318. Mr. Ramachandran, learned amicus curiae, criticized the sentence, placed reliance on ***Bachan Singh v. State of Punjab***[123] and submitted that the trial court and the High Court have committed the error of not applying the doctrine of equality which prescribes similar treatment to similar persons and stated that the Court in ***Bachan Singh*** (supra) has categorically held that the extreme penalty can be inflicted only in gravest cases of extreme culpability; in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also; and that the mitigating circumstances referred therein are undoubtedly relevant and must be given great weight in the determination of sentence. Further placing reliance on ***Machhi Singh v. State of Punjab***[124], it is submitted by learned amicus curiae that in the said case, the Court held that a balance sheet of the aggravating and mitigating circumstances should be drawn up and the mitigating circumstances should be accorded full weightage and a just balance should be struck between the aggravating and mitigating circumstances. He further pointed out number of decisions wherein this Court has given considerable weight to the circumstances of the criminal and commuted the sentence to life imprisonment.

319. Mr. Ramachandran further urged that in the present case, the decision in ***Bachan Singh*** (supra) was completely disregarded and the trial court,hile sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation were ruled out on the basis of the nature of the crime and not on its own merits. It is further contended by him that in ***Sangeet and another v. State of Haryana***[125] and ***Shankar Kisanrao Khade v. State of Maharashtra***[126], the decisions, i.e., ***Shiv v. High Court of Karnataka***[127], ***B.A.Umesh v. Registrar General, High Court of Karnataka***[128] and ***Dhananjoy Chaterjee v. State of West Bengal***[129], relied upon by the Special Public Prosecutor and the High Court, have been doubted by this Court.

[123] (1980) 2 SCC 684 , [124] (1983) 3 SCC 470, [125] (2013) 2 SCC 452 , [126] (2013) 5 SCC 546, [127] (2007) 4 SCC 713 [128] (2011) 3 SCC 85 , [129] (1994) 2 SCC 220

320. Learned amicus curiae has further propounded that sentencing and non-consideration of the mitigating circumstances are violative of Articles 14 and 21 of the Constitution. It is his submission that the prosecution's argument on aggravating circumstances gets buttressed by the material on record while the plea of mitigating circumstances rests solely on arguments and this imbalance is a serious violation of the doctrine of fairness and reasonableness enshrined in Article 14 of the Constitution; that there should be a fair and principle-based sentencing process in death penalty cases by which a genuine and conscious attempt is made to investigate and evaluate the circumstances of the criminal; that the fair and principled approaches are facets of Article 14; and that if the enumeration and evaluation of mitigating factors are left only to the accused or his counsel and the Court does not accord a principle-based treatment, the imposition of death penalty will be rendered the norm and not the exception, which is an inversion of the ***Bachan Singh*** (supra) logic and a serious violation of Article 21 of the Constitution.

321. Mr. Ramachandran submitted that the trial court and the High Court failed to pay due regard to the mitigating factors; that the courts have committed the mistake of rejecting the mitigating factors by reasoning that it may not be sufficient for awarding life sentence; and that the courts have not considered all the mitigating factors cumulatively to arrive at the conclusion whether the case fell within the rarest of rare category. He has referred to the Constitution Bench decision in ***Triveniben v. State of Gujarat***[130] wherein Shetty, J. in his concurring opinion, opined that death sentence cannot be given if there is any one mitigating circumstance in favour of the accused and all circumstances of the case should be aggravating and submitted that this line of judicial thought has been completely ignored by the High Court and the trial court.

322. Learned amicus curiae further contended that the attribution of individual role with respect to the iron rod, which was a crucial consideration in convicting the accused under Section 302 IPC, was not considered by the trial court or the High Court in the sentencing process and stressed that when life imprisonment is the norm and death penalty the exception, the lack of individual role has tobe regarded as a major mitigating circumstance. In this regard, reliance has been placed by him on ***Karnesh Singh v. State of U.P.***[131], ***Ronny v. State of Maharashtra***[132], ***Nirmal Singh v. State of Haryana133*** and ***Sahdeo v. State of U.P***[134].

323. Mr. Ramachandran has also contended that subsequent to the pronouncement in ***Machhi Singh*** (supra), there are series of decisions by this Court where the Court has given considerable weight to the concept of reformation and rehabilitation and commuted the sentence to life imprisonment. According to him, young age is a mitigating factor and this Court has taken note of the same in ***Raghubir Singh v. State of Haryana***[135], ***Harnam Singh v. State of Uttar Pradesh***[136], ***Amit v. State of Maharashtra***[137], ***Rahul v. State of Maharashtra***[138],

[130] (1989) 1 SCC 678 , [131] AIR 1968 SC 1402, [132] (1998) 3 SCC 625, [133] (1999) 3 SCC 670, [134] (2004) 10 SCC 682[135] (1975) 3 SCC 37, [136] (1976) 1 SCC 163, [137] (2003) 8 SCC 93, [138] (2005) 10 SCC 322

Rameshbhai Chandubhai Rathod v. State of Gujarat[139], ***Santosh Kumar Bariyar v. State of Maharashtra***[140], ***Sebastian v. State of Kerala***[141], ***Santosh Kumar Singh*** (supra), ***Rameshbhai Chandubhai Rathod II v. State of Gujarat***[142], ***Amit v. State of Uttar Pradesh***[143] and ***Lalit Kumar Yadav v. State of Uttar Pradesh***[144]. That apart, it is urged by him that when the crime is not pre-meditated, the same becomes a mitigating factor and that has been taken note of by this Court in the authorities in ***Akhtar v State of Uttar Pradesh***[145], ***Raju v. State of Haryana***[146] and ***Amrit Singh v. State of Punjab***[147].

324. Learned amicus curiae would further urge that when the criminal antecedents are lacking and the prosecution has not been able to say about that the appellants deserve imposition of lesser sentence. For the said purpose, he has commended us to the authorities in ***Nirmal Singh*** (supra), ***Raju v. State of Haryana*** (supra), ***Amit v. State of Maharashtra*** (supra), ***Surender Pal v. State of Gujarat***[148], ***Rameshbhai Chandubhai Rathod II*** (supra), ***Amit v. State of Uttar Pradesh*** (supra), ***Anil v. State of Maharashtra***[149] and ***Lalit Kumar Yadav v. State of Uttar Pradesh***[150].

325. Learned senior counsel has emphasized on the reform, rehabilitation and absence of any continuing threat to the collective which are factors to be taken into consideration for the purpose of commutation of death penalty to life imprisonment. In this regard, learned senior counsel has drawn inspiration from the decisions in ***Ronny*** (supra), ***Nirmal Singh*** (supra), ***Bantu v. State of Madhya Pradesh***[151], ***Lehna*** (supra), ***Rahul*** (supra), ***Santosh Kumar Bariyar*** (supra), ***Santosh Kumar Singh*** (supra), ***Rajesh Kumar v. State***[152], ***Amit v. State of Uttar Pradesh*** (supra), ***Ramnaresh v. State of Chhattisgarh***[153], ***Sandesh v. State of Maharashtra***[154] and ***Lalit Kumar Yadav*** (supra).

326. Mr. Ramachandran has also submitted that the present case should be treated as a special category as has been held in ***Swamy Shradhananda (2) v. State of Karnataka***[155] and the recent Constitution Bench decision in ***Union of India v. Sriharan***[156]. It is urged by him that in many a case, this Court has exercised the said discretion. Learned senior counsel in that regard has drawn our attention to the pronouncements in ***Rameshbhai Chandubhai Rathod*** (supra), ***Neel Kumar v. State of Haryana***[157], ***Ram Deo Prasad v. State of Bihar***[158], ***Chhote Lal v.State of Madhya Pradesh***[159], ***Anil v. State of Maharashtra*** (supra), ***Rajkumar*** (supra) and ***Selvam v. State***[160]

327. Mr. Hegde, learned friend of the Court, canvassed that the theory of reformation cannot be ignored entirely in the obtaining factual matrix in view of the materials brought on record. Learned senior counsel would contend that imposition

[139] (2009) 5 SCC 740, [140] (2009) 6 SCC 498, [141] (2010) 1 SCC 58, [142] (2011) 2 SCC 764, [143] (2012) 4 SCC 107
[144] (2014) 11 SCC 129, [145] (1999) 6 SCC 60, [146] (2001) 9 SCC 50, [147] (2006) 12 SCC 79, [148] (2005) 3 SCC 127
[149] (2014) 4 SCC 69, [150] (2014) 11 SCC 129, [151] (2001) 9 SCC 615, [152] (2011) 13 SCC 706, [153] (2012) 4 SCC 257
[154] (2013) 2 SCC 479, [155] (2008) 13 SCC 767, [156] (2016) 7 SCC 1

of death penalty would be extremely harsh and totally unwarranted inasmuch as the case at hand does not fall in the category of rarest of rare case. That apart, it is contended by him that the entire incident has to be viewed from a different perspective, that is, the accused persons had the bus in their control, they were drunk, and situation emerged where the poverty-stricken persons felt empowered as a consequence of which the incident took place and considering the said aspect, they may be imposed substantive custodial sentence for specific years but not death penalty. Additionally, it is submitted by him that in the absence of pre-meditation to commit a crime of the present nature, it would not invite the harshest punishment.

328. Mr. Luthra, learned senior counsel, has referred to the reports of the Superintendent of Jail that the conduct of the accused persons in the jail has been absolutely non-satisfactory and non-cooperative and the diabolic nature of the crime has shaken the collective conscience. According to him, the diabolic nature of the crime has nothing to do with poverty, for it was not committed for alleviation of poverty but to satiate their sexual appetite and enormous perversity. He would submit that this would come in the category of rarest of the rare cases in view of the law laid down in ***Sevaka Perumal v. State of Tamil Nadu***[161], ***Kamta Tiwari v. State of Madhya Pradesh***[162], ***State of U.P. v. Satish***[163], ***Holiram Bordoloi v. State of Assam***[164], ***Ankush Maruti Shinde v. State of Maharashtra***[165], ***Sundar v. State166*** and ***Mohfil Khan v. State of Jharkhand***[167]

329. It is also submitted by Mr. Luthra that mitigating circumstances are required to be considered in the light of the offence and not alone on the backdrop of age and family background. For this purpose, he has relied upon ***Deepak Rai v. State of Bihar***[168] and ***Purshottam Dashrath Borate v. State of Maharashtra***[169].

330. Mr. Sharma and Mr. Singh, learned counsel for the appellants, would submit that the conduct of the accused persons shows reformation as there are engaged in educating themselves and also they have been participating in affirmative and constructive activities adopted in jail and so, death penalty should not be affirmed and should be commuted. Mr. Sharma, learned counsel appearing for the accused Mukesh, submits that he is not connected with the crime in question. It is put forth that the case at hand cannot be regarded as rarest of the rare cases and, therefore, the maximum punishment that can be given should be for a specific period.

331. Presently, we shall proceed to analyse the aforesaid aspect. In ***Bachan Singh*** (supra), the Court held thus:

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so.

[157] (2012) 5 SCC 766, [158] (2013) 7 SCC 725, [159] (2013) 9 SCC 795, [160] (2014) 12 SCC 274, [161] (1991) 3 SCC 471
162 (1996) 6 SCC 250, [163] (2005) 3 SCC 114, [164] (2005) 3 SCC 793, [165] (2009) 6 SCC 667, [166] (2013) 3 SCC 215
[167] (2015) 1 SCC 67, [168] (2013) 10 SCC 421, [169] (2015) 6 SCC 652

Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

332. In the said case, the Court, after referring to the authority in ***Furman v. Georgia***[170], noted the suggestion given by the learned counsel about the aggravating and the mitigating circumstances. The aggravating circumstances suggested by the counsel read as follows:

"*Aggravating circumstances*: A court may, however, in the following cases impose the penalty of death in its discretion:

(*a*) if the murder has been committed after previous planning and involves extreme brutality; or

(*b*) if the murder involves exceptional depravity; or

(*c*) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
(*i*) while such member or public servant was on duty; or

(*ii*) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(*d*) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

After reproducing the same, the Court opined: "Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

333. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

[170] 33 L Ed 2d 346 : 408 US 238 (1972)

> "*Mitigating circumstances*.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
>
> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

The Court then observed:

> "We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

334. In the said case, the Court has also held thus:

> "It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

335. In ***Machhi Singh*** (supra), a three-Judge Bench has explained the concept of 'rarest of the rare cases' by observing thus:

> "The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the

> community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."

336. Thereafter, the Court has adverted to the aspects of the feeling of the community and its desire for self-preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing:

> "But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

337. It is apt to state here that in the said case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. After so enumerating, the propositions that emerged from ***Bachan Singh*** (supra) were culled out which are as follows:

> "The following propositions emerge from *Bachan Singh case*:
>
> "(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded

full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

339. The three-Judge Bench further opined that to apply the said guidelines, the following questions are required to be answered:

> "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"
>
> In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

340. The Court in ***Haresh Mohandas Rajput v. State of Maharashtra***[171], while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in ***Bachan Singh*** (supra) and the principles culled out in ***Machhi Singh*** (supra) and opined as follows:

> "19. In *Machhi Singh* v. *State of Punjab* this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances." After so stating, the Court ruled thus:
>
> "20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate

[171] (2011) 12 SCC 56

> punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See *C. Muniappan* v. *State of T.N*[172]., *Dara Singh* v. *Republic of India*[173], *Surendra Koli* v. *State of U.P.*[174], *Mohd. Mannan*[175] and *Sudam* v. *State of Maharashtra*[176].)
>
> 21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand."

341. This Court, while dealing with the murder of a young girl of about 18 years in ***Dhananjoy Chatterjee*** (supra), took note of the fact that the accused was a married man of 27 years of age, the principles stated in ***Bachan Singh's*** case and further took note of the rise of violent crimes against women in recent years and, thereafter, on consideration of the aggravating factors and mitigating circumstances, opined that:

> "In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment efitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

342. After so stating, the Court took note of the fact that the deceased was a school-going girl and it was the sacred duty of the appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust, he had raped and murdered the girl in retaliation which made the crime more heinous. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless school-going girl of 18 years, the Court came to hold that the case fell in the category of rarest of the rare cases and, accordingly, affirmed the capital punishment imposed by the High Court.

343. In ***Laxman Naik v. State of Orissa***[177], the Court commenced the judgment with the following passage:

[172] (2010) 9 SCC 567, [173] (2011) 2 SCC 490, [174] Ibid, [175] (2011) 5 SCC 317 ,[176] (2011) 7 SCC 125s,
[177] (1994) 3 SCC 381

> "The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large".

344. It is worthy to note that in the said case, the High Court had dismissed the appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of the sentence, the Court referred to the decision in ***Bachan Singh's case*** and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case disclosed only aggravating circumstances against the appellant. Elaborating further, the Court held thus:

> "The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

After so stating, the Court, while affirming the death sentence, opined that:

> " …….The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the

> category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code."

345. ***Kamta Tiwari*** (supra) is a case where the appellant was convicted for the offences punishable under Sections 363, 376, 302 and 201 of IPC and sentenced to death by the learned trial Judge and the same was affirmedby the High Court. In appeal, the two-Judge Bench referred to the propositions culled out in ***Machhi Singh*** (supra) and expressed thus:

> "Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances — but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to he family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari Uncle'. Obviously her closeness with the appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder — as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

346. In ***Bantu v. State of Uttar Pradesh***[178], a five year old minor girl was raped and murdered and the appellant was awarded death sentence by the trial Court which was affirmed by the High Court. This Court found the appellant guilty of the crime and, thereafter, referred to the principles stated in ***Bachan Singh, Machhi Singh*** (supra) and ***Devender Pal Singh v. State of A.P.***[179] and eventually came to hold that the said case fell in the rarest of the rare category and the capital punishment was warranted. Being of this view, the Court declined to interfere with the sentence.

[178] (2008) 11 SCC 113, [179] (2002) 5 SCC 234

347. In ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***[180], the appellant was awarded sentence of death by the learned trial Judge which was confirmed by the High Court, for he was found guilty of the offences punishable under Sections 376(2)(f), 377 and 302 IPC. In the said case, the prosecution had proven that the appellant had lured a three year old minor girl child on the pretext of buying her biscuits and then raped her and eventually, being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:

> "37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.
>
> 38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

348. At this stage, it is fruitful to refer to some authorities where in cases of rape and murder, the death penalty was not awarded. In ***State of T.N. v. Suresh and another***[181], the Court, while unsettling the judgment of acquittal recorded by the High Court and finding that the accused was guilty of rape of a pregnant woman and also murder, awarded the sentence of life imprisonment by observing:

> "The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused". From the aforesaid authority, it is seen that the Court did not think it appropriate to restore the

[180] (2012) 4 SCC 37, [181] (1998) 2 SCC 372

death sentence passed by the trial court regard being had to the passage of time.

349. In ***Akhtar v. State of U.P.*** (supra), the appellant was found guilty of murder of a young girl after committing rape on her and was sentenced to death by the learned Sessions Judge and the said sentence was confirmed by the High Court. The two-Judge Bench referred to the decisions in ***Laxman Naik*** (supra) and ***Kamta Tiwari*** (supra) and addressed itself whether the case in hand was one of the rarest of the rare case for which punishment of death could be awarded. The Court distinguished the two decisions which have been referred to hereinabove and ruled:

> "In the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death".

350. In ***State of Maharashtra v. Barat Fakira Dhiwar***[182], a three-year old girl was raped and murdered by the accused. The learned trial Judge convicted the accused and awarded the death sentence. The High Court had set aside the order of conviction and acquitted him for the offences. This Court, on scrutiny of the evidence, found the accused guilty of rape and murder. Thereafter, the Court proceeded to deal with the sentence and, in that context, observed:

> "Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in *Bachan Singh* v. *State of Punjab*. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life".

351. Keeping in view the aforesaid authorities, the Court, in ***Vasanta Sampat Dupare v. State of Maharashtra***[183], proceeded to adumbrate what is the duty of the Court when the collective conscience is shocked because of he crime committed and observed:

> "... When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the

[182] (2002) 1 SCC 622, [183] (2015) 1 SCC 253

> intense indignation the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away with any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to rarest of the rare case. We are also required to pose two questions that has been stated in ***Machhi Singh's*** case."

352. In the said case, the Court dwelt upon the manner in which the crime was committed and how a minor girl had become a prey of the sexual depravity and was injured by the despicable act of the accused to silence the voice so that there would be no evidence. Dealing with the same, the Court referred to earlier judgments and held:

> "58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life-spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.
>
> 59. In this context, we may fruitfully refer to a passage from *Shyam Narain* v. *State (NCT of Delhi)*[184], wherein it has been observed as follows:

[184] (2013) 7 SCC 77

"*1*. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity."

In the said case, while describing the rape on an eight-year-old girl, the Court observed: (*Shyam Narain case*, SCC p. 88, para 26)

"*26*. … Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight-year-old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that 'child is a gift of the providence' enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers."

Elucidating further, the Court held:

"60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated.

> But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned counsel would submit that the appellant had no criminal ntecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.
>
> 62. As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four-year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold."

353. In the said case, a review petition bearing Review Petition (Criminal) Nos. 637-638 of 2015 was filed which has been recently dismissed. U.U. Lalit, J., authoring the judgment, has held:

> "19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition. 20. The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for

> Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in *Bachan Singh* but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petition."

354. The mitigating factors which have been highlighted before us on the basis of the affidavits filed by the appellants pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative path they have chosen and their transformation and the possibility of reformation. That apart, emphasis has been laid on their young age and rehabilitation.

355. Now, we shall focus on the nature of the crime and manner in which it has been commited. The submission of Mr. Luthra, learned senior counsel, is that the present case amounts to devastation of social trust and completely destroys the collective balance and invites the indignation of the society. It is submitted by him that that a crime of this nature creates a fear psychosis and definitely falls in the category of rarest of the rare cases.

356. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, PW-1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, *inter alia*, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the

record in Ex. PW-50/A and Ex. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, *inter alia*, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

357. When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the same.

358. Before we part with the case, we are obligated to record our unreserved appreciation for the assistance rendered by Mr. Raju Ramachandran and Mr. Sanjay R. Hegde, learned amicus curiae appointed by the Court. We must also record our uninhibited appreciation for Mr. M.L. Sharma and Mr. A.P. Singh, learned counsel

for the appellants, for they, keeping the tradition of the Bar, defended the appellants at every stage.

359. In view of our preceding analysis, the appeals are bound to pave the path of dismissal, and accordingly, we so direct.

R. BANUMATHI, J.

I have gone through the judgment of my esteemed Brother Justice Dipak Misra. I entirely agree with the reasoning adopted by him and the conclusions arrived at. However, in view of the significant issues involved in the matter, in the light of settled norms of appreciation of evidence in rape cases and the role of Judiciary in addressing crime against women, I would prefer to give my additional reasoning for concurrence.

2. Honesty, pride, and self-esteem are crucial to the personal freedom of a woman. Social progress depends on the progress of everyone. Following words of the father of our nation must be noted at all times:

> *"To call woman the weaker sex is a libel; it is man's injustice to woman. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be. If non-violence is the law of our being, the future is with woman. Who can make a more effective appeal to the heart than woman?"*

3. **Crimes against women – an area of concern:** Over the past few decades, legal advancements and policy reforms have done much to protect women from all sources of violence and also to sensitize the public on the issue of protection of women and gender justice. Still, the crimes against women are on the increase. As per the annual report of National Crime Records Bureau titled, 'Crime in India 2015' available at **http://ncrb.nic.in/StatePublications/CII/CII2015/FILES /Compendium - 15.11.16.pdf,** a total of 3,27,394 cases of crime against women were reported in the year 2015, which shows an increase of over 43% in crime against women since 2011, when 2,28,650 cases were reported. A percentage change of 110.5% in the cases of crime against women has been witnessed over the past decade (2005 to 2015), meaning thereby that crime against women has more than doubled in a decade. An overall crime rate under the head, 'crime against women' was reported as 53.9% in 2015, with Delhi UT at the top spot.

4. As per the National Crime Records Bureau, a total of 34,651 cases of rape under Section 376 IPC were registered during 2015 (excluding cases under the

Protection of Children from Sexual Offences Act, 2012). An increasing trend in the incidence of rape has been observed during the period 2011-2014. These cases have shown an increase of 9.2% in the year 2011 (24,206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with further increase of 35.2% in the year 2013 (33,707 cases) over 2012 and 9.0% in 2014 (36,735 cases) over 2013. A decrease of 5.7% was reported in 2015 (34,651 cases) over 2014 (36,735 cases). 12.7% (4,391 out of 34,651 cases) of total reported rape cases in 2015 were reported in Madhya Pradesh followed by Maharashtra (4,144 cases), Rajasthan (3,644 cases), Uttar Pradesh (3,025 cases) and Odisha (2,251 cases) accounting for 11.9%, 10.5%, 8.7% and 6.5% of total cases respectively. NCT of Delhi reported highest crime rate of 23.7% followed by Andaman & Nicobar Islands at 13.5% as compared to national average of 5.7%. In order to combat increasing crime against women, as depicted in the statistics of National Crime Records Bureau, the root of the problem must be studied in depth and the same be remedied through stringent legislation and other steps. In order to secure social order and security, it is imperative to address issues concerning women, in particular crimes against women on priority basis.

5. Stringent legislation and punishments alone may not be sufficient for fighting increasing crimes against women. In our tradition bound society, certain attitudinal change and change in the mind-set is needed to respect women and to ensure gender justice. Right from childhood years' children ought to be sensitized to respect women. A child should be taught to respect women in the society in the same way as he is taught to respect men. Gender equality should be made a part of the school curriculum. The school teachers and parents should be trained, not only to conduct regular personality building and skill enhancing exercise, but also to keep a watch on the actual behavioural pattern of the children so as to make them gender sensitized. The educational institutions, Government institutions, the employers and all concerned must take steps to create awareness with regard to gender sensitization and to respect women. Sensitization of the public on gender justice through TV, media and press should be welcomed. On the practical side, few of the suggestions are worthwhile to be considered. Banners and placards in the public transport vehicles like autos, taxis and buses etc. must be ensured. Use of street lights, illuminated bus stops and extra police patrol during odd hours must be ensured. Police/security guards must be posted at dark and lonely places like parks, streets etc. Mobile apps for immediate assistance of women should be introduced and effectively maintained. Apart from effective implementation of the various legislation protecting women, change in the mind set of the society at large and creating awareness in the public on gender justice, would go a long way to combat violence against women.

6. **Factual Matrix:** The entire factual matrix of the concerned horrendous incident has already been fairly set out in the judgment of my esteemed brother

Justice Dipak Misra, the High Court and the trial Court. Suffice only to briefly recapitulate the facts, for my reference purpose and for completion.

7. In the wintry night of 16.12.2012, when the entire Delhi was busy in its day-to-day affair, embracing the joy of year-end, two youths were bravely struggling to save their dignity and life. It is a case of barbaric sexual violence against women, in fact against the society at large, where the accused and juvenile in conflict with law picked up a 23 year old physiotherapy student and her male friend (PW-1) accompanying her, from a busy place in Delhi-Munirka Bus stop and subjected them to heinous offences. The accused gang-raped the prosecutrix in the moving bus and completely ravished her in front of her helpless friend, Awninder Pratap (PW-1). The accused, on satisfaction of their lust, threw both the victims, half naked, outside the bus, in December cold near Mahipalpur flyover. The prosecutrix and PW-1 were noticed in miserable condition near Mahipalpur flyover, where they were thrown, by PW-72 Raj Kumar, who was on patrolling duty that night in the area and PW-73 Ram Chandar, Head Constable, rushed the prosecutrix and PW-1 to Safdarjung Hospital owing to the need of immediate medical attention. Law was set in motion by the statement of PW-1, which was recorded after giving primary medical treatment to him. Statement/Dying declaration of the prosecutrix was also recorded by PW-49 Doctor, PW-27 Sub-Divisional Magistrate and PW-30 Metropolitan Magistrate. After intensive care and treatment in ICU in Delhi, the victim was airlifted to a hospital in Singapore by an air-ambulance where she succumbed to her injuries on 29.12.2012.

8. The incident shocked the nation and generated public rage. A Committee headed by Justice J.S. Verma, Former Chief Justice of India was constituted to suggest amendments to deal with sexual offences more sternly and effectively in future. The suggestions of the Committee led to the enactment of Criminal Law (Amendment) Act, 2013 which, *inter alia,* 322 brought in substantive as well as procedural reforms in the core areas of rape law. The changes brought in, *inter alia*, can broadly be titled as under:-

(i) Extension of the definition of the offence of rape in Section 375 IPC; (ii) Adoption of a more pragmatic approach while dealing with the issue of consent in the offence of rape; and (iii) Introduction of harsher penalty commensurating with the gravity of offence. These subsequent events though not relevant for the purpose of this judgment, I have referred to it for the sake of factual completion.

9. Both the courts below, by recording concurrent findings, have found all the accused guilty of the offences they were charged with and owing to the ravity and manner of committing the heinous offences held that the acts of the accused *shake the conscience of the society falling within the category of rarest of rare cases and* awarded death penalty. Briefly put, the courts below have found that the prosecution has established the guilt of the accused *inter alia* on the following:

1. Three dying declarations of the prosecutrix, complementing each other, corroborated by medical evidence and other direct as well as circumstantial evidence.

2. Testimony of eye witness - PW-1, corroborated by circumstantial evidence as well as scientific evidence.

3. Recovery of the bus in which incident took place and recovery of the concerned iron rod therefrom, completing the chain of circumstantial evidence, by proof of scientific evidence like DNA analysis, finger print analysis etc.

4. Arrest of the accused and their identification by PW-1, recovery of articles belonging to the prosecutrix and PW-1 from the accused, pursuant to their disclosure statement, substantiated by proof of DNA analysis.

5. Conspiracy of the accused in the commission of offence.

10. While concurring with the majority, I have recorded my reasoning by considering the evidence on record in the light of settled legal principles and also analysed the justifiability of the punishment awarded to the accused. For proper appreciation of evidence, it is apposite to first refer to the settled principles and norms of appreciation of evidence of prosecutrix and other evidence in a rape case.

11. **Duty of court in appreciation of evidence while dealing with cases of rape:** Crime against women is an unlawful intrusion of her right to privacy, which offends her self-esteem and dignity. Expressing concern over the increasing crime against women, in ***State of Punjab v. Gurmit Singh and Others*** (1996) 2 SCC 384, this Court held as under:-

> "**21.** Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female**. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case**……." **[Emphasis supplied]**

12. The above principle of law, declared in ***Gurmeet Singh's case*** is reiterated in various cases viz., ***State of Rajasthan v. N.K. The Accused*** (2000) 5 SCC 30; ***State of H.P. v. Lekh Raj and Another*** (2000) 1 SCC 247; ***State of H.P. v. Asha Ram*** (2005) 13 SCC 766.

13. Clause (g) of sub-section (2) of Section 376 IPC (prior to 2013 Amendment Act 13 of 2013) deals with cases of gang rape. In order to establish an offence under Section 376(2)(g) IPC, read with *Explanation I* thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape is committed by even one, all the accused are guilty, irrespective of the fact that only one or more of them had actually committed the act. Section 376(2)(g) read with *Explanation I* thus embodies a principle of joint liability. But so far as appreciation of evidence is concerned, the principles concerning the cases falling under sub-section(1) of Section 376 IPC apply.

14. In a case of rape, like other criminal cases, onus is always on the prosecution to prove affirmatively each ingredients of the offence. The prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts. In ***Narender Kumar v. State (NCT of Delhi)*** (2012) 7 SCC 171, it was held as under:-

> **"29.** However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. …… There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt."

15. At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of prosecutrix in lieu of settled legal principles. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well-settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination etc., if the same is found natural and trustworthy.

16. Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society.

Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity. In ***State of Karnataka v. Krishnappa,*** (2000) 4 SCC 75, it was held as under:-

> **"15.** Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity — it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. ……
>
> **16. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos**. [**emphasis supplied**]"

17. There is no legal compulsion to look for corroboration of the prosecutrix's testimony unless the evidence of the victim suffers from serious infirmities, thereby seeking corroboration. In ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,*** (1983) 3 SCC 217**,** it was held as under:-

> "**9.** In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. ……
>
> **10.** By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of

overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the ophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (*1*) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (*2*) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (*3*) She would have to brave the whole world. (*4*) ……

11. …….. **On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. ……. [emphasis supplied]"**

It was further held in ***Bharwada Bhoginbhai Hirjibhai (supra)*** that if the evidence of the victim does not suffer from any basic infirmity and the "probabilities-factor" does not render it unworthy of credence, there is no reason to insist on corroboration except corroboration by the medical evidence. The same view was taken in ***Krishan Lal v. State of Haryana*** (1980) 3 SCC 159.

18. It is well-settled that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable and there is a ring of truth in it. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not requirement of law but a guidance of prudence under given circumstances. In ***Rajinder alias Raju v. State of Himachal Pradesh,*** (2009) 16 SCC 69**,** it was held as under:-

"**19.** In the context of Indian culture, a woman—victim of sexual aggression—would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore,

ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent."

19. In ***Raju and Others v. State of Madhya Pradesh*** (2008) 15 SCC 133, it was held as under:-

"**10.** …….that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. ……

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

20. In ***State of H.P. v. Asha Ram*** (2005) 13 SCC 766, this Court highlighted the importance of, and the weight to be attached to, the testimony of the prosecutrix. In para (5), it was held as under:

"**5.** …….. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

21. As held in the case of ***State of Punjab v. Ramdev Singh*** (2004) 1 SCC 421, there is no rule of law that the testimony of the prosecutrix cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. The above judgment of ***Ramdev Singh (supra)*** has been approvingly quoted in ***State of U.P. v. Munshi*** (2008) 9 SCC 390.

22. In a catena of decisions, this Court has held that conviction can be based on the sole testimony of the prosecutrix, provided it is natural, trustworthy and worth being relied upon *vide* ***State of H.P. v. Gian Chand*** (2001) 6 SCC 71, ***State of Rajasthan v. N.K. The Accused*** (2000) 5 SCC 30; ***State of H.P. v. Lekh Raj and Another*** (2000) 1 SCC 247, ***Wahid Khan v. State of Madhya Pradesh*** (2010) 2 SCC 9, ***Dinesh Jaiswal v. State of Madhya Pradesh*** (2010) 3 SCC 232; ***Om Prakash v. State of Haryana*** (2011) 14 SCC 309.

23. Observing that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix and that corroboration of testimony of a prosecutrix is not a requirement of law but only a rule of prudence, in ***Narender Kumar's case (supra)***, this Court held as under:-

> "**20.** It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case."
>
> **21.** A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, *if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence*, direct or substantial (*sic* circumstantial), which may lend assurance to her testimony. (Vide *Vimal Suresh Kamble* v. *Chaluverapinake Apal S.P.* (2003) 3 SCC 175 and *Vishnu* v. *State of Maharashtra* (2006) 1 SCC 283.)"

24. Courts should not attach undue importance to discrepancies, where the contradictions sought to be brought up from the evidence of the rosecutrix are immaterial and of no consequence. Minor variations in the testimony of the witnesses are often the hallmark of truth of the testimony. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Due to efflux of time, there are bound to be minor contradictions/discrepancies in the statement of the prosecutrix but such minor discrepancies and inconsistencies are only natural since when truth is sought to be projected through human, there are bound to be certain inherent contradictions. But as held in ***Om Prakash v. State of U.P.*** (2006) 9 SCC 787, the Court should examine the broader probabilities of a case.

25. There is no quarrel over the proposition that the evidence of the prosecutrix is to be believed by examining the broader probabilities of a case. But where there are serious infirmities and inherent inconsistencies in evidence; the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part, no reliance can be placed upon the testimony of the prosecutrix. In ***Tameezuddin v. State (NCT of Delhi),*** (2009) 15 SCC 566, it was held as under:-

> "**9.** It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable."

The same view was taken in ***Suresh N. Bhusare v. State of Maharashtra*** (1999) 1 SCC 220 and ***Jai Krishna Mandal v. State of Jharkhand*** (2010) 14 SCC 534.

26. On the anvil of the above principles, let us test the case of prosecution and version of the prosecutrix as depicted in her dying declaration.

27. **Dying Declaration:** Prosecution relies upon three dying declarations of the victim:- (i) Statement of victim recorded by PW-49 Dr. Rashmi Ahuja (Ex. PW-49/A) when the victim was brought to Safdarjung Hospital and admitted in the Gynae casualty at about 11:15 p.m. on 16.12.2012 – the victim gave a brief account of the incident stating that she went to a movie with her friend Awnindra (PW-1) and that after the movie, they together boarded the bus from Munirka bus stop in which she was gang-raped and that she was thrown away from the moving bus thereafter, along with her friend; (ii) Second dying declaration recorded by PW-27 Usha Chaturvedi, SDM (Ex. PW-27/A) on 21.12.2012 at about 09:00 p.m. – the victim gave the details of the entire incident specifying the role of each accused: gang-rape, unnatural sex committed on her, the injuries inflicted by accused on her vagina and rectum, by use of iron rod and by insertion of hands in her private parts; description of the bus, robbery and lastly throwing both the victim and also her boyfriend out of the moving bus in naked condition near Mahipalpur flyover; (iii)

Third dying declaration recorded by PW-30 Pawan Kumar, Metropolitan Magistrate (Ex.PW-30/D) on 25.12.2012 at 1:00 PM at ICU, Safdarjung Hospital by putting questions in multiple choice and recording answers through such questions by gestures or writings – the victim wrote the names of the accused in the third dying declaration. Evidence of PW-28 Dr. Rajesh Rastogi and the certificate (Ex.PW-28/A) given by him establishes that the victim was in a fit mental condition to give the statement through gestures. Furthermore, PW-75 Asha Devi, mother of the victim in her cross-examination also deposed that she had a talk with her daughter on the night of 25.12.2012, which shows that the victim was conscious, communicative and oriented. Contentions urged, assailing the fit mental condition of the victim have no merit.

28. With regard to the contention that there were improvements in the dying declarations, I am of he view, the victim was gang-raped and iron rod was inserted in her private parts in the incident and the victim must have been pushed to deep emotional crisis. Rape deeply affects the entire psychology of the woman and humiliates her, apart from leaving her in a trauma. The testimony of the rape victim must be appreciated in the background of the entire case and the trauma which the victim had undergone. As a matter of record, PW-49 Dr. Rashmi Ahuja, at around 11:15 p.m. on the night of 16.12.2012, had attended to the prosecutrix as soon as she was brought to the hospital and had prepared casualty/OPD Card of the prosecutrix (Ex. PW-49/A), as well as her MLC (Ex. PW-49/B). At that time, PW-49 had found her cold and clammy due to vaso-constriction. The prosecutrix was found shivering, for which she was administered IV line and warm saline in order to stabilize her pulse and BP. When the victim was in such a condition, the victim cannot be expected to give minute details of the occurrence like overt act played by the accused, insertion of iron rod etc. There is no justification for blowing up such omission out of proportion in the statement recorded by PW-49 Dr. Rashmi Ahuja and doubt the same. In the occurrence, physical and emotional balance of the victim must have been greatly disturbed. Startled by the incident, whatever the victim was able to momentarily recollect, she narrated to PW-49 and placed in that position non-mention of minute details in Ex.PW-49/A cannot be termed as a material omission.

29. Dying declaration is a substantial piece of evidence provided it is not tainted with malice and is not made in an unfit mental state. Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well-known tests to ascertain as to whether the statement was made in reference to cause of death of its maker and whether the same could be relied upon or not. The Court also has to satisfy as to whether the deceased was in a fit mental state to make the statement. The Court must scrutinize the dying declaration carefully and ensure that the declaration is not the result of tutoring, prompting or imagination. Once the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration. It cannot be

laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. That the deceased had the opportunity to observe and identify the assailants and was in a fit state to make the declaration. [***K. Ramachandra Reddy and Anr. v. Public Prosecutor*** (1976) 3 SCC 618]

30. The principles governing dying declarations have been exhaustively laid down in several judicial pronouncements. In ***Paniben (Smt.) v. State of Gujarat,*** (1992) 2 SCC 474, this Court referred to a number of judgments laying down the principles governing dying declaration. In this regard, I find it apposite to quote the following from ***Paniben (supra)*** as under:-

> **"18.** Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:
>
> (*i*) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*Munnu Raja* v. *State of M.P.* (1976) 3 SCC 104)
>
> (*ii*) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (*State of U.P.* v. *Ram Sagar Yadav* (1985) 1 SCC 522; *Ramawati Devi* v. *State of Bihar* (1983) 1 SCC 211).
>
> (*iii*) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (*K. Ramachandra Reddy* v. *Public Prosecutor* (1976) 3 SCC 618). (*iv*) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (*Rasheed Beg* v. *State of M.P.* (1974) 4 SCC 264)

(*v*) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (*Kake Singh* v. *State of M.P.* (1981) Supp. SCC 25) (*vi*) A dying declaration which suffers from infirmity cannot form the basis of conviction. (*Ram Manorath* v. *State of U.P.* (1981) 2 SCC 654)

(*vii*) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (*State of Maharashtra* v. *Krishnamurti Laxmipati Naidu* (1980) Supp. SCC 455)

(*viii*) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. *Surajdeo Oza* v. *State of Bihar* (1980) Supp. SCC 769)

(*ix*) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (*Nanahau Ram* v. *State of M.P.* (1988) Supp. SCC 152)

(*x*) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (*State of U.P.* v. *Madan Mohan* (1989) 3 SCC 390)" The above well-settled tests relating to dying declarations and the principles have been elaborately considered in a number of judgments. *[Vide* ***Khushal Rao v. State of Bombay***, AIR 1958 SC 22; ***State of Uttar Pradesh v. Ram Sagar Yadav,*** (1985) 1 SCC 552; ***State of Orissa v. Bansidhar Singh,*** (1996) 2 SCC 194; ***Panneerselvam v. State of Tamil Nadu*** (2008) 17 SCC 190; ***Atbir v. Govt. of NCT of Delhi*** (2010) 9 SCC 1 and ***Umakant and Anr. v. State of Chhattisgarh*** (2014) 7 SCC 405].

31. **Multiple Dying Declarations:** In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declaration, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations. Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration. Court has to examine the contents of dying declaration in the light of various surrounding facts and circumstances. This Court in a number of cases, where there were multiple dying declarations, consistent in material particulars not being contradictory to each other, has affirmed the conviction. [*Vide* ***Vithal v. State of Maharashtra*** (2006) 13 SCC 54].

32. In ***Amol Singh v. State of Madhya Pradesh*** (2008) 5 SCC 468, while discarding the two inconsistent dying declarations, laid down the principles for consideration of multiple dying declarations as under:-

> **"13.** Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See *Kundula Bala Subrahmanyam* v. *State of A.P.* (1993) 2 SCC 684) However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

33. In ***Ganpat Mahadeo Mane v. State of Maharashtra*** (1993) Supp.(2) SCC 242, there were three dying declarations. One recorded by the doctor; the second recorded by the police constable and also attested by the doctor and the third dying declaration recorded by the Executive Magistrate which was endorsed by the doctor. Considering the third dying declaration, this Court held that all the three dying declarations were consistent and corroborated by medical evidence and other circumstantial evidence and that they did not suffer from any infirmity.

34. In ***Lakhan v. State of M.P.*** (2010) 8 SCC 514, this Court considered a similar situation where in the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the Judicial Magistrate lacked certain information given earlier. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between two dying declarations and non-mention of certain features in the dying declarations recorded by the Judicial Magistrate does not make both the dying declarations inconsistent.

35. In the light of the above principles, I now advert to analyze the facts of the present case. The victim made three dying declarations:- (i) statement recorded by PW-49 Dr. Rashmi Ahuja immediately after the victim was admitted to the hospital; (ii) Dying declaration (Ex.PW-27/A) recorded by PW-27 SDM Usha Chaturvedi on 21.12.2012; and (iii) dying declaration (Ex.PW-30/D) recorded by PW-30 Pawan Kumar, Metropolitan Magistrate on 25.12.2012 at 1:00 P.M by multiple choice questions and recording answers by gestures and writing. In the first dying declaration (Ex.PW-49/A), the prosecutrix has stated that more than two men

committed rape on her, bit her on lips, cheeks and breast and also subjected her to unnatural sex. In the second dying declaration (Ex.PW-27/A) recorded by PW-27, the victim has narrated the entire incident in great detail, specifying the role of each accused, rape committed by number of persons, insertion of iron rod in her private parts, description of the bus, robbery committed and throwing of both the victims out of the moving bus in naked condition. In the second dying declaration, she has also stated that the accused were addressing each other with the names like, ***"Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay".*** In the second dying declaration, though there are improvements in giving details of the incident, names of the accused etc., there are no material contradictions between the first and second dying declaration (Ex.PW-49/A and Ex.PW-27/A).

36. On 25.12.2012 at 1:00 P.M, PW-30 Pawan Kumar, Metropolitan Magistrate recorded the statement by putting multiple choice questions to the victim and by getting answers through gestures and writing. The third dying declaration (Ex.PW-30/D) is found consistent with the earlier two declarations. It conclusively establishes that the victim was brutally gang-raped, beaten by iron rod, subjected to other harsh atrocities and was finally dumped at an unknown place. While making the third declaration, the victim also tried to reveal the names of the accused by writing in her own handwriting viz. Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju.

37. As per the settled law governing dying declarations, even if there are minor discrepancies in the dying declarations, in the facts and circumstances of the case, the Court can disregard the same as insignificant. A three-Judge Bench of this Court in ***Abrar v. State of Uttar Pradesh*** (2011) 2 SCC 750***,*** held that it is practical that minor discrepancies in recording dying declarations may occur due to pain and suffering of the victim, in case the declaration is recorded at multiple intervals and thus, such discrepancies need not be given much emphasis.

> "**12**. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To our mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. We, particularly, notice that the dying declaration had been recorded by the Tahsildar after the doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. We are, therefore, of the opinion, that no fault whatsoever could be found in the dying declarations."

38. When a dying declaration is recorded voluntarily, pursuant to a fitness report of a certified doctor, nothing much remains to be questioned unless, it is proved that the dying declaration was tainted with animosity and a result of tutoring.

Especially, when there are multiple dying declarations minor variations does not affect the evidentiary value of other dying declarations whether recorded prior or subsequent thereto. In ***Ashabai and Anr. v. State of Maharashtra*** (2013) 2 SCC 224, it was held as under:

> "15. ….As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other."

39. Considering the present case on the anvil of the above principles, I find that though there was time gap between the declarations, all the three dying declarations are consistent with each other and there are no material contradictions. All the three dying declarations depict truthful version of the incident, particularly the detailed narration of the incident concerning the rape committed on the victim, insertion of iron rod and the injuries caused to her vagina and rectum, unnatural sex committed on the victim and throwing the victim and PW-1 out of the moving bus. All the three dying declarations being voluntary, consistent and trustworthy, satisfy the test of reliability.

40. **Dying Declaration by gestures and nods:** Adverting to the contention that the third dying declaration made through gestures lacks credibility, it is seen that the multiple choice questions put to the prosecutrix by PW-30 Pawan Kumar, Metropolitan Magistrate, were simple and easily answerable through nods and gestures. That apart, before recording the dying declaration, PW-30 Pawan Kumar, Metropolitan Magistrate had satisfied himself about fit mental state of the victim to record dying declaration through nods and gestures. There is nothing proved on record to show that the mental capacity of the victim was impaired, so as to doubt the third dying declaration. As the victim was conscious, oriented and meaningfully communicative, it is natural that the victim was in a position to write the names of the accused persons and also about the use of long iron rod. The third dying declaration recorded through nods and gestures and also by the victim's own writing, writing the names of the accused inspires confidence in the Court; the same was rightly relied upon by the trial Court as well as the High Court.

41. Dying declaration made through signs, gesture or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the Court ought to take is to ensure that the person recording the dying

declaration was able to correctly notice and interpret the gestures or nods of the declarant. While recording the third dying declaration, signs/gestures made by the victim, in response to the multiple choice questions put to the prosecutrix are admissible in evidence.

42. A dying declaration need not necessarily be by words or in writing. It can be by gesture or by nod. In ***Meesala Ramakrishan v. State of A.P.*** (1994) 4 SCC 182, this Court held as under:-

> "20. …..that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational attainment, what gestures and nods were made, what were the questions asked — whether they were simple or complicated — and how effective or understandable the nods and gestures were."

The same view was reiterated in ***B. Shashikala v. State of A.P.*** (2004) 13 SCC 249.

43. In the case of rape and sexual assault, the evidence of prosecutrix is very crucial and if it inspires confidence of the court, there is no requirement of law to insist upon corroboration of the same for convicting the accused on the basis of it. Courts are expected to act with sensitivity and appreciate the evidence of the prosecutrix in the background of the entire facts of the case and not in isolation. In the facts and circumstances of the present case as the statements of the prosecutrix in the form of three dying declarations are consistent with each other and there are no material contradiction, they can be completely relied upon without corroboration. In the present case, the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond reasonable doubt. The victim also wrote the names of the accused persons in her own hand-writing in the dying declaration recorded by PW-30 (Ex.PW-30/D). Considering the facts and circumstances of the present case and upon appreciation of the evidence and material on record, I find all the three dying declarations consistent, true and voluntary, satisfying the test of probabilities factor. That apart, the dying declarations are well corroborated by medical and scientific evidence adduced by the prosecution. Moreover, the same has been amply corroborated by the testimony of eye witness-PW-1.

44. **Corroboration of Dying declaration by Medical Evidence:-** The dying declaration is amply corroborated by medical evidence depicting injuries to vagina and internal injuries to rectum and recto-vaginal septum as noted by PW-49 Dr. Rashmi Ahuja and PW-50 Dr, Raj Kumar Chejara. On the night of 16.12.2012, the prosecutrix was medically examined by PW-49 who recorded her injuries and statement in the MLC (Ex. PW-49/B). On local examination, a sharp cut over right labia and a 6 cm long tag of vagina was found hanging outside the introitus. Vaginal

examination showed bleeding and about 7 to 8 cm long posterior vaginal wall tear. A rectal tear of about 4 to 5 cm was also noticed communicating with the vaginal tear. Apart from the said injuries to the private parts of the prosecutrix, guarding and rigidity was also found in her abdomen and several bruises and marks on face were noticed. Bruises and abrasions around both the eyes and nostrils were also found. Lips were found edematous and left side of the mouth was injured by a small laceration. Bite marks over cheeks and breast, below areola, were also present. Bruises over the left breast and bite mark in interior left quadrant were prominent.

45. During surgery, conducted on 16/17.12.2012 PW-50 Dr. Raj Kumar Chejara (Ex.PW-50/A and Ex. PW-50/B) noted contusion and bruising of jejunum, large bowel, vaginal tear, and completely torn recto-vaginal septum. Small and large bowels were affected and were extremely bad for any definitive repair. It was also noted that rectum was longitudinally torn and the tear was continuing upward involving sigmoid colon, descending colon which was splayed open. There were multiple perforations at many places of ascending colon and calcum. Terminal illeum approximately one and a half feet loosely hanging in the abdominal cavity avulsed from its mesentery. Rest of the small bowel was non-existent with only patches of mucosa at places and borders of the mesentery were contused. While performing second surgery on 19th December, 2012, surgery team also recorded findings that rectum was longitudinally torn on anterior aspect in continuation with peritorial tear and other internal injuries. On 26-12-2012 the condition of the prosecutrix was examined and it was decided to shift her abroad for further treatment and she was shifted by an air-ambulance to Singapore Mount Elizabeth Hospital. The prosecutrix died at Mount Elizabeth Hospital, Singapore on 29-12-2012 at 04:45 AM. Cause of death is stated as sepsis with multi organ failure following multiple injuries. (Ex.PW-34/A)

46. Injuries to vagina, rectum and recto-vaginal septum as noted by PW-49 Dr. Rashmi Ahuja and PW-50 Dr. Raj Kumar Chejara; and the injuries as depicted in the post-mortem certificate, including the other external injuries which are evidently marks of violence during the incident, exhibit the cruel nature of gang rape committed on the victim. The profused bleeding from vagina and tag of vagina hanging outside; completely recto-vaginal septum clearly demonstrate the violent act of gang rape committed on the victim. The medical reports including the operation theatre notes (Ex. PW-50/A and 50/B) and the injuries thereon indicates the pain and suffering which the victim had undergone due to multiple organ failure and other injuries caused by insertion of iron rod.

47. If considered on the anvil of settled legal principles, injuries on the person of a rape victim is not even a *sine qua non* for proving the charge of rape, as held in ***Joseph v. State of Kerala*** (2000) 5 SCC 197. The same principle was reiterated in ***State of Maharashtra v. Suresh*** (2000) 1 SCC 471. As rightly held in ***State of Rajasthan v. N.K., The Accused***(2000) 5 SCC 30, absence of injury on the person of

the victim is not necessarily an evidence of falsity of the allegations of rape or evidence of consent on the part of the prosecutrix. In the present case, the extensive injuries found on the vagina/private parts of the body of the victim and injuries caused to the internal organs and all over the body, clearly show that the victim was ravished.

48. **Corroboration of dying declaration by scientific evidence:-** The DNA profile generated from blood-stained pants, t-shirts and jackets recovered at the behest of A-2 Mukesh matched with the DNA profile of the victim. Likewise, the DNA profile generated from the blood-stained jeans and banian recovered at the behest of A-3 Akshay matched with the DNA profile of the victim. DNA profile generated from the blood-stained underwear, chappal and jacket recovered at the behest of A-4 Vinay matched with the DNA profile of the victim. DNA profiles generated from the clothes of the accused recovered at their behest consistent with that of the victim is an unimpeachable evidence incriminating the accused in the occurrence. As submitted by the prosecution, there is no plausible explanation from the accused as to the matching of DNA profile of the victim with that of the DNA profile generated from the clothes of the accused. The courts below rightly took note of the DNA analysis report in finding the accused guilty.

49. **Bite marks on the chest of the victim and Odontology Report:** It is also to be noted that the photographs of bite marks found on the body of the victim, lifted by PW-66 Shri Asghar Hussain were examined by PW-71 Dr. Ashith B. Acharya. The analysis shows that at least three bite marks were caused by accused Ram Singh whereas one bite mark has been identified to have been most likely caused by accused Akshay. This aspect of Odontology Report has been elaborately discussed by the High Court in paragraphs (91) to (94) of its judgment. Odontology Report which links accused Ram Singh and accused Akshay, with the case, strengthens the prosecution case as to their involvement.

50. Going by the version of the prosecutrix, as per the dying declaration and the evidence adduced, in particular medical evidence and scientific evidence, I find the evidence of the prosecutrix being amply corroborated. As discussed earlier, in rape cases, Court should examine the broader probabilities of a case and not get swayed by discrepancies. The conviction can be based even on the sole testimony of the prosecutrix. However, in this case, dying declarations recorded from the prosecutrix are corroborated in material particulars by:- (i) medical evidence; (ii) evidence of injured witness PW-1; (iii) matching of DNA profiles, generated from blood-stained clothes of the accused, iron rod recovered at the behest of deceased accused Ram Singh and various articles recovered from the bus with the DNA profile of the victim; (iv) recovery of belongings of the victim at the behest of the accused, viz. debit card recovered from A-1 Ram Singh and Nokia mobile from A-4 Vinay. The dying declarations well corroborated by medical and scientific evidence strengthen the case of the prosecution by conclusively connecting the accused with the crime.

51. **Use of Iron Rod and death of the victim:** Case of the prosecution is that the accused brutally inserted iron rod in the vagina of the prosecutrix and pulled out internal organs of the prosecutrix. The defence refuted the use of iron rod by the accused on the ground that the complainant as well as the victim did not mention the use of iron rods in their first statements. Contention of the appellants is that when the victim had given details of the entire incident to PW-49 Dr. Rashmi Ahuja, if iron rod had been used, she would not have omitted to mention the use of iron rods in the incident. We do not find force in such a contention, as ample reliable evidence are proved on record which lead to the irresistible conclusion that iron rod was used and it was not a mere piece of concoction.

52. Use of iron rods and insertion of the same in the private parts of the victim is established by the second dying declaration recorded by SDM PW-27 Usha Chaturvedi, where the victim has given a detailed account of the incident, role of the accused, gang rape committed on her and other offences including the use of iron rods. The brutality with which the accused persons inserted iron rod in the rectum and vagina of the victim and took out her internal organs from the vaginal and anal opening is reflected in Ex.PW- 49/A. Further, medical opinion of PW-49 (Ex. PW-49/G) stating that the recto-vaginal injury could be caused by the rods recovered from the bus, strengthens the statement of the victim and the prosecution version. When the second and third dying declarations of the prosecutrix are well corroborated by the medical evidence, non-mention of use of iron rods in prosecutrix's statement to PW-49 Dr. Rashmi Ahuja (Ex. PW-49/A), does not materially affect the credibility of the dying declaration. Insertion of iron rod in the private parts of the prosecutrix is amply established by the nature of multiple injuries caused to jejunum and rectum which was longitudinally torn, tag of vagina hanging out; and completely torn recto-vaginal septum.

53. At the behest of accused Ram Singh two iron rods (**Ex.P-49/1** and **Ex.P-49/2**) were recovered from the shelf of the driver's cabin *vide* seizure Memo Ex.PW-74/G. The blood-stained rods deposited in the *Malkhana* were thereafter sent for chemical analysis. The DNA report prepared by PW-45 Dr. B.K Mohapatra, indicates that the DNA profile developed from the blood-stained iron rods is consistent with the DNA profile of the victim. Presence of blood on the iron rods and the DNA profile of which is consistent with the DNA profile of the victim establishes the prosecution case as to the alleged use of iron rods in the incident.

54. **Evidence of PW-1:** In his first statement made on 16.12.2012, eye witness PW-1 stated that he accompanied the prosecutrix to Select City Mall, Saket, New Delhi in an auto from Dwarka, New Delhi where they watched a movie till about 08:30 p.m. After leaving the Mall, PW-1 and the victim took an auto to Munirka from where they boarded the fateful bus. After the prosecutrix and PW-1 boarded the bus, the accused surrounded PW-1 and pinned him down in front side of the bus. While the accused Vinay and Pawan held PW-1, the other three accused committed

rape on the victim on the rear side of the bus. Thereafter, other accused held PW-1, while Vinay and Pawan committed rape on the victim. Later accused Mukesh who was earlier driving the bus, committed rape on the victim. After the incident, PW-1 and the prosecutrix were thrown out of the moving bus, near Mahipalpur flyover. In the incident, PW-1 himself sustained injuries which lends assurance to his credibility.

55. That PW-1 accompanied the victim to Select City Mall and that he was with the victim till the end, is proved by ample evidence. As per the case of the prosecution, on the fateful day, the complainant and the prosecutrix had gone to Saket Mall to see a movie. CCTV footage produced by PW-25 Rajender Singh Bisht in two CDs (Ex.PW-25/C-1 and PW-25/C-2) and seven photographs (Ex.PW-25/B-1 to Ex.PW-25/B-7) corroborate the version of PW-1 that the complainant and the victim were present at Saket Mall till 8:57 p.m. The certificate under Section 65-B of the Indian Evidence Act, 1872 with respect to the said footage is proved by PW-26 Shri Sandeep Singh (Ex.PW-26/A) who is the CCTV operator at Select City Mall.

56. The computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65-B of the Evidence Act. Sub-section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65-B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act.

57. Having carefully gone through the deposition of PW-1, I find that his evidence, even after lengthy cross examination, remains unshaken. The evidence of a witness is not to be disbelieved simply because of minor discrepancies. It is to be examined whether he was present or not at the crime scene and whether he is telling the truth or not. PW-1 has clearly explained as to how he happened to be with the victim and considering the cogent evidence adduced by the prosecution, presence of PW-1 cannot be doubted in any manner. PW-1 himself was injured in the incident and he was admitted in the Casualty Ward, where PW-51 Dr. Sachin Bajaj examined him. As per Ex.PW-51/A, lacerated wound over the vertex of scalp, lacertated wound over left upper lip and abrasion over right knee were found on the person of PW-1. Testimony of PW-1 being testimony of an injured witness lends credibility to his evidence and prosecution's case. As rightly pointed out by the Courts below, no convincing grounds exist to discard the evidence of PW-1, an injured witness.

58. The question of the weight to be attached to the evidence of an injured witness has been extensively discussed by this Court in ***Mano Dutt and Anr. v State of Uttar Pradesh*** (2012) 4 SCC 79. After exhaustively referring to various judgments on this point, this Court held as under :-

> "31. We may merely refer to *Abdul Sayeed* v. *State of M.P.(2010)10 SCC 259* where this Court held as under: (SCC pp. 271-72, paras 28-30)
>
> "*28*. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness.' [Vide *Ramlagan Singh* v. *State of Bihar(1973) 3 SCC 881*, *Malkhan Singh* v. *State of U.P.(1975) 3 SCC 311*, *Machhi Singh* v. *State of Punjab (1983) 3 SCC 470*, *Appabhai* v. *State of Gujarat1988 Supp SCC 241*, *Bonkya* v. *State of Maharashtra(1995) 6 SCC 447*, *Bhag Singh v. State of Punjab (1997) 7 SCC 712*, *Mohar* v. *State of U.P.(2002) 7 SCC 606* (SCC p. 606*b-c*), *Dinesh Kumar* v. *State of Rajasthan(2008) 8 SCC 270*, *Vishnu* v. *State of Rajasthan(2009) 10 SCC 477*, *Annareddy Sambasiva Reddy* v. *State of A.P.(2009) 12 SCC 546* and *Balraje* v. *State of Maharashtra(2010) 6 SCC 673*.]
>
> *29*. While deciding this issue, a similar view was taken in *Jarnail Singh* v. *State of Punjab(2009) 9 SCC 719* where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29) '*28*. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa* v. *State of Karnataka1994 Supp (3) SCC 235* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.
>
> *29*. In *State of U.P.* v. *Kishan Chand(2004) 7 SCC 629* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was

present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan* v. *State of Haryana(2006) 12 SCC 459*). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.'

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

59. After the accused were arrested, they made disclosure statements. Pursuant to the said disclosure statements, recoveries of various articles were effected which included clothes of the accused and articles belonging to PW-1 and the prosecutrix. The *Samsung Galaxy Duos mobile phone* recovered from A-2 was identified by the complainant in the court as belonging to him and testimony of the complainant was further fortified by the testimony of PW-56 Sandeep Dabral, Manager, Spice Mobile Shop, who stated that the said Samsung Mobile bearing the respective IMEI number was sold in the name of the complainant. Also, the *metro card* and *silver ring* recovered at the behest of A-3 Akshay were identified by PW-1 in court as belonging to him. The silver ring was also identified by the complainant in the TIP proceedings conducted on 28.12.2012. Likewise, the *Hush-Puppies* shoes recovered at the behest of A-4 Vinay and wrist watch of *Sonata* make recovered at the behest of A-5 Pawan were identified by PW-1 in TIP proceedings as belonging to him. Recoveries of articles of PW-1 and other scientific evidence, irrebutably establish the presence of PW-1 at the crime scene and strengthens the credibility of PW-1's testimony.

60. Apart from the recoveries made at the behest of the accused, presence of PW-1 is also confirmed by DNA profile generated from the blood-stained mulberry leaves and grass collected from Mahipalpur (seized *vide* Memo Ex. PW-74/C) where both the victims were thrown after the incident. As per the Chemical Analysis Report, DNA profile generated from the blood-stained murberry leaves collected from the Mahipalpur flyover were found to be of male origin and consistent with the DNA profile of PW-1. This proves that PW-1 was present with the victim at the time of the incident and both of them were together thrown out of the bus at Mahipalpur.

61. Further, as discussed infra, pursuant to the disclosure statement of the accused, clothes of accused, some of which were blood-stained and other

incriminating articles were recovered. PW-45 Dr. B.K. Mohapatra matched the DNA profiles of the blood detected on the clothes of the accused with that of the complainant and the victim. One set of DNA profile generated from jeans-pant of the accused Akshay (A-3) matched the DNA profile of PW-1. Likewise, one set of DNA profile generated from the sports jacket of accused Vinay (A-4) was found consistent with the DNA profile of PW-1. Also, one set of DNA profile generated from black coloured sweater of Accused Pawan Gupta (A-5) was found consistent with the DNA profile of PW-1. Result of DNA analysis further corroborates the version of PW-1 and strengthens the prosecution case. DNA Analysis Report, as provided by PW-45 is a vital piece of evidence connecting the accused with the crime.

62. Matching of DNA profile generated from the bunch of hair recovered from the floor of the bus near the second row seat on the left side, with DNA profile of the complainant is yet another piece of evidence corroborating the version of PW-1[*vide* Ex.PW-45/B]. Further, DNA profile developed from burnt cloth pieces, recovered from near the rear side entry of the bus was found consistent with DNA profile of PW-1; and this again fortifies the presence of PW-1 with the victim in the bus.

63. Contention of the appellants is that there are vital contradictions in the statements of PW-1. It is contended that initially PW-1 did not give the names of the accused in the FIR and that he kept on improving his version, in particular, in the second supplementary statement recorded on 17.12.2012 in which he gave the details of the bus involved. To contend that testimony of PW-1 is not trustworthy, reliance is placed on ***Kathi Bharat Vajsur And Anr. v State of Gujarat*** (2012) 5 SCC 724. In ***Kathi Bharat Vajsur's case***, this Court has observed that when there are inconsistencies or contradictions in oral evidence and the same is found to be in contradiction with other evidence then it cannot be held that the prosecution has proved the case beyond reasonable doubt.

64. While appreciating the evidence of a witness, the approach must be to consider the entire evidence and analyze whether the evidence as a whole gives a complete chain of facts depicting truth. Once that impression is formed, it is necessary for the court to scrutinize evidence particularly keeping in view the prosecution case. Any minor discrepancies or improvements not touching the core of the prosecution case and not going to the root of the matter, does not affect the trustworthiness of the witness. Insofar as the contention that PW-1 kept on improving his version in his statement recorded at various point of time, it is noted that there are indeed some improvements in his version but, the core of his version as to the occurrence remains consistent. More so, when PW-1 and the victim faced such a traumatic experience, immediately after the incident, they cannot be expected to give minute details of the incident. It would have taken some time for them to come out of the shock and recollect the incident and give a detailed version of the

incident. It is to be noted that in the present case, the statements of PW-1 recorded on various dates are not contradictory to each other. The subsequent statements though are more detailed as compared to the former ones, in the circumstances of the case, it cannot be said to be unnatural affecting the trustworthiness of PW-1's testimony.There is hardly any justification for doubting the evidence of PW-1, especially when it is corroborated by recovery of PW-1's articles from the accused and scientific evidence.

65. The trial Court as well as the High Court found PW-1's evidence credible and trustworthy and I find no reason to take a different view. The view of the High Court and the trial court is fortified by the decisions of this court in ***Pudhu Raja and Anr. v. State Rep. by Inspector of Police***, (2012) 11 SCC 196, ***Jaswant Singh v. State of Haryana*** (2000) 4 SCC 484 *and* ***Akhtar and Ors. v. State of Uttaranchal*** (2009) 13 SCC 722. Further, the evidence of PW-1 is amply strengthened by scientific evidence and recovery of the incriminating articles from the accused. The alleged omissions and improvements in the evidence of PW-1 pointed out by the defence do not materially affect the evidence of PW-1.

66. **Recovery of the bus and its Involvement in the incident:**
Description of the entire incident by PW-1 and the victim led the investigating team to the Hotel named "Hotel Delhi Airport", where PW-1 and the victim were dumped after the incident. PW-67 P.K. Jha, owner of Hotel Delhi Airport handed over the pen drive containing CCTV footage (Ex.P-67/1) and CD (Ex.P-67/2) to the Investigating Officer which were seized. From the CCTV footage, the offending bus bearing registration No.DL-1PC-0149 was identified by PW-1. The bus was seized from Ravi Dass Camp and Ram Singh (A-1) was also arrested.

67. PW-81 Dinesh Yadav is the owner of the bus bearing Registration No.DL-1PC-0149 (Ex.P-1). PW-81 runs buses under the name and style "Yadav Travels". On interrogation, PW-81 Dinesh Yadav stated that A-1 Ram Singh was the driver of the bus No.DL-1PC-0149 in December, 2012 and A-3 Akshay Kumar Singh was his helper in the bus. PW-81 also informed the police that the bus was attached to Birla Vidya Niketan School, Pushp Vihar, New Delhi to ferry students to the school in the morning and that it was also engaged by a Company named M/s. Net Ambit in Noida, to take its employees from Delhi to Noida. PW-81 also informed the police that after daily routine trip, A-1 Ram Singh used to park the bus at Ravi Dass Camp, R.K. Puram, near his residence. PW-81 further informed that on 17.12.2012, the bus as usual went from Delhi to Noida to take the Staff of M/s Net Ambit to their office. The recovery of the bus (Ex.P-1) and evidence of PW-81 led to a breakthrough in the investigation that A-1 Ram Singh was the driver of the bus and A-3 Akshay was the cleaner of the bus.

68. Furthermore, in order to prove that A1 Ram Singh (Dead) was the driver of the bus No.DL-1PC-0149 (Ex.P-1), PW-16 Rajeev Jakhmola, Manager (Administration) of Birla Vidya Niketan School, Pushp Vihar, New Delhi was

examined. In his evidence, PW-16 stated that PW-81, Dinesh Yadav had provided the school with seven buses on contract basis including the bus No.DL-1PC-0149 (Ex.P-1) and that A-1 Ram Singh was its driver. In his interrogation by the police, PW-16 had also handed over Ram Singh's driving licence alongwith copy of agreement of the school with the owner of the bus and other documents. By adducing the evidence of PW-81 Dinesh Yadav and PW-16 Rajeev Jakhmola, the prosecution has established that the bus in question was routinely driven by A-1 Ram Singh (Dead) and A-3 Akshay Kumar was the helper in the bus.

69. On 17.12.2012, a team of experts from CFSL comprising PW-45 Dr. B.K. Mohapatra, PW-46 A.D. Shah, PW-79 P.K. Gottam and others, went to the Thyagraj Stadium and inspected the **bus Ex.P1.** On inspection, certain articles were seized from the said bus *vide* seizure memo Ex.PW-74/P. It is brought on record that the samples were diligently collected and taken to CFSL, CBI by SI Subhash (PW-74) *vide* RC No. 178/21/12 for examination. The DNA profile of material objects lifted from the bus bearing No.DL-1PC-0149 were found consistent with that of the victim and the complainant. Matching of the DNA profile developed from the articles seized from the bus DL-1PC-0149 like hair recovered from the third row of the bus on the left side with the DNA profile of PW-1, strengthens the prosecution case as to the involvement of the offending bus bearing registration No.DL-1PC-0149. DNA profile developed from the blood-stained curtains of the bus and blood-stained seat covers of bus and the bunch of hair recovered from the floor of the bus below sixth row matched with the DNA profile of the victim. The evidence of DNA analysis is an unimpeachable evidence as to the involvement of the offending bus in the commission of offence and also strong unimpeachable evidence connecting the accused with the crime.

70. The accused neither rebutted this evidence nor offered any convincing explanation except making feeble attempt by stating that everything was concocted. PW-46, A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI examined the chance prints lifted from the bus. Chance print marked as 'Q.1' lifted from the bus (Ex.P-1) was found identical with the left palm print of accused Vinay Sharma. Further chance print marked as 'Q.4' was found identical with right thumb impression of accused Vinay Sharma. A finger print expert report (Ex.PW-46/D) states that the chance print lifted from the bus being identical with the finger print of accused Vinay Sharma, establishes the presence of accused Vinay Sharma in the bus, thereby strengthening prosecution case.

71. **Arrest and Recovery under Section 27 of the Indian Evidence Act:** Prosecution very much relies upon disclosure statements of the accused, pursuant to which articles of the victim and also of PW-1 were recovered. Accused being in possession of the articles of the victim and that of PW-1, is a militating circumstance against the accused and it is for the accused to explain as to how they came in possession of these articles. Details of arrest of accused and articles recovered from the accused are as munder:-

ACCUSED RAM SINGH (A-1) (Dead)			
ARREST (WHEN+ WHERE+ BY WHOM)	**ARTICLES RECOVERED FROM ACCUSED**		
	Details of articles recovered from the person of the accused	**Details of articles recovered pursuant to disclosure statement**	**Items identified as that of PW-1 Awninder Pratap Singh/Prosecutrix**
(1)	(2)	(3)	(4)
On 17.12.2012, PW-80 Pratibha Sharma alongwith PW-74 Subhash Chand SI and PW-65 Ct. Kirpal Singh arrested A-1 at 4:15 PM (Arrest Memo: Ex.PW-74/D) from Ravi Das Camp, R.K. Puram, Delhi.	1) One Unix Mobile Phone with MTNL Sim [Ex.PW-74/5]; (2) Photocopy of Election Card and Pan Card; (3) Rs. 207/- in cash [personal search Memo Ex.PW-74/E]	(1) Bus (Ex.P-1) DL-1PC-0149 (2) Keys of Bus, (Ex.P-74/2) (3)Driving License, Fitness Certificate, Permit Pollution Certificate and other documents of bus bearing registration no. DL-1PC-(0149 (Ex.P-74/4) (4) Two blood-stained rods (Ex.P49/1 and Ex.49/2) (5) Indian Bank Debit Card(Ex.P74/3) (6) Blood-stained green and black coloured T-Shirt (Ex.74/6) and blood-stained brown coloured chappal (Ex.74/7). (7) Some ashes and partly burnt clothes (seizure memo Ex. PW-74/M.)	Debit Card, marked as Ex. PW-74/3 belongs to the prosecutrix as deposed by PW-75- Asha Devi, mother of prosecutrix.

ACCUSED MUKESH (A-2)			
ARREST (WHEN+ WHERE+BY WHOM)	**ARTICLES RECOVERED FROM ACCUSED**		
	Details of articles recovered from the person of the accused	**Details of articles recovered pursuant to disclosure statement**	**Items identified as that of PW-1 Awninder Pratap Singh/ Prosecutrix**
(1)	(2)	(3)	(4)
A-2 was traced at Karoli	(1) Rs. 226/- in cash	Disclosure statement recorded	In the TIP
District, Rajasthan by PW-58 SI Arvind Kumar alongwith staff ASI Anand Prakash, HC Randhawa, HC Mukesh, HC Sachin and Ct. Umesh, pursuant to A-1's disclosure. He was formally arrested on 18.12.2012 at 6.30 p.m. by PW80 SI. (Arrest Memo Ex.PW-58/B)	(2) Key (3) one black and brown colour purse containing PAN Card, Visiting cards and voter card and (4)Nokia Mobile phone bearing IMEI No.351863010659247 (5) Samsung Galaxy Duos Mobile with IMEI No.354098053454886 And No.354099053454884 (Ex. P/6)	on 18.12.2012 by PW-60 HC Mahabir (Ex.PW-60/I) Following items recovered: 1. one blood-stained green T-shirt 2. one blood-stained grey colour pants. 3. blood-stained bluish grey colour jacket.	proceedings held on 20.12.2012, PW-1 identified the Samsung Galaxy Duos (recovered from accused Mukesh) as belonging to him.

ACCUSED AKSHAY (A-3)			
ARREST (WHEN+ WHERE+BY WHOM)	**ARTICLES RECOVERED FROM ACCUSED**		
	Details of articles recovered from the person of the accused	**Details of articles recovered pursuant to disclosure statement**	**Items identified as that of PW-1 Awninder Pratap Singh/ Prosecutrix**
(1)	(2)	(3)	(4)
On 21.12.2012 at 9:15 p.m., pursuant to the disclosure of A-1, PW-53 SI Upender alongwith team comprising Insp. Ritu Raj, PW-61 SI Jeet Singh and ASI Ashok Kumar arrested him from his house at Karmalahang. (Arrest Memo: Ex.PW53/A)	No personal articles recovered from the accused at his residence, Karmalahang	1) One black bag containing blood-stained blue jeans (2) Blue black Nokia mobile phone with IMEI No.359286040159081 (3) Blood-stained red coloured banian. (4) One silver ring (5) Two metro cards	In the TIP proceedings held on 26.12.2012, PW-1 identified the Silver ring (recovered from accused Akshay) as belonging to PW-1 Complainant

ACCUSED VINAY (A-4)			
ARREST (WHEN+ WHERE+BY WHOM)	**ARTICLES RECOVERED FROM ACCUSED**		
	Details of articles recovered from the person of the accused	**Details of articles recovered pursuant to disclosure statement**	**Items identified as that of PW-1 Awninder Pratap Singh/ Prosecutrix**
(1)	(2)	(3)	(4)
On 18.12.2012 at 1:30 p.m., on disclosure of A-1, PW-80 SI Pratibha Sharma alongwith PW-60 HC Mahabir and Manphool arrested him from Ravi Das Camp, R.K. Puram, Delhi in the presence of A-1. (Arrest Memo: Ex.PW-60/B). Supplementary disclosure recorded on 19.12.2012 by PW-68 SI Mandeep (Ex.PW-68/A)	(1) One black coloured Nokia mobile phone bearing IMEI no.35413805830821 418 (Ex.PW-60/D)	Blood-stained blue coloured jeans (Ex.P-68/1) 2. Blood-stained black coloured jacket (Ex.P-68/2) 3. Blood-stained full sleeved black coloured T-shirt (Ex.P-68/3) 4. Blue coloured chappals (Ex.P-68/4) 5. Hush puppy shoes (Ex.P2 under Ex.PW-68/C) 6. Black coloured Nokia mobile phone with IMEI No.353183039047391 (Ex.P-68/5) – seizure Memo Ex.PW-68/D	· PW-1 identified hush puppy shoes (recovered from accused Vinay) as belonging to him. · Nokia mobile phone bearing IMEI No.353183039047391 was identified as the mobile phone of the prosecutrix.

ACCUSED PAWAN GUPTA @ KALU (A-5)			
ARREST WHEN+ WHERE+BY WHOM)	**ARTICLES RECOVERED FROM ACCUSED**		
	Details of articles recovered from the person of the accused	**Details of articles recovered pursuant to disclosure statement**	**Items identified as that of PW-1 Awninder Pratap Singh/ Prosecutrix**
(1)	(2)	(3)	(4)
On 18.12.2012, on disclosure of A-1, PW-80 S.I. Pratibha Sharma Alongwith PW-60 HC Mahabir and Manphool went to Ravi Das Camp at 1:15 p.m. to arrest him. (Arrest Memo:Ex.PW-60/A)	1) One black purse containing some visiting cards (2) Rs.8,200 in cash (3)One silver coloured ring with green nug (Personal Search Memo: Ex.PW-60/C).	(1)one blood-stained black coloured sweater (Ex. P-68/6) (2)blood-stained coca cola (colour) pants. (Ex.68/7) (3)Blood-stained brown coloured underwear (Ex.P-68/8) (4)Brown coloured sports. Shoes (Ex.P-68/9) (5)One wristwatch of Sonata make (Ex.P-3) (6)Two currency notes of Rs.500/- each (Ex.P-7)	In the TIP proceedings conducted on 25.12.2012, Sonata wrist watch identified by PW-1 (recovered from accused Pawan) as belonging to him.

72. As noted in the above tabular form, various articles of the complainant and the victim were recovered from the accused viz., Samsung Galaxy Phone (recovered at the behest of A-2 Mukesh); silver ring (recovered at the behest of A-3 Akshay); Hush Puppies shoes (recovered at the behest of A-4 Vinay) and Sonata Wrist Watch (recovered at the behest of A-5 Pawan). Recovery of belongings of PW-1 and that of the victim, at the instance of the accused is a relevant fact duly proved by the prosecution. Notably the articles recovered from the accused thereto have been duly identified by the complainant in test identification proceedings. Recovery of articles of complainant (PW-1) and that of the victim at the behest of accused is a strong incriminating circumstance implicating the accused. As rightly pointed out by the Courts below, the accused have not offered any cogent or plausible explanation as to how they came in possession of those articles.

73. Similarly, the Indian bank debit card (Ex.PW-74/3) recovered at thebehest of A-1 Ram Singh and black coloured Nokia mobile phone (Ex.PW-68/5) recovered at the behest of A-4 Vinay have been proved to be used by the prosecutrix. PW-75 Asha Devi mother of the victim in her testimony stated that the Debit card belonged to her PW-75 Asha Devi and that the same was in the possession of her daughter. Nokia mobile phone (Ex.PW-68/5) is stated to be the mobile used by the victim. Notably, the articles of the prosecutrix recovered from the accused were proved by the evidence of PW-75 Asha Devi (mother of the victim) and the same was not controverted by the defence.

74. Section 25 of the Indian Evidence Act (for short 'the Evidence Act') speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence. Section 26 of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Sections 25 and 26 of the Evidence Act put a complete bar on the admissibility of a confessional statement made to a police officer or a confession made *in absentia* of a Magistrate, while in custody. Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26 of the Evidence Act and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. Section 27 of the Evidence Act reads as under:-

> "**27. How much of information received from accused may be proved.-** Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Section 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and is a relevant fact and accordingly it can be safely allowed to be given in evidence.

75. Section 27 has prescribed two limitations for determining how much of the information received from the accused can be proved against him: (i) The information must be such as the accused has caused discovery of the fact, i.e. the fact must be the consequence, and the information the cause of its discovery; (ii) The information must '*relate distinctly*' to the fact discovered. Both the conditions must be satisfied. Various requirements of Section 27 of the Evidence Act are succinctly summed up in ***Anter Singh v. State of Rajasthan*** (2004) 10 SCC 657:-

> "**16.** The various requirements of the section can be summed up as follows:
>
> (*1*) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
>
> (*2*) The fact must have been discovered.
>
> (*3*) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(*4*) The person giving the information must be accused of any offence.

(*5*) He must be in the custody of a police officer.

(*6*) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(*7*) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

76. Appending a note of caution to prevent the misuse of the provision of Section 27 of the Evidence Act, this Court in ***Geejaganda Somaiah v. State of Karnataka*** (2007) 9 SCC 315, observed that the courts need to be vigilant about application of Section 27 of the Evidence Act. Relevant extract from the judgment is as under:-

> "**22.** As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act."

77. Even though, the arrest and recovery under Section 27 of the Evidence Act is often sought to be misused, the courts cannot be expected to completely ignore how crucial are the recoveries made under Section 27 in an investigation. The legislature while incorporating Section 27, as an exception to Sections 24, 25 and 26 of the Evidence Act, was convinced of the quintessential purpose Section 27 would serve in an investigation process. The recovery made under Section 27 of the Evidence Act not only acts as the foundation stone for proceeding with an investigation, but also completes the chain of circumstances. Once the recovery is proved by the prosecution, burden of proof on the defence to rebut the same is very strict, which cannot be discharged merely by pointing at procedural irregularities in making the recoveries, especially when the recovery is corroborated by direct as well as circumstantial evidence, especially when the investigating officer assures that failure in examining independent witness while making the recoveries was not a deliberate or *mala fide*, rather it was on account of exceptional circumstances attending the investigation process.

78. While the prosecution has been able to prove the recoveries made at the behest of the accused, the defence counsel repeatedly argued in favour of discarding

the recoveries made, on the ground that no independent witnesses were examined while effecting such recoveries and preparing seizure memos.

79. The above contention of the defence counsel urges one to look into the specifics of Section 27 of the Evidence Act. As a matter of fact, need of examining independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the Judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. In the present case, PW-80 SI Pratibha Sharma has deposed in her cross-examination that no independent person had agreed to become a witness and in the light of such a statement, there is no reason for the courts to doubt the version of the police and the recoveries made.

80. When recovery is made pursuant to the statement of accused, seizure memo prepared by the Investigating Officer need not mandatorily be attested by independent witnesses. In ***State Govt. of NCT of Delhi v. Sunil and Another*** (2001) 1 SCC 652, it was held that non-attestation of seizure memo by independent witnesses cannot be a ground to disbelieve recovery of articles' list consequent upon the statement of the accused. It was further held that there was no requirement, either under Section 27 of the Evidence Act or under Section 161 Cr.P.C. to obtain signature of independent witnesses. If the version of the police is not shown to be unreliable, there is no reason to doubt the version of the police regarding arrest and contents of the seizure memos.

81. In the landmark case of ***Pulukuri Kottaya v. King-Emperor*** AIR 1947 PC 67, the Privy Council has laid down the relevance of information received from the accused for the purpose of Section 27 of the Evidence Act. Relevant extracts from the judgment are as under:

> "10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."

The test laid down in ***Pulukuri Kottaya's case*** was reiterated in several subsequent judgments of this Court including ***State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*** (2005) 11 SCC 600.

82. In the light of above discussion, it is held that recoveries made pursuant to disclosure statement of the accused are duly proved by the prosecution and there is no substantial reason to discard the same. Recovery of articles of PW-1 and also that of victim at the instance of the accused is a strong incriminating evidence against accused, especially when no plausible explanation is forthcoming from the accused. Further, as discussed infra, the scientific examination of the articles recovered completely place them in line with the chain of events described by the prosecution.

83. **DNA Analysis:** In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA analysis. For the purpose of DNA profiling, various samples were taken from the person of the prosecutrix; the complainant; the accused, their clothes/articles; the dumping spot; the iron rods; the ashes of burnt clothes; as well as from the offending bus. PW-45 Dr. B.K. Mohapatra analysed the said DNA profiles and submitted his report thereof. In his report, he concluded that the samples were authentic and capable of establishing the identities of the persons concerned beyond reasonable doubt. Prosecution relies upon the biological examination of various articles including the samples collected from the accused and the DNA profiles generated from the blood-stained clothes of the accused. The DNA profile generated from the samples collected, when compared with the DNA profile generated from the blood samples of the victim and PW-1 Awninder Pratab Pandey, were found consistent.

84. For easy reference and for completion of narration of events, I choose to refer to the articles recovered from the accused pursuant to their disclosure statements and other articles like blood-stained clothes; samples of personal fluids like blood, saliva with control swab; other samples like nail clippings, penil swab, stray hair etc. Details of the DNA analysis is contained in the reports of biological examination and DNA profiling (Ex.PW-45/A to Ex.PW-45/C), furnished by PW-45 Dr. B.K. Mohapatra.

ACCUSED RAM SINGH (A-1) (Dead)				
ARTICLES RECOVERED FROM ACCUSED		**Findings of DNA generated from clothes**		**DNA profile generated from other articles, swab etc.**
Recovery pursuant to disclosure statement	**Samples collected from the person of the accused**	**Items Matchin DNA profile of PW1**	**Items matching DNA profile of Victim.**	**Findings (Ex.Pw45/B)**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
(1) Bus (Ex.P-1) DL-1PC-0149 (2) Keys of Bus, (Ex.P-74/2) (3)Driving License, Fitness Certificate, Permit Pollution Certificate and other documents of bus bearing registration no. DL-1PC-0149 (Ex.P-74/4) (4) Two blood-stained rods (Ex.P49/1 and Ex.49/2) (5) Indian Bank Debit Card(Ex.P74/3) (6) Blood-stained green and black coloured T-Shirt (Ex.74/6) and blood-stained brown coloured chappal (Ex.74/7). (7) Some ashes and partly burnt clothes (seizure memo Ex. PW-74/M.)	1)Penile swab (2) Saliva (3)Nail clippings (4)Control swab (5)Blood in gauze (6) Underwear	-NA-	(1) DNA profile generated from Partially torn green and black colored striped half sleeve t-shirt found to be female in origin and consistent with the DNA profile of victim (1q) [8.7.3 @ Ex. PW 45/B]. (2) DNA profile generated from brown colored plastic chappal found to be female in origin and consistent with the DNA profile of victim (1q) [8.7.3 @ Ex. PW 45/B]	1) DNA profile generated from Blood detected in gauze of accused matched the DNA profile generated from rectal swab of the victim. (2) Blood as well as human spermatozoa was detected in the underwear of the accused and the DNA profile generated there-from was found to be female in origin, consistent with that of the victim. (3) The DNA profile developed from blood stains from both the iron rods, recovered at the instance of accused Ram Singh from bus, is of female origin and consistent with the DNA profile of prosecutrix. (4) The DNA profile developed from burnt clothes pieces was found to be of male origin and consistent with the DNA profile of the complainant.

ACCUSED MUKESH (A-2)				
ARTICLES RECOVERED FROM ACCUSED		**Findings of DNA generated from clothes**		**DNA profile generated from other articles, swab etc.**
Recovery pursuant to disclosure statement	**Samples collected from the person of the accused**	**Items Matchin DNA profile of PW1**	**Items matching DNA profile of Victim.**	**Findings (Ex.Pw45/B)**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
Disclosure statement recorded on 18.12.2012 by PW-60 HC Mahabir (Ex.PW-60/I) Following items recovered: 1. one blood-stained green T-shirt 2. one blood-stained grey colour pants. 3. blood-stained bluish grey colour jacket.	(1) Blood in gauze (2)Nail clippings (3) Urethral swab (4)Glans swab (5)Cut of pubic hair (6) Saliva (7) Stray hair (8) Underwear.	-NA-	The DNA profile generated from blood-staine d pants, t-shirts and jackets recovered at the behest of accused matched the DNA profile of the victim.	(1) Blood was detected in gauze and nail clippings but it did not yield female fraction DNA for analysis. 2)Human Spermatazoa was detected in urethral swab, glans swab and underwear but the same did not yield female fraction DNAfor analysis
ACCUSED AKSHAY (A-3)				
(1)	**(2)**	**(3)**	**(4)**	**(5)**
1) One black bag containing blood-stained blue jeans (2) Blue black Nokia mobile phone bearing IMEI No.35928604015 (3) Blood-stained red coloured banian. (4) One silver ring (5) Two metro cards	1) Blood in gauze (2) Saliva (3) Control gauze (4) Penile Swab (5)Nail clippings (6) Underwear (7) Scalp hair and Pubic hair (8) Red colour banian	One set of the DNA profile generated from jeans pant of the accused matched the DNA profile of PW1.	The DNA profile Generated from blood-stained red coloured banian recovered at the behest of accused matched the DNA profile of the victim.	DNA profile generated from breast swab of the victim was found consistent with the DNA profile of the blood of the accused Akshay.

ACCUSED VINAY (A-4)				
ARTICLES RECOVERED FROM ACCUSED		**Findings of DNA generated from clothes**		**DNA profile generated from other articles, swab etc.**
Recovery pursuant to disclosure statement	**Samples collected from the person of the accused**	**Items Matchin DNA profile of PW1**	**Items matching DNA profile of Victim.**	**Findings (Ex.Pw45/B)**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
1.Blood-stained blue coloured jeans (Ex.P-68/1) 2.Blood-stained black coloured jacket (Ex.P-68/2) 3.blood-stained full sleeved black coloured T-shirt (Ex.P-68/3) 4.blue coloured chappals (Ex.P-68/4) 5. Hush Puppy shoes(Ex.P2 under Ex. PW-68/C) 6. Black coloured Nokia mobile phone with IMEI No.353183039047391 (Ex.P-68/5)	(1) Blood in gauze (2)Nail clippings (3) Urethral swab (4)Glans swab (5)Cut of pubic hair (6) Saliva (7) Stray hair (8) Underwear (9)Mons Pubis	One set of the DNA profile generated from sports jacket of the accused matched the DNA profile of PW1.	The DNA profile generated from blood-stained underwear, chappal and jacket recovered at the behest of accused matched the DNA profile of the victim.	(1) Blood was detected in gauze and nail clippings but it did not yield female fraction DNA for analysis.
ACCUSED PAWAN GUPTA @ KALU (A-5)				
(1)	**(2)**	**(3)**	**(4)**	**(5)**
Disclosure statement recorded by PW-60 HC Mahabir. Following items recovered on 19.12.2012: (1)one blood-stained black coloured sweater (Ex. P-68/6) (2)blood-stained coca cola (colour) pants. (Ex.68/7) (3)Blood-stained brown coloured underwear (Ex.P-68/8) (4)Brown coloured sports shoes (Ex.P-68/9) (5)One wristwatch of Sonata make (Ex.P-3) (6)Two currency notes of Rs.500/- each (Ex.P-7) Site plan of the spot from where the said articles are recovered and seized (Ex. PW-68).	(1) Blood in gauze (2)Nail clippings (3)Urethral swab (4)Glans swab (5) Cut of pubic hair (6) Saliva (7) Stray hair	One set of the DNA profile generated from jeans pant of the accused matched the DNA profile of PW1.	(1) Another set of DNA profile generated from sweater recovered at the behest of the accused matched the DNA profile of the victim. (2) DNA profile generated from sports shoes of the accused matched with the DNA profile of the prosecutrix	(1) Blood was detected only in gauze and nail clipping of the accused but the same did not yield female fraction DNA for analysis.

85. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. **DNA** – ***De-oxy-ribonucleic acid***, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.

86. We may usefully refer to ***Advanced Law Lexicon, 3rd Edition eprint 2009 by P. Ramanatha Aiyar*** which explains DNA as under:-

> ***"DNA.- De-oxy-ribonucleic*** *acid, the nucleoprotein of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms.*
>
> *The material in a cell that makes up the genes and controls the cell. (Biological Term)*
>
> ***DNA finger printing.*** *A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)"*

In the same Law Lexicon, learned author refers to DNA identification as under:

> ***DNA identification.*** *A method of comparing a person's deoxyribonucleic acid (DNA) – a patterned chemical structure of genetic information – with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. – Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)*

87. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or

from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A Cr.P.C. is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.

88. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in ***Santosh Kumar Singh v. State through CBI*** (2010) 9 SCC 747, the Court held as under:-

> "65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.
>
> 66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in *Kamalanantha* v. *State of T.N.* (2005) 5 SCC 194 We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.
>
> 67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.
>
> 68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for

the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In *Bhagwan Das* v. *State of Rajasthan* AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Kamti Dev i* v. *Poshi Ram* (2001) 5 SCC 311 . In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9." [emphasis added].

89. From the evidence of PW-45 and the details given in the above abular form, it is seen that the DNA profile generated from blood-stained clothes of the accused namely, A-1 Ram Singh (dead); A-2 Mukesh; A-3 Akshay; A-4 Vinay; and A-5 Pawan Gupta @ Kalu are found consistent with the DNA profile of the prosecutrix. Also as noted above, two sets of DNA profile were generated from the black colour sweater of the accused Pawan. One set of DNA profile found to be female in origin, consistent with the DNA profile of the prosecutrix; other set found to be male in origin, onsistent with the DNA profile of PW-1. Likewise, two sets of DNA profile were generated from the black colour sports jacket of accused Vinay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of PW-1. Likewise, two sets of DNA profile were generated from the jeans pant of accused Akshay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of PW-1. The result of DNA analysis and that of the DNA profile generated from blood-stained clothes of the accused found consistent with that of the victim is a strong piece of evidence incriminating the accused in the offence.

90. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in origin,

consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay.

91. As discussed earlier, identification by DNA genetic finger print is almost hundred per cent precise and accurate. The DNA profile generated from the blood-stained clothes of the accused and other articles are found consistent with the DNA profile of the victim and DNA profile of PW-1; this is a strong piece of evidence against the accused. In his evidence, PW-45 Dr. B.K. Mohapatra has stated that once DNA profile is generated and found consistent with another DNA profile, the accuracy is hundred per cent and we find no reason to doubt his evidence. As pointed out by the Courts below, the counsel for the defence did not raise any substantive ground to rebut the findings of DNA analysis and the findings through the examination of PW-45. The DNA report and the findings thereon, being scientifically accurate clearly establish the link involving the accused persons in the incident.

92. **Conspiracy:** The accused have been charged with the offence of "conspiracy" to commit the offence of abduction, robbery/dacoity, gang rape and unnatural sex, in pursuance of which the accused are alleged to have picked up the prosecutrix and PW-1. The charge sheet also states that in furtherance of conspiracy, the accused while committing the offence of gang rape on the prosecutrix intentionally inflicted bodily injury with iron rod and inserted the iron rod in the vital parts of her body with the common intention to cause her death.

93. The learned *amicus* Mr. Sanjay Hegde submitted that there is no specific evidence to prove that there was prior meeting of minds of the accused and that they had conspired together to commit grave offence by use of iron rod, resulting in the death of the victim and, therefore, insertion/use of iron rod by any one of the accused cannot be attributed to all the accused in order to hold them guilty of the offence of murder.

94. The essentials of the offence of conspiracy and the manner in which it can be proved has been laid down by this Court through a catena of judicial pronouncements and I choose to briefly recapitulate the law on the point, so as to determine whether the offence is made out in this case or not. Meeting of minds for committing an illegal act is *sine qua non* of the offence of conspiracy. It is also obvious that meeting of minds, thereby resulting in formation of a consensus between the parties, can be a sudden act, spanning in a fraction of a minute. It is neither necessary that each of the conspirators take active part in the commission of each and every conspiratorial act, nor it is necessary that all the conspirators must know each and every details of the conspiracy. Essence of the offence of conspiracy is in agreement to break the law as aptly observed by this Court in ***Major E.G. Barsay v. State of Bombay*** (1962) 2 SCR 195.

95. So far as the English law on conspiracy is concerned, which is the source of Indian law, KENNY has succinctly stated that in modern times conspiracy is defined as an agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. Stressing on the need of formation of an agreement, he has cautioned that conspiracy should not be misunderstood as a purely mental crime, comprising the concurrence of the intentions of the parties. The meaning of an 'agreement', he has explained by quoting following words of Lord Chelmsford:

> "Agreement is an act in advancement of the intention which each person has conceived in his mind."

KENNY has further said that it is not mere intention, but the announcement and acceptance of intentions. However, it is not necessary that an overt act is done; the offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. [**Refer KENNY on *Outlines of Criminal Law*, 19th Edn., pp. 426-427]**

96. The most important aspect of the offence of conspiracy is that apart from being a distinct statutory offence, all the parties to the conspiracy are liable for the acts of each other and as an exception to the general law in the case of conspiracy intent i.e. *mens rea* alone constitutes a crime. As per Section 10 of the Evidence Act, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then, anything done by any one of them in reference to their common intention, is admissible against the others. As held in ***State of Maharashtra v. Damu and Others*** (2000) 6 SCC 269, the only condition for the application of the rule in Section 10 of the Evidence Act is that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence.

97. The principles relating to the offence of criminal conspiracy and the standard of proof for establishing offence of conspiracy and the joint liability of the conspirators have been elaborately laid down in ***Shivnarayan Laxminarayan Joshi and Ors. v. State of Maharashtra*** (1980) 2 SCC 465; ***Mohammad Usman Mohammad Hussain Maniyar and Ors. v. State of Maharashtra*** (1981) 2 SCC 443; ***Kehar Singh and Ors. v. State (Delhi Administration)*** (1988) 3 SCC 609; ***State of Maharashtra and Ors. v. Som Nath Thapa and Ors.*** (1996) 4 SCC 659; ***State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*** (2005) 11 SCC 600; ***State Through Superintendent of Police, CBI/SIT v. Nalini and Ors.*** (1999) 5 SCC 253 ***Yakub Abdul Razak Menon v. The State of Maharashtra, through CBI, Bombay*** (2013) 13 SCC 1.

98. Another significant aspect of the offence of criminal conspiracy is that it is very rare to find direct proof of it, because of the very fact that it is hatched in secrecy. Unlike other offences, criminal conspiracy in most of the cases is

proved by circumstantial evidence only. It is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. Conspiracy is a matter of inference, deduced from words uttered, criminal acts of the accused done in furtherance of conspiracy. (*Vide* ***Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra*** (1970) 1 SCC 696; ***Firozuddin Basheeruddin and Ors. v. State of Kerala*** (2001) 7 SCC 596; ***Ram Narain Poply v. Central Bureau of Investigation and Ors.*** (2003) 3 SCC 641; ***Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra*** (2008) 10 SCC 394; ***Pratapbhai Hamirbhai Solanki v. State of Gujarat and Anr.*** (2013) 1 SCC 613; ***Chandra Prakash v. State of Rajasthan*** (2014) 8 SCC 340 etc.)

99. In ***Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra*** (2008) 10 SCC 394, this Court, after referring to the law laid down in several pronouncements, summarised the core principles of law of conspiracy in the following words:

> "23. Thus, it is manifest that the meeting of minds of two or more persons fordoing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement."

100. In the present case, there is ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution has established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy, is established by the sequence of events and the conduct of the accused. Existence of conspiracy and its objects could be inferred from the chain of events. The chain of events described by the victim in her dying declarations coupled with the testimony of PW-1 clearly establish that as soon as the complainant and the victim boarded the bus, the accused switched off the lights of the bus. Few accused pinned down PW-1 and others committed rape on the victim in the back side of the bus one after the other. The accused inserted iron rods in the private parts of the prosecutrix, dragging her holding her hair and then threw her outside the bus. The victim has also maintained in her dying declaration that the accused persons were exhorting that the victim has died and she be thrown out of the bus. Ultimately, both the victim and the complainant were thrown out of the moving bus through the front door, having failed to throw them through the rear door. The chain of action and the act of finally throwing the victim and PW-1 out of the bus

show that there was unity of object among the accused to commit rape and destroy the evidence thereon.

101. In this case, the existence of conspiracy is sought to be drawn by an inference from the circumstances: (i) the accused did not allow any other passenger to board the bus after PW-1 and the prosecutrix boarded the bus; (ii) switching off the lights; pinning PW-1 down by some while others ommit rape/unnatural sex with the prosecutrix at the rear side of the bus; (iii) exhortation by some of the accused that the victim be not left alive; and (iv) their act of throwing the victim and PW-1 out of the running bus without clothes in the wintery night of December. Existence of conspiracy and its objects is inferred from the above circumstances and the words uttered. In my view, the courts below have rightly drawn an inference that there was prior meeting of minds among the accused and they have rightly held that the prosecution has proved the existence of conspiracy to commit gang rape and other offences.

102. As already stated in the beginning, in achieving the goal of the conspiracy, several offences committed by some of the conspirators may not be known to others, still all the accused will be held guilty of the offence of criminal conspiracy. The trial court has recorded that the victim's *complete alimentary canal from the level of duodenum upto 5 cm from anal sphincter was completely damaged. It was beyond repair. Causing of damage to jejunum is indicative of the fact that the rods were inserted through vagina and/or anus upto the level of jejunum." Further "the septicemia was the direct result of internal multiple injuries"*. Use of iron rod by one or more of the accused is sufficient to inculpate all the accused for the same. In the present case, gang rape and use of iron rod caused grave injuries to victim's vagina and intestines; throwing her out of the bus in that vegetative state in chilled weather led to her death; all this taking place in the course of same transaction and with the active involvement of all the accused is more than sufficient evidence to find the accused guilty of criminal conspiracy. I, thus, affirm the findings of the courts below with regard to conviction of all the accused under Section 120-B IPC and Section 302 read with Section 120-B IPC.

103. Apart from considering the principles of law of conspiracy distinctly, if we consider it in the context of 'conspiracy to commit the offence of gang rape, unnatural sex etc., as is specifically relevant in the present case, we find that existence of common intent and joint liability is already implicit in the offence of gang rape. Gang rape is dealt with in clause (g) of sub-section (2) of Section 376 IPC read with *Explanation 1*. As per *Explanation 1* to Section 376 IPC, "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape" and all of them shall be liable to be punished under sub-section (2) of Section 376 IPC. As per *Explanation 1*, by operation of deeming provision, a person who

has not actually committed rape is deemed to have committed rape even if only one of the groups has committed rape in furtherance of the common intention.

104. While considering the scope of Section 376(2)(g) IPC read with *Explanation*, in ***Ashok Kumar v. State of Haryana*** (2003) 2 SCC 143, this Court held as under:-

> "**8.** Charge against the appellant is under Section 376(2)(*g*) IPC. In order to establish an offence under Section 376(2)(*g*) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence. [**Emphasis added**]"

So far as the offence under Section 376 (2)(g) IPC, the sharing of common intention and the jointness in commission of rape is concerned, the same is established by the presence of all the accused in the bus; their action in concert as established by the dying declaration of the prosecutrix and the evidence of PW-1, presence of blood in the clothes of all the accused, DNA profile generated thereon being consistent with the DNA profile of the victim.

105. The prosecution has established the presence of the accused in the bus and the heinous act of gang rape committed on the prosecutrix by the accused by the ample evidence – by the multiple dying declaration of the victim and also by the evidence of PW-1 and medical evidence and also by arrest and recovery of incriminating articles of the victim and that of PW-1 complainant. The scientific evidence in particular DNA analysis report clearly brings home the guilt of the accused.

106. **Section 235(2), Criminal Procedure Code:** Once the conviction of the accused persons is affirmed, what remains to be decided is the question of appropriate punishment imposed on them. On the aspect of sentencing, we were very effectively assisted by the learned *Amicus Curiae*. Accused were convicted ***vide*** **judgment and order dated 10.09.2013** and on the very next day of judgment i.e. **on**

11.09.2013, the arguments on sentencing were concluded. Thereafter, a separate **order on sentence was pronounced on 13.09.2013.**

107. Counsel for the appellants as well as the learned *amicus* Mr. Raju Ramachandran contended that no effective opportunity was given to the appellants to lead their defence on the point of sentencing as mandated under Section 235(2) Cr.P.C. and each of the accused were not individually heard in person on the question of sentence. Learned *Amicus Curiae*, Mr. Raju Ramachandran submitted only the counsel for the accused were heard and all the accused were treated alike irrespective of their individual background and were sentenced to death, which is in clear violation of the mandate of Section 235(2) Cr.P.C. It was submitted that Section 235(2) Cr.P.C. is intended to give an opportunity to the accused to place before the Court all the relevant facts and material having a bearing on the question of sentence and, therefore, salutary provision should not have been treated as a mere formality by the trial court. In support of his contention, the learned *Amicus* has placed reliance upon a number of judgments viz. – (i) ***Dagdu & Ors. v. State of Maharashtra*** (1977) 3 SCC 68; (ii) ***Malkiat Singh and Ors. v. State of Punjab*** (1991) 4 SCC 341**;** and (iii) ***Ajay Pandit alias Jagdish Dayabhai Patel and Anr. v. State of Maharashtra*** (2012) 8 SCC 43**.**

108. Section 235 Cr.P.C. deals with the judgments of acquittal or conviction. Under Section 235(2) Cr.P.C., where the accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the accused on the question of sentence and then pass sentence in accordance with law. **Section 235(2) Cr.P.C.** imposes duty on the court to hear the accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of applicability of Section 360 Cr.P.C. i.e. when the court finds the accused eligible to be released on probation of good conduct or after admonition.

109. Section 354 Cr.P.C. specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Cr.P.C. deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. **Section 354(3) Cr.P.C.** mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

110. The statutory duty to state special reasons under Section 354(3) Cr.P.C. can be meaningfully carried out only if the hearing on sentence under Section 235(2) Cr.P.C. is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any;

(iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused under Section 235(2) Cr.P.C. on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Cr.P.C. becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment.

111. It is well-settled that Section 235(2) Cr.P.C. is intended to give an opportunity of hearing to the prosecution as well as the accused on the question of sentence. The Court while awarding the sentence has to take into consideration various factors having a bearing on the question of sentence. In case, Section 235(2) Cr.P.C. is not complied with, as held in ***Dagdu's case***, the appellate Court can either send back the case to the Sessions Court for complying with Section 235(2) Cr.P.C. so as to enable the accused to adduce materials; or, in order to avoid delay, the appellate Court may by itself give an opportunity to the parties in terms of Section 235(2) Cr.P.C. to produce the materials they wish to adduce instead of sending the matter back to the trial Court for hearing on sentence. In the present case, we felt it appropriate to adopt the latter course and accordingly asked the counsel appearing for the appellants to file affidavits/materials on the question of sentence. Consequently, *vide* order dated 03.02.2017, we directed the learned counsel for the accused to place in writing, before this Court, their submissions, whatever they desired to place on the question of sentence. In compliance with the order, Mr. M.L. Sharma, learned counsel on behalf of the accused A-2 Mukesh and A-5 Pawan and Mr. A.P. Singh, learned counsel on behalf of the accused Akshay Kumar Singh, Vinay Sharma and Pawan Gupta filed the individual affidavits of the accused.

112. Accused Mukesh (A-2) in his affidavit has stated that he was picked up from his house at Karoli, Rajasthan and brought to Delhi and reiterated that he is innocent and he denied his involvement in the occurrence. In their affidavits, accused Akshay Kumar Singh (A-3), accused Vinay Sharma (A-4) and accused Pawan Gupta (A-5) submitted in their individual affidavits have stated that they hail from an ordinary/ poor background and are not much educated. They have also stated that they have aged parents and other family members who are dependent on them and they are to be supported by them. Accused have also stated that they have no criminal antecedents and that after their confinement in Tihar Jail they have maintained good behavior.

113. Learned counsel Mr. M.L. Sharma submitted that accused Mukesh (A-2) is innocent and he has been falsely implicated only because he is the brother of accused Ram Singh.

114. Taking us through the affidavits filed by the accused, learned counsel Mr. A.P. Singh submitted that the accused namely Akshay Kumar Singh, Pawan Gupta and Vinay Sharma hail from very poor background; and have got large families to support; and have no criminal antecedents. It has been contended that having regard to the fact that the three accused have no prior criminal antecedents and are not hardened criminals, the case will not fall under "rarest of rare cases" to affirm the death sentence.

115. Supplementing the affidavits filed by the accused, the learned *amicus* and senior counsel Mr. Raju Ramachandran and Mr. Sanjay Hegde submitted that assuming that the conviction of the appellants are confirmed, the accused who hail from very ordinary poor background and having no criminal antecedents, the death sentence be commuted to life imprisonment.

116. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

117. In ***State of M.P. v. Munna Choubey and Anr***. (2005) 2 SCC 710, it was observed as under:

> "**10.** Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu (1991) 3 SCC 471."

118. In ***Jashubha Bharatsinh Gohil and Ors. v. State of Gujarat*** (1994) 4 SCC 353, while upholding the award of death sentence, this Court held that sentencing process has to be stern where the circumstances demand so. Relevant extract is as under:

> "**12**……The courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the

> avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be."

119. **Whether the Case falls under rarest of rare cases:** Law relating to award of death sentence in India has evolved through massive policy reforms-nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformative approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in ***Bachan Singh v. State of Punjab*** (1980) 2 SCC 684, by a Constitution Bench of this Court.

120. In ***Bachan Singh (supra),*** while upholding the constitutional validity of capital sentence, this Court revisited the law relating to death sentence at that point of time, by thoroughly discussing the law laid down in ***Jagmohan Singh v. State of U.P.*** (1973) 1 SCC 20; ***Rajendra Prasad v. State of U.P.*** (1979) 3 SCR 646 and other cases. The principles laid down in ***Bachan Singh's*** case is that, normal rule is awarding of 'life sentence', imposition of death sentence being justified, only in rarest of rare case, when the option of awarding sentence of life imprisonment is unquestionably foreclosed'. By virtue of ***Bachan Singh (supra),*** **'**life imprisonment' became the rule and 'death sentence' an exception. The focus was shifted from 'crime' to the 'crime and criminal' i.e. now the nature and gravity of the crime needs to be analysed juxtaposed to the peculiar circumstances attending the societal existence of the criminal. The principles laid down in **Bachan Singh's** case were considered in ***Machhi Singh and Ors. v. State of Punjab*** (1983) 3 SCC 470 and was summarised as under:-

> "**38**. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case (supra): (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the `offender' also require to be taken into consideration along with the circumstances of the `crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

121. In ***Machhi Singh's*** case, this Court took the view that in every case where death penalty is a question, a balance sheet of aggravating and mitigating circumstances must be drawn up before arriving at the decision. The Court held that for practical application of the doctrine of 'rarest of rare case', it must be understood broadly in the background of five categories of cases crafted thereon that is 'Manner of commission of crime', 'Motive', 'Anti-social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder'. These five categories are elaborated in para nos. 32 to 37 as under:-

"**32.** The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is

viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. *Manner of commission of murder*

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. *Motive for commission of murder*

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. *Anti-social or socially abhorrent nature of the crime*

35. (*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. *Magnitude of crime*

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. *Personality of victim of murder*

> **37.** When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

122. The principle laid down in ***Bachan Singh (supra)*** and ***Machhi Singh (supra)*** came to be discussed and applied in all the cases relating to imposition of death penalty for committing heinous offences. However, lately, it was felt that the courts have not correctly applied the law laid down in ***Bachan Singh (supra)*** and ***Machhi Singh (supra),*** which has led to inconsistency in sentencing process in India; also it was observed that the list of categories of murder crafted in ***Machhi Singh (supra),*** in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario. In ***Swamy hradhananda alias Murali Manohar Mishra (2) v. State of Karnataka*** (2008) 13 SCC 767; a three-Judge Bench of this Court, observed as under in this regard:-

> "**43**. In Machhi Singh the Court crafted the categories of murder in which `the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and `whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide

very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."

123. A milestone in the sentencing policy is the concept of 'life imprisonment till the remainder of life' evolved in ***Swamy Shradhananda (2)(supra).*** In this case, a man committed murder of his wife for usurping her property in a cold-blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was ffirmed by the High Court. Though the conviction was affirmed by this Court also on the point of sentencing, the views of a two-Judge Bench of this Court, in ***Swamy Shradhananda v. State of Karnataka*** (2007) 12 SCC 282 differed, and consequently, the matter was listed before a three-Judge Bench, wherein a mid way was carved. The three-Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused, viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court etc., made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in ***Swamy Shradhananda (2) (supra)*** the Court directed that the accused *shall not be released from the prison till the rest of his life.* Relevant extract from the judgment reads as under:

"**92**. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all."

124. After referring to a catena of judicial pronouncements post ***Bachan Singh (supra)*** and ***Machhi Singh (supra),*** in the case of ***Ramnaresh and Ors. v. State of Chhattisgarh*** (2012) 4 SCC 257, this Court, tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances.

It would be apposite to refer to the same here:

"**Aggravating circumstances**

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

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

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

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

(5) Hired killings.

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

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

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

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

Mitigating circumstances

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

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

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

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

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

125. Similarly, this Court in ***Sangeet and Another v. State of Haryana*** (2013) 2 SCC 452, extensively analysed the evolution of sentencing policy in India and stressed on the need for further evolution. In para (77), this Court emphasized on making the sentencing process a principled one, rather than Judge-centric one and held that a re-look is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court.

126. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused

displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be made to ***Holiram Bordoloi v. State of Assam*** (2005) 3 SCC 793 [Para 15-17], ***Ankush Maruti Shinde and Ors. v. State of Maharashtra*** (2009) 6 SCC 667 (para 31-34), ***Kamta Tiwari v. State of Madhya Pradesh*** (1996) 6 SCC 250 (para 7-8), ***State of U.P. v. Satish*** (2005) 3 SCC 114 (para 24-31), ***Sundar alias Sundarajan v. State by Inspector of Police and Anr.*** (2013) 3 SCC 215 (para 36-38, 42-42.7, 43), ***Sevaka Perumal and Anr. v. State of Tamil Nadu*** (1991) 3 SCC 471 (para 8-10, 12), ***Mohfil Khan and Anr. v. State of Jharkhand*** (2015) 1 SCC 67 (para 63-65).

127. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of ***Bhagwan Swarup v. State of U.P.*** (1971) 3 SCC 759 (para 5), ***Deepak Rai v. State of Bihar*** (2013) 10 SCC 421 (para 91-100) and ***Shabhnam v. State of Uttar Pradesh*** (2015) 6 SCC 632 (para 36).

128. Let me now refer to a few cases of rape and murder where this Court has confirmed the sentence of death. In ***Molai & Anr. v. State of M.P. (1999) 9 SCC 581***, death sentence awarded to both the accused for committing offences under Sections 376 (2)(g) IPC, 302 read with Section 34 IPC and 201 IPC, was confirmed by this Court. The accused had committed gang rape on the victim, strangulated her thereafter and threw away her body into the septic tank with the cycle, after causing stab injuries. It was held as under:

> "**36**……It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under-garment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

129. In ***Bantu v. State of Uttar Pradesh*** (2008) 11 SCC 113, the victim aged about five years was not only raped, but was murdered in a diabolic manner. The Court awarded extreme punishment of death, holding that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed must be delicately balanced by the Court in a dispassionate manner.

130. In ***Ankush Maruti Shinde and Ors. v. State of Maharashtra*** (2009) 6 SCC 667, concerned accused were found guilty of offences under Sections 307 IPC, 376(2)(g) IPC and 397 read with 395 and 396 of IPC. This Court declined to interfere with the concurrent findings of the courts below and upheld death penalty awarded to the accused, taking into account the brutality of the incident, tender age of the deceased, and the fact of a minor girl being mercilessly gang raped and then put to death. The court also noted that there was no provocation from the deceased's side and the two surviving eye witnesses had fully corroborated the case of the prosecution.

131. In ***Mehboob Batcha and Ors. v. State rep. by Supdt. of Police*** (2011) 7 SCC 45, accused were policemen who had wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.05.1992 till 02.06.1992 and had beaten him to death there with *lathis*, and had also gang raped his wife Padmini in a barbaric manner. This Court could not award death penalty due to omission of the courts below in framing charge under Section 302, IPC. However, the observations made by this Court are worth quoting here:

> "Bane hain ahal-e-hawas muddai bhi munsif bhi Kise vakeel karein kisse munsifi chaahen -- Faiz Ahmed Faiz
>
> **1.** If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below. ……..
>
> **9.** We have held in Satya Narain Tiwari @ Jolly and Anr. v. State of U.P. (2010) 13 SCC 689 and in Sukhdev Singh v. State of Punjab, (2010) 13 SCC 656 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment……"

132. In ***Mohd. Mannan @ Abdul Mannan v. State of Bihar*** (2011) 5 SCC 317, this Court upheld award of death sentence to a 43 year old accused who brutally raped and murdered a minor girl, while holding a position of trust. Relevant considerations of the Court while affirming the death sentence are extracted as under:

> "**26**….The postmortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the

> authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that Appellant is a menace to the society and shall continue to be so and he can not be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court."

In ***Shivaji @ Dadya Shankar Alhat v. State of Maharashtra*** (2008) 15 SCC 269***; Rajendra Pralhadrao Wasnik v. The State of Maharashtra*** (2012) 4 SCC 37 award of death penalty in case of rape and murder was upheld, finding the incident brutal and accused a menace for the society.

133. In ***Dhananjoy Chatterjee alias Dhana v. State of W.B.*** (1994) 2 SCC 220, a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. and 5.45 p.m. The entire case of the prosecution was based on circumstantial evidence. However, Court found that it was a fit case for imposing death penalty. Following observation of the Court while imposing death penalty is worth quoting:-

> "14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.
>
> 15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the

criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment." **(emphasis added)**

134. In a landmark judgment ***Shankar Kisanrao Khade v. State of Maharashtra*** (2013) 5 SCC 546, **Justice Madan B. Lokur (Concurring)** after analysing various cases of rape and murder, wherein death sentence was confirmed by this Court, in para (122) briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under:-

"**122.** *The principal reasons for confirming the death penalty in the above cases include:*

*(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (**Jumman Khan v. State of U.P.** (1991) 1 SCC 752, **Dhananjoy Chatterjee v. State of W.B.** (1994) 2 SCC 220, **Laxman Naik v. State of Orissa** (1994) 3 SCC 381, **Kamta Tewari v. State of M.P.** (1996) 6 SCC 250, **Nirmal Singh v. State of Haryana** (1999) 3 SCC 670, **Jai Kumar v. State of M.P.** (1999) 5 SCC 1, **State of U.P. v. Satish** (2005) 3 SCC 114, **Bantu v. State of U.P.** (2008) 11 SCC 113, **Ankush Maruti Shinde v. State of Maharashtra** (2009) 6 SCC 667, **B.A. Umesh v. State of Karnataka** (2011) 3 SCC 85, **Mohd. Mannan v. State of Bihar** (2011) 5 SCC 317 and **Rajendra Pralhadrao Wasnik v. State of Maharashtra** (2012) 4 SCC 37);*

*(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (**Dhananjoy Chatterjee** (1994) 2 SCC 220, **Jai Kumar** (1999) 5 SCC 1, **Ankush Maruti Shinde** (2009) 6 SCC 667 and **Mohd. Mannan** (2011) 5 SCC 317);*

*(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (**Jai Kumar**(1999) 5 SCC 1, **B.A. Umesh** (2011) 3 SCC 85 and **Mohd. Mannan** (2011) 5 SCC 317);*

*(4) the victims were defenceless (**Dhananjoy Chatterjee** (1994) 2 SCC 220, **Laxman Naik** (1994) 3 SCC 381, **Kamta Tewari** (1996) 6 SCC 250, **Ankush Maruti Shinde** (2009) 6 SCC 667, **Mohd. Mannan** (2011) 5 SCC 317 and **Rajendra Pralhadrao Wasnik** (2012) 4 SCC 37);*

*(5) the crime was either unprovoked or that it was premeditated (**Dhananjoy Chatterjee** (1994) 2 SCC 220, **Laxman Naik** (1994) 3 SCC 381, **Kamta Tewari** (1996) 6 SCC 250, **Nirmal Singh** (1999) 3 SCC 670, **Jai Kumar** (1999) 5 SCC 1, **Ankush Maruti Shinde** (2009) 6 SCC 667, **B.A. Umesh** (2011) 3 SCC 85 and **Mohd. Mannan** (2011) 5 SCC 317) and in three cases the antecedents or the prior history of the convict was taken into onsideration (**Shivu v. High Court of Karnataka** (2007) 4 SCC 713, **B.A. Umesh** (2011) 3 SCC 85 and **Rajendra Pralhadrao Wasnik** (2012) 4 SCC 37)."*

135. We also refer to para (106) of ***Shankar Kisanrao Khade's case*** where **Justice Madan B. Lokur (Concurring)** has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in
such commutation. Para (106) reads as under:-

> "**106.** A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:
>
> (*1*) the young age of the accused [***Amit* v. *State of Maharashtra*** *(2003) 8 SCC 93* aged 20 years, ***Rahul v. State of Maharashtra*** *(2005) 10 SCC 322* aged 24 years, ***Santosh Kumar Singh v. State*** *(2010) 9 SCC 747* aged 24 years, ***Rameshbhai Chandubhai Rathod*** *(2) (2011) 2 SCC 764* aged 28 years and ***Amit* v. *State of U.P.****(2012) 4 SCC 107* aged 28 years];
>
> (*2*) the possibility of reforming and rehabilitating the accused (in ***Santosh Kumar Singh*** *(2010) 9 SCC 747* and ***Amit* v. *State of U.P.****(2012) 4 SCC 107* the accused, incidentally, were young when they committed the crime);
>
> (*3*) the accused had no prior criminal record (***Nirmal Singh*** *(1999) 3 SCC 670*, ***Raju*** *(2001) 9 SCC 50*, ***Bantu*** *(2001) 9 SCC 615*, ***Amit* v. *State of Maharashtra*** *(2003) 8 SCC 93*, ***Surendra Pal Shivbalakpal*** *(2005) 3 SCC 127*, ***Rahul*** *(2005) 10 SCC 322* and ***Amit* v. *State of U.P*** *(2012) 4 SCC 107*);
>
> (*4*) the accused was not likely to be a menace or threat or danger to society or the community (***Nirmal Singh*** *(1999) 3 SCC 670*, ***Mohd. Chaman*** *(2001) 2 SCC 28*, ***Raju*** *(2001) 9 SCC 50*, ***Bantu*** *(2001) 9 SCC 615*, ***Surendra Pal Shivbalakpal*** *(2005) 3 SCC 127*, ***Rahul*** *(2005) 10 SCC 322* and ***Amit* v. *State of U.P.*** *(2012) 4 SCC 107*). (*5*) a few other reas been acquitted by one of the courts (***State of T.N.* v. *Suresh*** *(1998) 2 SCC 372*, ***State of Maharashtra* v. *Suresh*** *(2000) 1 SCC 471*, ***State of Maharashtra v. Bharat Fakira Dhiwar*** *(2002) 1 SCC 622*, ***State of Maharashtra v. Mansingh*** *(2005) 3 SCC 131* and ***Santosh Kumar Singh*** *(2010) 9 SCC 747*);
>
> (*6*) the crime was not premeditated (***Kumudi Lal v. State of U.P.*** *(1999) 4 SCC 108*, ***Akhtar v. State of U.P.*** *(1999) 6 SCC 60*, ***Raju v. State of Haryana*** *(2001) 9 SCC 50* and ***Amrit Singh v. State of Punjab*** *(2006) 12 SCC 79*);
>
> (*7*) the case was one of circumstantial evidence (***Mansingh*** *(2005) 3 SCC 131* and ***Bishnu Prasad Sinha*** *(2007) 11 SCC 467*).
> In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (***Kumudi Lal*** *(1999) 4 SCC*

108) and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (***Haresh Mohandas Rajput*** *(2011) 12 SCC 56*)."

136. In the same judgment in ***Shankar Kisanrao Khade v. State of Maharashtra*** (2013) 5 SCC 546, **Justice** ***Madan B. Lokur (concurring*** while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the *prima facie* difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

"**148.** It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is etributive justice or serves an incapacitative goal."

In ***Shankar Kisanrao's case,*** it was observed by **Justice Madan B. Lokur** that ***Dhananjay Chatterjee's case*** was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

137. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in ***Machhi Singh (Supra)*** and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: ***Gurvail Singh @ Gala and Anr. v. State of Punjab*** (2013) 2 SCC 713; ***Mohfil Khan and Anr. v. State of Jharkhand*** (2015) 1 SCC 67; ***Purushottam Dashrath Borate and Anr. v. State of Maharashtra*** (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In ***Mohfil***

Khan (supra), this Court specifically observed that '***it would be the paramount duty of the Court to provide justice to the incidental victims of the crime – the family members of the deceased persons.***

138. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- '***death sentence'***, ***life sentence commutable to 14 years***' or '***life imprisonment for the rest of the life***'.

139. The question would be whether the present case could be one of the rarest of rare cases warranting death penalty. Before the court proceed to make a choice whether to award death sentence or life imprisonment, the court is to draw up a balance-sheet of aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered:- (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

140. We are here concerned with the award of an appropriate sentence in case of brutal gang-rape and murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the *Munirka bus stand* with the *mala fide* intent of ravishing and torturing her. The accused not only abducted the victim, but gang-raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries.

141. If we look at the aggravating circumstances in the present case, following factors would emerge:

Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang-rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (PW-1) naked in the cold wintery night and trying to run the bus over them.

The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.

The horrific acts reflecting the in-human extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.

The acts committed so shook the conscience of the society.

142. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants namely A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:-

(a) Family circumstances such as poverty and rural background,

(b) Young age,

(c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,

(d) Absence of criminal antecedents,

(e) Conduct in jail, and

(f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

143. In ***Purushottam Dashrath Borate and Anr. v. State of Maharashtra*** (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

144. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in ***Om Prakash v. State of Haryana*** (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

145. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "**rarest of rare cases**". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

146. In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to 'life imprisonment for the rest of the life'. The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of '*rarest of rare case*' where the question of any other punishment is 'unquestionably foreclosed'. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the 'rarest of rare category', then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

147. The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nation-wide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes

ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

148. The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

149. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "*the best thermometer to the progress of a nation is its treatment of its women.*" Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement "**to end violence against women**" and "**respect for women and her dignity**" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same.

Appeals dismissed.

2017 (II) ILR - CUT- 222

VINEET SARAN, C.J. & K. R. MOHAPATRA, J.

W.P.(C) NO. 21430 OF 2016

ESSAR PARADIP TERMINALS LTD. & ANR. .....Petitioner

.Vrs.

CHAIRMAN, PARADIP PORT TRUST .....Opp. Parties

Tender – Opp.Party-PPT invited tenders in respect of a project for a period of 30 years – Petitioner-Company became the successful bidder and concession agreement was entered into between the parties on 10.11.09 – Petitioner furnished performance Bank Guarantee of Rs. 20 crore on Dt 03.06.2016 – However, as the petitioner did not fulfill its part of obligation as per clause 3.1.(a) of the concession agreement termination notice issued to him, followed by fresh tender call notice – Hence the writ petition – Both the parties had delayed in fulfilling their part of the obligations as provided under clause 3.1 of the concession agreement – As such in equity the petitioner-Company is not entitled to the main relief of quashing the fresh tender call notice – However since the Opp. Party was also at fault and had not fulfilled its part of obligation, the cancellation of the concession agreement should be without imposing any penalty and without forfeiting any security deposit made by the Petitioner-Company at the time of entering into the concession agreement, nor should it be treated as a defaulter to debar it from future contracts – Held, this court issued directions that though the concession agreement Dt 10.11.2009 would stand terminated, the Opp.Party would not be entitled to encash any security deposit or the bank guarantee to the petitioner-company, deposited by him at the time of entering in to the concession agreement – Further, the Petitioner-Company shall not be treated as a defaulter and the Opp. Party shall not invoke clause 2.2.8 of the concession agreement against the Petitioner-Company.

(Paras 9,10,11)

For Petitioner : M/s. Asok Mohanty, Sr Adv.
M/s. Sanjaat Das, S.Jena, S.Das & S.Ray

For Opp. Parties : Mr. S. D. Das, Sr Adv.
M/s. M.M. Swain, H.K. Behera, S. Biswal,
H. K. Mohanty & J.S. Samal

Date of hearing : 24.04.2017
Date of judgment: 24.04.2017

JUDGMENT

VINEET SARAN, CJ.

The Opposite Party-Paradip Port Trust had invited tenders for a project called "Request for Qualification for Development of Deep Draught Coal Berth on Build, Operate and Transfer basis" for a period of 30 years. In February 2009, discussions were held between the intending 2 bidders and opposite party. Thereafter on 21.08.2009, the petitioner-company was declared as the successful bidder and was issued with the 'Letter of Award' (LoA). The Concession Agreement was entered into between the opposite party and the petitioner-company on 10.11.2009. As per clause 3 of the said agreement, there were certain conditions to be complied, both by the petitioner-company as well as the opposite party. Besides other conditions, the petitioner-company was to furnish "Financial Close" as had been defined in the said Concession Agreement. Clause 3.1(b) of the Concession Agreement provided for the Conditions Precedent to be satisfied by the opposite party. Clause 3.2 provided for the Conditions Precedent to be complied with by both the parties within 180 days of the Concession Agreement, which in the present case, was entered into on 10.11.2009. For convenience clause nos. 3.1(b) and 3.2 of Concession Agreement are reproduced below :

> "3.1 xx xx xx
>
> (b) The following Conditions Precedent shall be satisfied by the Concessioning Authority :
>
> (i) procurement of the clearances required for the Project, as set out in Appendix 8;
>
> (ii) handing over physical possession of the Project Site and/or the Port's Assets for the purposes of the Project;
>
> 3.2 The aforesaid Conditions Precedent shall be complied with within 180 (one hundred and eighty) Days of the date of the Agreement. Each Party shall promptly inform the other Party in writing when the Conditions Precedent for which it is responsible have been satisfied."

2. Admittedly, neither of the parties complied with the Conditions Precedent as contemplated in Clause 3.2 of the Concession Agreement. The time of 180 days provided in the Concession Agreement was extended mutually, either expressly or impliedly, from time to time and finally on 10.03.2015, the opposite party obtained various clearances and fulfilled the Conditions Precedent as per clause 3.1(b). The petitioner-company was given

180 days time from the said date, i.e., 10.03.2015 by the opposite party for complying with the Conditions Precedent provided under clause 3.1(b) of the agreement. Such time of 180 days from 10.03.2015 was extended by the opposite party from time to time, which was finally extended up to 327 days, and came to an end on 31.01.2016. Admittedly, the petitionercompany did not comply with and fulfill the Conditions Precedent as prescribed, within the aforesaid time.

3. There was no communication between the petitioner-company and the opposite party after 31.01.2016 until 03.03.2016, when the termination notice was issued by the opposite party giving the details of various extensions granted and noticing that the petitioner-company had not performed and discharged its part of the obligations under the Concession Agreement within the extended time of 31.01.2016, and by invoking clause 3.6 of the Concession Agreement, such termination notice was issued for fulfilling the conditions within a further period of 90 days from the receipt of the notice, failing which the Concession Agreement dated 10.11.2009 entered into between the opposite party and the petitioner-company, would stand terminated.

4. According to the petitioner-company, since notice dated 03.03.2016 was served on the petitioner-company on 07.03.2016, the said period of 90 days was to expire on 07.06.2016. Prior to the said date, the petitioner-company had furnished a Performance Bank Guarantee of Rs.20 crore on 03.06.2016. However, the other requirements of "Financial Close", were not fulfilled by the petitionercompany and further extension was sought for. There was no response to the communication dated 03.06.2016 by the opposite party and then again on 02.09.2016, the petitionercompany wrote to the opposite party for further extension. However, when the opposite party did not respond to any of such communications made by the petitioner-company nor accepted the bank guarantee submitted on 03.06.2016, the petitioner-company approached this Court by filing this writ petition primarily with the prayer for quashing the termination notice dated 03.03.2016 and for extending the time for fulfilling its obligations under clause 3.1(a) of the Concession Agreement, and for fulfilling the Conditions Precedents, and also for quashing of fresh tender call notice.

5. We heard Mr. Asok Mohanty, learned Senior Counsel along Mr. Sanjaat Das, learned counsel for the petitioner-company, as well as Mr. S.D. Das, learned Senior Counsel along with Mr. Haripada Mohanty, learned counsel for the opposite party, and perused the record. Pleadings between the

parties have been exchanged. On consent of the parties, this writ petition is disposed of at the admission stage. The facts, as narrated, are not disputed by the parties.

6. Mr. Mohanty, learned Senior Counsel for the petitioner-company submits that after the parties had entered into the Concession Agreement on 10.11.2009, within a period of 180 days, the petitioner-company had furnished the sanction letter of Performance Bank Guarantee of Rs.20 crore on 20.01.2010. The other Conditions Precedent, as prescribed, were also being fulfilled by the petitioner-company, but the opposite party had also not fulfilled its part of the obligation, as required under clause 3.1(b) of the Concession Agreement until 10.03.2015, which was nearly 5½ years after the parties entered into the Concession Agreement on 10.11.2009, and was required to be completed within 180 days. It is contended that there might have been some default on the part of the petitionercompany, but the intention of the petitioner-company to fulfill its obligations under clause 3.1(a) of the Concession Agreement was absolutely clear as substantial part of the obligations had been fulfilled on 20.01.2010, when the petitioner-company furnished the sanction letter for Performance Bank Guarantee of Rs.20 crore.

7. It is contended that the default was on the part of the opposite party, as it had not obtained necessary clearance from the Government Departments and had not handed over physical possession of the site within prescribed period of 180 days and took more than five years, because of which the petitioner-company had to take time for fulfilling its part of the obligations. Learned counsel further submits that intention of the petitioner-company was always to fulfill its part of obligations within the time, but because of some unforeseen circumstances and also because of the conduct of the opposite party in delaying its part of performance of obligations, the petitioner-company could not fulfill its obligations within 180 days from 10.03.2015 or during the extended time.

8. Mr. S.D.Das, learned Senior Counsel appearing for the opposite party submitted that the obligations to be fulfilled by the opposite party was delayed because certain clearance were to be obtained from different Government Departments. However, it is contended that the time for fulfilling the obligations of the respective parties provided under clause 3.2, was extended from time to time and as a last opportunity the petitioner was granted 180 days from the date of handing over possession with effect from 10.03.2015, which also was extended from 180 days to 327 days, but the

petitioner-company did not fulfill its part of obligations. It is contended that the petitioner-company would not be entitled to any sympathy, as even after the further extended period of 327 days, the petitioner-company was granted another 90 days to fulfill its obligation vide termination notice dated 03.03.2016 and the petitionercompany could not fulfill its obligation within such period also.

Mr. Das further submitted that clause 3.6 of the Concession Agreement provides for maximum 180 days period to be granted in the termination notice, and though 90 days period was granted, which was permissible under clause 3.6, yet if 180 days is also taken as granted from 03.03.2015 which is the maximum period, then too the petitioner-company did not fulfill its part of obligations within the said period of 180 days, and as such the petitioner-company would not be entitled to any relief as sought for in this writ petition.

9. Having heard learned counsel for the parties and considering the facts of the case, we are of the opinion that the fault lies not on any one of the parties, as both the parties had delayed in fulfilling their part of the obligations, as provided under clause 3.1 of the Concession Agreement. The petitioner-company had made its intention clear that by obtaining sanction letter for Performance Bank Guarantee of Rs.20 crore within the period of 180 days from the date when the parties entered into the Concession Agreement. The opposite party admittedly could not fulfill its part of the obligations within the prescribed period of 180 days. It took more than five years to do so. Thereafter, the petitionercompany took substantial time and then also, besides furnishing the Performance Bank Guarantee, did not fulfill its part of obligation as prescribed under clause 3.1(a) of the Concession Agreement. As such, in equity, we are of the opinion that the petitioner-company would not be entitled to the main relief of quashing the fresh tender notice.

10. However, considering the facts of the case and balancing the equities between the parties, we are of the opinion that since the opposite party was also at fault to quite some extent and had not fulfilled its part of obligation within 180 days and took more than five years to do so, the cancellation of the Concession Agreement should be without imposing any penalty and without forfeiting any security deposit made by the petitioner-company at the time of entering into the Concession Agreement, nor should it be treated as a defaulter for purpose of debarring it from future contracts.

11. Accordingly, we dispose of this writ petition with the direction that though the Concession Agreement dated 10.11.2009 would stand terminated, the opposite party would not be entitled to encash any security deposit or the bank guarantee and shall return the security deposit or the bank guarantee, which the petitioner-company had deposited at the time of entering into the Concession Agreement. Further, petitioner-company shall not be treated as a defaulter and the opposite party shall not invoke clause 2.2.8 of the Concession Agreement against the petitioner-company. No order as to costs.

Petition disposed of.

2017 (II) ILR - CUT- 227

VINEET SARAN, C.J. & K. R. MOHAPATRA, J.

W.P.(C) NO. 4673 OF 2017

SANTILATA KHUNTIA ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Money claim – Cause of action arose in the year, 2010 – Writ petition filed in the year 2017 claiming relief – When the claim is time barred even for filing a suit, the same cannot be revived by invoking writ jurisdiction – However, writ petition can be entertained only if the dues are admitted.

In this case neither the dues of the petitioner are admitted nor have been acknowledged by the O.P.No.2-Bhubaneswar Municipal Corporation – Held, the present writ petition is not maintainable.

(Paras 4, 5, 6)

Case Law Referred to :-

1. 2010 (II) OLR 355 : Sri Padma Charan Patra -V- State of Orissa & Ors.

For Petitioner : Mr. Kamal Behari Panda & S.Mishra
For Opp. Parties : Additional Govt. Advocate

Date of Hearing : 20.04.2017
Date of judgment : 20.04.2017

JUDGMENT

VINEET SARAN, CJ.

The case of the petitioner is that she was awarded a contract by Bhubaneswar Municipal Corporation-opposite party no.2 to perform certain work, for which an agreement was executed on 16.11.2009. The said work was to be completed by 29.03.2010. According to the petitioner, the work was completed in the year 2010 and the bills for payment of the dues were submitted by her on 20.11.2011. Prior to that, according to the petitioner, the bills submitted by her were cross-checked by the Municipal Authorities on 01.06.2011. According to the petitioner, even though she had completed the work in the year 2010 and submitted all the bills in the year 2011, yet no payment was made to her by the opposite parties, for which she sent a legal notice to Bhubaneswar Municipal Corporation on 17.09.2016 through her Advocate for payment of the dues. Even on the application seeking for information which was filed by the petitioner under the Right to Information Act, the opposite parties did not give any response. She, thus, has filed this writ petition claiming payment of outstanding bills from Bhubaneswar Municipal Corporation along with interest @ 18% per annum.

2. From the facts as stated above, what we notice is that no acknowledgement of any amount due to the petitioner has been made at any stage by Bhubaneswar Municipal Corporation. Admittedly, the work was completed in the year 2010 and the bills were submitted in the year 2011. The cause of action arose after the work was completed in the year 2010, or at best, at the stage when the bills were submitted by the petitioner. Limitation for filing of a money suit for claiming any amount from Bhubaneswar Municipal Corporation for the work done and completed by the petitioner in the year 2010 would be three years, either from 2010 when the work was completed, or from 2011, when the bills were submitted by her. Such limitation period having expired, the petitioner then sent a legal notice in the year 2016, which is six years after completion of the work. Since there was no response, the petitioner has filed this writ petition, much after the period of limitation had expired even for filing a money suit.

3. Besides that, disputed questions of fact are involved in this writ petition for which evidence will have to be led by the parties for deciding the issues involved, which cannot be done in the writ jurisdiction. We are also of the opinion that when the claim of the petitioner is time barred even for filing a suit, the same cannot be revived by invoking writ jurisdiction. Normally, under the writ jurisdiction, the Court could at best interfere when the statutory authorities have acknowledged or admitted certain dues, which are

to be paid and not being paid by such authorities and that too, when the claim is filed within a reasonable period. In the present case, the petitioner has not been able to produce any document to show that there are admitted dues of the petitioner, which are to be paid by Bhubaneswar Municipal Corporation.

4. Learned counsel for the petitioner relied upon the decision in the case of ***Sri Padma Charan Patra –v- State of Orissa and others***, reported in 2010 (II) OLR 355, wherein this Court at paragraph-13 of the said judgment has held as follows:

> *"13. The State of Orissa filed its counter affidavit contending that the petitioner has no cause of action for filing the present writ application and the same is liable to be dismissed. The Agreement No.305F dated 19.11.2004 has been closed with levy of penalty by the Chief Engineer (DPI and Roads) on 07.12.2007, which was communicated to the petitioner on 17.12.2007. It was contended that notwithstanding the cooperation of the department, the petitioner could not complete the work in time and has prayed for extension of time, which was also allowed to the petitioner. As the work was not completed in time, keeping in view the escalation and estimate and suffering of public, it was felt necessary to close the contract with levy of penalty. The writ application, is therefore, not maintainable and liable to be dismissed. It is further contended by learned Addl. Govt. Advocate that the writ petition for a money claim is not maintainable. The proposition broadly stated may be correct, but the apex Court has held in a number of cases that a writ petition is maintainable for* ***admitted dues****….."*

In said case, it has also been mentioned that the Apex Court has held in a number of cases that a writ petition is maintainable for admitted dues. There is no quarrel over such proposition of law, as the said authorities are obliged to pay the dues which are admitted. However, in the instant case, the dues are neither admitted nor have been acknowledged by the opposite parties-State authorities. In such a case, the party will have to prove the claim by adducing evidence, which can only be done in Civil Suit and not in writ jurisdiction.

5. Learned counsel for the petitioner also relied upon a decision of the Hon'ble Supreme Court in the case of ***Union of India & Ors. V. Tantia Construction Pvt. Ltd.,*** wherein at paragraph 27 it has been held as follows:

"27. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company."

In the said case, the Apex Court has held that merely because there is an arbitration clause, the writ petition should not be dismissed on the ground of availability of alternate remedy, as it is well-established law that alternate remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court. The facts of the said case are absolutely different than in which the Apex Court has made the aforesaid observation. There is no doubt about the fact that alternate remedy is not an absolute bar for entertaining a writ petition. However, the jurisdiction under Article 226 of the Constitution cannot be invoked for reviving a claim, which is otherwise beyond the period of limitation even for filing a civil suit. Had there been any acknowledgement from the side of the opposite parties of any amount to be due, even if there is no admission of such dues to be paid, then too, this Court could have invoked its jurisdiction under Article 226 of the Constitution of India. But in absence of any such admission/acknowledgement on the part of Bhubaneswar Municipal Corporation, the claim for which the cause of action arose in the year, 2010, cannot be entertained by way of filing a writ petition in the year, 2017.

6. For the forgoing reasons, we are of the opinion that the claim in the present writ petition, as raised by the petitioner, would not be maintainable. As such, we dismiss the writ petition. However, dismissal of the writ petition will not stand in the way of the petitioner initiating any other proceedings against the opposite parties for redressal of her grievance, if the law so permits.

Writ petition dismissed.

2017 (II) ILR - CUT- 231

VINEET SARAN, C.J. & K.R. MOHAPAPATRA, J.

W.P.(C) NO. 22315 OF 2016

M/S. DEBABRATA SAMAL ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……..Opp. Parties

TENDER – Whether the tender of the petitioner, which was submitted alongwith four other tenders, but was the only qualified tender, would be considered as single tender or not ? – Held, the tender of the petitioner was to be treated as a "single tender" – Object behind it is that there should be competitive bidding between the parties before the tender is accepted. (Paras 4,5,6)

Case Laws Referred to :-

1. 2014 (I) ILR-CUT 382 : M/s. Kalinga Order Supplier -V- State of Orissa.
2. AIR 2016 SC 3366 : State of Jharkhand & Ors. -V- M/s. CWE-SOMA Consortium.

For Petitioner : Mr. Milan Kanungo
M/s. S.Mishra & S.R.Mohanty

For Opp.Parties : Addl. Govt. Advocate

Date of hearing : 09.05.2017
Date of judgment: 09.05.2017

JUDGMENT

VINEET SARAN, CJ.

In response to the Tender Call Notice dated 12.08.2016 issued by opposite party No.2-Chief Engineer (DPI and Roads), Works Department, Bhubaneswar for the work "Improvement of Badachana-Balichandrapur Road From 7/200 KM to 11/980 Km under State Plan" for estimated cost of Rs.5,38,43,202/, the petitioner as well as four other contractors had applied. The technical bids of all the five tenderers were considered by the Tender Evaluation Committee on 18.11.2016. Except the technical bid of the petitioner, the bids of other four bidders were found to be technically disqualified and the petitioner alone was found to be qualified bidder. The proceedings of the Tender Evaluation Committee dated 18.11.2016 reveals that the Committee recommended for cancelation of the tender on the following grounds:

> *"After detail scrutiny of the bid documents furnished by the bidders and complain and compliance received by this office, the findings of the Committee are as follows:*

Sl. No	***Name of the Bidder***	***Findings***
1.	*M/s Gourav Construction, Special Class Contractor*	*The bidder has not furnished the existing commitment and ongoing works in Schedule-G format. Hence, the bidder is disqualified for the aforesaid work on the ground of submission of such false statement of declaration as per Clause 117 outlined in the DTCN*
2.	*2. M/s Divine Construction, Super Class Contractor*	*The available bid capacity is less than the required Bid Capacity. Hence, the bidder fails to meet the eligible criteria as per Clause-122 (f) of DTCN and hence, disqualified*
3.	*Sri Debarata Samal, 'A' Class Engineer Contractor*	*The bidder has submitted all the required documents as per the clauses of DTCN.*
4.	*Bhagabati Build & Constructions (P) Ltd., Super Class Contractor*	*The bidder has not furnished the ongoing work i.e. "Improvement such as widening and strengthening to Rajngar-Dangamal-Talchua road from 13/315 Km to 17/914 Km in the district of Kendrapara for the year 2015-16 under State Plan" in Schedule-G format. Hence, the bidder is disqualified for the aforesaid work on the ground of submission of such false statement or declaration as per Clause 117 outlined in the DTCN.*
5.	*M/s B.L. Construction, Super Class Contractor*	*The bidder has not furnished valid VAT Clearance Certificate as per Clause 7 and 122(b) of the DTCN and hence, disqualified.*

After detailed discussion, the Committee unanimously decided to cancel the tender and retender the work for competitive bidding".

2. Pursuant thereto, the opposite party No.2 cancelled the tender vide its order dated 25.11.2016. This petition is thus filed with the prayer for quashing the recommendation of the Tender Evaluation Committee in its meeting dated 18.11.2016 and for cancelation of bid by order dated 25.11.2016 and to open the financial bid of the petitioner so as to settle the tender in its favour. Pursuant to order dated 25.11.2016, the opposite parties issued fresh tender call notice dated 26.11.2016, which has also been challenged in this writ petition.

3. We have heard Sri Milan Kanungo, learned Senior Counsel appearing along with Sri S.Mishra and Sri S.R.Mohanty, learned counsel for the petitioner, as well as learned Additional Government Advocate appearing for the opposite parties. Pleadings between the parties having been exchanged and on consent of the parties, this writ petition is disposed of at the admission stage.

4. The facts, as narrated above, are not disputed by the parties. It is also admitted by the parties that the Orissa Public Works Department Code (for short, 'OPWD Code') would be applicable to the grant of contracts by the opposite parties. The question to be considered by this Court is as to whether the tender of the petitioner, which was submitted along with four other tenders, but was the only qualified tender, would be considered as single tender or not. The relevant Clause of the OPWD Code is Clause-29. The pre-amended Clause-29 of the OPWD Code is as follows:

> *"29. When in response to a notice calling for tenders, only a single tender is received the approval of the next higher authority should be obtained if the tender is otherwise in order and is acceptable."*

After amendment in the year 2015, the said Clause-29 of the Volume-II of the OPWD Code stands as under:

> *"29. When in response to a notice calling for tenders, only a single tender is received in the first time, the tender shall be cancelled without opening of the bid and fresh tender be invited publicity. If single tender is received, even after retendering then the approval of the next higher authority should be obtained, if the tender is otherwise in order and acceptable."*

5. Prior to 2015, in case of single tender, the approval of next higher authority was to be obtained before accepting the tender. After amendment of the OPWD Code in 2015, the said option of accepting the single tender after obtaining approval of the next higher authority was left open only in the case of retendering, and not in the first tender. As such, if it is held that the tender of the petitioner was to be treated as a 'single tender', then after the amendment of Clause-29 of the OPWD Code 2015, the only option left with the opposite parties is to retender, as even after obtaining approval of the next higher authority, the tender could not have been accepted, as such 'single tender' was in response to the first tender call notice and not retender.

6. The purpose of not accepting the single tender or bid is to ensure competition among the bidders. The exception to accept the single tender is now provided only in case of retendering, where in the initial tendering process also there was a single bid or tender. Thus, the object is very clear that there should be competitive bidding between the parties before the tender is accepted. Merely because five tenders were filed, it would not mean that it is a case of multiple tenders, unless two or more tenders are found to be in order and accepted. If the submission of learned counsel for the petitioner is accepted that since there were five tenders, thus even if only one tender was found to be in order, then too it should not be treated as 'single tender', the same would not serve the purpose as there would be no competitive bid for the work proposed to be done. If there is only one tender which remains valid, and the financial bid of the single tender is to be opened, then there would be absolutely no competitive price bidding and if the same is accepted, it would actually amount to be a case of 'single tender', even though there may have been five tenderers at the threshold, out of which one remains valid.

7. Similar view was taken by a Division Bench of this Court in the case of *Arun Kumar Mohanty Vs. State of Odisha* [W.P.(C) No.13334 of 2014 decided on 27.08.2014], wherein when only one tender was found to be valid and others were rejected on technical grounds, then the Technical Evaluation Committee had recommended for approval of next higher authority and consequently the Collector rejected the said tender process and directed for retendering. In such circumstances, the Division Bench of this Court found the action of the Collector to be correct as it held that the "*the tender of the petitioner had been reduced to single tender*".

Another Division Bench of this Court in the case of *M/s Kalinga Order Supplier Vs. State of Orissa*, reported in 2014 (I) ILR-CUT 382, has also taken the similar view. In almost similar facts, the Hon'ble Supreme Court in a recent decision reported in AIR 2016 SC 3366 (*State of Jharkhand and others Vs. M/s CWE-SOMA Consortium*) has also held that even though several tenders may have been filed, but when only one tender was found to be valid, the same should be treated as 'single tender'.

8. Learned counsel for the petitioner has vehemently argued that in the similar cases the same Tender Evaluation Committee has accepted the single tender, which was found to be valid, even though other tenders filed for the same work were found to be disqualified. In his support, learned counsel has

relied on certain decisions of the Tender Evaluation Committee filed along with the additional affidavit. He also relied upon a communication of the Government of Odisha in Works Department dated 6th December, 2014, wherein the Government has written to the Chief Engineer in a particular case, where there were two tenders and only one tender qualified, then the same could be accepted in terms of the OPWD Code, and the same was not to be treated as 'single tender' since two numbers of bids were received in response to the tender call notice. It is noteworthy that the aforesaid communication was in a particular case which was being considered by the Government, and cannot be taken as a rule, as the same would be against the provisions of the amended OPWD Code. The said order was also not passed after taking into consideration the judgment passed by this Court, referred to above.

9. It has been submitted by learned counsel for the petitioner that the cases being considered by the High Court were not covered by the OPWD Code, whereas the Tender Evaluation Committee, while deciding the matter in other cases, has after considering the OPWD Code, decided and confirmed the tender even in case where only one tender is found to be valid. The same cannot be treated as a precedent as we have already held hereinabove that in view of the provisions of the OPWD Code, in the given facts, the tender of the petitioner is to be treated as a 'single tender'.

10. In view of the aforesaid facts of the case, we hold that the bid of the petitioner is to be treated as 'single tender', and further hold that even when there may be several tenders filed, but only a single tender is found to be qualified, the same should be treated as 'single tender', as there would be no competitive price bidding. As such, according to amended Clause-29 of the OPWD Code, in case of there being 'single tender', as in the present case, the opposite party No.2 has no option but to cancel the tender and direct for retendering, which has been so done. Accordingly, the reliefs prayed for in the present writ petition do not deserve to be granted. The writ petition stands dismissed.

Writ petition dismissed.