

**THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 10.07.2009

+ **DEATH SENTENCE REFERENCE 2/2008**

**STATE** ... Petitioner/Appellant

- Versus -

**JYOTISH PRASAD & ANOTHER** ... Respondents

**Advocates who appeared in this case:-**

For the Petitioner/Appellant : Mr M.N. Dudeja

For the Respondent No.1 : Mr Vikas Arora

For the Respondent No.2 : Mr Navin Chawla

**WITH**

+ **CRL. A. 768/2008**

**JYOTISH PRASAD** ... Appellant

- Versus -

**STATE (NCT OF DELHI)** ... Respondent

**Advocates who appeared in this case:-**

For the Appellant : Mr Vikas Arora

For the Respondent : Mr M.N. Dudeja

**AND**

+ **CRL. A. 90/2009**

**ASHISH KUMAR KAPRI** ... Appellant

- Versus -

**STATE OF NCT OF DELHI** ... Respondent

**Advocates who appeared in this case :-**

For the Appellant : Mr Navin Chawla

For the Respondent : Mr M.N. Dudeja

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE V.B. GUPTA**

- |    |                                                                        |     |
|----|------------------------------------------------------------------------|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment ? | YES |
| 2. | To be referred to the Reporter or not ?                                | YES |
| 3. | Whether the judgment should be reported in Digest ?                    | YES |

**BADAR DURREZ AHMED, J**

1. These appeals and the death sentence reference arise out of the judgment dated 02.08.2008 and the order on sentence dated 11.08.2008 passed by the learned Additional Sessions Judge, Patiala House Courts, New Delhi in Sessions Case No.19/2004 arising out of FIR No.112/2004 registered at police station IGI Airport. By virtue of the impugned judgment, the appellants Jyotish Prasad and Ashish Kumar Kapri have been convicted under Sections 394/302/201/34 IPC as well as under Section 376 (2)(g) IPC. The learned Additional Sessions Judge, by the impugned order on sentence, imposed the extreme penalty of death sentence on both the appellants in respect of the offence of murder punishable under Section 302 IPC. With regard to the conviction under Section 394 IPC, the appellants were sentenced to undergo rigorous imprisonment for 10 years each and also to pay a fine in the sum of Rs 1,000/- each and in default of the payment of such fine, they were to undergo simple imprisonment for one month each. With regard to the offence under Section 201 IPC, the appellants were

sentenced to undergo rigorous imprisonment for seven years alongwith a fine in the sum of Rs 1,000/- each. In default of payment of fine, they were required to undergo simple imprisonment for one month. As regards their conviction under Section 376 (g) IPC, the appellants were directed to undergo imprisonment for life as also to pay a fine in the sum of Rs 1,000/- each and in default thereof to undergo simple imprisonment for one month.

2. The prosecution case is that in the early hours of 17.03.2004, Ms Dawn Emelie Griggs aged about 60 years, an Australian citizen, arrived at the Indira Gandhi International Airport (hereinafter referred to as 'IGI Airport') from Hongkong on board Flight No. CX-753. At the said airport, she took a taxi bearing No. DL-1T-2248 from the prepaid taxi booth at about 2.30 a.m. The driver of this taxi is alleged to be the appellant Jyotish Prasad. The allegation is that the appellant Jyotish Prasad alongwith the appellant Ashish, who is also a taxi driver, were already planning to loot some passenger. The allegation goes further that when the appellant Jyotish Prasad had taken the said Ms Griggs in his taxi, she appeared to be an easy prey. After driving a short distance, the appellant Ashish was also admitted into the taxi by the appellant Jyotish Prasad. Thereafter, they took the taxi onto an unpaved (*kachha*) passage towards the jungle around the airport area. On this, Ms Griggs started shouting. It is alleged that Ashish caught hold of her and

gagged her mouth with a piece of cloth which was in the taxi and which was used for cleaning purposes. The prosecution case goes further in that the appellants stopped the taxi near a well in the jungle and snatched her waist purse. She was then taken out from the taxi and dragged near the bushes and thereafter, raped by the appellants one by one. Thereafter, the appellants used a screw driver which was available in the taxi and caused injuries on her person. They throttled her by pressing her neck and also by gagging her and thereby killed her. It is further alleged that they took out the luggage of the deceased from the taxi, opened the same and searched through her luggage for valuables. They took out the currency and travellers cheques, etc. from the bags which they threw in a dry well nearby and then disappeared.

3. At about 10.50 a.m., on 17.03.2004, an information was received at the police station IGI Airport, Delhi that a dead body of a female was lying in the jungle near the Bharat Petroleum Gate of IGI Airport. The information was reduced to writing as D.D. No.3-A (Exhibit-PW-1/A). The said information was marked to PW-27 (SI Suresh Chand) who left for the spot alongwith Constable Anil Kumar. PW-28 (Inspector J.L. Meena), who was the investigating officer in this case, came to know about this fact and he departed from the police station IGI Airport by recording the same in D.D. No.4-A (Exhibit-PW-1/B) at 10.55 a.m. When the investigating officer (IO) reached the spot at about 11.20

a.m., he found a dead body of a female of foreign origin lying in the jungle about 300 metres away from the Bharat Petroleum Depot. There was blood lying at the spot and a piece of cloth was found inserted in the mouth of the corpse. The investigating officer (J.L. Meena) also noticed injuries near the right eye and nose of the deceased. He also noticed bluish marks on her neck. One plastic bottle and spectacles were found lying near the dead body. The bottle was of Evian brand. After conducting a search, the investigating officer found some articles lying in a dry well about 150 metres away from where the dead body was lying. One Murari Pandey (PW-16) at the request of the investigating officer took out the articles from the well. The articles comprised of one red bag of medium size, two black bags and some loose papers, books and a pair of shoes. A tag of the airlines mentioning CX-753 was found affixed on all the three bags. On checking the contents of the bags, two photocopies of the passports were recovered. One was an Australian passport and the other was a British passport. The name of the holder of both the passports was Dawn Emelie Griggs. A photograph was recovered from the baggage and the photographs of Dawn Emelie Griggs were also visible in the photocopies of the passports. The investigating officer compared the photograph as appearing in the photocopies of the passports with that of the dead body and came to the conclusion that the dead body was of Dawn Emelie Griggs.

4. After sometime, the crime team reached the spot and photographed the dead body, place of incident and the surrounding areas. Photographs of the bags taken out from the well were also taken. The site was inspected by the crime team members and they also inspected the plastic bottle and other articles. The finger print team also reached the spot and they lifted finger prints from the glass, one plastic lunch box and from one bottle of plastic and from the polythene pouch and a folder after taking the same out of the bags. The articles which were recovered were sealed in parcels with the seal of JLM and seizure memos were prepared. Blood stained earth and earth control were also lifted from the spot and were sealed separately with the seal of JLM (initials of the investigating officer) vide separate seizure memos Exhibit-PW-2/C.

5. The investigating officer had also found the ear rings lying near the head and the said ear rings and other belongings of the lady and those which were found on her dead body were removed and sealed vide seizure memo Exhibit-PW-2/B. The said other belongings, included a Citizen watch, two rings, one *chutki*, one stone necklace, one ring on which the following words were inscribed — “*Param Pita Shiv Parmatma*”. After completing the other investigative procedures and after the finger-print expert and the crime team officials handed over

their reports, the investigating officer left the spot alongwith PW-27 (SI Suresh Chand) and reached IGI Airport. The investigating officer collected details of the flight from PW-8 (SI Surender Latia), who was posted at IGI Airport and who was deputed by the investigating officer to collect details from the Immigration Office. Photocopies of the flight chart were seized vide memo Exhibit-PW-8/A. Photocopies of the disembarkation card, photo copies of the flight manifesto, record of the Bureau of Immigration, etc. were taken. The said documents were marked as Exhibit-PW-8/B, C, D and E). On going through the said documents, the investigating officer arrived at the conclusion that the deceased Ms Griggs had arrived at IGI Airport in the early hours by Flight No.CX-753 from Hongkong. In order to cross-check as to the mode of transport taken by her, upon her arrival at the Delhi Airport, the investigating officer went to the prepaid taxi booth / counter. At the said counter, one Mahender Pal (PW-3) was found to be in charge of the prepaid taxi booth. He provided a carbon copy of a voucher (Exhibit-PW-3/B), which was issued in the name of the deceased. The said voucher indicated the destination as Karol Bagh and the fare for the journey was indicated as Rs 250/-. The said PW-3 (Mahender Pal) told the investigating officer that as per their records, Ms Griggs had boarded taxi No. DL-1T-4428. The document, which was provided by the PW-3 (Mahender Pal) was seized vide memo Exhibit-PW-3/A. It may be relevant to point out that the investigating officer also seized

the photocopy of the register maintained at the prepaid taxi booth and the same was marked as Exhibit-PW-3/C. The original register was also later on placed on the judicial file during evidence and it is exhibited as Exhibit-PW-3/C. It is the case of the prosecution that this register contains the record of the taxies which are allotted to passengers from the said prepaid booth.

6. Armed with the information hitherto gathered by him, the investigating officer searched for the owner of the taxi. Apparently, the taxi owner PW-11 (Rakesh Kumar) was found in the parking lot of IGI Airport. He was asked as to who was driving the taxi in the intervening night of 16<sup>th</sup> / 17<sup>th</sup> March, 2004. The said taxi owner PW-11 (Rakesh Kumar) is alleged to have told the investigating officer that it was driven by the appellant Jyotish Prasad.

7. The sequence of events, according to the prosecution, which followed, is that thereafter, the said PW-11 (Rakesh Kumar) led the police party to the house of one Harender at Shahbad where the appellant Jyotish Prasad was residing as a tenant. The appellant Jyotish Prasad was found at that place. It is stated that the appellant Jyotish Prasad was then taken to the parking lot where the taxi was parked and he was interrogated on the way near Shahbad Road. Apparently, the appellant Jyotish Prasad confessed to the crime vide Exhibit-PW-27/A.

He is also stated to have named appellant Ashish as his accomplice. Jyotish Prasad was arrested and his personal search was conducted vide memo Exhibit-PW-27/B. He was found to be in possession of one purse containing one US dollar, Rs 240/- in Indian currency, one telephone diary, one driving licence, one Nokia mobile phone, one key of a vehicle and one prepaid voucher (Exhibit-PW-3/D), which was the driver's copy issued by the prepaid taxi booth. Exhibit-PW-3/D bore the number 88919 and, on it, 'Griggs' was written separately. The passenger's name was given as "Mr Griggs Daun". The taxi number "4428" was written in hand. The said voucher (Exhibit-PW-3/D) was taken into possession vide seizure memo Exhibit-PW-27/C. Jyotish Prasad is then said to have led the police party to the taxi stand near IGI Airport and to have pointed out the taxi bearing registration No. DL-1T-4428 which was seized vide seizure memo Exhibit-PW-27/H. At the parking lot, the underwear, which Jyotish Prasad was wearing, was also taken into possession and sealed vide memo Exhibit-PW-27/D. Thereafter, the appellant Jyotish Prasad took the police party to the place of incident and pointed out the same and also identified the well where he dropped the belongings of the deceased. He is alleged to have also pointed out the sewage manhole where he is alleged to have dropped some cards and the passport of the deceased, after the offence. He is also said to have pointed out the place where he concealed his share of the loot. Pointing out memos Exhibit-PW-27/D, 27/E, 27/F

and 27/K were prepared. The appellant Jyotish Prasad is said to have led the police party to a well which was 14-15 feet deep and in the presence of the police party he entered the same and after digging some soil, with his hands, he took out a bundle (*potli*) and thereafter he came out of the well. When the said bundle was opened, it was found to contain 300 Australian dollars, seven travelers cheques, four currency notes of Hongkong dollars in the denomination of 100 dollars each and two currency notes of Hongkong dollars in the denomination of 20 dollars each. The travelers cheques were found to be in the name of Dawn E. Griggs. The said articles were seized vide seizure memo Exhibit-PW-27/G. The investigating officer alongwith the police officials then once again visited the prepaid taxi parking lot at the IGI Airport. The crime team officials had been informed to inspect the recovered taxi and when the investigating officer arrived at the parking lot, the crime team members were present. Thereafter, the taxi was inspected by the members of the crime team who recovered one *jungle* *gokhroo* (wild thorn) from the right hand side rear tyre of the vehicle. One such *gokhroo* was also found from the mat which was lying near the rear seat and the mud was also removed from all the four tyres. Some hair were also lifted from inside the taxi. The above articles were placed in a sealed parcel vide seizure memo Exhibit-PW-27/1. Finger prints were also lifted from the taxi by the finger print expert on 17.03.2004. The investigating officer then once again visited the

prepaid taxi booth situated in the arrival section of IGI Airport. There, he met one Vijay Kumar (PW-4) who was an employee working at the said booth. PW-4 (Vijay Kumar) informed the investigating officer that it was he who issued the voucher / receipt of the prepaid taxi in respect of the foreign lady, namely, Griggs Dawn. Consequently, the statement of Vijay Kumar was recorded. The investigating officer also recorded the statement of PW-15 (Head Constable Upender) in whose presence Ms Griggs had boarded the taxi No. DL-1T-4428. Thereafter, the investigating officer returned to the police station and deposited the case properties in the *malkhana*.

8. Since Jyotish Prasad had named Ashish as his accomplice, the investigating officer searched for Ashish. At the taxi stand, appellant Ashish Kumar was allegedly produced by one Kishan Pal, who was the owner of another taxi, but upon interrogation, Ashish Kumar did not disclose anything. He was handed over to the Station House Officer for further interrogation. The investigating officer then went to Safdarjung Hospital for the purposes of getting the *post mortem* examination conducted on the dead body of Ms Emelie Dawn Griggs. It is also pertinent to note that in the meantime, the Consul Officer and Consular General of the Australian High Commission had also arrived at the Safdarjung Hospital. A team of doctors conducted the *post mortem* examination and thereafter, the dead body was handed over to one Mr

Josef who had been appointed by the Australian High Commission to collect the dead body.

9. On 18.03.2004, appellant Ashish was released after interrogation with the direction to appear at the police station on the next day. On 19.03.2004, when Jyotish Prasad was again interrogated, he apparently disclosed that he, alongwith Ashish, had thrown the passport of the deceased and other documents in the sewer and that he had handed over the screw driver to Ashish. Consequently, Ashish was again called to the police station on 19.03.2004 and was interrogated. He did not reveal anything and as such, he was released with the direction to visit the police station again the next day. On 20.03.2004, Jyotish Prasad is alleged to have led the police party to the sewer situated near the Bharat Petroleum depot. The sewer was searched with the help of the contractor / employees of the airport and in the course of the search, five cards and one plastic cover were recovered. On 20.03.2004, Ashish visited the police station, but as before, he did not disclose anything and denied knowledge about the case. He was allowed to go home with the direction to appear again on 21.03.2004. On 21.03.2004, Ashish was thoroughly interrogated and gave information with regard to the screw driver and the looted amount. Consequently, Ashish was arrested vide arrest memo Exhibit-PW-13/A. Ashish, thereafter, took the police party to the place of occurrence and at a

distance of about 30-35 steps away from the dry well in which the luggage had been recovered pointed out the place where he had thrown the screw driver. Thereafter, he took out the screw driver Ex. A-1 from the mud (*kichar*). The investigating officer prepared the sketch of the screw driver Exhibit-PW-27/N and seized the same vide Exhibit-PW-27/P. In the meanwhile, the employees of the contractor Nasruddin (PW-9) were busy in the search of the passport in the sewer. At the end of the sewer near the treatment plant *jail* (mesh), an Australian passport cover was recovered. Allegedly, both the appellants identified the cover of the Australian passport as the same belonging to the deceased which they had thrown in the sewer. The passport cover (Exhibit-P-7) was taken into possession vide memo Exhibit-PW-9/B and the statements of Nasruddin and Virpal, who had entered the sewer and searched for this document, were recorded. It is then alleged that the appellant Ashish led the police party to a place at a distance of about 350 metres from Shahbad on the Samalkha side where he pointed out the place amongst the bushes and took out a white polythene bag which, when opened, was found to contain Rs 5,400/- in Indian Currency, 260 Australian Dollars, 54 coins of different countries, including Australia, New Zealand and Hongkong. He also took out one shirt (Exhibit-S-17) from the bushes. The shirt and the other recovered articles were seized and placed in separate sealed parcels vide seizure memo Exhibit-PW-27/Q.

10. On 23.03.2004, both the appellants were produced before Dr Sarvesh Tandon (PW-26) at Safdarjung Hospital for medical examination. After conduct of the said examination, six parcels duly sealed with the seal of Safdarjung Hospital reportedly containing scalp hair, pubic hair and blood gauze of both the appellants were collected. The same were seized vide memo Exhibit-PW-18/A by SI Vivek Pathak (PW-18), who also handed over to the investigating officer the *post mortem* report of the deceased and 9 sealed *pulandas* (parcels), which were prepared by the doctor after the conduct of the *post mortem* examination of the dead body of Dawn Emelie Griggs. The said parcels were duly sealed with the seal of the Department of Forensic Medicine, Safdarjung Hospital and were seized vide seizure memo Exhibit-PW-18/B. The contents of the 9 parcels seized as per memo Exhibit-PW-18/B were as under:-

- “1. One white colour cloth parcel sealed with the seal of “Department of Forensic Medicine, S.J.H., India” bearing the words “P.M. No.399/2004 dt. 18.3.2004 signature and date.”
2. One glass phial sealed with the seal of “Department of Forensic Medicine, S.J.H. India” containing the scalp hair of deceased Ms. Dawn Emelie Griggs, aged 59 years/F, R/o P.O. Box 243 Byron Bay NSW Australia, P.M. No.399/2004 dt. 18.3.2004” and bearing a slip of paper on which some words were written.
3. One glass phial sealed with the seal of aforesaid seal bearing a (slip of papers) on which some detail were written, containing the blood Gauze piece of

deceased.

4. One glass phial sealed with the seal of aforesaid seal bearing a (paper) slip on which the aforesaid details were written and containing a cloth piece of mouth.
5. One glass phial sealed with the seal of aforesaid seal bearing a (paper) slip on which the aforesaid details were written, containing the pubic hair.
6. One glass phial sealed with the seal of aforesaid seal and bearing a (paper) slip on which aforesaid detail were written and containing the nail clippings of left hand.
7. One glass phial sealed with the aforesaid seal and bearing a (paper) slip of a aforesaid details containing vaginal swab (4) in number.
8. One glass phial sealed with the aforesaid seal having a (paper) slip with some detail thereon, containing vaginal slides (4) in number.
9. A glass phial sealed with the aforesaid seal having a (paper) slip with the aforesaid detail and containing the nail clippings of right hand.”

11. On 01.04.2004, the investigating officer went to the jungle where the dead body had been recovered and lifted six *gokhroos* (wild thorns) from the place of incident by way of samples vide seizure memo Exhibit-PW-29/N. Finger prints of the accused persons had also been collected by the investigating officer and were sent to the Finger Prints Bureau, Crime Branch, Delhi Police, Delhi at Malviya Nagar for comparison with the finger prints lifted from the articles in the baggage and the taxi. The extracts collected from the medical examination of the appellants and those collected upon the conduct of *post mortem*

examination of body of the deceased were sent to the Forensic Science Laboratory, Rohini, Delhi on 22.04.2004 through PW-12 (Head Constable Ranbir).

12. The *challan* was filed in court on 26.05.2004 and the case was committed to the Sessions Court on 08.06.2004. It is alleged that when the investigating officer went to the Forensic Science Laboratory, Rohini to collect the report in this case, they informed him that some more blood of the accused persons would be required for comparison and detailed examination. Consequently, an application was moved before the learned Additional Sessions Judge, who by an order dated 01.10.2004, permitted the investigating officer to produce the appellants before the doctor for the purposes of collecting blood samples. Thereafter, the appellants were produced before the doctor on 07.10.2004 at Safdarjung Hospital and their blood samples were taken. The same were taken into possession and put in separate sealed containers as per seizure memo Exhibit-PW-22/A dated 07.10.2004. On 08.10.2004, the same were handed over to PW-21 (SI Amleshwar Rai) for depositing the same at FSL, Rohini for the purposes of conducting a comparison. On 22.11.2004, PW-17 (Head Constable Rawat Singh) collected the results from FSL, Rohini. On going through the report, the investigating officer found that the offence of rape was also disclosed and, therefore, Section 376 (g) IPC was

incorporated in the supplementary charge-sheet dated 23.11.2004 which was submitted in court. It is further alleged that since the blood group of both the appellants was the same, the investigating officer requested the FSL, Rohini for conducting the DNA test which was consequently conducted. The DNA report is Exhibit-PW-6/K, L, M, N, O, P, Q. A supplementary charge-sheet dated 30.03.2005 was submitted. As per the prosecution, the DNA report indicates that the semen on the clothes of the deceased and the vaginal swab and the vaginal slides of the deceased matched with the semen on the underwears of both the accused persons as well as with their blood samples. Thus, according to the prosecution, it was clear that both the appellants had committed rape upon the deceased. The conclusion contained in the DNA report reads as under:-

“CONCLUSION

The DNA test performed on the Exhibits provided is sufficient to conclude that Biological fluid present on the sources of Exhibits ‘14’ (i.e. Vaginal Swab said to be from the Deceased), Exhibits ‘15b’, ‘15c’ and ‘15d’ (i.e. Microslides said to be Vaginal slide from the Deceased) and Exhibit ‘16a’ (Pyjama said to be from the Deceased) and Exhibit ‘16d’ (Underwear said to be from the Deceased) are from the Source of the Exhibit ‘1’ (i.e. ‘Blood of Accused Jyotish’) and Exhibit ‘3’ (i.e. ‘Blood of Accused Ashish’).”

13. Initially, the charges framed against the appellants were for offences under Sections 120-B/394/397/404/302/201/34 IPC. After filing of the supplementary charge-sheet, as indicated above, the charge under Section 376 (g) IPC was also framed against the appellants. The

appellants having pleaded not guilty to the charges framed, claimed trial. The prosecution examined as many as 29 witnesses. The trial court, after going through the testimony of these witnesses and after examining the other evidence on record, came to the conclusion that the appellants were guilty under Sections 394/302/201/34 IPC as well as under Section 376 (2) (g) IPC.

14. The learned counsel appearing on behalf of the appellant Jyotish Prasad submitted that this is a case where there are no eye witnesses and it is entirely based on circumstantial evidence. The circumstances being:-

- (1) recovery of articles at the instance of the appellants;
- (2) recovery of the screw driver, blood stained shirt, etc. at the instance of the appellants;
- (3) the last seen evidence of PW-15 (HC Upender Singh);
- (4) the report of the finger prints expert and the FSL report with respect to the DNA test.

According to the learned counsel for the appellant Jyotish Prasad, the entire case is a frame-up. According to him, it was a face saving exercise conducted by the Delhi Police to show that tourists of developed nations get quick justice. According to him, the defence

would be able to demonstrate the probability of the evidence having been created. He submitted that the authorities were hard-pressed to solve the case somehow as it got a lot of media attention at both the national and international level. According to him, the scientific evidence, which includes the reports of the finger print experts, the DNA report, have all been manipulated.

15. It was contended by the learned counsel that the case for the prosecution was that the appellants had a plan to loot and rape foreign tourists. According to him, the circumstances of the case clearly indicate that it was not a case of looting or robbery. The ear rings, watch and other articles were left on the body. Even the camera and other articles, which would have had some value, were left in the baggage which was found from the dry well nearby. According to the learned counsel, these circumstances in themselves indicate that it was not at all a case of looting.

16. As regards the offence of rape, the learned counsel pointed out that the circumstances also do not indicate it to be a case of rape. The body of Dawn Emelie Griggs was found in the jungle in a fully clothed condition. The clothes were not torn, they were not removed. According to him, this is indicative of the fact that she had not been raped.

17. In this connection, it was further contended that even the investigating officer did not initially consider it to be a case of rape. The letter of request for conducting the post mortem examination did not indicate any request to the doctor to examine the dead body from the angle of rape. A reference was made to Exhibit-PW-26/DA, which sets out the brief facts given to the doctor for conducting the *post mortem* examination. The said document is dated 18.03.2004 and it only mentions murder. Not robbery and certainly no rape. Consequently, it was suggested that there was no indication of the present case being one of rape or there was no occasion for the doctors, who conducted the *post mortem* examination, to have taken vaginal swabs and or slides and / or preserved the same. According to the learned counsel, the fact that the record suggests that such vaginal swabs and / or vaginal slides were preserved is indicative of the manipulations involving not only the investigating agency but also PW-26 (Dr Sarvesh Tandon), who is one of the doctors who conducted the *post mortem*. Several other documents were referred to, such as Exhibit-PW-27/D, which is the recovery memo in respect of the underwear of Jyotish Prasad; Exhibit-PW-27/E, which is the pointing out memo in respect of the well; Exhibit-PW-27/F, which is the pointing out memo in respect of sewage manhole. In none of these documents, there is any mention of rape. Even in Exhibit-PW-27/H,

which is the recovery memo in respect of the taxi – DL-1T-4428, the offence mentioned is murder and looting. There is no mention of the offence of rape. Consequently, it was submitted by the learned counsel that the case of rape has been built up subsequently and it is for this reason that the vaginal swabs and vaginal slides had been retained by the forensic science laboratory as would be evident from its report dated 19.11.2004. Further, blood samples were taken from the appellants for the purposes of establishing a case of rape. The learned counsel for the appellant Jyotish Prasad submitted that, at that point of time, the charge-sheet had been filed and the court had even framed the charges which did not include the charge for the offence of rape under Section 376 IPC. It was only after the receipt of the DNA report of the Forensic Science Laboratory that a supplementary charge-sheet was filed and a case of rape was also made out. According to the learned counsel, the entire sequence of events leading upto the framing of the charge of rape, indicates and, in the least, creates serious doubts that the case against the appellants was a frame-up and was manipulated.

18. Another point urged by the learned counsel for the appellant Jyotish Prasad was in connection with the receipt (Exhibit-PW-3/D) issued by the prepaid taxi booth at IGI Airport. He submitted that Exhibit-PW-3/D, which is the pink coloured receipt and was issued by the prepaid taxi booth to the passenger (Dawn Emelie Griggs) to be

handed over to the driver of the taxi at the point of destination so that the driver can then come to the prepaid booth and collect his remuneration against the said receipt, is said to have been recovered from the person of Jyotish Prasad at his house on 17.03.2004. The carbon copy of this receipt was retained at the prepaid taxi booth and the same has been marked as Exhibit-PW-3/B. Referring to the said receipt Exhibit-PW-3/D and the carbon copy Exhibit-PW-3/B, the learned counsel pointed out that it is unusual for the word 'Griggs' to have been separately indicated across the top left corner of the said documents. It was also pointed out that the name of the passenger is given as 'Mr Daun' and not 'Ms Dawn Emelie Griggs'. According to the learned counsel for the appellant, it is quite possible that the said Exhibits PW-3/B and PW-3/D pertained to some other passenger, namely, 'Mr Daun' and not to the deceased. It was also contended that the number '4428' written in hand on Exhibit-PW-3/D, which was the receipt given to the passenger, is not indicated in the carbon copy (Exhibit-PW-3/B), which was retained by the prepaid taxi booth. According to the learned counsel for the appellant, the number '4428' was written on the receipt subsequently so as to link the receipt with the taxi number DL-1T-4428. This was a part of the manipulation done by the investigating officer in order to somehow fix the blame on the appellants.

19. Referring to the testimony of PW-11 (Rakesh Kumar), who is the alleged taxi owner of the taxi bearing registration No.DL-1T-4428, the learned counsel for the appellant Jyotish Prasad submitted that it was he who ought to have been the prime suspect in the case. Particularly, when the said witness has clearly indicated that there was no written proof to show that the appellant Jyotsh Prasad was in his employment. The said witness has also admitted that there was no proof of payment of any salary. Another aspect of the matter to which the learned counsel for the appellant Jyotish Prasad drew our attention was the circumstance that PW-11 (Rakesh Kumar) was found to be present at the airport at 2.00 p.m. on 17.03.2004 when the investigating officer met him. At that point of time, the taxi DL-1T-4428 was parked at the taxi stand and Jyotish Prasad was not within the airport premises. The only implication that can be drawn from this, according to the learned counsel, is that Jyotish Prasad had handed over the taxi to PW-11 (Rakesh Kumar) by 2.00 p.m. and since PW-11 (Rakesh Kumar) has himself admitted that he also plied his taxi whenever Jyotish Prasad asked for rest, it meant that in all probability Jyotish Prasad had also handed over the keys to PW-11 (Rakesh Kumar). Yet, the keys were shown to be recovered from the appellant Jyotish Prasad later in the day.

20. Referring to the testimony of PW-15 (HC Upender Singh), the learned counsel for the appellant Jyotish Prasad submitted that this witness has been produced as the last seen witness but, his testimony cannot be believed. According to the learned counsel, PW-15 (HC Upender Singh) is said to have taken the victim to the taxi for the purposes of helping her in boarding the same and in that process, he is said to have seen the appellant Jyotish Prasad driving the taxi. As per his testimony, PW-15 (HC Upender Singh) stated that Vijay Kumar (PW-4), the clerk at the prepaid taxi booth filled in the voucher No.88919 and allotted the taxi No. DL-1T-4428 and handed over the same to PW-15 for the purposes of helping the lady to board the taxi. While doing so, he saw that Jyotish Prasad was driving the taxi. With regard to this, the learned counsel for the appellant Jyotish Prasad submitted that the photograph of the deceased was not shown to PW-15 (HC Upender Singh) as admitted in his testimony. How, then, did he connect the lady whom he allegedly took to the taxi with the lady who was found dead, namely, Dawn Emelie Griggs ? Moreover, it was submitted that it was not possible for the said witness to have remembered the faces of all the passengers and also to remember as to which taxi they had used. This is clearly so because as admitted by the said witness in his cross-examination—“more than 500 to 700 foreigners also used the services of prepaid taxi in a night at IGI Airport”. The said witness has also admitted that it is not possible to

remember the faces of the passengers and also to remember as to which taxi they had used. The learned counsel also submitted that the testimony of this witness cannot be relied upon at all, particularly as the appellant Jyotish Prasad was also not subjected to any test identification parade.

21. The learned counsel for the appellant Jyotish Prasad then challenged the recoveries allegedly made from or at the instance of Jyotish Prasad. Referring to the evidence with regard to the finger prints and, in particular, to Exhibit-PW-5/A, which pertains to the lifting of the chance prints from the luggage, the learned counsel submitted that the same was purportedly done after 1.00 p.m. on 17.03.2004, when the goods had already been taken out and had passed through several hands. He also submitted that it is of significance that only three chance prints were found on a small plastic glass (tumbler) and that no other chance prints were found on the suitcase, including the articles contained therein, such as the camera, etc. According to the learned counsel, this clearly indicates that the chance prints were planted inasmuch as when the accused allegedly went through the baggage of the deceased, they must have handled other articles but their prints are not to be found.

22. With regard to Exhibit-PW-5/B, which relates to the lifting of the chance prints from the taxi, the learned counsel for the appellant submitted that all the chance prints were taken from outside the taxi. There were no chance prints from inside the taxi. Moreover, only eight points have been mentioned with regard to the comparison of the admitted prints and the chance prints as indicated in Exhibit-PW-7/A and Exhibit-PW-7/B. He further submitted that it was the prosecution case that the appellants strangled the lady with bare hands, yet no chance prints have been taken from the neck of the deceased. No chance prints were also found from the top of the luggage which meant that nobody else also left any prints, whereas a number of people had handled the baggage.

23. Referring to Exhibit-PW-6/A to G, which is the report of the Forensic Science Laboratory dated 19.11.2004, the learned counsel submitted that insofar as Jyotish Prasad is concerned, it appears that his blood group is 'O', whereas that of the deceased is 'A'. There is no blood or semen stain on the deceased or any of her articles which belongs to the 'O' group and, therefore, the appellant Jyotish Prasad is clearly not involved. He further submitted that there had been no request or necessity for retaining Exhibits 15b, 15c and 15d for further DNA analysis and, therefore, the note at the end of the results of analysis in Exhibit PW-6/A to G indicating such retention, was clearly

an afterthought and manipulated. He also referred to PW-6 (A.K. Srivastava), who, in his cross-examination, indicated that he did not recommend the DNA test nor did he ask the police for getting the DNA test conducted. The learned counsel questioned – Why, then, were the vaginal swabs and slides retained and who directed the drawing of blood samples from the appellants on 07.10.2004? The learned counsel then took us through the testimony of PW-29 (J.L. Meena, the investigating officer) in an attempt to point out the failings in the investigation carried out by him as also the contradictions. The learned counsel suggested that the investigating officer had manipulated the entire evidence in order to frame the appellants who were poor and defenceless. The learned counsel also contended that several witnesses, who had been cited, were not ultimately examined by the prosecution. For example, Kishan Pal, who allegedly gave the undertaking to produce the appellant Ashish on each date at the police station was not examined. Constable Anil Kumar, who was cited as a witness and would have testified as to the recoveries, was not examined. Constable Raj Kumar was also not examined though cited as a witness in respect of the arrest and recovery memos. Virpal, who was one of the persons who went into the sewer to recover the cards and passport cover and was cited as a witness by the prosecution, was also not examined. It is only the contractor Nasruddin who was examined as a witness. Head Constable Babu Lal, who was cited as a witness to the recovery of the

passport cover as also a witness to the drawing of blood samples on 07.10.2004 from the appellant Ashish was also not examined. Again, Constables Vinod Kumar and Parveen Singh, who were witnesses to the recovery of the soil and *gokhroos*, were not examined. Dr Brajesh Mishra, who examined the accused Jyotish Prasad on 18.03.2004 was also not examined nor was the MLC produced in evidence.

24. Mr Navin Chawla, the learned counsel appearing on behalf of the appellant Ashish, reiterated and adopted the arguments made on behalf of the appellant Jyotish Prasad. In addition, he submitted that the recoveries attributed to Ashish would have no meaning inasmuch as the screw driver was allegedly recovered at a distance of 30-35 steps from the well where the luggage had already been recovered. The area had already been searched thoroughly by the crime team and, therefore, it cannot be believed that the screw driver, which was shown to have been recovered at the instance of Ashish, was not already within the knowledge of the investigating officer. The spot from where the Australian dollars, etc. were shown to have been recovered at the instance of Ashish, was also only about 100 feet from the main road and open to public. The said recovery, therefore, cannot be attributed to Ashish. As regards the blood stained shirt recovered from the bushes at the instance of Ashish, the learned counsel submitted that there is no independent recovery witness insofar as this shirt is concerned. He

further submitted that the pointing out memos with regard to:- (i) the alleged place of occurrence (Exhibit-PW-27/K); (ii) the pointing out of the well (Exhibit-PW-27/L); (iii) the pointing out of manhole (Exhibit-PW-27/M); (iv) the pointing out of the place from where the screw driver was allegedly recovered (Exhibit-PW-27/O); and Exhibit-PW-27/Q from where the articles, including the Australian currency were recovered, were all facts which were already within the knowledge of the investigating officer and, therefore, the same could not be attributed to Ashish. With regard to the recovery of the underwear Exhibit-PW-27/R from Ashish, the learned counsel submitted that the same was shown to have been recovered from his room in a residential colony, but no independent witness was joined. It was allegedly recovered on 21.03.2004. From 17.03.2004 till 21.03.2004, Ashish had been called by the police every day. The learned counsel submitted that it is difficult to believe that when Ashish had washed his pants, he would not have washed his underwear if he had anything to hide !

25. With regard to the tests conducted at the Forensic Science Laboratory, the learned counsel submitted that as per the testimony of PW-26 (Dr Sarvesh Tandon), the samples were taken, preserved, sealed and handed over to the investigating officer in person on 18.03.2004. But PW-18 stated in his testimony that he collected the material on 23.03.2004. Assuming that the *post mortem* report and the samples

were with the police on 23.03.2004, they were retained in the *malkhana* till 19.04.2004 in an unrefrigerated condition and then sent to the Forensic Science Laboratory, Rohini. There was a chance of the samples degrading since they had been kept at normal room temperatures. The learned counsel submitted that the samples were allegedly tested on 19.08.2004, but the report was only prepared on 19.11.2004. Between 19.08.2004 and 19.11.2004, on 01.10.2004, an application had been moved before the learned Additional Sessions Judge indicating that the FSL, Rohini has asked for more blood for conducting the DNA tests. The application was allowed by the learned Additional Sessions Judge by an order dated 01.10.2004 itself. On 07.10.2004, the blood samples were drawn from the appellants Jyotish Prasad and Ashish at Safdarjung Hospital. The same were sent to the Forensic Science Laboratory, Rohini on 08.10.2004 and were also tested on that date, but no DNA analysis has been indicated in the report of 19.11.2004. After conducting the test, remnants of the samples were retained by the Forensic Science Laboratory, Rohini except Exhibit 15b, 15c and 15d, which were the vaginal microslides. On 28.03.2005, the DNA test was conducted. According to the learned counsel, the entire sequence of events leading to the conduct of the DNA test is nothing but suspicious. The learned counsel submitted that the vaginal swab was taken on 18.03.2004, whereas the DNA test was conducted in March, 2005 and the possibility of degradation cannot be

ruled out. With reference to Modi's Medical Jurisprudence and Toxicology, Twenty-third Edition, he submitted that vaginal swabs are prone to degradation in a short time and it is, therefore, essential for the same to be refrigerated. In this context, he referred to the testimony of PW-17 to indicate that the vaginal swabs had not been kept in a fridge. Consequently, he submitted that the possibility of degradation cannot be ruled out which would make reliance on the DNA report doubtful.

26. Lastly, Mr Navin Chawla contended that an accused cannot be compelled to be a witness against himself. He submitted that the order directing the drawing of blood samples from the appellants was patently illegal and violative of the constitutional guarantee given in Article 20(3) which clearly stipulated that no person accused of any offence shall be compelled to be a witness against himself. According to him, the drawing of blood samples against the wishes of the appellants, constituted one such infraction and, therefore, the DNA report, which is based on a comparison with the blood samples drawn pursuant to the said order dated 01.10.2004, cannot be looked into. For this proposition, he placed reliance on the following decisions:-

- 1) **Goutam Kundu v. State of West Bengal and Another: 1993 (3) SCC 418;**
- 2) **Rakesh Bisht v. Central Bureau of Investigation: 2007 Cri LJ 1530;** and

3) ***The State of Bombay v. Kathi Kalu Oghad and Others:***  
**AIR 1961 SC 1808.**

27. Mr M.N. Dudgeja, the learned counsel appearing for the State submitted that insofar as the appellant Jyotish Prasad is concerned, the circumstances against him are the admissible portions of his disclosure statement, the testimony of PW-15 (HC Upender Singh), who had last seen Ms Dawn Emelie Griggs in the taxi driven by the appellant Jyotish Prasad; the testimony of PW-11 (Rakesh Kumar), who is the owner of the taxi DL-1T-4428; the recovery of the driver's copy of the prepaid receipt Exhibit-PW-3/D from Jyotish Prasad; recovery of the key of the taxi from Jyotish Prasad; recovery of foreign currency and the travelers cheques belonging to the deceased from Jyotish Prasad; finger prints on the plastic 'glass' (tumbler) found in the baggage of the deceased; finger prints on the taxi bearing registration number DL-1T-4428; strains of hair of the deceased in the said taxi; the fact that the soil on the tyre of the said taxi matched with the soil of the place of occurrence; the recovery of *gokhroos* from the tyres of the said taxi similar to those found in and around the place of occurrence; the passport cover and the telephone cards of the deceased recovered at the instance of Jyotish Prasad from a secluded place; semen found in the underwear of Jyotish Prasad and last, but not the least, the DNA report conclusively implicating Jyotish Prasad. With regard to the circumstances against the appellant Ashish, Mr Dudgeja submitted that

in addition to those which are common to both the appellants, Jyotish Prasad and Ashish, the following circumstances clearly implicate appellant Ashish:-

- 1) The admissible portion of the disclosure statement of Ashish leading to the recovery of the screw driver, foreign currency and blood stained shirt from near the place where the dead body was found;
- 2) The circumstance of the blood found on the shirt of Ashish matching with the blood of the deceased; and
- 3) The semen stain found on the underwear of Ashish matching with the vaginal slides as per their DNA results.

28. Mr Dudeja submitted that the DNA testing was necessary for fastening the identity of the culprits with definiteness. Now that the DNA results have been placed in evidence, it is absolutely clear that the appellants were involved in the crime. With regard to Exhibit-PW-3/B and Exhibit-PW-3/D, the prepaid taxi receipt and the carbon copy thereof, Mr Dudeja submitted that the fact that the name of the passenger was given as 'Mr Daun' does not, in any way, affect the case of the prosecution. He submitted that 'Mr' had been written in all the vouchers on a presumptive basis by the employees at the booth on account of rush of work. With regard to the name 'Daun' and not 'Dawn', Mr Dudeja submitted that the employees working at the

prepaid booth were not well-versed in English or in foreign names and their exact spellings were not known to them. The voucher is prepared only upon hearing the name and neither the passport nor the ticket is seen. Thus, whether 'Dawn' or 'Daun' is written on the voucher would not be a significant or material difference. With regard to why the name 'Griggs' was separately written on the top left hand corner of the two Exhibits PW-3/B and PW-3/D, Mr Dudeja stated that no question was put in this connection to PW-3 or PW-4 who could have answered the same. Therefore, the appellants cannot make any capital out of this. In any event, according to him, nothing turns on this.

29. Consequently, Mr Dudeja submitted that the trial court, after examining the evidence on record in detail, has correctly convicted the appellants for committing both the murder of and rape upon Dawn Emelie Griggs. He submitted that this court ought to confirm the conviction as well as the death sentences and the other sentences awarded by the trial court.

30. Upon examination of the evidence on record and after considering the arguments advanced by the counsel for the parties, it is difficult for us to accept the plea on the part of the appellants that they have been framed in this case. While it may be true that initially, this was thought to be a case of looting and murder and that it is only

subsequently that the offence of rape was added. From this fact alone, it cannot be said that the entire case has been manipulated or fabricated at the instance of the investigating officer. If we are to accept the appellant's contention that they have been framed, then we would have to return a finding that not only were the documents and evidence manipulated by the investigating officer and those around him, but also by all the independent persons involved in the case, such as the doctors constituting the medical board which conducted the *post mortem* examination, the technicians at the Forensic Science Laboratory, who conducted the initial tests culminating in the report dated 19.11.2004 and the personnel who conducted the DNA matching which resulted in the report dated 28.03.2005. There is no material which would enable us to come to such a conclusion. Since the allegation on the part of the appellants was that the appellants are poor and defenceless persons and that they have been framed by the police which was trying to save its face and show its efficiency in solving a case involving a foreign national, we have given a great deal of thought to this aspect of the matter. However, though we find that there may have been some glitches on the part of the investigation and particularly the investigating officer and that there may have been some embellishments on the part of some of the prosecution witnesses, it cannot be said that the entire case has been manipulated and the two appellants have been framed.

31. We were very anxious to know as to how the investigating officer reached the appellants in the first instance. If the sequence and chain of events starting from the discovery of the dead body of Dawn Emelie Griggs and leading to the arrest of the appellants is complete, then the story of the prosecution becomes credible. To ascertain this aspect of the matter, we have examined the evidence in detail. We find that soon after the dead body of Dawn Emelie Griggs was found, the investigating officer arrived at the scene. From a nearby well, some baggage was taken out. On opening the said baggage, the photocopies of the passports of Dawn Emelie Griggs alongwith photographs were recovered. The photograph on the said photocopies matched with the face of the dead body. From this, the investigating officer could easily conclude that the dead body was of Dawn Emelie Griggs. One of the bags, which did not carry any checked-in baggage tag, contained the air tickets indicating that the passenger had come from Hongkong to Delhi and that the next leg of her journey was Delhi-Colombo and thereafter Colombo-Brisbane. The Delhi-Colombo and Colombo-Brisbane segments were unused. The baggage tag on one of the baggages as well as the counter-foil of the said ticket indicated that Dawn Emelie Griggs had arrived in Delhi on board Flight No. CX-753 from Hongkong in the night intervening 16/17.03.2004. Obviously, the next step for the investigating officer was to go to IGI Airport and to cross-

check the arrival of this passenger. The investigating officer went to IGI Airport, met with the Immigration Officers. He checked the flight manifesto and found that Dawn Emelie Griggs had indeed travelled on flight No. CX-753 which arrived in the intervening night of 16<sup>th</sup> and 17<sup>th</sup> March, 2004. He then went to the prepaid taxi booth which was the next logical step to ascertain as to whether the said passenger had taken a taxi from any of the said booths from the airport. In one of the prepaid taxi booths, it was ascertained that a passenger by the name of ‘Griggs’ had taken a prepaid taxi bearing registration No.4428. The same was cross-checked with the register maintained at the prepaid booth. From this, the owner of the taxi bearing registration No.4428, namely, Rakesh Kumar (PW-11) was located. He indicated that the taxi was standing in the parking lot and that on the night intervening 16/17.03.2004, the taxi had been driven by his employee (Jyotish Prasad). Thereafter, the investigating officer went to Jyotish Prasad’s place of residence, found him to be there, interrogated him, made seizures from him and further recoveries at his instance, as indicated above. It is thus clear that the events starting from the discovery of the dead body to the arrest of Jyotish Prasad form a complete and unbroken sequence and this in itself lends credibility to the prosecution case.

32. We now come to appellant Ashish. Ashish is connected with this case only through the disclosure statement made by the appellant

Jyotish Prasad. Since, apart from the disclosure statement of Jyotish Prasad, there was no material against Ashish, he was not initially arrested. But, he was called each day to the police station for interrogation. Ultimately, Ashish disclosed certain facts which led to the recovery of the screw driver at his instance, foreign currency and the blood stained shirt. It is in this manner that both, appellant Jyotish Prasad and appellant Ashish, have been implicated for the rape and murder of Dawn Emelie Griggs. We do not agree with the submissions made by the learned counsel for the appellants that they have been framed in this case.

33. We now come to the question of the last seen evidence of PW-15 (HC Upender Singh). Insofar as this witness is concerned, it does appear to us that his testimony is the weakest part of the prosecution case. This is so because this witness, as pointed out above, has himself stated that about 500 to 700 foreigners arrived at IGI Airport each night. It is, therefore, difficult to imagine as to how he had recalled the name of Dawn Emelie Griggs without having been shown a photograph of hers. He was also not asked to identify the appellant Jyotish Prasad in any test identification parade. Therefore, his testimony has to be considered with a pinch of salt.

34. However, this weak link is not vital to the prosecution case because of the availability of other solid scientific evidence. The scientific evidence comes in the shape of, first of all, finger prints; secondly, blood and semen samples and, thirdly, DNA analysis. The chance prints lifted from the plastic tumbler found in the baggage of the deceased matched with the finger prints of Jyotish Prasad. This clearly establishes the fact that Jyotish Prasad had opened the baggage of Dawn Emelie Griggs and had gone through her articles. Finger prints of Jyotish Prasad were also matched with the chance prints retrieved from the taxi bearing registration No. DL-1T-4428. This clearly connected the appellant Jyotish Prasad with the said taxi. The Forensic Science Laboratory report (Exhibit-PW-6/A to G) dated 19.11.2004 clearly indicated the blood stains on the shirt belonging to Ashish to be of 'A' group. The blood stained hair of the deceased was also of 'A' group as were the blood stains found on the lady's top and the underwear belonging to the deceased. The semen stains from the underwear of Jyotish Prasad indicated 'O' group and the said stains present in the underwear of Ashish Kumar were indicated as inconclusive. The test conducted on the blood samples drawn on 08.10.2004 from the appellants were revealed in the report (Exhibit-PW-6/H to J). The said report indicated that the blood group of both the appellants Jyotish Prasad and Ashish Kumar was 'O'. From the reports (Exhibit-PW-6/A to G) and (Exhibit-PW-6/H to J), it is evident

that the blood group of the blood stains in the shirt belonging to Ashish was the same as the blood group of the deceased, i.e., 'A' group. Thus, from the reports of 19.11.2004, it could not be conclusively determined that it is the appellants and the appellants alone who were involved in the crime. This is where the importance of the DNA tests is made out. The results of the DNA tests and the conclusion arrived at, as indicated in Exhibit-PW-6/K to P dated 28.03.2005, are as below:-

#### “RESULTS OF EXAMINATION

The DNA profiles of the Biological fluid present on the source of the Exhibits '14' (i.e. Cotton wool swab said to be Vaginal Swab from the Deceased, '15b', '15c', '15d' (i.e. Microslides said to be Vaginal slide from the Deceased), '16a' (Pyjama said to be from the Deceased), '16d' (Underwear said to be from the Deceased), are identical with the Profiles from the source of the Exhibits '1' (i.e. blood sample of the Accused Jyotish), '8' (i.e. Underwear of Accused Jyotish Prasad) and '3' (i.e. blood sample of the Accused Ashish) and '9' (i.e. Underwear of Accused Ashish).

#### CONCLUSION

The DNA test performed on the Exhibits provided is sufficient to conclude that Biological fluid present on the sources of Exhibits '14' (i.e. Vaginal Swab said to be from the Deceased), Exhibits '15b', '15c' and '15d' (i.e. Microslides said to be Vaginal slide from the Deceased) and Exhibit '16a' (Pyjama said to be from the Deceased) and Exhibit '16d' (Underwear said to be from the Deceased) are from the Source of the Exhibit '1' (i.e. 'Blood of Accused Jyotish') and Exhibit '3' (i.e. 'Blood of Accused Ashish').”

This leaves no manner of doubt that the appellants were involved in the rape and murder of Dawn Emelie Griggs.

35. Two issues, which were raised by Mr Navin Chawla, need to be addressed, however, the first issue is with regard to the degradation of the vaginal swab over a period of one year. While, as a hypothesis, it may be stated that a vaginal swab kept in an unrefrigerated condition would be subject to degradation, but that has to be established as a fact. In the present case, the DNA analysis report does not indicate that the vaginal swab Exhibit-PW-14 obtained from the deceased had deteriorated to such a condition or, at all, which did not permit them to do DNA profiling in respect thereof. In any event, the question of degradation is only limited to the vaginal swab and not to the microslides (Exhibits 15b, 15c and 15d). In his cross-examination, PW-6 (Dr A.K. Srivastava) has categorically stated that microslides, being slides which are properly dried, have no chance of degradation. The DNA profiles of the biological fluids present in the microslides were found identical with the profiles from the blood samples of the appellants Jyotish Prasad and Ashish Kumar. Thus, the arguments with regard to degradation advanced by the learned counsel for the appellant Ashish cannot be accepted.

36. The second issue raised by Mr Navin Chawla was with regard to the question of legality and constitutional validity of the action requiring the appellants to give blood samples at a stage when the trial had already begun in the sense that the charge of murder had been

framed though, the charge of rape had not yet been framed. Just as taking of a handwriting sample or a voice sample does not mean that the person, whose sample is taken, is compelled to be a witness against himself, so also the person whose blood sample is taken cannot be regarded as being compelled to be a witness against himself. When a blood sample is taken, it is taken only for the purposes of establishing the person's identity. The Supreme Court decision in the case of **Kathi Kalu** (*supra*) clearly held that *"to be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification"*. The Supreme Court further observed that *"the giving of finger impression or of specified signature or of handwriting, strictly speaking, is not "to be a witness"*. The expression "to be a witness" was held by the Supreme Court to mean imparting knowledge in respect of the relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. The court further observed that *"Article 20(3) of the Constitution is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and*

*cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge*”. It is obvious that the giving of a blood sample does not, in any way, amount to self-incrimination inasmuch as it is only the identity of the person which is to be established. Consequently, the argument advanced by the learned counsel for the appellant Ashish Kumar on this aspect of the matter cannot be accepted. The taking of blood samples of the appellants does not, in any way, in our view, violate the Constitutional mandate of Article 20(3).

37. In view of the foregoing, we uphold the conviction of the appellants as made out in the impugned judgment.

38. We now come to the question of death sentence. It is true that the constitutionality of a death sentence has been upheld by the Supreme Court. It is also true that Section 302 IPC provides for the imposition of a death sentence. But, it is equally true that it also provides for the imposition of imprisonment for life. The mere fact that a death sentence can be awarded does not mean that it has to be awarded. Particularly, when the alternative sentence of life imprisonment is an adequate punishment.

39. Death sentence has been seen as the ‘appropriate’ punishment for horrific crimes both as regards measure and deterrence. There is also the view that a death sentence is neither ‘appropriate’ nor does it have a deterrence value. Woody Allen, the famous actor, author, screenwriter and director sarcastically said – “Capital punishment would be more effective as a preventive measure if it were administered prior to the crime”.

40. However, we are not entering the arena of debate as to whether the death sentence should or should not be abolished. That, for the present, is for the legislature to consider. But, in every case involving 302 IPC, the question of ‘death or life’ does crop up. The trial court has to mete out either a sentence of imprisonment for life or a sentence of death. Sentencing, apart from the question of establishing the guilt of an accused, itself, involves serious considerations. The nature of the crime, the victim and the criminal have all to be seen. Does the criminal exhibit a general propensity to commit crime ? Is he a one-time offender ? Is the manner of his crime so loathsome and his nature so beyond redemption that his life must be ended ?

41. One thing, however, is clear that when there is choice between a death sentence and a sentence of life imprisonment, the latter is the rule

and the former is the exception and, if we may say so, a very rare exception.

42. The learned Additional Session Judge, while imposing the extreme penalty of death sentence, has merely considered the case of **Dhananjay Chatterjee v. State of West Bengal: 1994 (2) SCC 220** and has come to the conclusion that since the Supreme Court found the case of *Dhananjay Chatterjee* (*supra*) to be fit for awarding the death penalty, the present case was an even “fitter” case for the award of death penalty. He further concluded that all the aggravating circumstances, which were present in *Dhananjay Chatterjee*’s case, are also present in the present case. We find that this approach of the learned Additional Sessions Judge of comparing the fact situation of one case with another for the purposes of sentencing is not the correct approach and certainly not what the Supreme Court directed in the case of **Bachan Singh v. State of Punjab: 1980 (2) SCC 684** as explained in **Machhi Singh and Others v. State of Punjab: 1983 (3) SCC 470**. In fact, the requirement of the law is that the principles enunciated by the Supreme Court in the aforesaid two cases have to be applied to the facts of each individual case where the question of imposition of death sentence arises. There is the requirement of preparing a balance-sheet of the aggravating and mitigating circumstances before the death penalty can be imposed. We do not find that this requirement has been

satisfied by the learned Additional Sessions Judge. He has merely examined the fact situation in *Dhananjay Chatterjee*'s case and, in his view, finding it to be similar, has gone ahead and imposed the death penalty in the present case.

43. If the approach adopted by the learned Additional Sessions Judge were to be correct, then he could very well have compared the present case with that of *Kumudi Lal v. State of U.P.*: 1999 (4) SCC 108, where the appellant was convicted for raping and murdering a young girl of 14 years of age, but the Supreme Court reduced the death sentence awarded by the courts below to life imprisonment. Similarly, in *Bishnu Prasad Sinha and Another v. State of Assam*: 2007 (11) SCC 467, the appellant before the Supreme Court had been convicted of having raped and murdered a girl of about 7-8 years of age. One of the appellants was a night-chowkidar of the waiting room where the girl and her father were resting and waiting for their onward journey. The Supreme Court reduced the death sentence to life imprisonment in respect of both the appellants. There are other cases of rape and murder where the Supreme Court has reduced the sentence to imprisonment for life from the sentence of death awarded by the trial court and confirmed by the High Court. There are also cases where the Supreme Court has confirmed death sentences.

44. In **Aloke Nath Dutta v. State of W.B.:** 2007 (12) SCC 230, the Supreme Court noticed that different sentences had been awarded in similar cases. The Supreme Court observed:-

“178. When a statute provides for death penalty, so long as the same is not ultra vires, application thereof cannot be altogether eliminated. But keeping in view the decision of the Constitution Bench of this Court, the jurisdiction of this Court in this behalf is limited. Death penalty can be awarded only if in the opinion of the court, the case answers the description of the rarest of rare cases. What would constitute the rarest of the rare case must be determined in the fact situation obtaining in each case. We have also noticed hereinbefore that different criteria have been adopted by different Benches of this Court, although the offences are similar in nature. Because the case involved offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding death penalty or a lesser penalty as several factors therefor are required to be taken into consideration. No sentencing policy in clear-cut terms has been evolved by the Supreme Court. What should we do ?”

Cases cannot be ‘standardized’ for the purposes of sentencing. This principle was clearly recognized in **Bachan Singh** (*supra*). The Supreme Court also observed:-

“Secondly, criminal cases do not fall into set-behavioristic patterns. Even within a single-category offence there are Infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blame-worthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated".[Messinger and Bittner’s Criminology Year-Book (ibid.), Albert W. Alschuler article at page 421] This

is particularly true of murder. "There is probably no offence'. observed Sir Ernest Gowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this Court in *Jagmohan Singh v. State of U.P.: 1973 (1) SCC 20* by citing the instance of the Model Penal Code which was presented to the American Supreme Court in *McGoutha v. California: 1971 402 US 183*."

45. Explaining its decision in *Bachan Singh* (*supra*), the Supreme Court in *Swamy Shraddananda (2) v. State of Karnataka: 2008 (13)*

**SCC 767** held:-

"38. In the end, the Court following the decision in *Jagmohan Singh v. State of U.P.: 1973 (1) SCC 20* left the sentencing process exactly as it came from the legislative, flexible and responsive to each case on its merits, subject to the discretion of the Court and in case of any error in exercise of the discretion subject further to correction by the superior court(s). The Court observed: (*Bachan Singh v. State of Punjab: 1980 (2) SCC 684, SCC p. 748 para 197*).

In *Jagmohan*, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since *Jagmohan* - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted *only in gravest cases of extreme culpability*; (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also."

Thus, it is clear that each case is different and the trial court, while considering the question of sentence, ought to be concerned about the facts and circumstances of the case before and not with other cases having 'similar' or 'similar-looking' facts. The court is required to draw up a balance-sheet of aggravating and mitigating factors, if it contemplates the imposition of the extreme penalty. That was not done in this case. And, that is why we say that the approach of the learned Additional Sessions Judge was not correct.

46. In ***Machhi Singh*** (*supra*), the Supreme Court observed 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 sentences arises. The following propositions emerge from *Bachan Singh's 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 has 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.

39. In order to apply these guidelines inter-alia the following questions may be asked and 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?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”

It is clear that life imprisonment is the rule and death sentence is a rare exception. The Supreme Court has clearly indicated that a death sentence can 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 a sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. We find that the present case does not fall within the category of rarest of the rare cases. Nor are we

convinced that life imprisonment would be an altogether inadequate punishment. For these reasons, we are unable to confirm the death sentence awarded to the appellants by the learned Additional Sessions Judge.

47. Consequently, we alter the sentence from a death sentence in respect of both the appellants to a sentence of imprisonment for life insofar as the offence punishable under Section 302 IPC is concerned. The other sentences in respect of the other offences awarded by the learned Additional Sessions Judge are not disturbed.

48. While upholding the impugned judgment on conviction of the appellants and by modifying the sentence, to the extent indicated above, the present appeals and the death sentence reference stand disposed of.

**BADAR DURREZ AHMED, J**

**V.B. GUPTA, J**

**July 10, 2009**

*dutt*