

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

% *Judgment Reserved On: 24th September, 2009*
Judgment Delivered On: 27th October, 2009

+ **Death Sentence Ref.04/2008**

STATE Through: Ms. Richa Kapoor, A.P.P.

AND

SANJAY DASS (CONVICT)
Through: Mr. Sanjeev Sharma, Advocate

CRL.A.464/2009

SANJAY DASS Appellant
Through: Mr. Sanjeev Sharma, Advocate

VERSUS

STATE Respondent
Through: Ms. Richa Kapoor, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

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

PRADEEP NANDRAJOG, J.

1. The above captioned appeal and the death sentence reference arise out of the judgment and order dated

04.10.2008 and the order on sentence dated 21.10.2008 passed by the learned Additional Sessions Judge in Sessions Case No.09/2007 arising out of FIR No.295/2006 registered at PS Roop Nagar. By virtue of the judgment and order dated 4.10.2008, Sanjay Dass has been convicted for offences under Sections 302/307/376/379 IPC. It may be noted that Sanjay Dass was charged for an offence punishable under Section 392 IPC but has been convicted for a lesser offence i.e. the offence punishable under Section 379 IPC. Vide order on sentence, the learned Additional Sessions Judge has imposed the extreme penalty of death sentence on Sanjay Dass in respect of the offence of murder punishable under Section 302 IPC. With regard to the offence(two) punishable under Section 307 IPC, he has been sentenced to undergo rigorous imprisonment for 10 years and pay fine in sum of Rs.1,000/- pertaining to the injuries caused by him to Kumari X and Kumari Y; in default to undergo SI for 3 months. With regard to the offence punishable under Section 376 IPC, he has been sentenced to undergo rigorous imprisonment for 10 years and pay fine in sum of Rs.1,000/-; in default to undergo SI for 3 months. With regard to the offence punishable under Section 379 IPC, he has been sentenced to undergo rigorous imprisonment for 2 years and pay fine in sum of Rs.500/-; in default to undergo SI for 1 month.

2. It is settled legal position that while dealing with a reference for confirmation of a death sentence, the High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law, and if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by Sessions Judge. Reference be made to the decision of Supreme Court reported as State of Tamil Nadu v Rajendran (1998) 8 SCC 679 wherein it was observed:-

“In performing its duty, the High Court is of necessity bound to consider the merits of the case itself and has to examine the entire evidence on record. The legislature having provided in the confirmation proceedings, a final safeguard of the life and liberty of the subject in cases of capital sentences, the duty of the High Court becomes more onerous to consider independently the matter carefully and examine all relevant material evidence and come to a conclusion one way or the other. It is, therefore, the duty of the High Court in a death reference to consider the evidence afresh.”

3. Accordingly, with the able assistance of learned Counsel for the State and Sanjay Dass, hereinafter referred to as the accused, we perused the entire evidence led at the trial while hearing the reference and the connected appeal.

4. Criminal law was set into motion when at around 01.05 A.M. on 19.10.2006, an entry was made in the PCR Form Ex.PW-19/A by HC Jai Kumar PW-19 to the effect that a call has

been received from the mobile number 9811042809 informing that children have been murdered by the servants at 6/4, Singh Sabha Road. HC Jai Kumar immediately transmitted the aforesaid information to Police Station Roop Nagar where HC Pawan Kumar PW-20, recorded the DD No.3A, Ex.PW-20/A, to the effect that a wireless information has been received informing that servants had murdered children at 6/4, Singh Sabha Road, Roop Nagar.

5. On receiving a copy of the afore-noted DD entry, SI Dharampal PW-40, accompanied by Const.Tejpal PW-25, proceeded to the building bearing Municipal No.6/4, Singh Sabha Road, Roop Nagar, Delhi. Simultaneously, Inspector Baltej Singh PW-48, who also received the information recorded in DD No.3A, reached the said building. On reaching the said building, the aforesaid police officers learnt that three children of Mr.Ramesh Kumar Aggarwal PW-10 and Nirmal Aggarwal PW-23, who are residing at the second floor of the said building, have been injured and removed to Sunder Lal Jain Hospital. The children who were injured were a boy named Pratham (herein after referred to as the "Deceased") aged 4 years, a girl named X aged 17 years and a girl named Y aged 9 years. (The real names of the two girls are not being disclosed

as the instant case pertains to the commission of the offence of rape).

6. Leaving SI Dharampal PW-40, at the place of occurrence, Inspector Baltej Singh PW-48 and Const. Tejpal PW-25, proceeded to Sunder Lal Jain Hospital where they learnt that the deceased has been brought dead at the hospital as recorded in the MLC Ex.PW-2/C of the deceased. We note that following was recorded on the MLC Ex.PW-2/C of the deceased:-

“....Alleged H/o stab injury, incise wound over Lt submandibular region at house at 12.45 AM on 19/10/06, brought in casualty by his relatives at 1:15 AM on 19/10/06 for medical aid.

L/E incise wound over Lt Submandibular region

.....

Child was declared brought dead.....”

7. Inspector Baltej Singh PW-48 and Const. Tejpal PW-25, further learnt that X and Y have also been admitted in the hospital in an injured condition as recorded in their MLCs Ex.PW-2/A and Ex.PW-2/B respectively. We note that following was recorded on the MLC Ex.PW-2/A of X:-

“Alleged H/o stab injury, incise wound over anterior aspect of neck and multiple incise wound over back at home at 12.45 AM on 19/10/06, brought in casualty by her relatives at 1:15 AM on 19/10/06 for medical aid.

L/E Deep incise wound over anterior aspect of neck and multiple incise wound over back.

.....

Shifted to OT

Admit in ICU”

8. We note that following was recorded on the MLC Ex.PW-2/B of Y:-

“Alleged H/o stab injury, incise wound over anterior aspect of submandibular region and Lt side neck Rt index and middle finger injury at home at 12.45 AM on 19/10/06, brought in casualty by her relatives at 1:15 AM on 19/10/06 for medical aid.

L/E Incise wound over anterior aspect of submandibular region, Lt side neck and Rt index and middle finger.

Shifted to OT

Admit in ICU”

9. At the hospital, Inspector Baltej Singh PW-48 and Const.Tej Pal met Ramesh Kumar Aggarwal PW-10, the father of the children. Inspector Baltej Singh recorded the statement Ex.PW-10/A of Ramesh Kumar Aggarwal and made and endorsement Ex.PW-48/A thereon, and at around 04.00 A.M. on 19.10.2006 forwarded the same through Const.Tejpal PW-25, for the purposes of registration of an FIR. Const.Tejpal took the endorsement Ex.PW-48/A to HC Pawan Kumar PW-20, who recorded the FIR No.295/06 Ex.PW-2/B at 6.05 A.M. on 19.10.2006. In his statement Ex.PW-10/A Ramesh Kumar Aggarwal stated that his family consists of his wife Nirmala Aggarwal, three daughters Nikita Aggarwal, X and Y and his

son Pratham (deceased) and that they reside on the second floor of the building bearing Municipal No.6/4 Singh Sabha Road, Ghanta Ghar, Shakti Nagar, Delhi. That he had employed a domestic servant named Sanjay (accused) on the recommendation of a driver named Jeetu five days prior to 19.10.2006. The accused used to reside in a room constructed on the roof of their residence. On 18.05.2006 in the evening he was watching television along with his wife and children in his room. At about 10.00 P.M. his three children i.e. X, Y and the deceased left their room while the accused remained in his room till 11.15 P.M. The accused was watching television and pressing his legs till the time he remained in his room. At about 11.15 P.M. the accused left from their room and he and his wife went to sleep. At about 12.45 P.M. his daughter X who was smeared with blood and writhing in pain suddenly came to his room. After telling him that the accused had hit her, X fell on the bed and became unconscious. In the meantime Y who was also smeared with blood came there. She told him that the accused had hit her and the deceased, upon which he and his wife rushed to the room of their children where they saw that the deceased was lying in a pool of blood with a knife stuck in his neck. On seeing the same he raised an alarm and removed his three children to Sunder Lal Jain Hospital with the help of his neighbours and relatives. The deceased was declared as

brought dead at the hospital. The condition of both his daughters was serious. The accused absconded from his house. The accused has murdered the deceased and caused injuries to both his daughters after committing a murderous attack on them.

10. In the meantime, injured girl X was operated upon at Sunder Lal Jain Hospital. The report Ex.PW-8/A of X prepared by Dr.Seema Patni PW-8, the surgeon who operated X records that she had multiple stab injuries on her chest and that ten wounds were found on her person. Dr.Seema Patni PW-8, made an endorsement on the MLC Ex.PW-2/A of X to the effect that the injuries found on the person of X are dangerous in nature.

11. Thereafter at about 1.50 A.M. X was examined by Dr.Rakesh Kumar Gupta. The relevant portion of the case note Ex.PW-11/C of X prepared by Dr.Rakesh Kumar Gupta reads as under:-

“....Alleged H/o Assault

Pt has been stabbed at multiple places

1. Tracheal wound – already tube put
2. Left side of chest wall around 47th ICS horizontal 5-9' cm long wound, sucking wound
3. Posterirly – 7-8 multiple wounds 2-3 ling vertically and horizontally placed

All the wounds bleeding profusely mid line superior wound has an discharge also.....”

12. At about 3.15 P.M. Dr.Uma Rani Swain PW-9, conducted the gynaecological examination of X. The relevant portion of the gynaecological examination report Ex.PW-9/A prepared by Dr.Uma Rani Swain reads as under:-

“.....Local pan examination: Whole pubic area with hair stained with fresh blood, bleeding and oozing from introital injury.

Internal examination: fresh injury (cut) in the midline of fourchette bleeding + size 1 cm and 4.5 cm deep, hymen ruptured with multiple small bruises on it. Fourchette cut extends upto hymen. No bleeding from internal pa...”

13. Injured girl Y was also operated upon at Sunder Lal Jain Hospital. The report Ex.PW-8/C prepared by Dr.Seema Patni PW-8, the surgeon who operated Y records that multiple wounds were found on her face and fingers and that a wound was found on her neck. Thereafter Dr.Seema Patni PW-8, made an endorsement on the MLC Ex.PW-2/B of Y to the effect that the injuries found on the person of Y are simple in nature.

14. Injured girl Y was also examined by Dr.Rakesh Kumar Gupta. The relevant portion of the case note Ex.PW-11/A of Y prepared by Dr.Rakesh Kumar Gupta reads as under:-

“L/E

Multiple lacerated wound over Ant aspect and lateral aspect of neck.

L/w over distal phalagx of Rt index, Rt middle and Lt ring finger

L/w of about 1 cm x 0.5 cm over Rt shoulder.”

15. At around 3.45 A.M. Dr.Uma Rani Swain PW-9, conducted the gynaecological examination of Y. The relevant portion of the gynaecological examination report Ex.PW-9/B prepared by Dr.Uma Rani Swain reads as under:-

“Ext genitalia: healthy and normal no obvious discharge or bleeding. Hymen intact. No sign of injury....”

16. At about 5.15 A.M. Dr.Neetu made endorsements on the MLCs Ex.PW-2/A and Ex.PW-2/B of X and Y respectively that *‘Pt. is not fit for statement because of tracheotomy.’*

17. After collecting the MLCs of the deceased, X and Y, Inspector Baltej Singh PW-48, proceeded to the place of occurrence. In the meantime, the crime team also reached the place of occurrence; on being summoned. At the place of occurrence, the police officials found that two bed sheets which were spread on the beds which were lying in the room of the children were stained with blood and that a foot print was imprinted on one of the said two bed sheets; a blood stained pyjama and an underwear were lying on the floor of the

children's room; a knife having an iron handle stained with blood was lying in the children's room; a bunch of hair was lying on the one of the bed lying in the children's room; a hair was lying on the floor of the children's room; the floor of the room of the parents of the children was stained with blood; bed sheet which was found spread on the bed which was lying in the room of the parents of the children was stained with blood; the floor of a bathroom which was situated near the children's room was stained with blood and that a knife was lying outside the said bathroom. The police lifted the aforesaid materials and seized the same vide memo Ex.PW-40/A.

18. ASI Manish Kumar Bhardwaj PW-26, Finger Print Expert, lifted a chance print from a bathroom near the room of the children and as per the report Ex.PW-26/A the same could not be developed. HC Rajpal Singh PW-32, photographer, took 11 photos Ex.PW-32/A1 to Ex.PW-32/A11 of the place of occurrence; negatives whereof are Ex.PW-32/B1 to Ex.PW-32/B11.

19. SI Ajay Kumar PW-27, Incharge, Mobile Crime Team, North District, examined the place of occurrence and prepared the report Ex.PW-27/A, the relevant portion whereof reads as under:-

“14. Articles examined and lifts SOE – Lot of blood lying on the floor of the bed room and beds 1 Two nives – one from bed room floor and other in the bathroom window. 2 Three bed sheets with blood 3 Hair bunch 4 foot print on rt side bed sheet 5 Blood sample with hair (floor) 6 earth control 7 one plastic print (blood) found on the s/w board in bathroom 8 Blood soaked panty with underwear.....

ADVISE TO I/O OF THE CASE

1.

2. I.O. is advised to 1 send the D.B. for P.M. 2 Interrogate the parents, neighbours and corporate 3 to locate and interrogate servants 4 Also interrogate injured” (Emphasis Supplied)

20. Inspector Baltej Singh PW-48, prepared the sketches Ex.PW-48/B and Ex.PW-48/C of the two knives found at the place of occurrence and the site plan Ex.PW-48/D of the place of occurrence. Thereafter he prepared the inquest papers Ex.PW-1/C1 to Ex.PW-1/C11 pertaining to the death of the deceased. It may be noted here that the brief facts Ex.PW-1/C8 pertaining to the death of the deceased prepared by Inspector Baltej Singh records that *‘One knife has been recovered from the place of occurrence’*. It may be further noted that the death report Ex.PW-1/C9 of the deceased prepared by Inspector Baltej Singh records that the weapon used for committing the death of the deceased was apparently a sharp object.

21. Since the deceased was brought dead at the hospital, his body was sent to the mortuary at Aruna Asaf Ali Government Hospital, Sabzi Mandi, Delhi at 11.30 A.M. on 19.10.2006 where Dr.K.Goyal PW-1, conducted the post-mortem and prepared the post-mortem report Ex.PW-1/A of the deceased which records following external injuries on the person of the deceased:-

“1. Incised punctured wound 1.8 X 0.5 cm transversally placed over Lt front of neck about 2 cm left to the midline at the level of just below apple of Adam. The medial angle of the wound is more acute. The shape of the wound is more or less spindle shaped.

2. Two small cuticle deep cuts each 0.4 cm long and about 1 cm apart each other over just below and adjacent to middle part of mandible.”

22. The doctor further opined that the cause of death of the deceased is asphyxia consequent upon choking of trachea (wind pipe) by blood clots as a result of injuries to major vessels of left side of neck. The injuries were caused by sharp, cutting, penetrating and straight weapon and that the same were ante-mortem in nature. Injury no. (1) found on the person of the deceased was sufficient to cause death in the ordinary course of nature.

23. After conduct of the post-mortem, the doctor handed over the clothes, scalp hair and blood sample of the deceased

on a gauze to HC Tejpal PW-33, who in turn handed over the same to Inspector Baltej Singh PW-48, vide memo Ex.PW-33/A.

24. On the same day i.e. 19.10.2006 injured girls X and Y were shifted from Sunder Lal Jain Hospital to Apollo Hospital. Dr.Rakesh Kumar Gupta prepared the discharge summary Ex.PW-11/B of Y, the relevant portion whereof reads as under:-

“.....Lacerated wound Neck, fingers following on arm
Lt

Neck: Multiple lacerated deep wound in the neck

Hand: Multiple cut in different fingers

Lac from Rt shoulder

.....

Wounds stitched in layers.....”

25. On 19.10.2006 at about 5.15 P.M. X was examined by Dr.Urvashi Prasad Jha PW-46. Since X was unable to speak as she had undergone tracheotomy in her throat, she wrote her statement Ex.PW-46/A and gave the same to the doctor. The statement Ex.PW-46/A of X reads as under:-

“He tried to molest me. He entered inside me, took off his clothes. It pained. I tried to fight. This all happened in the end when he already stabbed me. He hurt all three of us simultaneously. Firstly he stabbed my younger sister, then me and then my brother. I don't know his name, my mom must be knowing it. I had seen him earlier also and I opened the light. He was working in my house since about 1 week. I don't remember his name. I think its Sanjay. (Emphasis Supplied)

26. After some time Inspector Baltej Singh PW-48, made an application Ex.PW-48/F before CMO, Apollo Hospital, for recording the statement of Y. However, at about 10.45 P.M., the doctor opined that Y is not fit for giving a statement. The doctor made an endorsement on the application Ex.PW-48/F that '*Patient Y is very anxious and has been anti-xilotius. She would be not fit for statement*'. Likewise, at about 11.00 P.M., Dr.Gaurav Singhal PW-3, made an endorsement Ex.PW-3/A on MLC Mark X of X that '*Pt not fit to talk at present as advised by Dr.Anoop K Ganjoo*'.

27. In the meantime, the police went about looking for the accused as Ramesh Kumar Aggarwal, the father of the children, indicted the accused as the person who caused death of the deceased and inflicted injuries on girls X and Y. In the early morning of 19.10.2006 the police received information that the accused is present in Rishikesh pursuant to which Inspector Vimal Kumar PW-29, accompanied by HC Yogender PW-28, proceeded to Rishikesh where he arrested the accused at 6.30 P.M. as recorded in the arrest memo Ex.PW-28/A.

28. On 20.10.2006 the accused was brought to Delhi and handed over to Inspector Baltej Singh PW-48. On being interrogated by Inspector Baltej Singh PW-48, in the presence of SI Rishipal Singh PW-34, the accused made his disclosure

statement Ex.PW-34/A wherein he admitted that he caused the death of the deceased; committed rape upon X and inflicted injuries upon the person of X and Y. He further stated that he had hidden the clothes which he was wearing at the time of occurrence and that he can get recovered the same. Pursuant thereto, the accused led Inspector Baltej Singh PW-48, SI Rishipal PW-34 and SI Ramesh Dixit PW-35, to the place of occurrence i.e. second floor, 6/4, Singh Sabha Road and got recovered a pyjama, vest, underwear and handkerchief from the roof of the room which was built upon the said floor. The aforesaid clothes were seized vide memo Ex.PW-34/A. It may be noted here that Prem Prakash Aggarwal PW-17, the brother of the father of the children, was also present at the time of the recovery of the said clothes. Inspector Baltej Singh PW-48, prepared the site plan of the place of recovery of the said clothes; being Ex.PW-48/I.

29. Thereafter SI Rishipal PW-34, took the accused to Hindu Rao Hospital where Dr.Rakesh Kumar PW-4, examined the accused. It may be noted here that MLC Ex.PW-4/A of the accused records that no fresh external injury was found on any part of the body of the deceased and that the secondary sexual characters of the accused are well developed.

30. After conducting the medical examination of the accused, the doctor handed over the blood sample of the accused on a gauze to SI Rishipal PW-34, who in turn handed over the same to Inspector Baltej Singh PW-48, vide memo Ex.PW-34/C.

31. On the same day i.e. 20.10.2006 at about 3.30 P.M. the accused was examined by Dr.M.K.Panigrahi PW-12, for the purposes of ascertaining whether he is capable to perform sexual intercourse. The report Ex.PW-12/A prepared by Dr.M.K.Panigrahi records that there is nothing to suggest that the accused is not capable of performing sexual intercourse and that no smegma was found in the external genitalia of the accused.

32. On 21.10.2006 Y was discharged from Apollo Hospital. On the same date Inspector Baltej Singh PW-48, recorded the statement of Y under Section 161 CrPC. In her statement Y indicted the accused as the person who caused the death of the deceased; committed rape upon X and inflicted injuries upon her and X.

33. On 22.10.2006 SI Rishipal PW-34, accompanied by HC Sanjay PW-30, again took the accused to Hindu Rao Hospital where he was examined by Dr.Hari Gupta PW-6. The MLC Ex.PW-6/A of the accused records that no fresh external injury was found on the person of the accused.

34. After conducting the medical examination of the accused, the doctor handed over two vials containing scalp hair and pubic hair of the accused to SI Rishipal PW-34, who in turn handed over the same to Inspector Baltej Singh PW-48, vide memo Ex.PW-30/A.

35. On the same day i.e. 22.10.2006 Inspector Baltej Singh PW-48, collected pyjama, t-shirt and brassiere worn by X at the time of her admission at Sunder Lal Jain Hospital, panty worn by Y at the time of her admission at Sunder Lal Jain Hospital, vaginal swabs of X and Y, urinal sample of X, blood which oozed out from vagina of X and pubic hair of X from Sunder Lal Jain Hospital and seized the same vide memo Ex.PW-9/C.

36. On 23.10.2006 the bed sheet seized from the room of the children and having a foot print imprinted upon it was sent to Sudhir Bhalla PW-14, Finger Print Expert, who opined that no chance print could be developed by him for the reason no ridges were found on the foot print imprinted upon the bed sheet in question. He further opined that the said foot print be got examined by physical and biology division of FSL, Delhi. Sudhir Bhalla prepared the report Ex.PW-14/A in said regard. Pursuant thereto, said bed sheet as also other articles which were seized during investigation were sent to FSL where Ravinder Kumar Jain PW-15, Finger Print Expert, examined the

foot print in question. Vide his report Ex.PW-15/B Ravinder Kumar Jain opined that the said foot print is smudged and does not disclose sufficient number of ridges hence no opinion can be given regarding the said print.

37. On the same day i.e. 23.10.2006 SI Manohar Lal PW-38, Draftsman, prepared the site plan to scale Ex.PW-38/A of the place of occurrence; at the instance of Inspector Baltej Singh PW-48.

38. On 23.10.2006 at about 8.00 P.M. Dr Gaurav Singh PW-3, made an endorsement Ex.PW-3/B on the MLC Mark X of X that *'Not fit to talk at present'*. On 24.10.2006 at about 12.00 P.M. Dr.Sudha Kansal PW-7, declared X fit to give a statement as evident from the endorsement Ex.PW-7/B made by her on the MLC Mark X of X pursuant to which Inspector Baltej Singh PW-48, of X under Section 161 Cr.P.C. In her statement X also indicted the accused as the person who caused the death of the deceased; committed rape upon her and inflicted injuries upon her and Y. Additionally, X stated that the accused removed a diamond ring from her finger at the time when he was committing rape upon her.

39. On 24.10.2006 S.S. Rana PW-16, Security Supervisor, Apollo Hospital, handed over the clothes which X and Y were wearing at the time of their admission in Apollo Hospital and

the blood sample of X on a gauze to Inspector Baltej Singh PW-48, who seized the same vide memo Ex.PW-16/A.

40. On 26.10.2006 Ramesh Kumar Aggarwal PW-10, the father of the children, handed over a torn t-shirt and a pyjama which Y was wearing at the time of the occurrence to Inspector Baltej Singh PW-48, who seized the same vide memo Ex.PW-10/B.

41. On 30.10.2006 the accused made another disclosure statement Ex.PW-35/A wherein he stated that he removed a ring from the finger of X at the time when he committed rape upon her and that he hid the same in the pocket of the pyjama which he was wearing at the time of the occurrence. Pursuant to the aforesaid disclosure made by the accused, Inspector Baltej Singh PW-48, made an application Ex.PW-36/A dated 31.10.2006 to the FSL for the return of the parcel containing the pyjama which was worn by the accused at the time of the occurrence. It be noted here that the application Ex.PW-36/A records that *'His clothes were sealed on the spot without thorough search as there was no information of any type regarding the said diamond ring at that time. Further more it was apprehended that too much handling/searching of the clothes may disturb evidence..... and blood vigilance stains of procutics and of accused'*. Dr.V.K.Goyal PW-36, Director,

FSL allowed the request of the Investigating Officer as evident from the endorsement Ex.PW-36/B made by him on the application Ex.PW-36/A.

42. After the return of the parcel in question by FSL, Inspector Baltej Singh PW-48, checked the pyjama which the accused was wearing at the time of the occurrence in the presence of SI Ramesh Dixit PW-35, upon which a diamond ring was found in the right pocket of the said pyjama. The aforesaid ring was seized vide memo Ex.PW-35/B.

43. On 04.11.2006 Ajay Goel PW-41, Metropolitan Magistrate, conducted the Test Identification proceedings of the ring which was found in the pocket of the pyjama of the accused. X participated in the said proceedings and identified the ring found in the pocket of the pyjama as the ring which was removed by the accused from her finger at the time when he committed rape upon her. Ajay Goel prepared the record Ex.PW-41/B of the said Test Identification proceedings.

44. The aforesaid seized materials viz; two bed sheets, an underwear, a pyjama, a knife, one strand of hair and bunch of hair seized from the room of the children; bed sheet seized from the room of the parents of the children; knife recovered from the bathroom situated near the room of the children; scalp hair, blood sample and clothes of the deceased; pyjama,

t-shirt and brassiere worn by X at the time of her admission in Sunder Lal Jain Hospital; underwear worn by Y at the time of her admission in Sunder Lal Jain Hospital; vaginal swabs of X and Y; urinal sample and pubic hair of X; blood which oozed from the vagina of X; pubic hair, scalp hair and the blood sample of the accused; clothes recovered at the instance of the appellant; ring found in the pocket of pyjama of the accused; shirt and pyjama worn by X at the time of her admission in Apollo Hospital; the blood samples of X and Y; clothes worn by the deceased at the time of occurrence and t-shirt and pyjama worn by Y at the time of occurrence were subjected to forensic evaluation at the FSL.

45. Vide FSL report Ex.PW-37/A, it was opined that blood was detected on the two bed sheets, underwear, pyjama, knife and one strand of hair seized from the room of the children; knife recovered from the bathroom; clothes worn by the deceased at the time of occurrence; pyjama, t-shirt and brassiere worn by X at the time of her admission in Sunder Lal Jain Hospital; underwear worn by Y at the time of her admission in Sunder Lal Jain Hospital; vaginal swabs of X and Y; t-shirt worn by X at the time of her admission in Apollo Hospital and t-shirt worn by Y at the time of occurrence. It was further opined that human semen was detected on the vaginal swabs of X and Y. That the

bunch of hair and one strand of hair seized from the room of the children were found to be of human origin and that they were dissimilar in most of their morphological and microscopical characteristics from the hairs contained in exhibit 23 i.e. pubic hair of X and the hair contained in exhibit 24 i.e. the scalp hair of the accused.

46. A close perusal of the FSL report Ex.PW-37/A shows that 38 parcels were sent by the Investigating Officer to FSL. Out of the said 38 exhibits, 6 exhibits were hairs. Exhibit No.5 was the bunch of hair seized from the room of the children. Exhibit No.6b was one strand of hair seized from the room of the children. Exhibit No.11 was the scalp hair of the deceased. Exhibit 23 was the pubic hair of X. Exhibit 24 was pubic hair of the accused. Exhibit No.25 was the scalp hair of the accused.

47. There is a serious anomaly in the FSL report Ex.PW-37/A. The anomaly is that the FSL report Ex.PW-37/A records that Exhibit No.5/bunch (few strands) of hair seized from the room of the children is dissimilar from Exhibit No.24/scalp hair of the accused. As already noted in para 46 above, exhibit no.24 was pubic hair of the accused and not scalp hair of the accused as recorded in the FSL report Ex.PW-37/A. Now the question which arises is that what was compared with exhibit no.5. Pubic hair of the accused or scalp hair of the accused?

48. To find the answer to the aforesaid question, we summoned the record of the FSL pertaining to the present case. A perusal of the record of the FSL shows that all the hairs sent to FSL were examined by Anita Chhari PW-37. The results of the hair examination conducted by Anita Chhari are contained at pages 56-62 of the record of the FSL. After conducting the said examinations, following conclusions were arrived at by Anita Chhari, which are recorded at page 61 of the record of the FSL:-

“i. Exhibit 5 (scalp hair) different from hair in exhibit 23 & 24 (pubic hair)

(ii) Only one hair in exhibit 6b & as such no opinion with respect to similarity or otherwise with exhibit 5 can be given.

(iii) Exhibit 5, exhibit 11, Ex.25,

No opinion is offered whether exhibit 5 is similar with exhibit 11 & Ex.25

(i) From morphological and microscopical examination, the hair in exhibit 5, 6b, 11, 23, 24 & 25 were found to be human in origin

(ii) Hair in exhibit 5 were found to be dissimilar in most of the morphological & microscopical characteristics with hair in exhibit 23 i.e. Pubic hair of X & exhibit 24 i.e. Pubic hair of accused.

(iii) No further opinion.”

49. Pursuant thereto, a rough report was prepared recording therein the results of the hair examinations conducted by Anita Chhari and the other examinations conducted at FSL with respect to the case property. It is most relevant to note that an

error occurred while recording conclusion no. (ii) i.e. 'hair in exhibit 5 were found to be dissimilar in most of the morphological & microscopical characteristics with hair in exhibit 23 i.e. Pubic hair of X & exhibit 24 i.e. Pubic hair of accused. The error which occurred was that exhibit 24 was referred to as containing scalp hair of the accused. However, said error was detected and duly corrected. The word 'scalp' was stroked and word 'pubic' was substituted in its place. It is also relevant to note that conclusion no. (iii) that no opinion could be offered whether exhibit 5 is similar to exhibit 11 and 25 was not recorded in the rough report. On the basis of the aforesaid rough report, the FSL report Ex.PW-37/A was prepared. Unfortunately, the error which had occurred in the rough report and was corrected subsequently found its way in the report Ex.PW-37/A. This practice of callously preparing reports by the officials of FSL is seriously deprecated by this court. It is expected that in future the officials of FSL would be more careful and vigilant while preparing the reports.

50. The correct factual position is that the hair seized from the spot (exhibit 5) was compared with pubic hair of X (exhibit 23) and pubic hair of the accused (exhibit 24). The result of the said comparison was that the characteristics of exhibit 5 were found to be dissimilar from the characteristics of exhibit 23

and 24. Additionally, the hair seized from the spot (exhibit 5) was also compared with scalp hair of the deceased (exhibit 11) and scalp hair of the accused (exhibit 25). However, no conclusive opinion could be rendered with regard to the said comparison.

51. Vide FSL report Ex.PW-37/B it was opined that blood detected on the two bed sheets, underwear and strand of hair seized from the room of the children was having O group; blood detected on pyjama seized from the room of the children and blood lifted from the said room was of human origin, group whereof could not be determined; blood detected on the bed sheet seized from the room of the parents, knife seized from the bathroom and clothes of the deceased was having O group; blood group of the deceased was O; no opinion could be given about the group of blood sample of the accused as the same had putrefied; blood detected on pyjama which X was wearing at the time of her admission in Sunder Lal Jain Hospital and t-shirt which Y was wearing at the time of her admission in Apollo Hospital was of human origin, group whereof could not be determined; no opinion could be given about the group of blood sample of X and blood which oozed from the vagina of X as the same had putrefied; blood detected on shirt and pyjama which X and Y respectively were

wearing at the time of her admission in Apollo Hospital was having O group and that no opinion could be given about the group of semen which was found on the vaginal swabs of X and Y.

52. Vide FSL report Ex.PW-37/C it was opined that blood was detected on the vest, underwear and pyjama recovered at the instance of the accused and that human semen was detected on the said underwear and pyjama. Vide FSL report Ex.PW-37/D it was opined that blood detected on the said vest was having O group; blood detected on the said underwear and pyjama was of human origin, group whereof could not be determined and that no opinion could be given about the group of semen which was detected on the said underwear and pyjama.

53. Armed with the aforesaid materials, a charge sheet was filed against the accused. Following charges were framed against the accused:-

"S. No.	Charge	Offence
1.	Section 302 IPC	Causing death of Deceased
2.	Section 376 IPC	Committing rape upon X
3.	Section 307 IPC	Attempting to murder X and Y

4.	Section 392 IPC	Committing robbery of ring of X"
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54. At the trial, the prosecution examined as many as 48 witnesses. With a view to have clarity in the analysis of the evidence led by the prosecution, we segregate the witnesses of the prosecution into 9 categories, clubbing in one category witnesses who have thrown light on the same issue. We would also be splitting, while noting, the testimonies of the witnesses, whenever required pertaining to the evidence throwing light on different facets/stages of the case of the prosecution.

A Witnesses who participated in the preparation of the necessary documents prepared by the police till the FIR was registered: - HC Jai Kumar PW-19, HC Pawan Kumar PW-20, HC Shiv Pratap Singh PW-24 and Const.Tej Pal PW-25.

55. HC Jai Kumar PW-19, deposed that the entry pertaining to the incident in question was recorded by him in the PCR Form Ex.PW-19/A. HC Pawan Kumar PW-20, deposed that the DD entry Ex.PW-20/A, FIR Ex.PW-20/B and the DD entry Ex.PW-20/C were prepared by him. HC Shiv Pratap Singh PW-24, deposed that the copy of the FIR Ex.PW-20/B was delivered by him to Ilaqa Magistrate and other senior police officials in the early morning of 19.10.2006. Const.Tej Pal PW-25, deposed that he took the endorsement Ex.PW-48/A prepared by

Inspector Baltej Singh PW-48, to the police station at about 04.00 A.M. on 19.10.2006 for the purposes of registration of an FIR.

B Witnesses who prepared the documents pertaining to the medical condition of the deceased, X and Y:- Dr.K.Goyal PW-1, Dr.M.Arshad PW-2, Dr.Gaurav Singhal PW-3, Dr.Rakesh Kumar PW-4, Dr.Hari Gupta PW-6, Dr.Sudha Kansal PW-7, Dr.Seema Patni PW-8, Dr.Uma Rani Swain PW-9, Santosh Kumar Upadhyaya PW-11, Dr.M.K.Panigrehi PW-12, S.S.Rana PW-16 and Dr.Urvashi Prasad Jha PW-46.

56. Dr.K.Goyal PW-1, deposed that he conducted the post-mortem of the deceased and prepared the post-mortem report Ex.PW-1/A of the deceased. He further deposed that he handed over the clothes, scalp hair and blood sample of the deceased on a gauze to the police.

57. Dr.M.Arshad PW-2, deposed that the MLCs Ex.PW-2/A, Ex.PW-2/B and Ex.PW-2/C of X, Y and the deceased were prepared by him. Dr.Gaurav Singhal PW-3, deposed that the endorsements Ex.PW-3/A and Ex.PW-3/B was made by him on the MLC Mark X of X and that tracheotomy tube inserted in the throat of X was removed on 23.10.2006.

58. Dr.Rakesh Kumar PW-4, deposed that he medically examined the accused on 20.10.2006 and prepared the MLC Ex.PW-4/A in said regard. He further deposed that he handed over the blood sample of the deceased to SI Rishipal after conducting the medical examination of the accused. Dr.Hari Gupta PW-6, deposed that he medically examined the accused on 22.10.2006 and prepared the MLC Ex.PW-6/A in said regard. He further deposed that he handed over two vials containing pubic hair and scalp hair of the accused to SI Rishipal after conducting the medical examination of the accused.

59. Dr.Sudha Kansal PW-7, deposed that she had prepared the history sheet Ex.PW-7/A of X on 19.10.2006 of X and that she made the endorsement Ex.PW-7/B on the MLC Mark X of X.

60. Dr.Seema Patni PW-8, deposed that she examined X at about 01.00 A.M. on 19.10.2006. X had multiple stab injuries all over her body, predominantly on the upper chest and abdomen and that her neck was slit open. Tracheotomy tube was put in the throat of X and that a chest tube was put in the left side of the chest of X. Multiple blood transfusions were given to X. She further deposed that she opined that the injuries found on the person of X were dangerous in nature and that the treatment record Ex.PW-8/A of X was prepared by her.

That she made the endorsement Ex.PW-8/B on the MLC Ex.PW-2/B of Y and prepared the treatment record Ex.PW-8/C of Y.

61. Dr.Uma Rani Swain PW-9, deposed that she conducted the gynaecological examination of X at about 3.15 P.M. on 19.10.2006 and prepared the report Ex.PW-9/A in said regard. She further deposed that she conducted the gynaecological examination of Y at about 3.45 A.M. on 19.10.2006 and prepared the report Ex.PW-9/B in said regard. After conducting the gynaecological examination of X and Y she handed over the materials seized vide memo Ex.PW-9/C to the police.

62. Santosh Kumar Upadhyaya PW-11, deposed that he is working as Record Clerk at Sunder Lal Jain Hospital and that the case note Ex.PW-11/A of Y, discharge summary Ex.PW-11/B of Y and the case note Ex.PW-11/C of X were prepared by Dr.Rakesh Kumar Gupta. That Dr.Neetu made the endorsements that '*Pt. is not fit for statement because of tracheotomy*' on the MLCs Ex.PW-2/A and Ex.PW-2/B of X and Y respectively. That he can identify the handwriting and signatures of Dr.Rakesh Kumar Gupta and Dr.Neetu.

63. Dr.M.K.Panigrehi PW-12, deposed that he examined the accused on 20.10.2006 at about 3.30 P.M. to ascertain whether the accused is capable of performing sexual intercourse and that he prepared the report Ex.PW-12/A in said

regard. S.S.Rana PW-16, deposed that he handed over the materials seized vide memo Ex.PW-16/A to the police.

64. Dr.Urvashi Prasad Jha PW-46, deposed that on 19.10.2006 X had written the account Ex.PW-46/A of the incident in her presence. She conducted the gynaecological examination of X at about 05.00 P.M. on 19.10.2006 and she noted following injuries on the person of X:- (i) A torn hymen; (ii) Circumferential tears between the hymen and the labia minora with slight bleeding; and (iii) Tear in the fouchette with slight bleeding which is suggestive of forced sexual vaginal intercourse.

C Witnesses to prove the scientific evidence: - Ravinder Kumar Jain PW-15, Dr.V.K.Goyal PW-36 and Anita Chhari PW-37.

65. Ravinder Kumar Jain PW-15, deposed that the report Ex.PW-15/A was prepared by him. Anita Chhari PW-37, deposed that the FSL reports Ex.PW-37/A, Ex.PW-37/B, Ex.PW-37/C and Ex.PW-37/D were prepared by her.

66. Dr.V.K.Goyal PW-36, deposed that the police made an application Ex.PW-36/A for return of the parcel containing the pyjama recovered at the instance of the accused and that he

made an endorsement Ex.PW-36/B on the said application allowing the return of the said application.

D Witnesses to prove the documents prepared during the investigation of the present case: - Sudhir Bhalla PW-14, ASI Manish Kumar Bhardwaj PW-26 and ASI Ajay Kumar PW-27.

67. Sudhir Bhalla PW-14, deposed that the report Ex.PW-14/A was prepared by him. ASI Manish Kumar Bhardwaj PW-26, deposed that the report Ex.PW-26/A was prepared by him. ASI Ajay Kumar PW-27, deposed that the report Ex.PW-27/A was prepared by him.

E Witnesses to prove the culpability of the accused: - X PW-21, Y PW-22, Ramesh Kumar Aggarwal PW-10, Nirmal Aggarwal PW-23, Gurpreet Singh PW-5 and Jeetan Dass PW-39.

68. X PW-21, deposed that on 14.10.2006 her mother employed the accused as a domestic servant. On 18.10.2006 at about 10.00 P.M. she, Y, the deceased and her parents were watching television in the room of her parents. After sometime, she, Y and the deceased went to their bedroom where Y and the deceased went to sleep whereas she studied for about half an hour. Thereafter she also went to sleep on the bed on which the deceased was sleeping. At about 12.00 A.M. she heard the noise of weeping of Y upon which she woke

up and saw that the accused was sitting between the bed on which she was sleeping and the bed on which Y was sleeping. She immediately switched on the light and saw that the neck and hands of Y were smeared with blood. The accused who was carrying a knife in his hand rushed towards her. She tried to open the door but the accused gave knife blows on her back and the left side of her body due to which she fell down on the floor. The accused went to Y, slit her throat and asked her to remove her pant. In the meantime, the deceased also woke up and started crying. Y asked the accused to allow her to go out to drink water but the accused told her to drink water from the tap in the bathroom which was situated in the said room. Y went to the bathroom and the deceased started to follow Y. When the deceased was about to enter the bathroom the accused caught hold of the deceased from his neck. The accused lifted the deceased from his neck, gave a knife blow on his neck and threw him on her bed. The knife got stuck in the neck of the deceased. She and Y requested the accused to let them go out and told him that they would not disclose a word about the incident to anyone. The accused went out of the room and brought another knife from the kitchen. The accused gave knife blows on her neck as also on the neck of Y. Thereafter he removed her pyjama and under pant as also his clothes. The accused tried to rape her but she managed to

save herself by taking a turn. The accused again gave a knife blow on her back and committed rape upon her. While committing rape upon her, the accused removed a ring from the finger of her left hand. The accused again tried to rape her but she fell down from the bed. The accused placed his fingers on her nostrils to ascertain if she was alive or not. She stopped her breath and the accused went out of the room. She asked Y to go to the room of her parents and inform them about the incident but she did not go as she was scared and apprehended that the accused is present outside the room. She and Y were bleeding from their necks. Thereafter she went to the room of her parents by crawling on the floor. On reaching there, she switched on the light upon which her mother woke up. Her mother woke up her father. Her father made her to lie down on the bed. She told her parents about the incident. Her mother and her neighbours helped her to wear clothes. Her father and her neighbours removed her, Y and the deceased to the hospital. The pyjama and the underwear recovered by the police from her room were worn by her at the time of the occurrence. She caught the hair of the accused when he assaulted her for the first time and that some strands of hair of the accused came in her hand.

69. On being questioned as to why she did not raise an alarm at the time of the occurrence, X stated that (Quote) *'I could not raise any alarm because I had sustained injuries on my neck. I had not struggled with the accused to save myself nor I had fought with him. Vol. I had pulled his hairs.'*

70. PW-22, deposed that on 18.10.2006 she, i.e. Y, the deceased and her parents were watching television in the room of her parents. At about 10.30 P.M., she, i.e. Y and the deceased went to their bedroom where she and the deceased went to sleep whereas X started studying. After sometime she felt that someone was fondling her body upon which she woke up. She saw that the accused was fondling her body with his hand. She removed the hand of the accused from her body upon which the accused pressed a knife on her neck as a result of which blood started to ooze out of her neck. When she removed his hand she also sustained injuries on her fingers. The accused pushed her from the bed due to which she fell down on the floor upon which she started weeping. On hearing her noise X woke up and switched on the light. X tried to open the door of the room but the accused attacked her with knife. The accused gave two-three knife blows to X. X caught the hair of the accused but fell on the floor. The accused asked her to open her pant. She asked the accused to

let her go out as she wanted to drink water upon which the accused told her to drink water from the tap in the bathroom. In the meantime the deceased also woke up and started crying. She went to the bathroom and the deceased started to follow her. The accused caught hold of the deceased from his neck, gave a knife blow on his neck and threw him on the bed. The knife got stuck in the neck of the deceased. The accused ran to the kitchen and brought another knife from there. The accused inflicted several knife blows on her body. The accused also gave knife blows on the neck and back of X. The accused removed the under pant of X as also his clothes. Thereafter the accused committed bad act with X. The accused made X to lie on her bed and again committed bad act with her. (The witness explained the meaning of 'bad act' by stating that (Quote) *'By bad act I mean that he laid himself on my sister'.*) The accused placed his fingers on the nostrils of X to ascertain if she was breathing or not and went out of the room. After a while X asked her to call their mother but she did not go as she was scared. After sometime X herself went to room of their parents by crawling on the floor. She followed X. She narrated the whole incident to her parents. Her father and neighbours removed her, X and the deceased to the hospital. She sustained injuries on her neck and other parts of her body.

71. On being questioned as to why she did not raise an alarm at the time of the occurrence, Y stated that (Quote) *'I did not cry because I have received cut with knife on my neck...I did not raise any alarm since I was injured. I was not having injuries on my leg. I did not run out of the because it was bolted from upside by a chitkani.'* On being questioned about the commission of rape by the accused upon X she stated that (Quote) *'Accused kept on lying on my sister for 3-4 minutes. At that time I was on my bed. The difference between the first bad act and second bad act was half a minute. My sister has tried to free her by moving herself on one side but accused gave a knife blow to her. When my sister took a turn on one side accused had given a knife blow to her. My sister had taken a turn much after the accused laid on her....For the second time, the bad act which the accused did with my sister was on my bed. I was sitting on the same bed'*. On being questioned about the movement of the accused to the kitchen the witness stated that (Quote) *'The accused left our bedroom at around 12.30 a.m. The door was open when the accused had left the bedroom to the kitchen to bring a knife. Within 5-10 seconds, accused had returned back to the bedroom with a knife. We did not try to run out of the bedroom because the accused in the meantime had come to the bedroom again.'*

72. Ramesh Kumar Aggarwal PW-10, the father of the children, deposed that they employed the accused as a domestic servant to work in their house five days prior to the intervening night of 18/19.10.2006 on the recommendation of a driver named Jeetu. They gave a room built on the roof of their residence to the accused for his occupation. On 18.10.2006 he, his wife and three children namely X, Y and the deceased were watching television in their room. The accused who was pressing his legs was also present in the said room at that time. At about 10.00 P.M., X, Y and the deceased went to their bedroom. At about 11.15 P.M. he and his wife went to sleep and the accused left their room. At about 12.45 P.M. X who was soaked with blood and writhing in pain entered their room all of a sudden. She told him and his wife that the accused has inflicted injuries on her body and thereafter fell on the bed. Meanwhile, Y who was also soaked with blood and was weeping loudly came to their room and told them that the accused has caused injuries to the deceased. On hearing the same, he and his wife rushed to the room of their children where they saw that the deceased was drenched with blood and that a knife was stuck in his neck. The knife which was stuck in the neck of the deceased did not belong to their household. He pulled out the knife from the neck of the deceased and threw it on the floor. The knife was taken away

by the accused. He raised an alarm upon which their neighbours came to their residence. He and his neighbours removed X, Y and the deceased to Sunder Lal Jain Hospital where the deceased was declared as brought dead. The doctors told him that the condition of X and Y was serious at the time of their admission in the hospital. After sometime the police arrived at the hospital and recorded his statement Ex.PW-10/A. The accused managed to escape from their house. On 26.10.2006 he handed over the t-shirt and the pyjama which Y was wearing at the time of the occurrence to the police. The date of birth of X and Y are 09.10.1989 and 28.07.1997 respectively as recorded in the birth certificates Ex.PW-10/C and Ex.PW-10/D.

73. On being questioned about the time of removal of the children to the hospital, the witness stated that (Quote) '*I heard the screams of my daughters around 12.45 am on 19.10.06. I left for Sunder Lal Jain Hospital around 12.50 to 12.55 am on 19.10.06. On the way to hospital I was accompanied by my first floor neighbour Sh. Gurmeet Singh.*' On being questioned about the knife which was stuck in the neck of the deceased the witness stated that (Quote) '*I had removed the knife from the neck of my son and the same was left at the spot. That knife remained on the spot when I left for*

the hospital. I did not find that knife there in my house when I came back at 10.00 am from the hospital'. On being questioned about the presence of the accused after the occurrence, the witness stated that (Quote) 'It is correct that after my daughter came to my bedroom I along with my wife and daughter had gone to the bedroom of my children. It is correct that accused was not found present in the room or in the house.'

74. Nirmal Aggarwal PW-23, the mother of the children, deposed that on 14.10.2006 they employed the accused as a domestic servant to work in their house. On 18.10.2006 she, her wife and her three children namely X, Y and the deceased were watching television in their bedroom. At about 10.30 P.M., X, Y and the deceased went to their bedroom. The accused was also present in their bedroom up till 11.00 P.M. and thereafter he also left from there. The accused used to sleep in a room built on the roof of their house. At about 12.40 AM she heard the noise that of light being switched on upon which she woke up and saw that X was smeared with blood and was not having any undergarments on her person. She woke up her husband and made X to lie on her bed. X told her that she has been assaulted by the accused. In the meantime Y also came there and told her that the accused has stabbed

her, X and the deceased. On hearing the same, she and her husband rushed to the bedroom of the children where they saw that a knife is stuck in the neck of the deceased. Her husband pulled out the knife from the neck of the deceased. They raised an alarm. She and her neighbours put on the clothes on the person of X and removed the children to Sunder Lal Jain Hospital. She had seen a knife in a bathroom situated near the stair case of her house.

75. On being questioned about her movements after the occurrence, the witness stated that (Quote) *'We had removed our children from our house around 12.40 am for hospital. I had not gone to sunder Lal hospital with my children but remained in the house. I remained in my house upto 1.30/1.45 am. Thereafter police came and took me to Jain Colony in search of the accused. SHO had taken me in the search of the accused. I returned back to my house around 4.00 am....It took about 1 hour to search out the house of my driver in Jain Colony. At that time accused was not found in the house of Jeetu. From there we had gone along with Jeetu to Jawahar Nagar where jija of accused had been residing. Accused was not found there also'*

76. On being questioned about the knives recovered from the place of occurrence the witness stated that (Quote) *'After*

removing the knife from the neck my husband had thrown the knife on the floor. When SHO was taking me in search of the accused in my house before leaving the house I had gone to the bathroom near the stair case where I noticed the knife. Knife which was lying in the bathroom was taken into possession by the police but I cannot say whether the other knife was also taken in the possession.'

77. Gurpreet Singh PW-5, deposed that he was the neighbour of the family of the children inasmuch he and the family of the children used to reside in the different floors of the same building in the year 2006. On the intervening night of 18.19/10.2006 at about 12.20 PM or 12.30 PM he was about to go to sleep when he heard some noise but he ignored the same. After a while he heard a voice saying that 'my children have been caused injuries'. On hearing the same, he immediately rushed to the second floor of the building in which he used to reside as the voice was coming from there. Ramesh Kumar Aggarwal, his wife, three daughters and one son were residing on the second floor. The family of Ramesh Kumar Aggarwal had employed one domestic servant. When he reached the second floor, Mr.Ramesh Aggarwal and his wife opened the door and told him that their children have been killed by their servant and that their servant has absconded.

He saw that Ramesh Kumar Aggarwal was carrying the deceased who was badly injured and was bleeding profusely. X was lying on the bed in an injured condition while Y who was also injured was standing in the room. He immediately offered his help to Ramesh Kumar Aggarwal for removing the children to the hospital. He also gave a call to the police from his mobile having number 9811042809 and informed them about the incident. Thereafter he along with Ramesh Kumar Aggarwal removed the deceased to Sunder Lal Jain Hospital in his own car while X and Y were also removed to the same hospital by someone else.

78. On being questioned about the room in which the occurrence took place the witness stated that (Quote) *'I had seen the room where the incident took place. I had not seen the knife lying in the room. I had seen the room of the children where the incident took place after I came from the hospital.'* On being questioned about the arrival of the police at the place of occurrence the witness stated that (Quote) *'I had taken Pratham (the son of the complainant) to the hospital. We had reached the hospital between 12.00 or 1.00 am. PCR came at the house after we left for hospital. In my presence police did not reach the hospital. I remained in the hospital only for 5*

minutes. When I returned back to the house I saw the police officials, present there.'

79. Jeetan Dass PW-39, deposed that he earns his livelihood by working as a driver. He had taught driving to the wife of Ramesh Kumar Aggarwal about 8-10 years prior to the year 2008. The wife of Ramesh Kumar asked him to get her a domestic servant. Since he had provided a boy named Jheri to her on an earlier occasion she again asked him to get her a domestic servant. The boy he had earlier provided to wife of Ramesh Kumar left her services. A person named Subash who was known to him had requested him to arrange some job for his brother-in-law. He asked Subash to meet the wife of Ramesh Kumar for the job upon which Subash along with his brother-in-law met her. After meeting Subash and his brother-in-law wife of Ramesh Kumar gave him a telephonic call and told him that she has employed the brother-in-law of Subash. The accused is the brother-in-law of Subash. In the month of October 2006 some police officials came to his house and made inquiries about the accused whereupon he learnt about the incident in question. He took the police officials to the residence of Subash where they met Subash.

80. On being questioned about the presence of wife of Ramesh Kumar Aggarwal at the time when the police came to

his house, the witness stated that (Quote) *'Wife of Ramesh was also with them'*. On being questioned about the identity of the accused the witness stated that (Quote) *'It is correct that I had not seen accused present in the court before I had referred him to the wife of Ramesh, complainant. Thereafter I had seen the photograph of the accused in the newspaper and after that I had seen him in the court. It is correct that I had not physically seen the accused before even after he was employed in the house of Ramesh.'*

F Witnesses who participated in the investigation of the present case:- HC Sanjay PW-30, HC Rajpal Singh PW-32, HC Tejpal PW-33, SI Rishipal Singh PW-34, SI Manohar Lal PW-38, SI Dharampal PW-40 and Inspector Baltej Singh PW-48.

81. We need not note the testimony of the aforesaid witnesses for they have deposed facts regarding the respective role played by them during investigation which have already been succinctly stated by us in the preceding paragraphs and in respect whereof not much submission were made during arguments. However, where necessary to deal with the submissions made by the learned counsel for the accused, such part of the testimony of the relevant witness should be noted.

G Witnesses to prove the arrest of the accused: - HC Yogender PW-28 and Inspector Vimal Kishore PW-29.

82. HC Yogender PW-28, deposed that on 19.10.2006 pursuant to a secret information he along with Inspector Vimal Kishore and other police officials had gone to Rishikesh to arrest the accused. They apprehended the accused at about 6.30 P.M. on 19.10.2006 at Rishikesh. On being questioned about the time when he left Delhi to go to Rishikesh the witness stated that (Quote) *'We left Delhi at about 1.30 am on 19.10.2006....'*

83. Inspector Vimal Kishore PW-29, deposed in harmony with the evidence of HC Yogender. On being questioned about the time when they left Delhi to go to Rishikesh the witness stated that (Quote) *'We left Delhi at about 1.30 am on 19.10.2006....'* On being questioned about the time when he left Delhi to go to Rishikesh the witness stated that (Quote) *'I left Delhi at 4.00 or 4.30 am on 19.10.06.....'*

H Witnesses to prove the recoveries effected at the instance of the accused:- Prem Prakash Aggarwal PW-17, SI Rishipal Singh PW-34, SI Ramesh Dixit PW-35 and Inspector Baltej Singh PW-48.

84. SI Rishipal Singh PW-34, SI Ramesh Dixit PW-35 and Inspector Baltej Singh PW-48, deposed that on 20.10.2006 at about 11.00 A.M. the accused led them to the second floor, 6/4 Singh Sabha Road, New Delhi i.e. the residence of the children and got recovered a pyjama, a vest, an underwear and a handkerchief from the roof of the room which was built on the said floor. Prem Prakash Aggarwal PW-17, the brother of the father of the children, deposed that he was present at the time of the said recovery. Additionally, SI Ramesh Dixit PW-35 and Inspector Baltej Singh PW-48, deposed that on 30.10.2006 on being interrogated the accused made his second disclosure statement wherein he stated that the ring which was removed by him from the finger of X at the time when he committed rape upon her was kept by him in the right pocket of the pyjama worn by him at that time. Pursuant thereto, the parcel containing the said pyjama was brought from the FSL to the police station. The said pyjama was checked upon which a diamond ring was recovered from the right pocket of the said pyjama.

I Witnesses to prove the dates of birth of X and Y: - Harish Kumar PW-13, Geeta Arora PW-43.

85. Harish Kumar PW-13, produced the birth register pertaining to year 1997. As per the said register, a female

child was born to Ramesh Kumar Aggarwal and Nirmala Aggarwal on 28.04.1997.

86. Geeta Arora PW-43, Principal, Happy School, brought the record pertaining to the admission of X and Y in the said school. As per the said record, the dates of birth of X and Y were 09.10.1989 and 28.04.1997 respectively.

87. In his examination under Section 313 Cr.P.C., the accused admitted that on 14.10.2006 he was employed as a domestic servant at the residence of Ramesh Kumar Aggarwal; that in the night of 18.10.2006 he surreptitiously entered the bedroom where X, Y and the deceased were sleeping; that he gave a knife blow on the neck of the deceased and inflicted injuries on the person of X and Y; that he raped X; that on 19.10.2006 he was arrested by the police at Rishikesh and that he got recovered the clothes which he was wearing at the time of the occurrence. The accused however denied having removed a ring from the finger of X at the time when he committed rape upon her. The accused further stated that he committed the aforesaid acts to seek revenge from the father of the children as he used to force him to commit homosexual acts with him.

88. The accused did not lead any evidence in his defence.

89. Believing the evidence of X PW-21 and Y PW-22, to be creditworthy, the learned Trial Judge has convicted the accused of having murdered the deceased, attempted to murder X and Y and raped X. With respect to the charge under Section 392 IPC framed against the accused, the learned Trial Judge has held that since there is no evidence to show that the accused used force to remove the ring from the finger of X he cannot be convicted for the offence of having committed robbery of the ring of X. The learned Trial Judge held that the accused is guilty of committing theft of the ring of X, an offence punishable under Section 379 IPC. (We shall be noting the reasoning of the learned Trial Judge with regard to imposition of death penalty on the accused in the later part of this judgment).

90. At the hearing, numerous arguments were advanced by the learned counsel for the accused, which arguments can be divided into following two categories:-

I Arguments pertaining to the correctness of the finding of guilt of the accused returned by the learned Trial Judge.

II Arguments pertaining to the correctness of the punishment awarded by the learned Trial Judge.

91. Arguments pertaining to the correctness of the finding of guilt of the accused returned by the learned Trial Judge: -
Under this head, following 17 arguments were advanced by the learned counsel for the accused:-

A The first submission advanced by the learned counsel for the accused pertained to the age of the accused on the date of offence. A faint plea was urged before us that accused was juvenile on the date of offence(s) with which he is charged and therefore he should have been tried in accordance with the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 read with Amendment (Care and Protection of Children) Act, 2006. Notwithstanding that the plea of juvenility was not raised before Trial Judge, in the interests of justice, vide order dated 03.09.2009 we directed that ossification test of the accused be conducted by a medical board of AIIMS to ascertain the age of the accused. Pursuant to the said order, Medical Superintendent, AIIMS, constituted a medical board consisting of following members:-

- | | | |
|--|---|--------------|
| “1. Dr.Sanjeev Lalwani | - | Chairman |
| Assistant Professor of Forensic Medicine | | |
| 2. Dr.Ashu Seith Bhalla | - | Member |
| Assoc. Professor of Radio-diagnosis | | |
| 3. Dr.Vijay Prakash Mathur | - | Member |
| Assistant Professor of C.D.E.R. | | |
| 4. Dr.Kashipa Harit | - | Member Secy. |

Department of Hospital Administration”

After conducting the physical, dental and radiological examination of the accused, Board prepared the report dated 18.09.2009, relevant portion whereof reads as under:-

“PHYSICAL EXAMINATION

SECONDARY SEXUAL CHARACTERS- Fully Developed

GENITALS-Adult size fully developed genitalia with bilaterally descended testis.

DENTAL CHARTING

Right Upper Jaw 1 to 7 8 th Partiall erupted

Right Lower Jaw 1 to 8

Left Upper Jaw 1 to 7 8 th Partially erupted

Left Lower Jaw 1 to 8

X-Ray – OPG- Report of Dental Radiological Examination OPG X Ray seen wisdom molar (3rd Molar) present and fully developed roots

Impression: Ages estimation between 18-22 years (Report Enclosed)

RADIOLOGICAL EXAMINATION (REPORT ENCLOSED)

.....

Report of Radiological Examination-

1. X-ray B/L Humerus- AP & Elbow – B/L Conjoint humeral epiphysis fused – BA > 17.5 years
2. X-ray B/L Knee – AP – B/L upper epiphysis fused – BA > 18.5 years.
3. Pelvis – AP – Iliac crest fused – age > 20 years
4. X-ray Chest (Shoulder with Medial end of Clavicle (B/L) – PA – Medial end of Clavicles fused bilaterally: BA > 22 years

REPORT

Considering the findings of physical, dental and radiological examination we are of the considered opinion that BONE AGE of convict Sanjay Dass S/o Sh.Asharfi Dass is **more than 22 years.**”

Counsel for the accused contended that it is an undisputed position that the margin of error in age ascertained by radiological examination is to be taken as 2 years on either side. Counsel therefore urged that age of the accused has to be taken as 20 years on 18.09.2009 and 17 years on 18/19.05.2006 i.e. the date of the offence, meaning thereby, that the accused was a juvenile on the date of the offence.

B The second submission advanced by the learned counsel for the accused was predicated upon the competency of the lawyer who defended the accused in the trial court and the manner of the conduct of the trial of the accused. The first limb of the submission advanced by counsel was that if an accused is not able to engage a lawyer, the State at its expense, must provide one to the accused and that the lawyer so provided must be “competent”. Counsel further urged that it is duty of the court to see and ensure that the accused is represented with diligence and competence by defence counsel and where the defence falls below acceptable standards at a criminal trial, it would amount to denial of counsel’ assistance. As per counsel, a perusal of the record of

the trial court shows that the lawyer appointed by the trial court to defend the accused defended the accused in a most slipshod manner inasmuch as he did not appear before the trial court on many dates and did not subject witnesses of the prosecution to any cross-examination. Counsel urged that the incompetence of his lawyer frustrated the accused to no end inasmuch as he could foresee the result of the trial and that said frustration led the accused to plead guilty, therefore in such circumstances, no credence should be given to so-called admissions made by the accused in his examination under Section 313 Cr.P.C. The second limb of the submission was that many witnesses of the prosecution were examined in the absence of counsel of accused which has greatly prejudiced the accused for the reason their evidence has gone unchallenged. Counsel urged that the trial of the accused must be held to be vitiated on account of said serious infirmity and as a result the conviction and sentence recorded against the accused must also be set aside.

C The third submission advanced by the learned counsel for the accused was that the evidence on record and other circumstances of the case are suggestive of the fact that the offence in question was committed by “two” persons. The said submission was predicated upon the PCR form Ex.PW-19/A, DD

entry Ex.PW-20/A, crime team report Ex.PW-27/A and FSL report Ex.PW-37/A. Counsel urged that the recordings contained in the PCR form Ex.PW-19/A and DD entry Ex.PW-20/A that “servants” had murdered the children probablizes that the offence was committed by more than one person. Counsel further urged that the said probability is further increased by the recording contained in the crime team report Ex.PW-27/A that *‘servants be located and interrogated’*. Counsel urged that the finding contained in the FSL report Ex.PW-37/A that semen was detected on the vaginal swabs of both X and Y establishes that both the girls had sexual intercourse on the date of the offence. Counsel urged the case of the prosecution was that only X was raped by the accused then the question which arises is that how come semen was detected on the vaginal swab of Y. As per the counsel, the conclusion which results from the above conspectus of facts is that the offence was committed by two persons.

D The fourth submission advanced by learned counsel was predicated upon the PCR form Ex.PW-19/A and the testimony of Gurpreet Singh PW-5. Counsel urged that Gurpreet Singh PW-5, deposed that he reached the place of occurrence between 12.20 P.M. to 12.30 P.M. on the intervening night of 18/19.10.2006. Counsel urged that first endeavour of Gurpreet

Singh on reaching the place of occurrence should have been to inform the police about the incident which was not the case inasmuch he informed the police much later at 01.05 A.M. on 19.10.2006 as evident from the perusal of the PCR form Ex.PW-19/A. Counsel urged that the gap of 35 minutes between the time of reaching of Gurpreet Singh at the place of occurrence and time of his informing the police about the incident shows that the parents of the children and Gurpreet Singh bought time to decide a strategy as to what should have been told to the police before conveying information of the incident to the police.

E The fifth submission advanced by learned counsel was predicated upon the site plan Ex.PW-48/D of the place of occurrence and the testimony of Gurpreet Singh PW-5. With reference to the site plan Ex.PW-48/D counsel urged that it showed there was a single entry into the flat where the crime took place. Counsel urged that normal conduct of the parents of children would have been to lock the door of the flat from inside before going to sleep. Counsel urged that under the circumstances, to gain an entry into the flat, somebody either had to break inside or would make a friendly entry. Counsel urged that the accused used to sleep on the room built above the flat where the crime took place and therefore he could have gained entry into the flat only by breaking inside. After

drawing attention of the court to the fact that there is no evidence establishing forced entry into the flat, a half-hearted plea was urged by the counsel that it is possible that the children and in particular X may have allowed entry to somebody known to her and that in probability the persons allowed entry by X were two in number who misused the faith of the young girl. Counsel then drew attention of the court to the deposition of Gurpreet Singh PW-5, that the door of the flat where the crime took place was opened by the parents of the children at the time when he reached there on hearing the alarm raised by the father of the children. Counsel urged that the fact that the door was opened by the parents of the children is suggestive of the fact that after those two persons who committed the crime ran away the parents of the children locked the door of their house, made a strategy as to what should be conveyed to the outside world and after having made the strategy raised an alarm.

F The sixth submission advanced by the learned counsel was that the evidence of X and Y does not inspire confidence as there are many improbabilities in their version of the incident. The first improbability pointed out by the learned counsel was that Y deposed that when she felt that somebody was groping her the light of the room of switched off and that she was able to recognize that the person groping her was the

accused. Counsel urged that how could Y recognize the accused in darkness as the time when the offence was committed was around 12.30 midnight. The second improbability pointed out by the learned counsel was that Y deposed that X was raped twice by the accused within a span of one minute, which counsel contended was most improbable. The third improbability pointed out by the learned counsel was that X and Y deposed that they did not raise an alarm at the time of the occurrence. Counsel urged that on sensing trouble first thing which ought to have been done by X and Y was to raise an alarm to attract the attention of her parents particularly when the distance between the rooms of the children and the parents was very less. As per counsel, the conduct of X and Y of not raising an alarm is most unnatural and raises a big doubt on their credibility. The fourth improbability pointed out by the learned counsel was that Y deposed that the accused did not lock their room at the time when he out of their room to bring second knife from the kitchen. Counsel urged that the most natural thing out to have been done by X and Y in said circumstances was to run to the room of their parents. Counsel urged that the failure of X and Y to do the same raises a big question mark on the truthfulness of their evidence.

G The seventh submission advanced by the learned counsel was predicated upon the statement Ex.PW-46/A of X. Counsel drew attention of the court to the recordings contained in the statement Ex.PW-46/A of X that '*I don't know his name, my mom must be knowing it..... I don't remember his name. I think its Sanjay*'. Counsel urged that the fact that X is doubtful about the identity of the assailant in her statement Ex.PW-46/A which is the first information given by X about the incident is suggestive of the fact that X was tutored to falsely implicate the accused.

H The eighth submission advanced by the learned counsel was also predicated upon the statement Ex.PW-46/A of X. Counsel urged that X stated in her statement Ex.PW-46/A that she tried to fight the accused, which statement is patently false inasmuch as no external injury was found on the person of the accused as recorded in the MLCs Ex.PW-4/A and Ex.PW-6/A of the accused.

I The ninth submission advanced by the learned counsel was predicated upon the conduct of Nirmala Aggarwal, the mother of the children, soon after the occurrence. Counsel drew attention of the court to the deposition of Nirmala Aggarwal PW-23, that she went with the police to look for the accused soon after the occurrence. As per counsel, the said

conduct of a mother who has just lost his son and whose two daughters are lying at the hospital is most abnormal.

J The tenth submission advanced by the learned counsel was that the evidence on record and other circumstances of the case strongly suggest that the knives recovered by the police from the place of occurrence were planted. This submission was predicated upon the brief facts Ex.PW-1/C8 pertaining to the death of the deceased, death report Ex.PW-1/C9 of the deceased and the testimony of Ramesh Kumar Aggarwal PW-10 and Gurpreet Singh PW-5. Counsel submitted that the brief facts Ex.PW-1/C8 pertaining to the death of the deceased records that one knife have been recovered from the place of occurrence whereas as per the case of the prosecution two knives have been recovered from there. Counsel submitted that as per the prosecution two knives were recovered from the place of occurrence by the time Inspector Baltej Singh prepared the death report Ex.PW-1/C9 of the deceased. Counsel urged had that been the case Inspector Baltej Singh would not have recorded in the death report that the death of the deceased was apparently caused by some sharp object, instead would have recorded that the death of the deceased was caused by a knife. Counsel urged that the cluelessness of Inspector Baltej Singh about the weapon of

offence in the death report Ex.PW-1/C9 of the deceased is indicative of the fact that the knives in question were planted by the police. Counsel then urged that the deposition of Rakesh Kumar Aggarwal PW-10, that the knife which was stuck in the neck of the deceased was taken away by the accused and Gurpreet Singh PW-5, completely demolishes the case of the prosecution with respect to the recovery of the knives in question. Counsel lastly urged that Gurpreet Singh PW-5, deposed that he did not see any knife in the room where the occurrence took place whereas as per the case of the prosecution one knife was recovered from the said room. Counsel argued that the cumulative effect of the aforesaid discrepancies in the evidence on record when coupled with the fact that no attempt was made by the investigating officer to lift the finger prints from the knives in question leads to an irresistible conclusion that the said knives were planted.

K The eleventh submission advanced by the learned counsel was that the recovery of the clothes at the instance of the accused is a doubtful recovery for the reason as per the prosecution, the accused after committing the crime, took a bath, changed his clothes and threw the clothes earlier worn by him at the time of the occurrence on the roof before fleeing. Counsel urged that Y claimed to have informed her

parents within 5 minutes of the accused leaving their room and that Ramesh Kumar Aggarwal claimed to have raised an alarm immediately thereafter. As per counsel, there was the time for the accused to take a bath, change his clothes, wear new clothes and throw the clothes changed by him on the roof.

L The twelfth submission advanced by the learned counsel was that the recovery of the ring of X from the pocket of the pyjama of the accused is a tainted recovery. Counsel first urged that there is a fundamental fallacy in the story set up by the prosecution with respect to ring of X. Counsel submitted that had the accused removed ring from the finger of X as claimed by the prosecution he would have done it for pecuniary gain and therefore it does not appeal to common sense that the accused would have taken the ring with him and would not have left behind it in the pocket of his pyjama. Counsel then contended that the fact that the accused did not state a word about the ring of X in his first disclosure statement and disclosed about the same only when factum of removal of ring came into the knowledge of the police makes it highly probable that ring was planted. Counsel urged that said probability is further increased by the fact that police did not find any ring in the pocket of pyjama of the accused at the time of the seizure of the said pyjama.

M The thirteenth submission advanced by the learned counsel was that predicated upon the FSL report Ex.PW-37/A. Counsel urged that X deposed that she had tugged the hair of the accused at the time of occurrence and that a bunch of scalp hair of the accused came in her hand. Counsel urged that the FSL report Ex.PW-37/A shows that hair which was seized from the place of occurrence were not opined to be those of the accused, which fact establishes the presence of somebody else at the place of occurrence.

N The fourteenth submission advanced by the learned counsel was that the evidence on record is suggestive of the fact that police had malice against the accused. The said submission is predicated upon an application filed by Inspector Baltej Singh before trial court on 20.10.2006 for seeking remand of the accused. The reason given by Inspector for seeking the remand of the accused was that the accused is required to be interrogated to ascertain the source of knife used by him for committing the offence. Counsel urged that the aforesaid reason is most flimsy inasmuch as the accused had already disclosed the sources of knives used by him for committing the offence in the alleged disclosure statement made by him. Counsel further urged that the attempt of the investigating officer to seek police remand of the accused

despite everything being cracked shows that investigating officer wanted to plug any loophole which may be there in the case of the prosecution. Counsel urged that the investigating officer succeeded in giving effect to his malafide intention by planting ring of X in the pocket of pyjama of the accused.

O The fifteenth submission advanced by the learned counsel was predicated upon the testimony of ASI Manish Kumar Bhardwaj PW-26 and Inspector Baltej Singh PW-48. Counsel pointed out there is a material contradiction between the testimony of the said witness in that ASI Manish Kumar Bhardwaj deposed that Inspector Baltej Singh was present with him at the place of occurrence between the period 2.00 A.M. to 5.00 A.M. on 19.10.2006 whereas Inspector Baltej Singh deposed that he left the place of occurrence at about 2.45 A.M. on 19.10.2006 to go to Sunderlal Jain Hospital and returned to place of occurrence at about 5.15 A.M.

P The sixteenth submission advanced by the learned counsel was that the evidence pertaining to the arrest of the accused is shrouded with great suspicion. The first suspicious circumstance pointed out by the counsel was that HC Yogender PW-28, deposed that pursuant to a secret information he along with Inspector Vimal Kishore left Delhi at about 01.30 A.M. on 19.10.2006 to go to Rishikesh. Counsel

urged that the incident happened at around 12.45 A.M. on 19.10.2006 and that if the accused was present at Rishikesh at 01.30 A.M. then he could not have committed the crime. Counsel further urged that the police got first information about the crime at 01.05 A.M. and therefore the fact that the police got the information about the whereabouts of the accused within 25 minutes of the receipt of the information of the crime is most improbable. The second suspicious circumstance pointed out by the learned counsel was that Jeetan Das PW-39, deposed that he saw the photograph of the accused in the newspaper. Counsel urged that the claim of the prosecution was that the accused was arrested on 19.10.2006 itself therefore where was the time with the police to get publish the photograph of the accused in the newspaper.

Q The last submission advanced by the learned counsel was that the statement of Y under Section 161 Cr.P.C. was recorded after considerable delay. Counsel urged that the statement of Y was recorded on 21.10.2006 i.e. 2 days after the incident and that there was no reason for the investigating officer to wait for two days before recording the statement of Y particularly when the injuries suffered by her were simple in nature.

92. The first submission of the learned counsel that the accused was a juvenile on the date of offence is based upon a

fallacy that the Medical Board has opined that the accused was aged 22 years on 18.09.2009. Had the Medical Board opined that the accused was aged 22 years on 18.09.2009 the submission of the learned counsel would have carried some weight but the fact of the matter is that Medical Board has opined that the accused was aged "above 22 years" on 18.09.2009. The MLCs Ex.PW-4/A and Ex.PW-6/A and the report Ex.PW-12/A of the sexual examination of the accused and the order on sentence dated 21.10.2008 passed by the trial court throw some light on the aspect of age of the accused on the date of offence. The MLCs Ex.PW-4/A and Ex.PW-6/A dated 20.10.2006 and 22.10.2006 respectively record the age of the accused as 22 years. The report Ex.PW-12/A of the sexual examination of the accused dated 20.10.2006 records the age of the accused as 20 years. The report further records that the accused is married and is father of a female child. It can reasonably be assumed that the aforesaid recordings would have been made by the doctors on the basis of the information provided to them by the accused. The order on sentence dated 21.10.2008 records that amicus curiae appointed by the court to defend the accused submitted before the trial court that the accused was aged between 19-20 years on the date of the offence, that he is a married person and father of a female child. It can again be assumed

without any doubt that the aforesaid submission would have been made by the counsel on the basis of the information provided to him by the accused. Considering the aforesaid recordings and the fact that the accused was married and was having a female child on the date of offence, we hold that the accused was aged 19-20 years on the date of offence. We may hasten to add that the accused has very cleverly not informed about the date and the year of his birth or the place of his birth, thereby preventing an investigation into the primary facts with reference to the record of the Registrar of Births and Deaths or the village panchayat, depending upon whether the accused was born in a rural or an urban area. This has also prevented the issue to be investigated by examining the parents of the accused.

93. To appreciate the second submission advanced by learned counsel, it is necessary to take a bird's eye view of the proceedings of the trial court.

94. On 07.02.2007 the present case was first time listed in the court of Additional Sessions Judge. It may be noted here that the trial court appointed Mr.Santosh Kumar Jha, Advocate as amicus curiae to conduct the defence of the accused. The case was adjourned to 23.02.2007 for hearing of arguments on framing of charges against the accused. On 23.02.2007 the arguments on framing of charges against the accused were

heard and the case was adjourned to 06.03.2007 for order on charge. On the next dates i.e. 06.03.2007 and 08.03.2007 the case was adjourned. On 09.03.2007 charges were framed against the accused. The accused pleaded not guilty to the charges framed against him and the case was adjourned to 18.04.2007 for the recording of prosecution evidence.

95. On 18.04.2007 three witnesses namely K.Goyal PW-1, Dr.M.Arshad PW-2 and Dr.Gaurav Singhal PW-3 were examined. It be noted here that counsel for the accused was not present in the court on the said date and therefore the witnesses could not be subjected to cross-examination. The case was adjourned to 16.05.2007 for recording of the remaining prosecution evidence.

96. On 16.05.2007 the witnesses; Dr.Rakesh Kumar PW-4, Gurpreet Singh PW-5 Dr.Hari Gupta PW-6, Dr.Sudha Kansal PW-7, Dr.Seema Patni PW-8 and Dr.Uma Rani Swain PW-9 were examined. The said witnesses were not subjected to any cross-examination by counsel for the accused. It is most relevant to note here that the witnesses examined till this time were formal witnesses. None of the said witnesses deposed anything which was incriminatory to the accused in the present case. On the same date Gurpreet Singh PW-5, the neighbour of the children, was examined. He was the first witness whose evidence incriminated the accused in the

present case. At the time of the cross-examination of the witness, the accused pleaded guilty to the charges framed against him. He also filed an application in said regard and the same was taken on record by the trial court. The witness was not subjected to any cross-examination by counsel for the accused. Thereafter the witnesses; Ramesh Kumar Aggarwal PW-10 and Santosh Kumar Upadhyaya PW-11 were partly examined and the case was adjourned to 26.05.2007 for recording of the remaining prosecution evidence and the accused was directed to rethink over the guilty plea taken by him.

97. On 26.05.2007 the examination-in-chief of the witnesses; Ramesh Kumar Aggarwal PW-10 and Santosh Kumar Upadhyaya PW-11, was completed and the other witnesses Dr.M.K.Panigrehi PW-12, Harish Kumar PW-13, Sudhir Bhalla PW-14, Ravinder Kumar Jain PW-15, S.S.Rana PW-16 and Prem Prakash Aggarwal PW-17 were examined. The said witnesses were not subjected to any cross-examination by counsel for the accused. The accused filed a second application pleading guilty to the charges framed against him.

98. On the next dates the case was adjourned. Thereafter on 13.09.2007 witness namely HC Jai Kumar PW-19 was examined. It be noted here that counsel for the accused was not present in the court on the said date. The case was

adjourned to 27.09.2007. On 27.09.2007 S.K.Jha, Advocate appraised the court that he does not want to defend the accused and in such circumstances, Mr.K.S.Rana, Advocate was appointed as counsel for the accused. The case was adjourned to 01.11.2007. On 01.11.2007 witnesses; HC Pawan Kumar PW-20 and X PW-21 were examined. X PW-21, was cross-examined at length whereas HC Pawan Kumar was not subjected to any cross-examination by counsel for the accused. On 2.11.2007 and 03.11.2007 Y PW-22 and Nirmala Aggarwal PW-23 were examined and subjected to a lengthy cross-examination. Thereafter on 3/4/5/6/7.12.2007 the witnesses; HC Shiv Pratap Singh PW-24, Const.Tejpal PW-25, ASI Manish Kumar Bhardwaj PW-26, SI Ajay Kumar PW-27, HC Yogender PW-28, Inspector Vimal Kishore PW-29, HC Sanjay PW-30 and Const.Ramesh Chand PW-31, were examined and subjected to cross-examination.

99. On 07.12.2007 counsel for the accused requested the trial court to allow him to cross-examine Ramesh Kumar Aggarwal PW-10, which request was accepted by the trial court and Ramesh Kumar Aggarwal was recalled. On the same date, counsel for the accused cross-examined Ramesh Kumar Aggarwal.

100. On the next dates i.e. 16/17/18.01.2008 the witnesses; HC Rajpal PW-32, HC Tejpal PW-33, SI Rishipal Singh PW-34, SI

Ramesh Dixit PW-35, Dr.V.K.Goyal PW-36, Anita Chhari PW-37 and SI Manohar Lal PW-38 were examined and subjected to cross-examination. On 17.01.2008 the accused filed third application pleading guilty to the charges framed against him. Vide order dated 17.01.2008 the trial court rejected all the applications filed by the accused pleading guilty to the charges framed against him. On the same date, counsel for the accused filed an application before the trial court seeking recall of the witnesses; Gurpreet Singh PW-5 and Prem Prakash Aggarwal PW-17, which application was allowed by the learned trial court.

101. On 02.02.2008 the witness; SI Dharampal PW-40 was examined and subjected to cross-examination. On the next date i.e. 04.02.2008 the witnesses; Gurpreet Singh PW-5 and Ramesh Aggarwal PW-17 were cross-examined by counsel for the accused. It may be noted here that the order sheet dated 04.02.2008 of the trial court records that the accused was aggrieved by the fact that the court is not taking into consideration the plea of guilt taken by him and tried to disrupt the proceedings of the court.

102. On the next date i.e.03.03.2008 the accused filed an application before the trial court seeking transfer of his case from the court which was dealing with his case to another court on the ground that the court which is dealing with his

case is not considering plea of guilt taken by him. In such circumstances, the matter was placed before District and Sessions Judge. On the same date, District and Sessions Judge sent the matter back to the concerned court in view of the submissions made by counsel for the accused that he does not want the case to be transferred to another court.

103. On the next date 04.03.2008 the witness namely Ajay Goel PW-41 was examined and subjected to cross-examination. The accused filed yet another application pleading guilty to the charges framed against him, which application was again rejected by the trial court. On the next dates the witnesses HC Arun Kumar PW-42, Geeta Arora PW-43, Santosh Kumar PW-44 and Dr.Urvashi Prasad Jha PW-46 were examined and subjected to cross-examination.

104. On 03.05.2008 the accused filed an application before the trial court for taking on record his confessional statement recorded by Metropolitan Magistrate under section 164 Cr.P.C., which application was dismissed by the trial court. On 13.05.2008 Inspector Baltej Singh PW-48 was examined and subjected to cross-examination. The evidence of the prosecution was closed by the prosecutor. On 02.07.2008 the statement of the accused was recorded under Section 313 Cr.P.C. wherein he virtually admitted all the incriminating

circumstances appearing against him. Thereafter the case kept on getting adjourned.

105. On 26.07.2008 an envelope was received in the trial court containing the confessional statement of the accused recorded by Metropolitan Magistrate under Section 164 Cr.P.C. The learned trial court refused to take into account the said statement on the ground that Metropolitan Magistrate had no jurisdiction to record the statement of the accused under Section 164 Cr.P.C. during the conduct of the trial.

106. On 24.09.2008 after a perusal of its order sheets the trial court found that the witnesses; K.Goyal PW-1, Dr.M.Arshad PW-2 and Dr.Gaurav Singhal PW-3 and Dr.Rakesh Kumar were examined in the absence of counsel of the accused. (It may be noted here that learned trial court has wrongly noted that Dr.Rakesh Kumar PW-4 was examined in the absence of counsel of the accused. The correct factual position is that the witness was examined in the presence of the counsel of the accused but was not subjected to any cross-examination by counsel). In that view of the matter, trial court gave an opportunity to the counsel for the accused to recall the said witnesses for cross-examination, which opportunity was not availed by counsel on the ground that the said witnesses were formal witnesses. Thereafter the arguments were heard and

the court passed the impugned judgment and order on sentence.

107. None can belittle the right of every accused to be fairly and adequately represented in a criminal trial, especially where capital sentence is involved. Counsels play an important role in the resolution of issues in an adversarial system. Every accused has a right to meet the case of the prosecution on even terms. Following observations of the U.S. Supreme Court in the decision reported as Jon Richard Argersinger v Raymond Hamlin (1972) 407 US 25 as approved by our Supreme Court in the decision reported as Madhav Hayawadanrao Hoskot v State of Maharashtra (1978) 3 SCC 544 epitomize the quintessence of this processual facet:

" The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence,

how much more true is it of the ignorant and illiterate or those of feeble intellect.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

108. Fair assessment of a counsel's performance has many inherent difficulties. Different counsels would defend not in the same way. No mechanical rule can be applied. To our mind, the test in the decision of US Supreme Court reported as Strickland v Washington (1984) 466 US 68 as laid down by Justice O'Connor is the one to be applied; as extracted from the head note:-

A. The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct fall within the wide range of reasonable professional assistance.

B. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional efforts, the result of the proceeding would have been different. A Reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

C. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."

109. The issue, therefore, has to be decided on the facts as they emerge from the record: What are the facts emerging from the record of the present case before us? Has the incompetence of the first counsel of the accused led the accused to make admissions in his statement under Section 313 Cr.P.C.

110. It is most relevant to note that the accused first time pleaded guilty at the stage of the cross-examination when Gurpreet Singh PW-5, who was the first witness who incriminated him in the present case was examined. The fact that the accused did not plead guilty on the occasions when the formal witnesses who were examined prior to the

recording of evidence of Gurpreet Singh is of utmost significance. The same is suggestive of the fact that the act of the accused pleading guilty to the charges framed against him had got nothing to do with the incompetence of his counsel or any other fact. Another fact which stands out is that the accused kept on pleading guilty even after the change of counsel. The accused pleaded guilty 5 times after the change of counsel. It is most significant to note that second counsel for the accused diligently appeared in the court, effectively cross-examined the witnesses of the prosecution and also cross-examined the material witnesses of the prosecution who could not be examined on previous occasion. If the accused was intelligent enough to come to the conclusion that his first counsel is incompetent and defending him in a shoddy manner he could very well also see that his second counsel was most competent, in that he was curing all the defects which had so far occurred in his trial. From the above narrative of the proceedings of the trial court it is clear that the accused was persistent in pleading guilty throughout the conduct of the trial. The extent of persistence of the accused to plead guilty can be gauged from the fact that he even sought to get his case transferred from one court to another for the reason the court dealing with his case was not considering the guilty plea taken by him. In the light of afore-noted facts, we do not agree

that with the learned counsel for the accused that the incompetence of his first counsel led the accused to make admissions in his statement under Section 313 Cr..P.C.

111. Insofar as the submission of learned counsel that the accused has been prejudiced by the facts that some of the witnesses of the prosecution were examined in the absence of defence counsel and that the material witnesses of the prosecution were not subjected to any cross-examination is concerned, suffice would it be to state that from the above narrative of the record of the proceedings of the trial it is crystal clear said defects were detected and cured by the learned trial court. The testimony of none of the material witnesses of the prosecution has gone uncontroverted. The learned trial court gave an opportunity to counsel for the accused to recall and cross-examine the witnesses who were examined in the absence of defence counsel.

112. Whether a conclusion can be drawn from the PCR Form Ex.PW-19/A, DD entry Ex.PW-20/A and the crime team report Ex.PW-27/A that the offence was committed by more than one person?

113. Generally, the process of criminal law sets into motion when the informant rings up number 100 and the said call is received at the police control room which is centralized. The duty officer at PCR thereupon notes the information provided

by the informant in the PCR form and conveys the said information either over the telephone or wireless to the concerned police station where the duty officer notes down the same in the DD register. In the process there is likelihood that duty officer at the PCR/police station can mix up facts while noting down the information. In the instant case, the probability of HC Jai Kumar PW-19, the scribe of PCR form Ex.PW-19/A, wrongly hearing or noting the word 'servant' as 'servants' cannot be ruled out. The error which crept in the PCR form Ex.PW-19/A was bound to occur in the DD entry Ex.PW-20/A as the DD entries are prepared on the basis of the information recorded in the PCR form. Be that as it may, the PCR form or DD entry are not substantive piece of evidence inasmuch as they only set into motion the involvement of the police in the investigation. By their very nature, DD entry and PCR form are a cryptic recording of information received at the PCR/police station.

114. Regarding the recording that 'servants be located and interrogated' contained in the crime team report Ex.PW-27/A, it is quite likely that the aforesaid recording was made by SI Ajay Kumar PW-26, on the basis of information contained in DD entry Ex.PW-20/A.

115. With regard to submission pertaining to vaginal swab of Y, it be noted here that the report Ex.PW-9/B of gynecological

examination of Y records that hymen of Y was found intact. The question which thus arises is that how come semen was found on vaginal swab of Y when she was not subjected to sexual intercourse?

116. The answer to the aforesaid question lies in the testimony of X and Y. As already noted herein above, both X and Y deposed that the accused asked Y to remove her pant. Y stated in her cross-examination that she sat on the bed on which the accused raped X. These two depositions explain the presence of semen on the vaginal swab of X. Though it is not clear from the testimony X and Y whether Y did remove her pant or not the fact, that semen was found on her vaginal swab shows that Y did remove her pant. The fact of the matter is that Y removed her pant as directed by the accused and sat on the bed on which the accused raped X after removing her pant. The semen of the accused fell on the bed sheet spread on the said bed and the vagina of Y got stained with the semen which had fallen on the bed sheet as she was sitting on the said bed and her private parts were not covered by any cloth.

117. Pertaining to the submission that the parents of the children and Gurpreet Singh bought time before conveying information of the incident to the police, it be noted here that X deposed that at around 12.00 A.M. on 19.10.2006 she heard

the noise of weeping of Y upon which she woke up and saw that the accused was present in her room. Y deposed that the accused left their room at around 12.30 A.M. to bring a knife from the kitchen and that she and X went to the room of their parents within five minutes of the accused leaving their room after committing the crime. Ramesh Kumar Aggarwal PW-10, deposed that X came into his room at 12.45 A.M. whereas Nirmala Aggarwal PW-23, deposed that X came into the said room at 12.40 A.M. From the above depositions, it is clear that the incident in question happened between 12.00 A.M. to 12.40/12.45 A.M. and that X and Y came into the room of their parents at 12.40/12.45 A.M. It is further apparent that Gurpreet Singh came to the place of occurrence only after 12.40/12.45 A.M. Therefore, the testimony of Gurpreet Singh that he reached the place of occurrence between 12.20 A.M. to 12.30 A.M. is not correct. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. One cannot expect people to make very precise or reliable estimates in such matters. It depends on the time-sense of individuals which varies from person to person.

118. The fifth submission advanced by the learned counsel is based upon an assumption that the parents of the children

locked the main door of the flat after the accused left their room and went to sleep at the room situated above said flat. It has come on evidence on record that the parents of the children were about to sleep at the time when the accused left their room. It is quite possible that the parents of the children went to sleep without locking the main door which gave an opportunity to the accused to enter the flat and to sneak in the room of the children. What is equally possible is that the parents of the children did lock the door but the accused did not go to his room but instead hid in the flat.

119. As regards the second limb of the fifth submission advanced by learned counsel, the submission assumes from the deposition of Gurpreet Singh 'that door was opened by the parents of the children' to mean that the door of the room was unlocked by the parents. The word 'opened' used by Gurpreet Singh could on one hand imply that the door was locked, but on the other hand it can also imply that the door was shut. It is quite possible that the accused shut the door while fleeing from the flat. It is also possible that an automatic lock was fitted on the door, the accused shut the door while fleeing and thus the same got automatically locked. In such circumstances, nothing much turns on the aforesaid deposition of Gurpreet Singh.

120. With regard to the submission that Y could not have recognized that the accused was the person who was groping her as there was darkness in the room at that time; there is no evidence to show that there was absolute darkness in the room. It is possible that moonlight or some light from outside was coming into the room through a window or ventilator or any other source which enabled Y to recognize the accused. It is not out of place to mention here that the accused was well familiar to Y as he was residing in her house since a week and hence she could recognize him in faint light.

121. A perusal of the impugned judgment shows that the sixth submission was also advanced before the trial court and the same was dealt by it in following terms:-

“136. The age of “Victim No.3” is about 9 years. In my opinion at such an age, a child can not be supposed to have any idea about attributes of act of “rape”. The course of events deposed to by her are quite compatible with version expected of a child. She has specifically stated that accused laid himself on “Victim No 2” twice and difference between two acts was half a minute. In my considered opinion that is the natural narration of an incident by an eye witness suited to her age. Secondly the act of sexual intercourse having been performed with the gap of half a minute is can not be said to be impossible.”

122. The aforesaid reasoning needs to be dealt with reference to the testimony of X and Y. X deposed that when the accused first tried to rape her she managed to save herself by taking a turn upon which the accused gave a knife blow on her back

and raped her. Y deposed that the accused twice committed “bad act” with X. She clarified that by the expression “bad act” she meant that the accused laid himself on X. The said clarification given by Y clears the air. The said clarification makes it clear that by expression “bad act” Y meant that the accused laid himself on X and not that the accused raped X. It is not out of place to mention here that Y fully corroborates the evidence of X by stating in her cross-examination that *‘my sister has tried to free her by moving herself on one side but accused gave a knife blow to her. When my sister took a turn on one side accused had given a knife blow to her. My sister had taken a turn much after the accused laid on her’*. From a cumulative reading of evidence of X and Y, the sequence of events which emerges is that the accused laid himself on X in order to rape her but X managed to save herself by taking a turn upon which the accused gave a knife blow on the back of X. Thereafter the accused again laid himself on X and raped her. It is apparent that X was raped only once.

123. With regard to the submission pertaining to the conduct of X and Y, we note the decision of Supreme Court reported as Rana Pratap v State of Haryana (1983) 3 SCC 327 wherein it was observed as under:-

“Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the

deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.”

124. In the decision reported as State of Karnataka v Yellapa Reddy AIR 2007 SC 185 Supreme Court held that unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reaction as unnatural.

125. In the decision reported as Shivappa v State of Karnataka AIR 2008 SC 1860 Supreme Court held that when the occurrence took place in a ghastly manner, the fact that witnesses became dumbfounded and did not shout would not lead to a conclusion that they are untrustworthy.

126. In the backdrop of the aforesaid dictum, it needs to be judged that whether the conduct of X and Y in not raising an alarm at the time of the occurrence can be termed as unnatural.

127. As already noted herein above, the accused attacked the children while they were sleeping. X and Y were caught

unawares. The accused was acting under a fit of rage. The extent of trauma faced by girls X and Y can be gauged from the deposition of X and Y that Y refused to go to the room of parents even after the accused had left their room after committing the crime fearing that the accused might be present outside their room. In view of the law laid down by Supreme Court in afore-noted cases particularly in Rana Pratap's case (supra) where Court has termed the conduct of a witness becoming speechless on witnessing an incident as natural, it cannot be said that the conduct of X and Y in not raising an alarm at the time of occurrence was unnatural. In the instant case, X and Y were not just the eye-witnesses but also the victims.

128. The answer to the fourth improbability pointed out by learned counsel lies in the testimony of Y. Y stated in her cross-examination that the accused returned to their room from the kitchen within 3-4 minutes of his leaving the room. Where was the time for X and Y to comprehend that the accused has left their room and that they should rush to the room of their parents in the absence of the accused?

129. This takes us to the next two submissions advanced by the learned counsel predicated upon the statement Ex.PW-46/A of X. X was seriously ill at the time when she wrote her statement Ex.PW-46/A. She had undergone tracheotomy and

the tracheotomy tube was still inside her neck. It is most reasonable to assume that the mental faculties of X were slow at that time because of which she took some time to remember the name of the accused. What is significant to note that X was able to correctly state that the name of the accused was Sanjay, that he was their domestic servant and that he was working in their house since last one week even when she was seriously ill. Far from showing that X was tutored to falsely implicate the accused statement Ex.PW-46/A goes a long way in showing that X spoke the truth at the first available opportunity.

130. To deal with the submission that the fact that no external injury was found on the person of the accused belies the claim of X that she tried to fight the accused, it is necessary to reconstruct the scene of crime. The accused was armed with a knife. The children were caught unawares as the accused attacked them while they were sleeping. The accused was under a fit of rage. He was inflicting injuries on X when she was trying to stop him. X was badly injured by the accused. X was defenceless. In these circumstances could X have managed to injure the accused? The answer is an emphatic NO.

131. The next question which has arisen is that whether the conduct of the mother of the children in going with the police to look for the accused too soon after the occurrence can be

termed as unnatural. Different people react differently in similar situations. In the facts of the present case it is completely comprehensible that the mother of the children was filled with fury against the accused and that her anger for the accused outweighed her other emotions. We find nothing unnatural in the conduct of mother of the children in assisting the police in arresting the deceased too soon after the occurrence.

132. Whether the knives seized by the police from the place of occurrence were planted?

133. It is no doubt true that the brief facts Ex.PW-1/C8 pertaining to the death of the deceased records that one knife was recovered from the place of occurrence. What is equally relevant to note is the fact that the other documents which were prepared contemporaneously with the brief facts Ex.PW-1/C8 record that two knives have been recovered from the place of occurrence. The crime team report Ex.PW-27/A records that two knives were recovered from the place of occurrence. The photographs of the place of occurrence show the presence of two knives at the place of occurrence. The police officials who participated in the spot investigation have deposed that two knives were recovered from the place of occurrence. Nirmala Aggarwal PW-23, has deposed about the presence of two knives at the place of occurrence. In the light

of aforesaid overwhelming evidence on record establishing that two knives were recovered by the police from the place of occurrence it is apparent that the investigating officer committed a lapse while preparing the brief facts Ex.PW-1/C8 of the death of the deceased. It is settled law that lapses by investigating officer are not sufficient to throw out the case of the prosecution, if it is otherwise established by cogent evidence.

134. Insofar as the submission predicated upon the death report Ex.PW-1/C9 of the deceased is concerned, the recording contained in the report that the death of the deceased was apparently caused by a sharp weapon is not indicative of the cluelessness of investigating officer about the weapon of offence but shows cautious behaviour of investigating officer. Though the fact that two knives were recovered from the place of occurrence indicates that the weapon of offence was knife, but the same was not a conclusive proof. The picture would have come out clearly only after the post-mortem of the deceased. The investigating officer wanted to be completely sure that the knife was the weapon of offence and therefore he did not record in the death report that the knife was the weapon of the offence.

135. It is true that Rakesh Kumar Aggarwal PW-10, deposed that the knife which was stuck in the neck of the deceased was

taken away by the accused. But at the same time it is also worth mentioning that the witness stated in his cross-examination that *'I had removed the knife from the neck of my son and the same was left at the spot. That knife remained on the spot when I left for the hospital. I did not find that knife there in my house when I came back at 10.00 am from the hospital'*. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. A cumulative reading of the aforesaid deposition made by Rakesh Kumar Aggarwal PW-10, shows that he got carried away while deposing facts and imagined that the knife which was stuck in the neck of the deceased was taken away by the accused.

136. To deal with the submission predicated upon the deposition of Gurpreet Singh PW-5, relating to the knives recovered from the place of occurrence, it is necessary to closely scrutinize the evidence of Gurpreet Singh.

137. Gurpreet Singh PW-5, deposed that he went to the room where the occurrence took place but did not see any knife there. He stated in his cross-examination that he went to the said room after the arrival of the police at the place of occurrence. It is possible that the police seized the knife which

was found in the room where the occurrence took place by the time Gurpreet Singh went there. It is also possible that Gurpreet Singh just did not see that a knife is lying in the room. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

138. With regard to the submission that no attempt was made by the police to lift the finger prints from the knives recovered from the place of occurrence, it is necessary to note the testimony of ASI Manish Kumar Bhardwaj PW-26 and SI Ajay Kumar PW-27.

139. From the narrative of the investigation given by us in the preceding paras, it is evident that the crime team reached the place of occurrence within few hours of occurrence. ASI Manish Kumar Bhardwaj PW-26, deposed that he inspected the place of occurrence, found a chance print from there and developed the same. SI Ajay Kumar PW-27, Incharge, Crime Team, deposed that he inspected the place of occurrence and prepared the report Ex.PW-27/A on the basis of the said inspection. Neither any question was put to the said witnesses in their cross-examination regarding the lifting of finger prints from knives in question nor was any suggestion given to them that they did not make any attempt to lift the fingerprints from

the knives in question. Having given no opportunity to the witnesses to explain the circumstance pertaining to lifting of finger prints from the knives in question no adverse inference can be taken against the prosecution. In taking the said view, we are supported by the decisions of Supreme Court reported as Rahim Khan v Khurshid Ahmad AIR 1975 SC 290, State of UP v Anil Singh 1988 (Supp) SCC 686 and Sunil Kumar v State of Rajasthan (2005) 9 SCC 298.

140. Whether the recovery of the clothes at the instance of the accused is doubtful?

141. Counsel for the accused harped on the fact that the case set up by the prosecution with respect to recovery of clothes is fallacious as it was not possible for the accused to have taken a bath before fleeing from the place of occurrence. The charge sheet filed against the accused contains a recording that after committing the crime the accused took a bath, changed his clothes, threw the clothes changed by him on the roof and fled from the place of occurrence. There is no evidence to show that the accused took bath before fleeing from the place of occurrence. However the first disclosure statement made by the accused records that the accused took bath before fleeing from the place of occurrence. It is possible that the accused washed his face and hands after committing the crime and referred his act of washing his face and hands as taking a bath

in his disclosure statement. Be that as it may, the fact of the matter is that the witnesses to the recovery namely, Prem Prakash Aggarwal PW-17, SI Rishipal Singh PW-34, SI Ramesh Dixit PW-35 and Inspector Baltej Singh PW-48, have corroborated each other on material particulars. The said witnesses were subjected to lengthy cross-examination but nothing could be elicited there from which could cast a doubt on their credibility.

142. This takes us to the submissions advanced by learned counsel with respect to the recovery of ring of X at the instance of the accused.

143. Is the act of the accused leaving behind the ring of X in the pocket of his pyjama improbable? Though we agree with the learned counsel that the accused in all probability would have removed the ring from the finger of X for pecuniary gain it is possible that the accused panicked after committing the crime and forgot to take out the ring from the pocket of his pyjama before fleeing from the place of occurrence. The first concern of the accused after committing the crime would have naturally been to escape the place of occurrence and it is completely comprehensible that he forgot to take out the ring from the pocket of his pyjama in his hurriedness to escape from the place of occurrence. We thus find nothing improbable

in the act of the accused in leaving the ring of X in the pocket of his pyjama.

144. However, we do agree with the learned counsel that the facts that the accused did not say a word about the ring of X in his first disclosure statement; that the second disclosure statement wherein the accused confessed about removing the ring of X was made after recording of the statement of X under section 161 Cr.P.C. i.e. after the time when the factum of removal of ring of X by the accused came to the knowledge of the police and that the police did not find any ring in the pocket of pyjama of the accused at the time of the seizure of the pyjama are strong pointers to the fact that recovery of ring of X at the instance of the accused is tainted. Therefore, we do not intend to use the fact of recovery of ring of X at the instance of the accused as an incriminating circumstance against the accused. However, we may add that it is settled law that where there are eye witnesses to an incident whose testimonies inspire confidence, minor issues pertaining to recoveries etc. have to be considered as supporting evidence, unless there is evidence of planting, for planting always is a serious issue.

145. Before proceeding to consider the submission predicated upon the FSL report Ex.PW-37/A we need to note the law on the subject, pertaining to the testimony of a person who claims

to be an expert on an issue of scientific or technical knowledge.

146. In Frye v. United States 54 App. D.C. 46 (1923) the Court of Appeals for the District of Columbia described the device concerning the admissibility of evidence of an expert, on a subject of science, technology or special knowledge, in the following words:

“Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

147. Since evidentiary reliability is based on scientific validity, the standard under which the test of reliability of the evidence is: Whether the principles on which the testimony is based has general acceptance in the field to which it (the opinion of the expert) belongs and that the expert has based his opinion keeping into account the said principles.

148. Thus, an expert opinion based on a methodology, which diverges significantly from the procedures accepted by

recognized authorities in the field would not be evidentially reliable.

149. Pertaining to evidentiary reliability of an expert opinion, the Frye's test has three fundamental components:

(a) It has to be satisfactorily shown that the expert evidence/opinion relates to a scientific, technical or other specialized knowledge and that the theory or technique applicable to the science, technology or specialized field is based on a methodology, hypothesis or tests which has/have been subjected to peer review and publication i.e. there exists standards controlling the techniques' operation and the same are generally accepted and additionally that it has been accepted that the relationship of the technique to methods has been established to be reliable keeping into account known or potential rate of error.

(b) The author of the opinion qualifies to be called an expert; by knowledge, skill, experience, training or education. It has to be kept in mind that the level of expertise may not affect the admissibility of evidence of the expert but certainly affects the weight to be accorded to the opinion of the expert.

(c) The proffered experts' testimony must reveal that the methodology, hypothesis or techniques applicable and the theory behind the principles applicable have been applied by the expert and that the expert is mindful of the known or potential rate of error in the derivative of the technique or methodology to the subject thereof. (Emphasis supplied)

150. An expert should ensure that the opinion prepared by him meets the standards laid down in Frye's test.

151. With regard to hair examination, it is essential that known hair sample meets appropriate standards in that there

are sufficient number of hair and that hair are representative of any variation in body of the donor. An ideal hair sample ought to have 50-100 randomly selected hair from a particular region of body. (See *Forensic Taphonomy* by William D Hugland and Marcella H Song and *Wiley Encyclopaedia*).

151. In the instant case, the task before Anita Chhari was to compare hair seized from the place of occurrence with the scalp hair of the accused. The number of strands of scalp hair of the accused provided by the investigating officer to FSL was inadequate. No conclusive opinion could have resulted from the examination of scalp hair of the accused because of inadequacy of the number of the strands. In that view of the matter, Anita Chhari should have asked the investigating officer to provide her with more strands of scalp hair of the accused. Be that as it may, Anita Chhari conducted the examination of the scalp hair of the accused despite the fact that the same did not meet the standards required for a successful examination. The results of the examination of scalp hair of the accused came as expected. Since sample of scalp hair of the accused did not meet the required standards no conclusive opinion could be given by Anita Chhari on the aspect that whether the hair seized from the place of occurrence was similar to the scalp hair of the accused. The results of the hair examination conducted by Anita Chhari did

not in any way help the prosecution. Anita Chhari only ended up wasting her time and the resources of FSL.

152. Forensic science plays an important role in the criminal justice system. It adjoins a missing link or strengthens a weak link in the chain of investigation by furnishing an impartial evidence, thereby helping the court to come to a conclusion regarding the perpetrator of a given crime. It is expected that in future the officials of FSL would not act in a mechanical manner and apply their minds before proceeding to conduct examination of the exhibits provided to them. If the sample provided is inadequate or the suspected material is inadequate, the report should so state without any opinion being expressed.

153. The submission of learned counsel that the FSL report Ex.PW-37/A establishes the presence of somebody else at the place of occurrence is based upon a fallacy that the hair seized from the spot was found to be dissimilar in most of their morphological and microscopical characteristics from the scalp hair of the accused inasmuch as exhibit 25 was wrongly typed as exhibit 24 in the report. We have already held in preceding paras that the error which had crept in the FSL report Ex.PW-37/A was that expression 'pubic hair of accused' was wrongly typed as 'scalp hair of the accused'. Thus, the aforesaid submission of learned counsel deserves no consideration.

154. Whether the application dated 20.10.2006 made by the Investigating Officer before the court of Metropolitan Magistrate is suggestive of the fact that the police had malice against the accused. The answer is No. Rather it is indicative of the fact that the investigating officer did not vigilantly read the disclosure statement of the accused and was looking for the answers unmindful of the fact that the said answers have been supplied by the accused in his disclosure statement.

155. What is the effect of the contradiction pointed out by the learned counsel between the testimony of ASI Manish Kumar Bhardwaj PW-26 and Inspector Baltej Singh PW-48. There must have been mayhem at the place of occurrence after the incident. Lot many police officers arrived at the place of occurrence. Inspector Baltej Singh PW-48, was coming/going to/from the place of occurrence. In such mayhem, it is most possible that ASI Manish Kumar Bhardwaj PW-26, did not notice that Inspector Baltej Singh has left the place of occurrence for a brief period. Be that as it may, it is settled legal position that minor contradictions which do not hit at the root of the case of the prosecution are to be ignored by the courts.

156. With regard to the submission pertaining to the arrest of the accused, it is necessary to cumulatively read the testimony of the police officers who were part of the police team which

arrested the accused i.e. HC Yogender PW-28 and Inspector Vimol Kishore PW-29. Inspector Vimal Kishore deposed that he along with HC Yogender left Delhi at about 04.00/04.30 A.M. on 19.10.2006 to go to Rishikesh to arrest the accused. It is thus apparent that an innocuous error has been committed by HC Yogender in deposing the time when the police party left Delhi to go to Rishikesh to arrest the accused.

157. Insofar as the receipt of secret information by the police about the whereabouts of the accused is concerned, the sequence of events which led to the arrest of the accused is that Nirmala Aggarwal PW-23, the mother of the children, took the police to the residence of Jeetan Das PW-39, the person who had recommended the accused to her. Jeetan Das in turn took the police to the residence of one Subash, the brother-in-law of the accused and the person who recommended the accused to him. Thereafter the police party proceeded to Rishikesh to arrest the accused. From the said conspectus of facts, it is apparent that the information about the whereabouts of the accused was provided to the police by Subash and not by a secret informer. This brings out the tendency of the police to claim credit for every break through that happens in a case. In the instant case, the overt statement is inconsequential as the accused has admitted

when questioned under Section 313 Cr.P.C. that he was arrested at Rishikesh at 6:30 PM on 19.10.2006.

158. Pertaining to the submission that the photograph of the accused was got published by the police in the newspaper, it be noted here that the incident happened on the intervening night of 18/19.10.2006. The police got information of the incident at about 1.05 A.M. on 19.10.2006. The police could not have got published the photograph of the accused before the morning of 20.10.2006. A perusal of the record of the trial court shows that the accused was produced before the Magistrate on 20.10.2006. It is apparent that PW-39 has mixed up facts.

159. Has there been a delay in recording the statement of Y under Section 161 Cr.P.C.? The medical evidence adduced by the prosecution sheds some light on the said aspect. Y had undergone tracheotomy as evident from the perusal of the MLC Ex.PW-2/B of Y. The endorsement dated 19.10.2006 made on the application Ex.PW-48/F by the doctor that '*Patient Y is very anxious and has been anti-xilotius. She would be not fit for statement*' shows that Y was not fit to give a statement till 19.10.2006. The endorsement further brings out that Y was in a disturbed mental state till 19.10.2006. In the light of the above facts, the fact that the police recorded the statement of Y on 21.10.2006 is completely justifiable.

160. Having dealt with the submissions advanced by the learned counsel, we proceed to adjudicate upon the most important question involved in the present case: Whether the accused is guilty of the offence (s) with which he is charged with.

161. In dealing with the said question, we first delineate the salient features of the case of the prosecution.

162. The first feature is that X and Y are injured witnesses. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

163. The second feature is that X is a victim of a sexual offence. The appreciation which should be adopted by a court while evaluating the evidence of a victim of sexual offence is clearly discernible from the decision of Supreme Court reported as Ranjit Hazarika v State of Assam (1998) 8 SCC 635 wherein it was observed as under:-

“The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are

such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act 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. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. 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 given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and

it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

164. The third feature is that X and Y have corroborated each other in material particulars.

165. The fourth feature is that X and Y have withstood the cross-examination.

166. The fifth feature is that X and Y have been corroborated by the medical evidence adduced by the prosecution in the present case. The injuries found on the person of the deceased, X and Y are in harmony with their depositions in said regard. The deposition of X and Y that the accused had raped her is corroborated by the testimony of Dr.Uma Rani Swain PW-9 that hymen of X was found ruptured, a fresh injury was found in the fourchette (area beneath the vaginal opening where labia minora meet) and that the said injury is suggestive of the fact that X was subjected to forced sexual intercourse.

167. The sixth feature is that the sexual examination report Ex.PW-12/A of the accused dated 20.10.2006 records that no smegma was found in the external genetilia of the accused which establishes that the accused had performed sexual intercourse around the date of offence.

168. The seventh feature is that the scientific evidence adduced by the prosecution also corroborates the case of the prosecution. The facts that semen was detected on vaginal swab of X and that blood and human semen was detected on the clothes recovered at the instance of the accused corroborate the case of the accused.

169. The eighth feature is that the parents of the children deposed that X and Y deposed that immediately after the occurrence X and Y came to their room and told them that the accused has committed the crime. It is also relevant to note that Gurpreet Singh PW-5 deposed that he went to the place of occurrence on hearing the alarm raised by the parents of the children, which alarm was raised by them soon after the occurrence. In this regards, reference be made to following observations of this Division Bench of this court in Criminal Appeal No.453/2005 Sunny @ Bhola v State decided on 18.09.2009:-

“The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognized in English law. The essence of the

doctrine is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction. that it becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*. (See the decisions of Supreme Court reported as *Gentela Vijayavardhan Rao v. State of A.P.* 1996 (6) SCC 241 and AIR 1999 SC 3883 *Sukhar v. State of Uttar Pradesh*)

The principles relatable to the rule of *res gestae* are four in number:

1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot and the declarations of all concerned in the common object are admissible.
4. Though admissible to explain or corroborate or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

170. Tested on the aforesaid anvil of law, it is apparent that there is spontaneity and immediate proximity as also continuity between the occurrence and the statements made by X and Y to their parents as also the statement made by the parents of the children to Gurpreet Singh. Therefore, the statements of the parents of X and Y and the statement of Gurpreet Singh are admissible under Section 6 of the Evidence Act. The necessary corollary of the above conclusion is that the fact that X and Y implicated the accused as the assailant too soon after the occurrence attaches a ring of truth to their evidence.

171. The ninth feature is that the fact that X implicated the accused as the assailant in her statement Ex.PW-46/A, which statement was made by her when she was seriously ill goes a long way in suggesting the culpability of the accused.

172. The tenth feature is that save and except the factum of removal of the ring from the finger of X the accused admitted all other incriminating facts appearing against him. In the decision reported as State of Maharashtra v Sukhdeo Singh & Anr (1992) 3 SCC 700 wherein Supreme Court observed as under:-

That brings us to the question whether such a statement recorded under Section 313 of the Code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements

made by the accused will not be evidence *Stricto sensu*. That is why Sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. Then comes Sub-section (4) which reads:

(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he had committed.

Thus the answers given by the accused in response to his examination under Section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, Sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. See *State of Maharashtra v. 1968CriLJ95*. This Court in the case of *Hate Singh v. State of Madhya Bharat* 1953 Cri. L.J. 1933 held that an answer given by an accused under Section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In *Narain Singh v. State of Punjab* [1963]3SCR678 this Court held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three-Judges Bench answered the question it would be advantageous to reproduce the relevant observations at pages 684-685:

Under Section 342 of the Code of the Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence. shall put questions to the accused person for the purpose of

enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation if any, of the incident which forms the subject-matter of the charge and his defence. By Sub-section (3), the answers give by the accused may "be taken into consideration" at the enquiry or the trial. *If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he had committed no offence, the statement of the accused can only be taken into consideration in its entirety."*

173. The afore-noted features clinch the issue that the accused is the perpetrator of the crime.

174. Arguments pertaining to the correctness of the punishment awarded by the learned Trial Judge: - Under this head, following 4 submissions were advanced by the learned counsel for the accused:-

A The first submission advanced by the learned counsel for the accused was with regard to the conviction of the accused

under Section 302 IPC for committing the murder of the deceased. Counsel urged that the accused attacked the deceased on a spur of moment and that he neither had any intention to cause death of the deceased nor knowledge, that injury inflicted by him would cause the death of the deceased, could be attributed to him. The gist of the submission of learned counsel was that clauses 'firstly' and 'thirdly' do not apply in the present case. With respect to clause 'thirdly' of Section 300 IPC counsel pressed into service the decision of Supreme court reported as Virsa Singh v State of Punjab AIR 1958 SC 465. With reference to the said decision, counsel urged that the body part which was targeted by an accused while inflicting injury and the ferocity of the blow given by the accused are the factors which are to be taken note of while determining whether clause 'thirdly' applies in a given case. Counsel urged that in the instant case knife injury was inflicted by the accused in submandibular region of the deceased. Counsel urged that the skin covering the said region is very soft and therefore even a gentle blow on the skin covering the said region would result in deep injuries to the organ situated in the said region. The counsel culminated his argument by contending that thus it cannot be said with utmost certainty that the blow given by the accused on the neck of the deceased was ferocious and therefore clause

‘thirdly’ cannot be applied in the present case. In a nutshell, the submission of the counsel was that the offence which can be made out against the accused is an offence punishable under Section 304 Part II IPC. Alternatively, counsel urged that at best the offence which stands made out is the offence punishable under Section 304 Part I IPC.

B The second submission advanced by the learned counsel was with regard to the conviction of the accused under Section 307 IPC for attempting to murder X. Counsel urged that in order to convict an accused under Section 307 IPC it is essential to show that the accused had an intention to cause ‘murder’ of the victim. Counsel urged that the accused inflicted injuries on the person of X in order to rape her and therefore intention to cause death of X cannot be attributed to the accused. Thus, the offence under Section 307 IPC for causing the death of X is not made out against the accused. As per counsel, the offence which stands made out against the accused is the offence of causing hurt to X by dangerous weapons i.e. an offence punishable under Section 324 IPC.

C The third submission advanced by the learned counsel was with regard to the conviction of the accused under Section 307 IPC for attempting to murder Y. Counsel urged that the accused inflicted injuries on person of Y in order to prevent her from obstructing him from raping X and therefore

intention to cause death of Y cannot be attributed to the accused. Counsel urged that the nature of injuries inflicted by the accused on the person of Y itself shows that the accused did not have any intention to murder Y. Counsel urged that the evidence adduced by the prosecution shows following two injuries on the person of Y: - (i) lacerated wound on the neck of Y and (ii) injuries on the fingers of Y. Counsel urged that lacerated wounds are usually inflicted by blunt instruments. As per counsel, the fact that lacerated wound was found on neck of Y suggests that blunt side of the knife was used by the accused to inflict an injury on the neck of Y which is indicative of the fact that the accused attacked Y to injure her and not to cause her death. Counsel then urged that injuries found on fingers of Y are suggestive of the fact that she sustained said injuries while defending herself. Counsel lastly urged that the fact that the doctor opined that the injuries found on the person of Y were simple in nature clinches the issue that the accused did not intend to cause the death of Y. Thus, the offence under Section 307 IPC for causing the death of Y is not made out against the accused and that the offence which stands made out against the accused is the offence of causing hurt to Y i.e. an offence punishable under Section 323 IPC.

D The last submission advanced by the learned counsel was that the learned trial court committed a grave illegality in

awarding death sentence to the accused. Counsel urged that the present case does not fall in the category of “rarest of rare cases” and thus the accused does not deserve death penalty.

175. Two offences involve the killing of a person. They are the offences of culpable homicide and the more heinous offence of murder. What distinguishes these two offences, is the presence of special *mens rea* which consists of four mental attitudes which are stated in Section 300 IPC as distinguishing murder from culpable homicide. Unless the offence can be said to involve at least one such mental attitude it cannot be murder. The first clause says that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death. The second clause deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom injury is caused. The mental attitude here is two-fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that the death will be the likely consequence of the intended injury. The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed

objectively. If the injury that the offender intends causing and thus causes is sufficient to cause death in the ordinary course of nature, the offence is murder and it is immaterial whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences of the act or not. The fourth clause comprehends dangerous act which must in all probability cause death.

176. The academic distinction between murder and culpable homicide not amounting to murder has vexed the Courts for more than a century. The safest way of approach to the interpretation and application of these provisions seems to be, to keep in focus the key words used in the various clauses of Section 299 and 300.

177. From a survey of case law on the point it emerges that whenever a Court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder on the facts of a case it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death leads to second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer

to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 is reached. This is the stage at which the Court should determine whether the fact proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of murder contained in Section 300. If the answer to this question is in the negative the offence would be culpable homicide not amounting to murder, punishable under the first or the second part of Section 304 depending respectively on whether the second or third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to murder, punishable under the first part of Section 304. The above are only broad guidelines and not cast iron imperatives. But sometimes the facts are so intertwined and the second and the third stages are so telescoped in each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

178. Intent which is a state of mind can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts. The nature of the weapon used, body part of the victim which was targeted by the accused, amount of force used by the accused, number of blows given

by the accused, antecedent and subsequent conduct of the accused, the amount of preparation done by the accused are some of the factors from which intention can be determined.

179. In the instant case, the accused gave “three” knife blows on a vital part of body of the deceased i.e. neck of the deceased which is evident from the post-mortem report Ex.PW-1/A of the deceased which records that three injuries were found on the neck of the deceased. Every sane person must be presumed to intend the result that his actions would normally produce. The fact that three knife blows were given by the accused on a vital organ of the deceased are very strong pointers to show that the accused intended to cause the death of the deceased. Thus, the act of the accused clearly falls under clause ‘firstly’ of Section 300 IPC. In the decision reported as Inder Singh v State 1995 Cri LJ 2627 (SC) the accused had given a spear blow on the neck of the deceased when he had fallen down on the ground. It was held by Supreme Court that the said act of the accused clearly showed his intention to cause the death of the deceased and his conviction for murder required no interference.

180. Not only that, the act of the accused of inflicting three knife injuries on the neck of the deceased was as imminently dangerous that the accused must be presumed to have known that in all probability it would cause death of the deceased. A

knowledge that the natural and probable consequences of an act would be death is sufficient to bring culpable homicide within the ambit of clause fourthly of Section 300 IPC. Therefore, the conviction of the accused under Section 302 IPC for causing the death of the deceased is most proper.

181. To bring an offence within the ambit of Section 307 IPC the prosecution must establish actus reus and mens rea. The requisite intention be of any of the kinds referred to in Section 300 IPC and that knowledge being the alternative to intention in clause 'fourthly' of Section 300, if established, it too would be sufficient. How do we gather the intention? It has to be gathered from the nature of weapon used, the number injuries inflicted, manner in which the weapon was used, seriousness of the resultant injury, severity of the blow, part of the body where injuries are inflicted and antecedent and subsequent conduct of the accused.

182. The report Ex.PW-8/A of X records that ten wounds were found on person of X meaning thereby, that ten knife blows were inflicted by the accused on the person of X. The case note Ex.PW-11/C of X records that wounds were found on the neck, chest and back of X. X had to undergo tracheotomy. The doctor opined that the injuries found on the person of X were 'dangerous' in nature. Both X and Y deposed that the accused checked whether X is alive or dead before leaving the scene of

crime. An irresistible conclusion which results from the above facts is that the accused attacked X with an intention to cause her death or that he can be presumed to have known that death of X was the natural and probable result of his act.

183. Insofar as the conviction of the accused under Section 307 IPC pertaining to the injuries caused to Y is concerned, it may be noted here that the case note Ex.PW-11/A records that injuries were found on neck, fingers and right shoulder of Y. Except for the said document, no other medical document pertaining to Y talks about the injury on the right shoulder of Y. There is no empirical data to show the depth of wound found on the neck of Y or the extent of damage suffered by Y because of the said injury. It is true that tracheotomy was undergone by Y as recorded in the MLC Ex.PW-2/B of Y but it cannot be overlooked that sometimes there is no need to perform a tracheotomy but the same is done by the doctors as a precautionary measure. In such circumstances, we find it difficult to hold that the accused injured Y with an intention to cause her death or that he can be presumed to have known that death of Y would be caused because of said injury.

184. Now the question which arises is that whether the accused is guilty of causing 'simple hurt' or 'grievous hurt' to Y.

185. Section 319, IPC defines the term hurt. Under Section 319, I.P.C., whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Any hurt falling under any of the clauses under Section 320, IPC is grievous hurt. A person therefore, cannot be said that he has caused grievous hurt unless the hurt caused is one of the kinds of hurt specified under Section 320, I.P.C. Therefore it is the duty of the Court to give a finding on its own whether the hurt was simple or grievous. The Court is not concerned with the classification made by a doctor as to whether the hurt was simple or grievous. A doctor is to describe the facts in respect of the nature of injury and the Court is to decide whether the nature of the injury described by the doctor comes within any of the clauses of Section 320, I.P.C. Section 320 reads as follows:

“Grievous hurt: The following kinds of hurt only are designated as "grievous":

First - Emasculation

Secondly - Permanent privation of the sight of either eye.

Thirdly - Permanent privation of the hearing of either ear.

Fourthly - Privation of any member of joint.

Fifthly - Destruction or permanent impairing of the powers of any member or joint.

Sixthly - Permanent disfiguration of the head or face.

Seventhly - Fracture or dislocation of a bone or tooth.

Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

186. The situs of the injury inflicted upon the victim goes a long way in determining that whether a hurt is a 'grievous hurt' in terms of clause eighthly of Section 320 IPC. In taking this view, we are supported by decision of Supreme Court reported as Niranjan Singh v State of UP AIR 2007 SC 2434 wherein it was observed as under:-

"The facts of the instant case show that Section 397 IPC was rightly applied. Any hurt which endangers life is a grievous hurt. It would be seen that one of the injuries was caused just below the nipple. The term "endangers life" is much stronger than the expression "dangerous to life". Apart from that in the provision "attempt" to cause grievous hurt attracts its application. The question whether the accused attempted to cause death or grievous hurt would depend upon the factual scenario. In the instant case knife blow was given on the chest just below the nipple. Considering the place where injury was inflicted i.e. on the chest the High Court was right in its view about the applicability of Section 397 IPC."

187. In the instant case, one of the injuries was inflicted by the accused on the neck of Y. The case summary Ex.PW-11/B of Y records that the wounds found on the person of Y were 'stitched in layers' which implies that the wounds were not superficial but deep in nature.

188. When the afore-noted two facts are considered in the light of decision of Supreme Court in Niranjan Singh's case (supra) the result is that the accused is guilty of causing grievous hurt by the use of a dangerous weapon or dangerous means to Y i.e. an offence punishable under Section 326 IPC.

189. This takes us to the last leg of the judgment that whether the death sentence has been rightly awarded to the accused.

190. This court discussed the imposition of death sentence in Death Reference No.1/2009 titled as State v Shree Gopal Maini decided on 31.08.2009 in following terms:-

“1. To attract the penalty of death, it has to be established that the case falls in the category of *the rarest of the rare*. Thus, the Court has not to stop if it finds the offence to be in the category of being rare. The Court has to see further; whether it is in the category of *the rarest of the rare* i.e. an extreme form of being extremely rare, within the larger category of rare has to be seen for.

2. In the decision reported as 1983 (3) SCC 470 Machhi Singh vs. State of Punjab it was held that while considering the imposition of penalty in an offence punishable with death, mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances.

3. Courts are required to draw up a virtual balance sheet, listing the mitigating and the aggravating circumstances against each other and then forming an opinion as to where does the fulcrum rest.

4. A Division Bench of this Court, of which one of us, namely, Pradeep Nandrajog, J. was a member of,

drew up a chart with reference to various judicial pronouncements of what have been considered as mitigating factors and aggravating factors. The decision is dated 8.5.2009 in Death Ref. No.1/2008 'State vs. Raj Kumar Khandelwal'. This very Bench Coram: Pradeep Nandrajog, J. and Indermeet Kaur, J. had summarized the said tabular chart in the decision dated 6.8.2009 disposing of Crl.Appeal No.635/2007 'Rajesh Kumar vs. State' and the connected Death Ref. No.2/2007 'State vs. Rajesh Kumar'. In para 72 and 73 of said decision, it was summarized as under:-

"72. A bird's eye view of various judicial decisions reveal that Courts have considered the undernoted circumstances, as mitigating: lack of any prior criminal record as held in the decision reported as 2006 EWHC 1555 (QB) In Re. Butters'; the age of the offender being too young or too old as held in the decision reported as AIR 1974 SC 799 Ediga Anamma vs. State of Andhra Pradesh; the character of the offender i.e. how the offender is perceived in the society by men of social standing; the probability of the offenders' rehabilitation, reformation and re-adaptation in the society; whether the offence was committed under a belief by the assailant that he was morally justified in doing so; or that the accused acted under the duress or domination of another person as held in the decision reported as 1982 (3) SCC 24 Bachan Singh Vs. State of Punjab; commission of the offence at the spur of the moment without any pre-meditation; or the offender being provoked (for instance by prolonged stress) in a way not amounting to the defence of provocation, as held in the decisions reported as 2008 EWHC 36 (QB) Re. Rahman and AIR 1998 SC 2821 A.Devendran vs. State of Tamil Nadu; a belief by the offender that the murder was an act of mercy as held in the decision reported as 1994 (Supply) 3 SCC 143 Janki Dass Vs. State (Delhi Administration); a guilty plea by the offender or his voluntarily surrendering before the authorities and his being genuinely remorseful as held in the decisions reported as (2008) EWHC 92 (QB) In Re. Rock and (2006) EWHC 1555 (QB) In Re. Butters'; that the offender acted to any extent in self defence;

that his intention was merely to cause serious bodily harm rather than to kill; that the victim provoked or in any way contributed to the crime, as held in the decision reported as AIR 1999 SC 1699 Kumudi Lal vs. State of U.P. Lastly, in the decisions reported as AIR 2007 SC 2531 Swami Shradhanand @Murali Manohar Mishra vs. State of Karnataka and 2007 Cri.L.J. 1806 Shivu & Anr. vs. High Court of Karnataka & Anr. it was held that in cases of conviction being based on circumstantial evidence a lenient view should be taken on the issue of sentence.

73. Aggravating factors/circumstances have been opined to be; the accused having undergone previous convictions and his proving to be a future danger/threat or menace to the society considering aspects like criminal tendencies, vagabond lifestyle, drug abuse etc. as per the decision reported as (2008) EWHC 719 (QB) In Re. Miller; offender being in a dominating position to the victim or in a position of trust and has abused the trust; anti social or socially abhorrent nature of the crime i.e. where the offence arouses social wroth and shakes the confidence of the people in any social institution; a crime committed for a motive which evinces total depravity and meanness for instance, a financial gain; where the magnitude of the crime is large i.e. there are more than one victims; where the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse extreme indignation of the community as held in the decision reported as 1983 (3) SCC 470 Machhi Singh Vs. State of Punjab; significant degree of planning or premeditation and lack of remorse as held in the decision reported as AIR 2005 SC 2059 Holiram Bordoli Vs. State of Assam; the victim being vulnerable due to age or physical infirmity as held in the decision reported as 2008 (110) Bom.LR. 373 State of Maharashtra Vs. Haresh Mohandass Rajput; mental or physical suffering inflicted on the victim before the death; victim being a public service provider or performing a public duty at the time when the crime was committed, as held in the decision

reported as (1977) 431 US 633 Roberts Vs. Louisiana. Lastly, the offender attacking sovereign democratic institutions as held in the decision reported as 2003 (6) SCC 641 Navjyot Sandhu @ Afsan Guru Vs. State."

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The latest decision of the Supreme Court pertaining to imposition of a sentence of death i.e. JT 2009 (7) SC 249 Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra, decided on 13.5.2009 has highlighted another important facet pertaining to the sentencing procedure; being the consideration of alternative options.

Discussing the nature of the content of the *rarest of rare* dictum, the Supreme Court observed, that a real and abiding concern for the dignity of human life postulates resistance to taking a life through the instrumentality of law. That ought not to be done, save in the rarest of rare cases, *when the alternative option is unquestionably foreclosed*.

Imprisonment for life as a penalty entails that the accused must remain in prison till his life i.e. would never be set free from jail. However, the executive has the power of remission under Section 433 Cr.P.C., which is subject to the restriction imposed by Section 433-A Cr.P.C. as per which a person sentenced to imprisonment for life or one whose sentence of death has been commuted to imprisonment for life cannot be released from prison unless he/she has served at least 14 years of imprisonment.

The alternative option considered by the Courts, is to pass a direction that the accused, who has been held guilty would not be released from prison, till a sentence more than 14 years imprisonment has been suffered by the accused, who has been sentenced to undergo imprisonment for life.

We need not note many and varied authorities taking resort to said alternatively; save and except a few. The option was

exercised in the decision reported as AIR 2002 SC 143 Jayawant Dattatrayasuryarao & Ors. vs. State of Maharashtra. The decision pertains to the infamous shooting by gangsters at J.J.Hospital, Mumbai. Lethal firearms were procured; being AK-47 rifles, hand grenades, revolvers etc. At midnight, shooting took place at J.J. Hospital, a government hospital, having 1500 beds in Mumbai. The target was one Shailesh Haldenkar under police protection. Rival gangs were involved. Shailesh Haldenkar belonged to one such gang and was in judicial custody. Three persons were shot dead; being, Shailesh Haldenkar, HC Chaintaman Gajanan Javsen and Const. Kawalsingh Baddu Bhanawat. Six other persons, being a patient and his relatives, the ward watchman and two other policemen were grievously injured. The Supreme Court, while upholding the conviction of the accused, did not concur with the sentence of death which was imposed, and under the alternative option, directed that the accused would not be entitled to any commutation or premature release. In the decision reported as 2008 (13) SCC 767 Swami Shraddhanand vs. State of Karnataka same alternative option was availed of i.e. it was directed that the convict would not be released from prison till the rest of his life.

In some of the decisions, noted in Swami Shraddhanand's case (supra), in paras 60 to 63 of the said decision, i.e. the decisions reported as Shri Bhagwan vs. State of Rajasthan 2001 (6) SCC 296, Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra 2002 (2) SCC 35, Ram Anoop Singh vs. State of Bihar 2002 (6) SCC 686 and Mohd. Munna vs. Union of India 2005 (7) SCC 417, it was directed that the accused shall not be released before completing an actual term of 20 years' imprisonment.

We may only add that the said decisions throw light of drawing distinctions between what would be rare and what would be the rarest of the rare. A sentence of life imprisonment can thus be classified in two categories i.e. the

ordinary category whereby the Court leaves the exercise of executive power at the discretion of the executive, to be so exercised after 14 years of imprisonment and grant remission; and a higher category, where the Court, in a rare case, but not the rarest of the rare, would clip said benefit being extended by directing that the accused shall undergo an actual sentence for a higher period or even for the remainder of his life. Such kinds of cases can be put in the category of rare cases with appropriate direction of not being entitled to the benefit of remission till a fixed term of imprisonment is undergone. Only after carrying out such an exercise should the Court take resort to the extreme action in a case which would be in the category of the rarest of the rare.”

191. Following aggravating circumstances have been noted by the trial court against the appellant:-

- I Being employed as domestic servant by the family of the children the accused held a position of trust.
- II The accused committed crime within 4-5 days of joining the employment.
- III The victims attacked by the accused were young.
- IV The victims were innocent and had not instigated the accused.
- V The accused came to the place of occurrence with a pre-determined intention of causing death of any person who would prevent him from raping X which is evident from the fact that the accused came armed with a knife and that the said knife was not an ordinary knife but appeared to be one kept by criminals.

VI The accused murdered the deceased in a diabolical manner.

VII The victims were defenceless

IX The accused was a morally depraved person evident from the fact that he raped X and inflicted serious injuries upon X and Y at the place where the deceased was lying murdered.

192. Only one mitigating circumstance has been noted by the learned Trial Judge i.e. young age of the accused.

193. In our opinion, circumstance no. II noted by the learned Trial Judge is not an aggravating circumstance. On the contrary, the converse situation would have been an aggravating circumstance. The learned trial court has also missed noting two mitigating circumstances which are (i) repentance of the accused and (ii) the accused was having a wife and children.

194. In the decision reported as Bishnu Prasad Sinha v State of Assam AIR 2007 SC 848 Supreme Court used the fact that the accused showed repentance in his statement under Section 313 Cr.P.C. as a mitigating circumstance. In the decision reported as Vasharam Narhibai Rajpura v State of Gujarat 2002 CriLJ 2930 the accused murdered his wife and four daughters. One of the factors which weighed with

Supreme Court in converting death sentence to life imprisonment was that the accused was father of a boy of a tender age and that the boy would be deprived of parental protection if death sentence is awarded to the accused.

195. Tested on the anvil aforesaid and keeping in view the fact that the crime committed by Sanjay is more than a murder of an ordinary category; having an aggravated content of the diabolical manner in which the offence was committed, we hold that the instant case falls in the category midway between i.e. of a category where the appropriate sentence to be imposed is of imprisonment for life with a direction that Sanjay would not be considered for being granted remission till he undergoes an actual sentence of 25 years.

196. The appeal and the death reference stand disposed of confirming the conviction of the accused for the offence of murder pertaining to the death of Master Pratham as also for the offence of having attempted to murder Kumari X as also for the offence of having raped Kumari X. The conviction of the accused for the offence of attempting to murder Kumari Y is modified, in that, pertaining to the injuries caused by him to Kumari Y, the accused is convicted for the offence of causing grievous hurt while using a dangerous weapon and by dangerous means i.e. the offence punishable under Section

326 IPC. The accused is acquitted of the offence punishable under Section 379 IPC for the reason we have found a taint in the manner the ring has been recovered as discussed in para 144 above.

197. Pertaining to the offence punishable under Section 302 IPC we sentence the appellant to undergo imprisonment for life with a direction that he would not be considered for premature release till he undergoes an actual sentence of imprisonment for 25 years. Thus, the confirmation of the sentence of death is declined. For the offence punishable under Section 307 IPC we maintain the sentence pertaining to the attempt to murder Kumari X. For the offence punishable under Section 376 IPC we maintain the sentence. For the offence punishable under Section 326 IPC for the grievous injuries caused to Kumari Y we sentence him to undergo imprisonment for 7 years.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

OCTOBER 27, 2009
mm / Dharmender