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

\+ **DEATH SENTENCE REFERENCE NO.6/2013**

STATE THROUGH REFERENCE ..... Petitioner

Through: Mr. Dayan Krishnan, Special Public Prosecutor with Mr. Madhav Khurana, Ms. Swati Goswami and Ms. Manvi Priya, Advocates.

versus

RAM SINGH & ORS. ..... Respondents

Through: Mr. A.P. Singh, Advocate for Akshay Kumar and Vinay Sharma.
Mr. M.L. Sharma, Advocate for Mukesh and Pawan Kumar Gupta.

\+ **CRL. APP. NO.1398/2013**

PAWAN KUMAR GUPTA ..... Appellant

Through: Mr. M.L. Sharma, Advocate.

versus

STATE ..... Respondent

Through: Mr. Dayan Krishnan, Special Public Prosecutor with Mr. Madhav Khurana, Ms. Swati Goswami and Ms. Manvi Priya, Advocates.

\+ **CRL. APP. NO.1399/2013**

MUKESH ..... Appellant

Through: Mr. M.L. Sharma, Advocate.

versus

STATE ..... Respondent

Through: Mr. Dayan Krishnan, Special Public Prosecutor with Mr. Madhav Khurana, Ms. Swati Goswami and Ms. Manvi Priya, Advocates.

+ **CRL. APP. NO.1414/2013**

VINAY SHARMA AND ANR. ..... Appellants
Through: Mr. A.P. Singh, Advocate

versus

STATE ..... Respondent
Through: Mr. Dayan Krishnan, Special Public Prosecutor with Mr. Madhav Khurana, Ms. Swati Goswami and Ms. Manvi Priya, Advocates.

% Date of Decision : March 13, 2014

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE PRATIBHA RANI

J U D G M E N T

: REVA KHETRAPAL, J.

1. In an epoch when sexual assaults and ravishments are the order of day, when young men (and even old ones) revel in public declaration of their promiscuous pursuits, when not only the streets but schools, colleges and work-places are approached by the vulnerable with trepidation and even the judge has to be sensitized to gender issues, the rape of a young girl hardly out of her teens, would have gone unnoticed as scores of other violations of infants, girls and women, but for fact that a public outraged at the manner in which the entrails of the ravished were culled out of her body, leaving her to die, stripped of all human dignity, completely unattired, in the darkness of a wintry night, on a thoroughfare, took to the streets in their quest for

justice. This had the trigger effect of impelling the investigative agencies into using such tools of investigation as had lain in their tool-kit hitherto before practically unused, to nail the culprits. Did they indeed manage to foist the guilt on the guilty is the subject matter of the present death reference and appeals. But before delving any further into this arena, it is deemed appropriate to delineate the stark facts, as nearly as possible, in the order of their occurrence.

2. The victims are the complainant/eye-witness (PW-1) and the prosecutrix who has not lived to recount her story, though has chronicled the same in the form of 'dying declarations'. The offenders before the Court are the four convicts, namely Mukesh, Akshay @ Thakur, Pawan @ Kalu, and Vinay. Besides them is the fifth culprit, Ram Singh, who allegedly snapped his own life chord, possibly on account of the rigors and mortifications of trial and against whom the proceedings have consequently abated. Lastly, there is a Juvenile in Conflict with Law (JCL) whose case was dealt with before the appropriate forum and need not detain us. Apart from these key players, there is another player of some import who has thrown light on the incident, he having suffered a robbery on the **same ill-fated bus** on which the alleged offences were committed, at the hands of the **very same convicts**, just a little before the prosecutrix and the complainant ill-advisedly boarded the same. He is prosecution witness Ram Adhar who after being divested of his meager possessions was unceremoniously thrown out of the bus, the inmates whereof apparently moved on in pursuit of fresh prey.

3. The warp and weft of the case of prosecution is as under:-

(i) On 16.12.2012 accused Ram Singh, Mukesh, Akshay @ Thakur, Pawan @ Kalu, Vinay and the JCL had dinner at the *jhuggi* of accused Ram Singh. Thereafter, the accused persons conspired to take bus bearing No. DL-1CP-0149, which was being habitually driven by Ram Singh as an employee of Yadav Travels and which was in his custody on the date of the incident, and pick up passengers who they would rob and also pick up a woman passenger to satiate their sexual appetite.

(ii) Pursuant to the conspiracy, the accused persons picked up Ram Adhar on 16.12.2012 at about 8:30 PM, robbed him of all his valuables and beat him before throwing him out of the bus.

(iii) The complainant and the prosecutrix had seen a movie at PVR Select City Mall, Saket and then taken an auto-rickshaw till Munirka Bus Stand. At Munirka Bus Stand, they boarded the bus in which the crime took place. The accused persons took Rs. 10/- each as fare from both the victims.

(iv) A few minutes after boarding the bus, they switched off the lights of the bus and three of the accused persons, namely, Ram Singh, Akshay Kumar and JCL started misbehaving with the complainant asking him why he was with the girl : *"Tu itni raat ko ladki lekar kahan ghoom raha hai"*. Thereupon, an altercation took place and the three of the accused persons then started to slap and beat up the complainant, who retaliated. Thereafter, the two other accused, namely, Vinay and Pawan

joined in hitting him with two iron rods and tore off all his clothes.

(v) The accused then took away all the belongings of both the victims viz. mobile phones, purse, credit card, debit card, etc.

(vi) Accused Ram Singh, Akshay @Thakur and the JCL then took the girl to the rear of the bus, beat her up and raped her one by one. During this time, accused Pawan @ Kalu and Vinay were holding the complainant and had pinned him down, and Mukesh was driving the bus.

(vii) Thereafter, accused Ram Singh, Akshay and the JCL held the complainant while Pawan @ Kalu and Vinay raped the prosecutrix.

(viii) Finally, accused Akshay @ Thakur took over the bus for a while and during this time accused Mukesh who was driving the bus came and raped the girl.

(ix) Throughout this period, they continued to assault the complainant with iron rods.

(x) So far as the prosecutrix is concerned, the accused persons not only raped her but also bit her all over her body and hit her repeatedly. The accused persons then inserted rods and hands in her rectal and vaginal region.

(xi) The accused persons with an intention to kill the prosecutrix and to ensure that their identities remain concealed forever, repeatedly **inserted the iron rods and their hands into her vagina as well as rectum pulling out the internal organs**. The nature of injuries, to say the least, was horrific, and without

doubt would have caused her death in the ordinary course of nature.

(xii) The intention to kill the victims is further clear from the fact that the crime committed, the accused persons attempted to throw the victims from the back door of the bus but finding it to be jammed, threw the victims from the front door of the moving bus, and thereafter tried to run them over. The prosecutrix was saved from the wheels of the bus on account of the fact that the complainant was able to pull her away in time.

(xiii) The accused persons in order to ensure that they are not caught and to further ensure that they leave no trace of the brutal incident, systematically attempted to destroy all the evidence of the incident. They first cleaned the bus with the clothes of both the victims and then washed the bus with water and thereafter burnt the clothes of the victims.

(xiv) After destroying the evidence in the aforesaid manner, the accused persons divided the loot amongst themselves in the following manner:

a. Accused Mukesh kept one 'Samsung' mobile with him.
b. Accused Pawan @ Kalu kept one wrist watch & Rs. 1000/-.
c. Accused Vinay kept a 'Nokia' mobile phone of the prosecutrix & a pair of 'Hush Puppy' shoes taken from the complainant.
d. Accused Akshay kept two rings, i.e. one silver & one gold taken from the complainant alongwith two metro cards.

e. The JCL kept a Nokia mobile phone, Rs. 1,100/- & one ATM card.

f. Accused Ram Singh (since deceased) kept one debit card with himself.

(xv) The intention of the accused persons was not only to commit gang rape on the prosecutrix, but to also rob the complainant and the prosecutrix and then to kill them and destroy all incriminating evidence so that they could not be tracked down.

4. The prosecution, in order to substantiate its case, marshalled in the witness-box 82 witnesses. Several documents and material objects were exhibited in the course of the trial, which shall be adverted to at the relevant stages.

5. For the preent, we straightway embark upon the exercise of minutely examining the case of the prosecution to ascertain its authenticity and with a view to ensure that truth prevails.

Setting into motion of the Criminal Law Machinery

6. The criminal law machinery was set in motion by one **Raj Kumar (PW-72)** working with EGIS Infra Management India Pvt. Ltd., a company engaged in patrolling NH-8. On the ill fated night, Raj Kumar was on patrolling duty in the area from Vasant Vihar to Kherki Daula at NH-8. At about 10:02 PM, while patrolling on his motor cycle, along with Surender Singh, he heard shrieks of *'Bachao Bachao'* from the left side of the road when he was proceeding from the side of Mahipalpur to Vasant Vihar. The sound was coming from the service road near milestone No. 17780, opposite Hotel 37. On stopping the motor cycle, he saw on the left side *"a boy in naked and*

injured condition, having blood all around, sitting near the bushes and also a girl in naked and injured condition lying nearby. She had some clothes around her neck." At around 10:05 PM, he informed his Control Room through his walkie-talkie about both the victims and requested his Control Room to inform the PCR on 100 number. He then gave his shirt to the boy to wear. Around the same time, a Bolero belonging to the said patrolling company also arrived at the site being driven by one Jeet Singh, who also informed the EGIS Control Room on his walkie-talkie. The said Jeet Singh put his sweater on the girl. The PCR van arrived at the spot after 10-15 minutes and the PCR officials brought a bed sheet and after tearing it into two pieces, gave the same to each of the victims to cover themselves.

7. PW-72 Raj Kumar having set the criminal law machinery in motion, the momentum was maintained by **Ram Pal Singh (PW-70)**, another employee of EGIS Infra Management, who was on duty at the Control Room situated at KM-24, Toll Plaza. In his testimony, Ram Pal Singh (PW-70) deposed that at about 10:07 PM, he received an information through walkie-talkie from their motor bike patrolling staff No.2 comprising of Raj Kumar Singh (PW-72) and Surender Singh that one boy and one girl were lying without clothes on the service road coming from the side of Gurgaon towards Delhi near Chainage No.17780 and that he should call at number 100. He conveyed this information to number 100 through the Control Room No.9717890175 and also instructed the EGIS staff patrolling on Bolero, i.e., Jeet Singh to reach at the above stated place. After about

10 minutes, Jeet Singh informed him that he had reached the spot and this information was also conveyed by him (PW-70) at around 10:20 PM at number 100.

8. The testimony of Raj Kumar (PW-72) is thus corroborated by the evidence of Ram Pal Singh (PW-70). It may be noted that there has been no serious challenge to the testimony of Ram Pal Singh (PW-70). Insofar as the testimony, of Raj Kumar (PW-72) is concerned, he was subjected to elaborate cross-examination, but notwithstanding, he stood by his testimony. A look now at the rescue operations.

Rescue of the victims

9. Consequent to the information received from the EGIS Control Room, the PCR emergency vehicles reached the spot. The prosecution has in this regard marshalled the evidence of **Head Constable Ram Chander (PW-73)**. The relevant portion of the testimony of Head Constable Ram Chander (PW-73) is extracted hereunder:-

> *"**At about 10.24PM, I received an information from control room of PCR** that near the foot of Mahipal Pur flyover towards Dhaula Kuan opposite GMR gate, a boy and a girl in a naked condition are sitting and the crowd has gathered. **Immediately within 5/6 minutes we reached the spot from Sanjay T-Point.** When we reached at the spot, I found the boy was sitting and was having a shirt on his person and that the girl was having some clothes around her neck and had a sweater on her body and she was lying. Both the boy and girl were bleeding from different parts of the body. I immediately dispersed the crowd to some distance and brought a bottle of water and a bed sheet from hotel 37. **I then tore the bed sheet into two parts and gave one part to the boy and gave another part of the bed sheet to the girl for covering themselves.** I gave some water to the boy and the girl and then put both of them in PCR van and rushed to S.J. Hospital. I reached the hospital at about 11PM. I dropped the boy in the casualty and since the girl had*

> *more injuries so I was asked to take her to the gynae section/building and got them admitted there.* ***They told their names on the way to the hospital. On the way to the hospital, they also told me that they boarded a bus from Munirka and after some time, the occupants started misbehaving with them and they had beaten the boy and took the girl on the rear side of the bus and committed rape with her and that thereafter they took off the clothes of the boy and girl and threw them naked on the road.****"*

10. In the course of the cross-examination of PW-73 Head Constable Ram Chander, the witness was confronted with his statement in terms of Section 161 Cr.P.C. to bring out certain contradictions. A perusal of the cross-examination, however, shows that the contradictions are of a minor nature, in that they are in respect of who gave the police officer the bed sheet, the size of the bed sheet, etc., and such contradictions arguably are to be ignored. But more about this at a later stage when it is proposed to dwell upon the legal position relating to contradictions, discrepancies, omissions, embellishments and the like. Suffice it to note at this stage that in the instant case the I.O. has not been asked any questions by the defence as to whether she had put questions to Ram Chander (PW-73) about who gave him the bed sheet, the size of the bed sheet and how long he took to reach the spot.

11. Of far greater significance is to note that the evidence of H.C. Ram Chander (PW-73) is heavily relied upon by the prosecution as ***res gestae*** under Sections 6 to 9 of the Indian Evidence Act, 1872 as the witness has, in his capacity of PCR Head Constable, deposed about the victims' description of the incident. The statements made by the victims to the witness are thus sought to be pressed into service as spontaneous and immediate and also contemporaneous with the

acts which constitute the offence. The prosecution also claims that the ***res gestae*** evidence of Ram Chander (PW-73) clearly corroborates the version of the complainant PW-1 and the dying declarations of the prosecutrix, but this aspect too needs examination and it is proposed to examine it later on. Indisputably, however, Ram Chander (PW-73) has given a clear and graphic description of rescue and has also corroborated the time in respect of the rescue of the victims and their admission to hospital. The defence has not been able to shake the evidence of this witness in cross-examination.

Recording of the first statement of the complainant, PW-1 which culminated in the registration of the First Information Report

12. Sub-Inspector Subhash Chand, **P.S. Vasant Vihar (PW-74)** after ascertaining that the complainant was fit for recording his statement proceeded to record the statement of the complainant/eye witness (PW-1) at Safdarjung Hospital. It is proposed to advert to the first statement of the complainant Ex.PW-1/A along with his subsequent statements Ex.PW-80/D-1, Ex.PW-80/D-3 and Ex.PW-1/B at length at the relevant juncture. For the present purposes, it need only be stated that the first statement of the accused Ex.PW-1/A recorded by S.I. Subhash Chand (PW-74) was treated as the rukka/tehreer, on the basis of which the First Information Report was registered. The said rukka/tehreer (Ex.PW-1/A) was sent by S.I. Subhash (PW-74) through **Constable Kirpal Singh (PW-65)**. On receipt of the said rukka/tehreer, DD No.11-A, which is Ex. PW-57/C, was recorded by A.S.I. Kapil Singh (PW-57) and thereafter an FIR was registered, being FIR No.413/2012 at Police Station Vasant

Vihar at 5:40 AM. The said FIR is exhibited as Ex.PW-57/D. The FIR and the original rukka/tehreer, with the endorsement of the Duty Officer Kapil Singh (PW-57) as Ex.PW-57/E, was handed over to the I.O. S.I. Pratibha Sharma (PW-80) for further investigation in the case. The SHO Inspector Anil Sharma (PW-78) corroborates this and states that on 17.12.2012 at about 5:40 AM, he entrusted the investigation to W/S.I. Pratibha (PW-80), as reflected in DD Entry No.11-A (Ex.PW-57/C). On receipt of the same, S.I. Pratibha (PW-80) proceeded to the Hospital along with Constable Kirpal Singh (PW-65) for investigation.

FIRST SEGMENT OF INVESTIGATION

13. Adverting to the initial stage of investigation, it is deemed appropriate to refer first to the testimony of PW-74 S.I. Subhash Chand, the said witness being a witness of some import in that it was he who recorded the first statement of the complainant.

14. **PW-74 S.I. Subhash Chand** stated in Court that on the night intervening 16th/17th December, 2012, at about 1.15 am, he received DD No.6-A (Ex.PW-57/A) at Munirka where he was attending some other call. He proceeded from Munirka to Mahipalpur on receipt of the said DD and as he was entering the main road, he received yet another DD, being DD No.7-A (Ex.PW-57/B), regarding admission of the two injured persons. On receipt of DD No.7-A, instead of moving towards Mahipalpur, he along with Constable Kirpal (PW-65) proceeded towards S.J. Hospital where he met PW-59 W/Inspector Raj Kumari, A.T.O., PS Vasant Kunj and PW-62 SI Mahesh Bhargava, who had

collected the MLCs of the prosecutrix and the complainant respectively. **The prosecutrix was declared unfit for statement by the doctor as she was in the ICU and he was told by PW-59 W/Inspector Raj Kumari that she was not in a position to speak.** However, the complainant was declared fit for statement. He (PW-74) accordingly proceeded to record the statement of the complainant (Ex.PW-1/A), which bears his signatures at Point 'B' and his endorsement (Ex.PW-74/A) at Point 'C'. He then gave the rukka to Constable Kirpal (PW-65) and sent him at 5:10 AM to the Police Station for registration of FIR. Thereafter, at about 6:30 AM/6:45 AM, PW-59 W/SI Pratibha (IO) and PW-65 Constable Kirpal came to S.J. Hospital, where he handed over a white colour bed sheet with which the complainant had covered himself to PW-80 SI Pratibha, after handing over a pant and a shirt to the complainant for being worn. The white bed sheet was blood stained. It was converted into a pulanda and sealed and seized vide seizure memo Ex.PW-74/B, which bears his signature at Point 'B'. The I.O. SI Pratibha then collected the exhibits of the prosecutrix which were sealed at the hospital vide memo Ex.PW-59/A and also her MLC from W/Inspector Raj Kumari (PW-59).

15. The testimony of PW-74 SI Subhash Chand insofar as it relates to the registration of the FIR is corroborated by **PW-65 Constable Kirpal Singh**.

16. **PW-78 Inspector Anil Sharma**, SHO of Police Station Vasant Vihar further corroborated the fact that on 17.12.12 at

about 5:40 AM, he received information about the registration of the case from the Duty Officer (PW-57, ASI Kapil Singh). PW-78, Inspector Anil Sharma testified that the investigation was entrusted to W/SI Pratibha Sharma (PW-80), who investigated the case from 5:40 AM on 17.12.2012 till 30.12.2012, when the investigation was taken over by him under the orders of his senior officers.

17. It is proposed now to deal with the first statement made by the complainant/eye-witness to SI Subhash Chand (PW-74) at 3:45 AM on 17.12.2012. The complainant, Awninder Pratap (PW1), who happened to be an engineer and was escorting the prosecutrix on the ill-fated night and who could not save her despite his valiance, narrated to the police the story of her woe as follows:

> *"I reside at the aforesaid address and work as Sr.Engineer Network at HCL Company, Sector 11, Noida. And I am preparing for the IES, Jyoti named girl is my friend who had come to me on 16.12.2012. We reached Munirka at about 9.00 p.m by Auto (TSR) after watching a movie at 'Select City Mall' Saket PVR when the show got over at 8.30 p.m. Just then a white coloured chartered bus came from the IIT side and stopped at Munirka bus stand and the conductor of the bus started shouting "Palam Mor-Dwarka-Dwarka". I and Jyoti boarded the bus from the front gate. Four boys were sitting in the cabin along with the driver and two boys were sitting at the back of the cabin, one on the right side and another one was on the left side. We sat on the second seat at the left side behind them. The bus had started. No other passenger had boarded from there. The bus conductor had collected twenty rupees from me as the fare of both of us. The bus climbed the flyover of the Malai Mandir and ran past Vasant Village and started climbing the flyover of the Airport. At the same time, three boys came from the cabin and asked me in a foul language, "Where are you going with the girl at night" and they started swearing at me. One of those boys slapped me and I too slapped him. Then all the three started fighting with me. I too beat up all three of them. Just then other two boys also came there. And all of them started beating and hitting me jointly. I tried to save myself*

between the seats of the bus that those boys pulled out an iron rod and started hitting me from which I got injured in my head, hand and legs. When Jyoti tried to save me, two boys pulled her to the rear side of the bus and those boys snatched from me two of my mobiles bearing Nos.9540034561 Samsung and 7827917720 Samsung Galaxy S-II and my purse containing therein 1000/- Rs. ICICI Debit Card, City Bank Credit Card and they also took out from my fingers one silver ring and another golden ring and they also snatched all my clothes-khaki coloured blazer, grey coloured sweater, black coloured jeans, black coloured Hush puppies shoes. They thrashed me so much that I fell unconscious. They also tore off all the clothes of Jyoti and took turns to rape her in the moving bus at the rear side of the bus. Jyoti had been shouting and crying very loudly. Whenever I tried to go towards her, they started beating me and held me at the front portion of the bus. Those boys asked the bus driver to drive fast and the driver kept driving the bus fast on the road. And those boys started throwing me from the rear gate of the bus. But the rear gate of the bus could not open. Later on they threw both of us from the moving bus at the road side of NH-8, Mahipal Pur and moved away. All of those boys were medium built in the age of 25-30 years. One boy with flat nose was the youngest of all those boys and had been wearing pants and shirt. One boy had been wearing red colored baniyan. They had also snatched away Jyoti's mobile bearing No.9818358144. I had been waving my hand to seek help from the vehicles passing by the road. Just then a police vehicle reached there and brought from somewhere two white bed sheets and gave us because those boys had thrown us stark naked and in semi-conscious condition. The PCR van had brought me and Jyoti to Safdarjung Hospital. There were many injuries and biting marks on the body of Jyoti. I can identify all those boys, the driver and the bus on confrontation. Strict legal action may be initiated against all those."

18. On the same day i.e on 17-12-2012, at about 7.30 a.m, the Complainant (PW-1) made another statement before the Investigating Officer, SI Pratibha Sharma (Ex.PW 80/D-1), which for the convenience of reference may be referred to as his first supplementary statement, in which he described in vivid detail the white coloured chartered bus in which the prosecutrix was destined to take her ill-fated ride with him. In his said statement, he stated that the bus had a blue and yellow colour line in the middle on the left side

(conductor's side). When they boarded the bus, he found that the seats were of red coloured cloth and the curtains were yellow in colour. There was a three seats row on the driver's side and a two seats row on the conductor's side in the bus. The door of the bus was next to the front wheel and there was also a cabin in front of the bus. He (PW-1) could identify the persons who had committed this crime with him and his friend and could show the place where the incident took place by accompanying the police.

19. At around 12 noon on the same day, i.e., on 17.12.2012, the complainant (PW-1) made another statement to the I.O., which, for the sake of convenience, may be referred to as his second supplementary statement, and which is exhibited as Ex.PW 80/D-3. The translated version of the said document reads as under:-

> *"I corroborate my previous statement and further state that I reached Munirka with you from S.J. Hospital. On my pointing out, you (police) prepared the site plan of the aforesaid place i.e. Munirka Bus Stand. Thereafter, I reached near the Mahipalpur flyover with you where those persons had thrown me and my friend out after committing the crime. On my pointing out, you prepared the site plan after inspecting the area near Mahipalpur flyover. The Crime Team also reached there and initiated the proceedings. You have taken some blood smeared grass and leaves into possession. There were some hotels and guest houses on the other side of the road near that place. You enquired their staff. Some hotels were equipped with CCTV cameras covering (footage of) the road. The CCTV footage of one of those, hotel Airport (?) was shown to me. Seeing the CCTV footage and identifying the white colored bus on which the word "Yadav" was printed in the Middle of the bus on the conductor side and which was not having any wheel cover on the front left side but having a white color wheel cover on the rear wheel of the bus, I disclosed that it was the same kind of the bus from which the accused had thrown me and my friend out with the intention of killing us after committing the crime and had fled from there taking the*

*bus along. During the crime many injuries had been caused to me on my head, face, eyes, knees and on my body. As soon as I entered the bus, I had seen a dark complexion person, whom his companions were calling as **'Ram Singh'**. At that time, three other boys were sitting in the cabin other than the driver and outside the cabin, one boy was sitting on the seat for two persons and another one boy was sitting on the seat for three persons. At that time, I thought those boys who were sitting outside (the cabin) were passengers. Those three boys were addressing themselves with the names of **Raju, Pawan and Vinay** when they were talking with each other. The name of the person, who was driving the bus, was **Mukesh or Ramesh**. The boys who had taken the Prosecutrix towards the rear side of the bus, were being addressed with the names of **Ram Singh and Thakur by the other boys**. They were committing rape with the Prosecutrix by going towards rear side one-by-one. After enquiry you have recorded my statement while sitting in Airport Hotel. I have heard the statement and the same is correct.*

20. Apart from the aforesaid statements made by the complainant, the complainant also gave his statement under Section 164 Cr.P.C. to the Metropolitan Magistrate, **PW-69 Shri Prashant Sharma**. The said statement is exhibited as Ex.PW-1/B and bears the certificate of the Metropolitan Magistrate regarding its correctness, which is Ex.PW-69/B. The application for recording of the said statement is Ex.PW-69/A and the record of questions put to the complainant by the concerned M.M. to satisfy himself as to the voluntariness of the said statement is Ex.PW-69/D. As per the deposition of PW-69 Shri Prashant Sharma, learned M.M., he recorded the statement of the complainant verbatim. The English translation of the said statement of the complainant (Ex.PW-1/B) recorded on 19.12.2012 at around 3:30 PM reads as under:-

*"**Statement of Sh. Awninder Pratap Pandey under Section 164 Cr.P.C***

*I and my friend (Prosecutrix) had come to Mall Select City Walk located at Saket on 16.12.2012 (Sunday). We had come there to watch the movie, "Life of Pi". The timing of the movie was 6:40 p.m. We had come out at 8:30 PM after watching the movie and had reached Munirka Bus Stand by a three wheeler. As soon as we reached there, we saw a white colored bus standing there. We had to go to Dwarka and a person from inside the bus had been calling the passengers of Palam Mor and those of Dwarka. "Yadav" was inscribed on the bus and there were also green and yellow colored stripes on the bus. That was a chartered bus. We had boarded the bus from Munirka bus stand. I had seen in the bus that the seats were red colored and its curtains were yellow colored. Just entering the bus, I had seen a black colored person whom his friends sitting in the bus itself were calling **"Mukesh- Mukesh"**. We sat on the two seated seat after entering the bus. I had seen that at that time 3 boys were sitting in the cabin besides the driver and outside the cabin one boy was sitting on a two seated seat and another one was sitting on a three seated seat. I had thought at that time that the two boys who were sitting outside the cabin were passengers. I had stood up and had asked the boy who was calling (the passengers) what was the fare of Dwarka, Sector-1 and he had taken Rs.10/- for each of us. He had informed that the fare of one passenger was ten rupees. After the fare being collected, the driver started the bus. Then the bus crossed the flyover of Malai Mandir and ran past Vasant Village. When the bus started climbing the flyover of the Airport, the three boys came from the cabin and reaching to us said, "Where are you roaming around with the girl at such late night?" Then they started swearing at me and (the prosecutrix). Then all the three persons started beating me. I had also beaten them during the fight. I and (the prosecutrix) had been shouting at that time in order to save ourselves. Then the boys who had been sitting outside the cabin also came out of the cabin and started beating me. They had hit me with the rod. They had hit me with the rod even while I was stark naked after they had stripped me completely. They had snatched all our articles. In the meanwhile two of the boys had dragged (the prosecutrix) to the rear seat of the bus and had taken turns to gang rape her. Then the two boys who had gang raped (the prosecutrix) had caught hold of me and the remaining three had taken turns to gang rape her. During the same time, even the bus driver had gang raped (the prosecutrix) in turns.*

The articles which those boys had snatched from me included my one 'Samsung Galaxy S-Duo mobile, another Samsung make mobile, a purse containing therein Rs. 1000, City Bank Credit Card, ICICI Debit Card, Company ID Card, Delhi Metro Smart Card besides my black colored jeans, a silver ring, a golden ring and Hush Puppies shoes. They had also snatched the Nokia mobile phone and grey colored purse of (the prosecutrix). Those boys had snatched even the wrist watches of both of us. During that fight, the two boys who had dragged (the prosecutrix) to the rear seat were being addressed by the remaining boys in the names of ***Ram Singh*** *and* ***Thakur****. I had been trying very much to go to the rear side and save (prosecutrix) but the three boys out of them had held me forcibly there. Whenever those three boys talked amongst - themselves, they addressed each other in the name of* ***Raju, Pawan and Vinay****. At that time, I had heard those boys saying,* ***"this girl has died. Throw her out of the bus"****. Those boys had hit me further with the rod at that time. Then both of us were dragged to the rear gate of the bus but the rear gate was closed. Those boys could not open the rear gate even after trying too much. Then they dragged us to the front door of the bus and threw us out of the bus. During the whole incident the bus driver drove the bus, fast and the remaining boys had told him to do so. After being thrown from the bus, I had been a little conscious. After throwing us from the bus,* ***the bus driver had taken such a turn that had I not pulled (the prosecutrix), the bus might have passed over her****. All these boys had gang raped (the prosecutrix) and had hit me and had attempted to kill me. Therefore, strict legal action may be taken against all these boys."*

21. PW-74 S.I. Subhash Chand has deposed at length with regard to the aforesaid and testified that after recording of the statement of the complainant (Ex. PW1/A) and his supplementary statements under Section 161 of the Code of Criminal Procedure (Ex. PW-80/D-1 and Ex. PW-80/D-3), the Investigating Officer was led to the spot by the complainant, who pointed out the boarding point to the I.O., that is, the Munirka bus stand as well as the spot at Mahipalpur flyover, where he and his companion (the prosecutrix) were thrown off the bus. The dumping point had already been secured by the police

owing to the fact that the victims were rescued from there. The Crime Team had also been called to the spot by the Investigating Officer which had picked up various debris including blood stained grass, mulberry leaves etc., which were seized vide memo Ex. PW74/C. The Crime Team had also taken photographs of the dumping spot, which are exhibited as Exbs. PW-43/A-1 to PW-43/A-9 (negatives) and PW-38/D-1 to PW-38/D-9 (positives). The Investigating Officer, SI Pratibha Sharma (PW-80) prepared a rough site plan of the boarding point as Ex. PW-80/A and the place where the victims were dumped as Ex. PW-80/B at the instance of the complainant.

22. PW-38, Head Constable Sonu Kaushik took rough notes and measurements of the dumping spot at Mahipalpur flyover. at the instance of the Investigating Officer, and thereafter of the boarding point at Munirka bus stand. On the basis of the said rough notes and measurements, he subsequently prepared scaled site plans of the aforesaid places, exhibited as Ex. PW-38/A and Ex. PW-38/B.

23. Adverting to the statements made by the prosecutrix, what might be aptly termed as her first dying declaration is the statement made by the prosecutrix before the concerned doctor, *viz.*, PW-49, Dr. Rashmi Ahuja, on being admitted to the hospital, i.e. Safdarjung Hospital.

24. PW-49. Dr. Rashmi Ahuja in her evidence states that on the night of 16.12.2012 at about 11.15 PM, the prosecutrix was brought to the casualty by a PCR Constable. As per PW-49 Dr. Rashmi Ahuja, she recorded the history of the patient as given by the prosecutrix in the Casualty/GRR paper in her own handwriting, which

is exhibited as Ex.PW-49/A and also prepared the MLC, which is Ex.PW-49/B. The relevant portion of her evidence relating to the recording of the MLC and the brief medical history of the prosecutrix is extracted herein below:-

> *"After examining the patient I prepared the MLC No. 37758 which is Ex. PW49/B and same is in my hand writing and bears my signature at point A. This MLC contains the alleged history as told by the prosecutrix herself and is recorded verbatim. Same is at point A to A.*
>
> *As per the alleged history told by the patient it was the case of gang rape in a moving bus by 4-5 man while she was coming from a movie with her boy friend. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. She remembers intercourse two time and rectal penetration also. She was also forced to suck their penis but she refused. All this continued for half an hour and then she was thrown off from the moving bus with her boy friend.*
>
> *It was the brief of the history which was told by the patient. However in Ex. PW-49/A, I recorded the detail history given by the prosecutrix . Same is as under:*
>
> *The prosecutrix, 23 years old, brought to GRR with PCR constable with alleged history of gang rape, as told by the prosecutrix. According to her she went to watch movie with her boy friend. She left the movie at about 8.45PM and was waiting for bus at Munirka bus stand where a bus going to Bahadurgarh stopped and both climbed the bus at around 9 PM. At around 9.05 to 9.10 PM , around 4-5 men in the bus started misbehaving with the girl, took her to the rear side of the bus while her boy friend was taken to front of the bus. Both were beaten up badly. Her clothes were torn over, she was beaten up, slapped repeatedly over her face, bitten over lips, cheek, breast and mons veneris. She was also kicked over her abdomen again and again. She was raped by a minimum of two men, she does not remember intercourse after that. She also had rectal penetration. They also forced their penis into her mouth and forced her to suck which she refused and she was beaten up instead. This continued for half an hour and she was then thrown away from the moving bus with her boy friend. She was taken up by the PCR Van to the hospital.*
>
> *This history is mentioned at point A to A of Ex. PW-49/A.*

At the time of her examination the prosecutrix was responding to verbal commands. She was having following external injuries :

i. Bruise over left eye covering whole of the eye.
ii. Injury mark (abrasion) at right angle of eye.
iii. Bruise over left nostril involving upper lip.
iv. Both lips edematous.
v. Bleeding from upper lip present.
vi. Bite mark over right cheek.
vii. Left angle of mouth injured (small laceration).
viii. Bite mark over left cheek.
ix. Right breast bite marks below areola present.
x. Left breast bruise over right lower quadrant, bite mark in inferior left quadrant.

Per abdomen :

i. Guarding & rigidity present

Local examination :

i. cut mark (sharp) over right labia present.
ii. A tag of vagina (6cm in length) hanging outside the introitus.
iii. There was profuse bleeding from vagina.

Per vaginal examination :

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

Per rectal examination :

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

The patient was prepared for OT and sent for an urgent X-ray and urgent ultra sound. She was referred to OT for complete perineal tear repair.

I may mention here that before examination, 20 samples (exhibits) were taken. The details of these exhibits are mentioned in Ex. PW-49/A from portion B to B. These samples in sealed condition sealed with the seal of hospital along with sample seal were handed over to concerned investigating officer Inspector Raj Kumari.

On 27.12.2012, SI Pratibha Sharma moved an application for tendering the opinion regarding the nature of injuries . The application is Ex. PW-49/C and my opinion is Ex. PW-49/D on the said application."

25. It is pertinent to note at this juncture that with regard to the nature of the injuries suffered by the prosecutrix, PW-49 Dr. Rashmi Ahuja opined that the **"Injuries to recto vaginal area are dangerous in nature"** (Ex.PW-49/D).

26. It may also be noted that PW-49 Dr. Rashmi Ahuja in her further testimony clarified that on 02.01.2013 an application Ex.PW-49/E was moved by Inspector Anil Sharma (second IO) for seeking clarification as to whether the victim herself had stated the facts recorded on the MLC or otherwise, in response to which she gave her comments at Point 'A' to 'A' of Ex.PW-49/E. A perusal of the said document Ex.PW-49/E shows that the opinion rendered by PW-49 Dr. Rashmi Ahuja was as under:-

> ***"The assault history & related events were told by the victim herself to me which I recorded on the MLC No.37758 dated 16/12/12 at 11.30 pm.***

27. From the aforesaid, it clearly emerges that the prosecutrix had herself narrated the assault history and related events and thus the MLC (Ex.PW-49/B) may appropriately be termed as the first dying declaration of the prosecutrix recorded by the medical practitioner who attended upon her in the first instance.

28. On 21.12.2012, the concerned SDM, Ms. Usha Chaturvedi, who appeared in the witness box as PW-27, recorded the second dying declaration of the prosecutrix (Ex. PW-27/A) and forwarded the same (vide letter Ex. PW-27/B) to the A.C.P. The prosecutrix in the aforesaid dying declaration vividly describes the incident including the insertion of rods in her private parts and further states that the accused were calling each other *"Ram Singh, Thakur, Raju,*

Mukesh, Pawan and Vinay". The relevant portion of the statement is extracted herein below:-

> *"Q.09 Iske baad kya hua? Kripya vistaar se bataiye.*
> *Ans.09 Paanch minute baad jab* bus *Malai Mandir ke pul par chadi toh conductor ne* bus *ke darwaze bandh kar diye aur andar ki batiya bujha di aur mere dost ke paas akar galiyan dene lage aur marne lage. Usko 3-4 logo ne pakad liya aur mujh ko baki log mujhe* bus *ke peechey hisey mein le gaye aur mere kapde faad diye aur bari-2 se rape kiya.* ***Lohey ki rod se mujhe mere paet par maara aur poore shareer par danto se kata****. Is se pehle mere dost ka saman - mobile phone, purse, credit card & debit card, ghadi aadi cheen liye.* ***But total chhey (6) log the jinhoney bari-bari se oral (oral) vaginal (through vagina) aur pichhey se (anal) balatkar kiya. In logo ne lohe ki rod ko mere shareer ke andar vaginal/guptang aur guda (pichhey se) (through rectum) dala aur phir bahar bhi nikala. Aur mere guptango haath aur lohe ki rod dal kar mere shareer ke andruni hisson ko bahar nikala aur chot pahunchayi.*** *Chhey logo ne bari-bari se mere saath kareeb ek ghante tak balatkar kiya. Chalti huyi* bus *mein he driver badalta raha taaki woh bhi balatkar kar sake.*
>
> *Q.10 Kya rastein mein kahin* bus *ruki?*
> *Ans.10 Nahi.*
>
> *Q.11 Aapne puri ghatna key dauran 100 number par phone karne ki koshish ki ya police picket dekh kar chillaye?*
>
> *Ans.11 Ghatna shuru hone se pehle ladai-jhagde ke dauran hi un logon ne hamare phone cheen liye the isliye phone karne ka mauka hi nahi mila. Main aur mera dost chilla rahe the lekin shayad bahar kisi ne suna nahi.*
>
> *Q.12 Is ghatna ke dauran aapne un logo ko aapas baat cheet karte suna. Kya weh aapas mein naam le rahe they? Aur kis tarah dikh rahe the?*
>
> *Ans.12 Purey ghatna kram mein maine suna ki woh log 'pakdo, kapdey fado maro, pichhey le chalo aur bhaddi galiyan de rahe the.* ***Weh Ram Singh, Thakur, Raju, Mukesh, Pawan, Vinay adi naam le rahe the.*** *Raat ka samay aur andhera hone ki wajah se sare kale hi dikh rahe the. Bol chaal ki bhasha aur unke appearance se weh anpad aur driver-cleaner type prateet ho rahe the.*
>
> *Q.13 Is purey ghatna kram ke dauran aap hosh mein thi? Aapko pata lag raha tha ki aapke saath kya ho raha hain?*

Ans.13. Aadhe time hosh tha uske baad behosh ho jaati thi toh woh log laat aur ghuso se marney lagtey the. Jab mera dost mujhe bachane ki koshish karta toh who log ussey pakad kar rok lete the. Usse bhi lohe ki rod se peeta aur sir par bhi maara issey woh bhi ardh-behoshi ki haalat mein tha.

Q.14 Is sab ke baad kya hua?

Ans.14 Mere dost ke bhi saare kapde utaar liye the aur hum dono ko maraa hua samajh kar chalti huyi bus *se sadak par faink diya. Hum dono nagn awastha mein sadak ke kinare pade huye the jise kisi gujarne wale vyakti ne dekh liya aur PCR ko inform kar diya."*

29. Adverting next to the third dying declaration made by the victim to **PW-30 Shri Pawan Kumar**, learned Metropolitan Magistrate, the application for recording of the said statement under Section 164 Cr.P.C. was moved by the Investigating Officer on 24.12.2012, which is exhibited as Ex.PW-30/A and thereafter, the learned Magistrate fixed the date for recording of the statement as 25.12.2012 at 9.00 AM at Safdarjung Hospital, vide his endorsement at Point 'P' to 'P-1' on Ex. PW-30/A.

30. The relevant part of the document Ex.PW-30/D is reproduced hereunder for the sake of ready reference:-

"25/12/2012 at 01.00 p.m.at ICU Safdarjung Hospital.

Statement of Prosecutrix (Name and Particulars withheld)

As opined by the attending doctors the Prosecutrix is not in position to speak but she is otherwise conscious and oriented and responding by way of gestures, so I am putting question in such a manner so as to enable to narrate the incident by way of gesture or writing.

Ques. : When and at what time the incident happened?
i. 20/12/2012 2. 13/12/2012 3. 16/12/2012
Ans. : 16/12/12 ***(by writing after taking time)***

Ques.: Have you seen the staff of the bus?
1. Yes 2. No
Ans. : ***1 yes by gesture (nodding her head)***

Ques.: Have you seen those people at that time?
1. Yes 2. No
Ans. : 1

Ques.: By which article they have given beatings? ***(answer by writing)***
Ans. : ***By iron rod which was long.***

Ques.: What happened of your belongings means mobile etc.?
1. Fell down 2. Snatched by them 3. Don't know
Ans. : 2

Ques.: Besides rape where and how did you get the injuries? (tried to answer by writing)
Ans. : ***Head, face, back, whole body including genital parts (by gesture indication)***

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

Ques.: What did they do after rape?
1. Left at home 2. Threw at unknown place
3. Got down at some other bus stop.
Ans: 2."

31. Mr. A.P. Singh and Mr. M.L. Sharma, learned counsel for the Appellants, assailed the dying declarations made by the prosecutrix before the S.D.M. and the M.M. on a number of grounds to contend that neither of the aforesaid dying declarations could form the basis of conviction of the Appellants. It is proposed to deal with the said contentions at the relevant time. Suffice it to state at this juncture that the commonality in their respective contentions was with regard to the first dying declaration of the prosecutrix, in that both counsel vehemently contended that this was the only statement made by the

prosecutrix which could be worthy of any credence and the Appellants not having been named as the assailants in the said statement made by the prosecutrix before the concerned doctor, the introduction of their names in her subsequent statements was nothing but political manipulation in conspiracy with the authorities concerned. But more about this later.

SECOND SEGMENT OF INVESTIGATION

32. At the outset, we note that the presence of the complainant and the prosecutrix at Saket till 8:57 PM is proved by the CCTV footage produced by **PW-25 Rajender Singh Bisht** in a CD (Ex.PW-25/C-1 and PW-25/C-2) and the photographs (Ex.PW-25/B-1 to Ex.PW-25/B-7). The certificate under Section 65B of the Indian Evidence Act, 1872 with respect to the said footage is proved by **PW-26 Shri Sandeep Singh** vide Ex.PW-26/A.

33. It is significant that the investigating agency got their first clue on 17.12.2012 from the viewing of the CCTV footage at Hotel Delhi Airport situated near the dumping spot. The said footage showed a bus matching the description given by the complainant at 9:34 PM and again at 9:53 PM. The said bus had the word 'Yadav' on one side. Its exterior was of white colour having yellow and green stripes and its front tyre on the left side did not have a wheel cap.

34. The complainant (PW-1) in his testimony corroborates that he had taken the I.O. to the place where he and the prosecutrix were thrown by the accused persons from the moving bus. He further states that the I.O. then made inquiries from the nearby hotels to obtain CCTV footage and on seeing the CCTV footage at Hotel Delhi

Airport, he identified a bus of the same description which he had boarded with the prosecutrix. He further deposed that the said bus was seen in the footage twice.

35. The pen drive containing the CCTV footage(Ex.P-67/1) and the CD (Ex.P-67/2) were thereupon seized by the I.O. vide seizure memo Ex.PW-67/A from **PW-67 Pramod Kumar Jha**, the owner of Hotel Delhi Airport. The same are identified by **PW-67 Pramod Jha, PW-74 S.I. Subhash, and PW-76 Gautam Roy from CFSL (PW-76)** during their examination in Court. PW-78, the SHO, Inspector Anil Sharma has testified that the said CCTV footage seized vide seizure memo Ex.PW-67/A was sent to the CFSL through S.I. Sushil Sawariya (PW-54) on 02.01.2013, and this part of the testimony of PW-78 is corroborated by the testimony of PW-54 SI Sushil Sawaria and PW-77, the MHC(M). Thereafter, on 03.01.2013, the report of the CFSL was received.

36. It is significant that the CCTV footage shown in the pen drive (PW-67/1) and the CD (PW-67/2) were played during the cross-examination of PW-67 Pramod Jha before the learned trial court. The observations of the learned trial court recorded in the evidence of PW-67 are apposite, which read as follows:-

> ***"Court observation:***
>
> *At this stage, at the instance of Ld. Defence counsel the pen drive is used in the laptop and a white colour bus is seen moving in front of hotel at 9.34PM and 9.53PM. The front wheel cap of the same bus is also not there. The word YADAV is written on the bus. However the registration number of the bus is not appearing in pen drive.*
>
> *At this stage the CD Ex. P-67/2 is also run in the court room on the laptop and it is also shows a white colour bus on which the*

word YADAV is written, moving in front of the hotel at 9.34PM and 9.53PM."

37. **PW-76 Gautam Roy**, Sr. Scientific Officer and also the Head of the Department Computer Forensic Division in CFSL, CBI corroborates the fact that on 02.01.2013 he received two sealed parcels sealed with the seal of PS and the seals tallied with the specimen seals provided. A blue coloured pen drive was found in parcel No.1, which he marked as Ex.1 and a Moserbear CD in the second parcel, which he marked as Ex.2. There was also a questionnaire with the parcels – Ex.PW-76/A. PW-76 Gautam Roy testified that he examined both the exhibits by playing them in the compuer and the bus was seen twice, at 9:34 PM and 9:54 PM. The bus shown in the exhibits had the word 'Yadav' written on its body and front wheel cover was missing and it had a dent on its rear side. The witness further testified that he photographed all these three by freezing the pen drive and the CD, and that these photographs were compared by him with the photographs taken by the photographer PW-79 P.K. Gottam which he had summoned. The witness proved on record the three comparison charts prepared by him in this regard as Ex.PW-76/B, PW-76/C and PW-76/D, and his detailed report as Ex.PW-76/E.

38. It may be noted that Gautam Roy (PW-76) clarified that there was a typographical mistake in his report (Ex.PW-76/E), where only one time is written, i.e., 21:34, but in his observation and draft report the bus is seen two times, i.e., at 21:34 and 21:54 and the said timings are mentioned in the said photographs Ex.PW76/B, Ex.PW76/C and

Ex.PW76/D. The witness proved the said draft report as Ex.PW-76/F. It is also relevant to note at this juncture that in the course of cross-examination of Gautam Roy (PW-76), the CCTV footage was once again played in Court at the request of the defence counsel while PW-76 Gautam Roy was in the box and a specific question was put to him with regard to tampering, the answer to which is extremely significant. The question and answer are accordingly extracted below:-

> *"Question: Is it correct that pictures, being played in the laptop today are not clear as the same are not (sic.) tampered with? Ans:* ***There is no tampering in the CD or the pen drive.*** *I need to add that CCTV footage are always not clear. Vol.:* ***However this footage was clear in my system.*** *Vol.:* ***Even today the picture is totally clear*** *and we have a video forensic software which make the pictures more clear."*

39. PW-79 P.K. Gottam from CFSL, CBI in respect of the photographs aforesaid testified that on 17.12.2012 and 18.12.2012, he took photographs of the bus bearing No.DL-1P-C-0149 parked at Thyagraj Stadium, INA, New Delhi from different angles as per the requirements of finger print and biology experts. He further testified that he handed over the positives of the said photographs Mark B1 in Ex.PW-76/B, photographs Mark C1 and C2 in Ex.PW-76/C, and photograph Mark D1 in Ex.PW-76/D to Shri Gautam Roy (PW-76) as per his requisition. He deposed that there was no possibility of tampering with the photographs as the software used for developing them was tamper proof.

40. A look now at the CFSL report, which is marked as Ex.PW-76/E. **The opinion given by the CFSL is that there was no**

tampering or editing in both the exhibits (Ex.P-67/1 and Ex.P-67/2), and that a bus having identical patterns as the one parked in Thyagraj Stadium is seen in the CCTV footage, which includes the word 'Yadav' written on one side, "back side dent (left)" and absence of wheel cover on the front left side. As already noted, the said report is proved by its author PW-76 Gautam Roy, Senior Scientific Officer and also Head of the Department, Computer Forensic Division in CFSL, CBI and is even otherwise *per se* admissible under Section 299 Cr.P.C.

41. In the course of hearing, we have also viewed the CCTV footage which starts at 21:00 hours and ends at 22:00 hours. It was noted by us that the bus is first sighted at 21:34 hours and thereafter for the second time at 21:53:56 hours. Thus, the CCTV footage showing the bus moving twice with the word 'Yadav' written on it and with its left front wheel cover missing is clearly identifiable. Be that as it may, the seizure of the CCTV footage was a prelude to the subsequent events as this was the vital clue which unravelled the sequence of events leading to the seizure of the bus and the arrest of the culprits.

42. Apparently, on the same day, that is, on 17.12.2012, on receipt of secret information, the Investigating Officer, SI Pratibha Sharma (PW-80) with SI Subhash (PW-74) and Constable Kirpal Singh (PW-65), went to Ravi Dass Camp at R.K. Puram, where they saw a bus matching the description seen in the CCTV footage identified by the complainant, parked near the Gurudwara.

43. PW-74, SI Subhash testifies that when they reached near the bus, one person got down from it and after seeing them, he started running. He chased that person and apprehended him with the help of Constable Kirpal (PW-65). On inquiry, that person disclosed his name as Ram Singh (since deceased), r/o Ravi Dass Camp, Sector 3, R.K. Puram. After apprehending Ram Singh (since deceased), he and the Investigating Officer, SI Pratibha (PW-80) checked the bus. The bus had red coloured seat covers and yellow coloured curtains. The description given by the complainant was matching with the description of the said bus. The seats of the bus were found wet. Some blood was visible on the corner of the wall touching the ceiling as well as on the floor of the bus. He had also noticed that Ram Singh (since deceased) was wearing a green and black coloured T-shirt and its collar was torn. The said T-shirt had blood stains on it. He also noticed blood stains on Ram Singh's brown coloured chappals. Ram Singh (since deceased) on being asked by S.I. Pratibha about the blood stains in the bus as well as on his T-shirt and chappals and also *qua* the condition of the bus, could not give any satisfactory reply.

44. On further interrogation by SI Pratibha (PW-80), Ram Singh (since deceased) admitted the incident and was arrested vide memo Ex. PW-74/D. [The arrest memo shows the time of his arrest to be 4.15 p.m. on 17.12.2012] His personal search was conducted vide memo Ex. PW-74/E and the accused made disclosure statement vide Ex. PW-74/F. **Ram Singh also got recovered two iron rods from the tool box of the driver's cabin, which were seized and sealed vide memo Ex. PW-74/G.** From the tool box, he also took out one

Debit Card of Indian Bank in the name of Asha Devi (PW-75), which was seized by SI Pratibha vide memo Ex. PW-74/H. The driving licence of Ram Singh and other documents relating to the bus were seized vide memo Ex. PW-74/I and the keys of the said bus vide memo Ex. PW-74/J. The bus Registration No. DL-1PC-0149 was seized vide memo Ex. PW-74/K.

45. As per the further deposition of PW-74, SI Subhash Chand, the word 'Dinesh'was written on the back side of the bus, Ex. P-1. The entry gate of the bus was ahead of the front left wheel. The rear wheel had a white coloured cap but the front wheel towards entry gate was without wheel cover. The t-shirt and chappals of Ram Singh which were blood-stained were seized vide memo Ex. PW-74/L bearing his signatures at Point 'A'. Ram Singh then led the raiding party to a place where they had burnt the clothes of the victims. They found some ashes and partly burnt clothes there, which were put in a paper bag and then sealed and seized vide memo Ex. PW-74/M. SI Pratibha (PW-80) prepared a site plan of the place where the bus was found parked, and where the burnt ashes were found on the side of Venktesh Road near the cap/cover of the nala. The said site plan was Ex. PW-74/N. Thereafter, Ram Singh was sent to the Police Station with Constable Kirpal (PW-65). Constable Suresh (PW-42) was called to the spot and the bus taken by him to the Thyagraj Stadium at around 5.45 p.m. The CFSL team reached Thyagraj Stadium at around 6.00 p.m. for inspection of the bus and lifted some exhibits and handed them over to SI Pratibha (PW-80), who sealed the said exhibits separately vide memo Ex. PW-74/P. Seal after use was handed over

to him (PW-74 SI Subhash Chand). PW-74, SI Subhash Chand was subjected to extensive cross-examination but withstood the same and nothing emerged therefrom to dis-credit his testimony in any manner.

46. **PW-38, H.C. Sonu Kaushik** then prepared sketch of the bus bearing Registration No. DL-1P-0149 while it was parked at Thyagraj Stadium (Ex.PW-38/C), which he states he handed over to the I.O., S.I. Pratibha Sharma.

47. The fact that bus bearing Registration No. DL-1PC-0149 was one of the buses hired by Birla Vidya Niketan School, Pushp Vihar, New Delhi and the driver of the bus at the relevant time was Ram Singh is sought to be proved by the prosecution through the testimony of **PW-16 Rajeev Jakhmola,** Manager (Administration) of the said school. The witness testified that **one Dinesh Yadav (PW-81) had provided to the school seven buses including bus bearing No. DL-1PC-0149 for the purpose of ferrying the children of the school. The driver of this bus was one Ram Singh s/o Mange Lal.** The documents relating to the bus including photocopies of the agreement between the School and the bus contractor, copy of the driving licence of Ram Singh and letter of termination dated 18.12.2012 with Yadav Travels were furnished by him to the Investigating Officer, SI Pratibha vide his letter dated 25.12.2012, exhibited as **Ex. PW-16/A (colly.)**.

48. Thus, according to the prosecution, from the evidence of PW-16 Rajeev Jakhmola, it stands proved that the bus in question was routinely driven by Ram Singh. The testimony of PW-16, Rajeev Jakhmola is corroborated by the testimony of **PW-81, Dinesh Yadav**,

who was the owner of the bus in question. PW-81, Dinesh Yadav testified on the same lines as PW-16, Rajeev Jakhmola, and stated that accused Ram Singh was the driver of the bus Ex.P.1 in the month of December, 2012 and one Akshay was the helper in the said bus. He further testified that on 25.12.2012 he had handed over the documents relating to the bus to the police, which were seized vide Ex. PW-80K and P-81/1 (colly.). Significantly, PW-81, Dinesh Yadav further testified:

> ***"This bus was being parked by accused Ram Singh near his house because this bus was attached with the school and also with an office as a chartered bus and that the accused used to pick up the students early in the morning."***

49. Significantly also, the learned trial court after recording the examination-in-chief of this witness noted:

> ***"The identity of the bus is not disputed by the learned defence counsels for the accused persons."***

50. In his disclosure statement Ex.PW-74/F, Ram Singh admitted to the commission of the offence along with certain other persons and stated that he could tell about their whereabouts: *"Apne sathio ko talash karke unke thikano se unko pakadwa sakta hun"*. It is the case of the prosecution that co-accused Vinay, Pawan and the JCL were arrested pursuant to the disclosure made by accused Ram Singh. Accused Ram Singh further disclosed that he had used two iron rods to hit the complainant: *"Maine cabin se do rod lohey ki nikali aur meine ladke ke sir par lohey ki rod se vaar kar diya."* and that he had taken a debit card from amongst the articles looted from the victims: *"Maine bhi aik debit card shopping ke liye rakh liya tha."*

51. **PW-75 Asha Devi**, mother of the prosecutrix identified the said debit card as the one belonging to her during her testimony in Court. She stated that the said ATM Card was of Indian Bank and was issued in her name which she had given to her daughter, the prosecutrix, for use. This part of her testimony is corroborated by **PW-4 Ms. Agila**, Manager, Indian Bank who proved the statement of account of Bank Account No.424561737 which was in the name of Asha Devi as Ex.PW-4/A, the requisite certificate under Section 65B of the Indian Evidence Act, 1872 as Ex.PW-4/B and the letter of the Chief Manager, Janak Puri Branch addressed to the I.O. certifying that debit card No.5044339142323735808 was issued on 07.04.2010 to Smt. Asha Devi as Ex.PW-4/C.

52. In his disclosure statement, Ram Singh further disclosed that on the night of 16/17.12.2012 he had burnt the clothes of the victims outside the gate of Ravi Dass Mandir, Sector-3, R.K. Puram. *"Iske baad ladka-ladki ke kapde jinse* bus *main khoon va gandagi saaf kee thi va purse tatha kuchh cards ko 16, 17.12.2012 kee raat ko hi Sector-3 R.K. Puram Ravidass Mandir ke gate ke bahar road par jala diya tha."* PW-74 SI Subhash testifies that accused Ram Singh had led them to the place where ashes and partly burnt clothes were seized vide seizure memo Ex.PW-74/M by the I.O. This part of the testimony of PW-74 is corroborated by the testimonies of two independent witnesses, namely, PW-13 Brijesh Gupta and PW-14 Jiwat Shah. Both the said witnesses testified on the same lines and also identified accused Mukesh and accused Ram Singh present in the Court on that day. **Thus, the factum of the burning of the clothes of**

the victims stands proved through the testimonies of two independent witnesses, namely, PW-13 and PW-14.

53. The further case of the prosecution is that on the following day, on the pointing out of accused Ram Singh, the IO, SI Pratibha Sharma arrested accused Pawan Kumar @ Kalu and accused Vinay Sharma. **PW-60 Head Constable Mahabir** of Police Station Vasant Vihar was a witness to the said arrest made near Ravi Das Temple. The relevant portion of his testimony reads as under:-

> *"At about 1 PM, accused Ram Singh pointed out towards accused Vinay and accused Pawan who were standing near a Municipal Tap and told us about their involvement. I apprehended accused Pawan and whereas SI Vishal apprehended accused Vinay. Accused Pawan and Vinay are present in the court today and correctly identified by the witness. IO had prepared the arrest memo of both the accused which are **Ex.PW60/A** and **Ex.PW60/B** respectively. The personal search of both the accused were conducted vide memos **Ex.PW60/C** and **Ex.PW60/D** respectively."*

54. PW-60 further testified that accused Pawan Kumar on 18.12.2012 was interrogated by the I.O. in his presence and made the disclosure statement Ex. PW-60/G, the admissible portion of which reads as under:-

> *"Apradh ke samay pehne hue apne kaprey aur jootey* bus *mein ladke se looti gayi mere hisey mein ayi haath ghadi aur ek hazar rupey meine apni jhuggi mein chhupa rakhe hain jinko mein aap ke saath chal kar baramad karwa sakta hun."*

55. **PW-68 SI Mandeep** has deposed regarding the recoveries made pursuant to the disclosure statement of Pawan. The testimony of PW-68 in this regard is as under:-

> *"Thereafter accused Pawan led the police party to his jhuggi at J-64 and from this jhuggi he took out his clothes which he was wearing at the time of incident i.e. a black colour sweater with grey strips on it and further that Aberconbie & Fitch was written*

on it, a coco cola colour pant having bloodstains (sic), one brown colour under wear having bloodstains, and one pair of Columbus shoes. These items were converted into a parcel and were sealed with the seal of PS. This parcel was seized vide Ex. PW-68/F. Thereafter accused Pawan took out one wrist watch make Sonata and two currency notes of Rs.500 each from under the mattress. The wrist watch was converted into a parcel and sealed with the seal of PS and then seized vide memo Ex. PW68/G bears my signature at point A. The seal after use was given to me. The rough site plan was prepared. Same is Ex. PW-68/H which bears my sign at point A."

56. The wrist-watch (Ex. P-3), which was seized vide seizure memo Ex. PW-68/G, as testified by SI Mandeep (PW-68), was identified by PW-1 (the complainant) in the test-identification proceedings conducted by PW-30 Shri Pawan Kumar, learned Metropolitan Magistrate on 25.12.2012 (Ex. PW1/C). PW-1 further identified the said wrist-watch (Ex. P-3) which is of make SONATA (Titan) during his testimony in Court and the two currency notes of denomination Rs.500/- each (Ex. P-7) recovered from the mattress from the jhuggi of accused Pawan during his testimony in court.

57. As noted above, the prosecution alleges that accused Vinay was arrested on the same day as accused Pawan, i.e., 18.12.2012 at 1:30 PM on the pointing out of accused Ram Singh from in front of Ravi Dass Mandir Road, Sector-3, R.K. Puram, New Delhi, vide arrest memo Ex.PW-60/B.

58. H.C. Mahabir (PW-60) has testified that accused Vinay was interrogated in his presence and his disclosure statement recorded, which is Ex.PW-60/H in which he stated that he could get recovered the clothes and chappals worn by him at the time of the incident and the looted articles from his jhuggi. Apparently however, on further

investigation by the I.O. on the following day, i.e., on 19.12.2012, he changed his stand.

59. S.I. Mandeep (PW-68) testified in Court about the further interrogation of accused Vinay on 19.12.2012 and the recoveries made by the I.O. in his presence. The relevant portion of the testimony of the witness is as under:-

> *"In my presence, interrogation was made from accused Vinay. His supplementary disclosure statement Ex. PW-68/A was recorded which bears my signature at point A. Accused disclosed that he is wearing the same clothes which he was wearing at the time of incident i.e. one blue colour jean, one black colour sport jacket, one t-shirt of full sleeve and one pair of rubber chappal. These items were converted into a pulanda and then were sealed with the seal of PS and thereafter it was seized vide memo Ex. PW-68/B which bears my signature at point A. Thereafter both the accused led the police party to the area of Ravi Dass Camp and accused Vinay led the police party to his jhuggi J-105, Ravi Dass Camp. Accused Vinay produced one pair of leather shoes make Hush Puppy by saying that these shoes are of the complainant. This pair of shoes was sealed in a parcel with the seal of PS and this parcel was seized vide memo Ex. PW-68/C which bears my signature at point A.* ***From the same jhuggi, he took out one polythene from a portion of the jhuggi behind the door and from this polythene, accused took out one NOKIA mobile phone Model 3110. The IMEI of this mobile was checked. This IMEI was tallying with the IMEI number of the prosecutrix****. This mobile phone was seized vide memo Ex. PW-68/D which bears my sign at point A. The IMEI no. of the phone was noted down in the seizure memo itself. Investigating officer prepared the rough site plan of the place of recovery which is Ex. PW-68/E bears my signature at point A."*

60. In his subsequent testimony, PW-68 S.I. Mandeep identified the Hush Puppy shoes of the complainant (Ex.P-2) which were seized in his presence vide seizure memo Ex.PW-68/C. The complainant (PW-1) also identified the pair of Hush Puppy shoes (Ex.P-2) belonging to him recovered from accused Vinay in TIP proceedings conducted by

the I.O. by moving an application (Ex.PW-30/G) before Shri Pawan Kumar, learned MM, PW-30. Shri Pawan Kumar (PW-30) has proved the said application as well as the TIP proceedings, which are Ex.PW-1/C.

61. On the same day on which accused Pawan and Vinay were arrested at Delhi, i.e., on 18.12.2012, accused Mukesh was apprehended from his native village in Karoli District, Rajasthan on 18.12.2012 after accused Ram Singh, brother of accused Mukesh, disclosed his involvement and possible whereabouts. He was, after his apprehension at Rajasthan, brought before the Investigating Officer S.I. Pratibha at Safdarjung Hospital, where, **on confirmation of the fact that he had with him the complainant's mobile phone and the IMEI number of the said mobile phone matched the IMEI number of the mobile of the complainant, he was arrested** vide memo Ex.PW-58/B on 18.12.2012 at 6:30 PM.

62. PW-58 S.I. Arvind Kumar testified that on apprehension of accused Mukesh, he had seized a Samsung Galaxy Duos mobile phone from him vide seizure memo Ex.PW-58/A, which was identified in Court by the complainant (PW-1) during his testimony as the mobile phone belonging to him. The said mobile phone apart from being identified by S.I. Arvind Kumar (PW-58) was also identified by H.C. Mahabir (PW-60), who testified that the same was given by S.I. Arvind Kumar to the I.O. at Safdarjung Hospital in his presence. **PW-56 Sandeep Dabral**, Manager of Spice Mobile Hot Spot Shop at Munirka also testified that a Samsung S-7562 dual SIM phone with IMEI No. 354098053454886 was sold in the name of the

complainant on 09.11.2012 vide bill Ex.PW-56/A. In the cross-examination of this witness, a copy of the photo-credit card of the complainant has also been exhibited as Ex.PW-56/D-1.

63. **PW-60 H.C. Mahabir** has testified that accused Mukesh was interrogated in his presence where he made certain disclosures, marked as Ex.PW-60/I. The relevant portion of disclosure statement of accused Mukesh, admissible under Section 27 of the Evidence Act, is extracted hereinbelow:

> *"Maine ghatna ke samay pehne kapde mere bhai Suresh ke kamre mein Saket mein chhipa kar rakhe hue hain ko baramad kara sakta hun. Mere paas se loot ka mobile, mere kabze se baramad ho gaya hai."*

64. Accused Mukesh further disclosed that:

> *"Jis road par vaardaat ke samay bus chalayi un rodon ki pehchaan kara sakta hun. Aur vaardaat mein shaamil Akshay Thakur va (JCL) ko talaash karke unke thikaano se pakadwa sakta hun."*

65. Pursuant to the aforesaid disclosure made by accused Mukesh, the clothes worn by him at the time of the incident were recovered from the house of Suresh (brother of the accused) from garage No.2, Anupam Apartment, Saket, at the instance of the accused. **PW-48 H.C. Giri Raj** has delineated the manner in which the recovery was made in his testimony and the clothes of the accused seized vide seizure memo Ex. PW-48/B and states that the seal after use was handed over to him.

66. On 21.12.2012, at 9:15 PM accused Akshay Kumar was arrested from village Karmalang, P.S. Tandwa, District Aurangabad, Bihar, vide arrest memo Ex.PW-53/A.

67. PW-53 S.I. Upender testified in Court in respect of the apprehension and arrest of accused Akshay Kumar as under:

> *"On 18.12.2012, I was posted at PS Saket as SI…….... A team comprising Inspector Ritu Raj, SHO of PS Saket, SI Jeet Singh of special staff, ASI Ashok Kumar of Special staff and myself was constituted. The owner of the bus who had already been examined, disclosed about the native place of accused Akshay which was at village Kamaralangh, PS Tandwa, Distt. Aurangabad, Bihar. Accordingly I along with the team members named above, departed for Aurangabad, Bihar and reached there. We reported at PS Tandwa around 11.40AM on 19.12.2012. The area was naxalite prone. So, bullet proof vehicles and assistance of local police was sought and the same were provided. We all along with local police reached village Kamaralangh in the house of accused Akshay Kumar. A raid was conducted but accused Akshay was not found present there. Upon local inquiry, it was revealed that accused may be present at village Gongo, Jharkhand, where his in laws are residing. As this area was also naxalite prone so the information from local resident were gathered about his presence. On 21.12.2012, it was informed to us that accused Akshay had come to his house at village Kamaralangh. Immediately we all rushed to the said village. A raid was conducted. Accused Akshay was found present in his house. He was apprehended and was interrogated. Accused Akshay today is present in court and witness has correctly identified the accused Akshay. Accused Akshay was arrested vide memo Ex. PW-53/A bearing my signature at point A. The grounds and information about the arrest of accused was conveyed to his father vide memo Ex. PW-53/B, the personal search of accused was conducted vide memo Ex. PW-53/C, both these memo bear my signature at point A. The disclosure statement of accused Akshay was recorded by me is Ex. PW-53/D."*

68. The testimony of PW-61 SI Jeet Singh corroborates the testimony of **PW-53 SI Upender** and further describes in detail the events leading to apprehension and arrest of accused Akshay and his disclosure statement recorded vide Ex. PW-53/I leading to the recovery of his blood stained jeans, the complainant's silver ring and blue coloured metro card.

69. PW-68 S.I. Mandeep has proved the recovery and seizure of the said silver ring during his testimony, the relevant portion of which reads as under:-

> *"On 27.12.12, I again joined the investigation of this case with SI Pratibha. I along with her and Ct. Om Prakash came to Saket Court and the custody of accused Akshay Thakur present in court was taken. In my presence, he led the police party to House No. 1943, Gali No. 3, Rajeev Nagar, Gurgaon. It was the room of his brother and from this room he took out one silver colour ring on which alphabet A was engraved and two metro cards, which he had taken out from a trunk, lying inside the room. These items were sealed in parcel with the seal of PS and then seized vide memo Ex. PW-68/M bears my signature at point A."*

70. On 28.12.2012, an application for conducting TIP was moved by the I.O. for identification of the articles, which is Ex.PW-9/A. The TIP proceedings were conducted by **PW-9 Shri Lokesh Kumar Sharma**, learned ACMM, South East where the complainant (PW-1) identified the silver ring (Ex.P-4) recovered from accused Akshay. The TIP proceedings recorded by PW-9 are Ex.PW-1/D. The application to obtain a copy of the TIP proceedings moved by the I.O. is proved on record as Ex.PW-9/B. The complainant (PW-1) identified the ring (Ex.P-4). The complainant also identified metro card Ex.P-5 as the one belonging to him and on which he had written his mobile number and name, and further testified that the other metro card recovered from accused Akshay belonged to the prosecutrix.

71. PW-53 SI Upender further testified in Court that accused Akshay Kumar, consequent to his disclosure, took the police party to Village Naharpur, District Gurgaon, where he led them to the house of one Tara Chand. It was a three-storyed house where his brother

Abhay stayed on the ground floor as tenant in one room. The room was found locked and his brother was not there. The witness further testified that accused Akshay Kumar took out the key from under one brick lying adjacent to the door and opened the door. He then took out one black coloured bag which contained a blue coloured jeans and stated that he was wearing the said jeans during the incident. The witness has testified that the said jeans had blood stains on it. **PW-61 SI Jeet Singh** in his testimony corroborates the above recovery and also identifies the recovered articles.

72. Further, accused Akhay also got recovered the NOKIA mobile phone he was using at the time of the incident from Village Naharpur, Gurgaon. S.I. Upender (PW-53) has testified in Court that he noted down that the IMEI number and the SIM card number of the mobile phone on its seizure memo and seized the phone vide seizure memo Ex. PW-53/H. He identified the blue black coloured Nokia phone (Ex. P-53/1) during his testimony in Court. PW-61 SI Jeet Singh in his testimony in Court corroborated the above and also identified the mobile phone (Ex. P-53/1).

TEST IDENTIFICATION PARADES

73. On 18.12.2012, the Investigating Officer S.I. Pratibha Sharma moved an application requesting conduct of TIP of accused Ram Singh in the Court of Sh. Namrita Aggarwal, learned M.M., Saket Courts vide application exhibited as Ex.PW-17/A. The TIP proceedings were recorded by **PW-17 Mr. Sandeep Garg, Metropolitan Magistrate** and the record of TIP proceedings proved as Ex.PW-17/B. In the course of his cross-examination, PW-17

stated that **Ram Singh refused to participate in the TIP proceedings on the ground that he was shown to the witnesses in the police station.** In this context, it deserves to be noted that S.I. Subhash (PW-74) testified that at the time of the apprehension/arrest, making of disclosure and consequential recoveries, accused Ram Singh was kept in muffled face. The witness has specifically testified that after conducting the personal search of accused Ram Singh, he was sent to the police station with Constable Kirpal in muffled face.

74. In the light of the aforesaid facts, the prosecution claims that an adverse inference must be drawn against accused Ram Singh (deceased) for his refusal to participate in the TIP. In view of the fact that accused Ram Singh is no more, this aspect need not detain us any further.

75. On 19.12.2012, PW-17 Mr. Sandeep Garg initiated TIP proceedings for accused Vinay and Pawan; both the accused refused to participate in the TIP. It would be apposite to refer to the relevant portion of the testimony of PW-17 Mr. Sandeep Garg which reads as under:-

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

76. The cross-examination of PW-17 Sandeep Garg, M.M., on behalf of accused Vinay shows that the only issue raised is whether the learned M.M. had enquired at the time of conducting the TIP that the accused had legal aid in the nature of assistance by a counsel. This issue, to our mind, is wholly irrelevant in the context of a Test

Identification Parade and, therefore, need not be dwelt upon. In the cross-examination of the witness on behalf of accused Pawan, a suggestion was made by counsel that accused Pawan was shown to the complainant prior to the TIP, which, however, was strongly refuted by PW-17 Mr. Sandeep Garg by stating that **accused Pawan had not stated that he had been shown to the complainant prior to his production before the witness.**

77. Thus, insofar as accused Pawan and Vinay are concerned, it is not even their case that they had been shown to the complainant prior to the conduct of Test Identification Parade proceedings.

78. In the light of the above, the prosecution claims that adverse inference is liable to be drawn for the refusal of accused Vinay and Pawan to participate in TIP **without giving any reason whatsoever**.

79. The TIP of accused Mukesh was conducted on 20.12.2012 at Tihar Jail by PW-17 Shri Sandeep Garg where PW-1 Awninder Pratap Singh identified the accused. During his testimony in Court, the complainant (PW-1) has identified his signature at Point 'A' in the TIP proceedings with respect to accused Mukesh (Ex.PW-1/E). The application moved by the I.O. S.I. Pratibha to obtain a copy of the said proceedings is Ex.PW-17/F. It deserves to be noted that there is no serious challenge to the TIP proceedings of accused Mukesh in the cross-examination of the learned Metropolitan Magistrate (PW-17) or even the I.O. (PW-80).

80. On the basis of the evidence relating to the TIP of accused Mukesh, the prosecution claims that the evidence of identification

of accused Mukesh in the test identification proceedings corroborates the dock identification by the eye witness/complainant, leaving no scope for the false implication of accused Mukesh as is sought to be contended by the defence.

81. The TIP of accused Akshay was conducted on 26.12.2012 at Central Jail No.4, Tihar Jail Complex, where the complainant/eye witness (PW-1) identified accused Akshay. The complainant (PW-1) has corroborated that he had gone to Tihar Jail for TIP of accused Akshay on 26.12.2012 and identified his signature at point 'A' in the TIP proceedings of accused Akshay, exhibited as Ex.PW-1/F.

82. On the basis of the evidence adduced by it as aforementioned, the prosecution claims that in view of the fact that accused Akshay voluntarily participated in the TIP, this evidence against him corroborates the dock identification by the eye witness/complainant.

THIRD SEGMENT OF INVESTIGATION

83. The case of the prosecution is that in addition to the identification of the accused by traditional methods viz., dock identification and identification by TIP, the investigating agency adopted scientific methods for conclusively proving the identity of the accused persons, such as DNA analysis, fingerprint and bite mark analysis. It is proposed to discuss elaborately each of the scientific methods adopted by the investigation to nail the culprits in view of the fact that one of the main issues involved in the present case raised by the defence is the identification of the accused.

84. With regard to the matching of DNA, PW-45 Dr. B.K. Mohapatra in his report after analysis of the DNA profiles generated from the known samples from the prosecutrix, the complainant, and each of the accused concluded that:

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

85. Once the identities of each of the persons was established through DNA analysis, the DNA profiles generated from the remaining samples, where the identity of biological material found thereon needed to be ascertained, were matched with the DNA profiles of the prosecutrix, the complainant and the accused, generated earlier from known samples. This analysis not only resulted in linking each of the accused with the victims but also the scene of the crime. A table summing up the findings of DNA analysis as set out in the reports of Dr. B.K. Mohapatra (PW-45) in respect of each of the accused is placed below:-

Serial No.	Name of the accused	Findings of DNA Analysis
1.	Ram Singh	i. Rectal swab from the prosecutrix contained DNA of male origin, which matched the DNA developed from blood sample of accused Ram Singh. ii. The DNA profile developed from the blood stains from the underwear of accused Ram Singh matched with the DNA

		of the prosecutrix. iii. The DNA profile developed from the blood stains found on the T-shirt and slippers of accused Ram Singh matched the DNA profile of the prosecutrix.
2.	Vinay	i. The DNA profile developed from the sample of the blood of the prosecutrix matched the DNA profile developed from stains from under garments of Vinay. ii. The DNA profile developed from blood stains from jacket of Vinay matched the DNA profile developed from the sample of the blood of the prosecutrix. iii. A separate DNA profile developed from blood stains from jacket of Vinay matched the DNA profile developed from the sample of the blood of the complainant. iv. The DNA profile developed from the sample of the blood of the prosecutrix matched the DNA profile developed from the blood stains on the pair of slippers of Vinay.
3.	Pawan	i. The DNA profile developed from the sweater of Pawan

		matched the DNA profile developed from the sample of the blood of the prosecutrix. ii. A separate DNA profile developed from the sweater of Pawan matched the DNA profile developed from the sample of the blood of the complainant. iii. The DNA profile developed from the sample of the blood of the prosecutrix matched the DNA profile developed from pair of shoes of Pawan.
4.	Mukesh	i. The DNA profile developed from the sample of the blood of the prosecutrix matched the DNA profile developed from blood stains of the pants, T-shirt and jacket recovered from accused Mukesh.
5.	Akshay	i. Breast swab from the prosecutrix contained DNA of male origin which matched the DNA of Akshay. ii. The first DNA profile developed from the jeans of Akshay matched the DNA profile developed from the sample of the blood of the prosecutrix. iii. The second DNA profile developed from the jeans of Akshay matched the DNA profile developed from the

		sample of the blood of the complainant.

86. A table summing the DNA analysis of biological samples lifted from the material objects such as the bus, the iron rods, and the ash and unburnt pieces of clothes is placed below:-

Serial No.	Identity of the victim	Findings of DNA Analysis
1.	Complainant	i. The DNA profile developed from burnt clothes pieces was found to be of male origin and was consistent with the DNA profile of complainant. ii. The DNA profile developed from hair and blood stained pieces of paper recovered from the bus matched with the DNA profile of complainant. iii. The DNA profile developed from blood stained dried leaves collected from the place where both the victims were thrown matched with the DNA profile of complainant.
2.	Prosecutrix	i. The DNA profile developed from blood stains from both the iron rods recovered at the instance of accused Ram Singh from bus is of female origin

		and was consistent with the DNA profile of prosecutrix. ii. The DNA profile developed from blood stains from curtains matched with the DNA profile of prosecutrix. iii. The DNA profile developed from blood stains from seat covers matched with the DNA profile of prosecutrix. iv. DNA profile developed from blood stains from the bunch of the hair recovered from floor of the bus below sixth row seat, blood stains prepared from the roof of the bus near back gate, blood stains prepared from the floor of the bus near back gate, blood stains taken from side of back stairs of the bus, blood stains taken from the inner side of the back door of the bus matched with the DNA profile of prosecutrix.

87. In his cross-examination, Dr. B.K. Mohapatra (PW-45) clearly stated that all the experiments were conducted as per the guidelines and methodology documented in the Working Procedure Manuals of the laboratory, which have been validated and recommended for use in the laboratory. The expert witness in the course of his cross-examination stated that **once a DNA profile is generated, its accuracy is 100%**. It may be worthwhile to note at this juncture that

there is no serious challenge in his cross-examination to the findings of DNA analysis nor any serious challenge was raised before us by learned defence counsel in the course of hearing.

88. Another scientific method adopted by the investigating agency in the instant case to establish the identity of the accused is the age old fingerprint technology. It emerges from the record that on 17.12.2012 and 18.12.2012, a team of experts from the CFSL had lifted chance prints from the bus in question (Ex.P-1) at Thyagraj Stadium. On 28.12.2012, PW-78 Inspector Anil Sharma of P.S. Vasant Vihar, the then S.H.O. of Police Station Vasant Vihar, requested the Director, CFSL for taking digital palm prints and foot prints of all the accused persons vide his letter Ex.PW-46/C. Pursuant to the said request made by PW-78 Inspector Anil Sharma, the CFSL on 31.12.2012 took the finger/palm prints and foot prints of the accused persons at Tihar Jail. After comparing the chance prints lifted from the bus with the finger prints/palm prints and foot prints of all the accused persons, **PW-46 Shri A.D. Shah, Senior Scientific Officer (Finger Prints), CFSL, CBI** submitted his report Ex.PW-46/D.

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

*"**8. RESULT OF EXAMINATION:***

*I. **The chance print marked as Q.1 is identical with left palmprint specimen of Vinay Sharma S/o Sh.Hari Ram Sharma marked here as LPS-28 on the slip marked here as S.28** (Matching ridge characteristics have been found in their relative positions in the chance palmprint and specimen palm print. This forms the basis of the opinion that these prints are identical. Eight of them have been marked with projected red lines with their detailed description are placed at Annexure-1)*

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

90. From the aforesaid, the prosecution claims that the identity of the Appellant Vinay Sharma as one of the perpetrators of the crime stands clearly established.

91. Yet another method adopted by the investigation in the instant case to establish the identity of the accused persons was bite mark analysis, which is done through comparison of bite marks found on the body of a victim with the dental models of the suspects. Suffice it to note that this method of identification is scientific and widely relied upon. In the well-known book on Medical Jurisprudence and Toxicology (Law, Practice and Procedure) by Dr. K.S. Narayan Reddy, Third Edition, 2010, Chapter VIII page 268, human bites, their patterns, the manner in which they should be lifted with a swab, moistened with sterile water and the manner in which such swabs need to be handled is delineated along with their usefulness in identification. The last aspect is dealt with as follows:-

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

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

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

93. In the present case, a number of bite marks were found on the body of the prosecutrix and, therefore, bite mark analysis was undertaken by the investigation to establish the identity of the accused persons. **The result of the analysis, as detailed hereunder, proved that at least three bite marks were caused by accused Ram Singh, whereas one bite mark has been identified to have been most likely caused by accused Akshay.**

94. Reference in this context may be made to the report of **PW-71 Dr. Ashith B. Acharya.** The said witness **in** his report (Ex. PW-71/C) stated that:

> *"……. There is absence of any unexplainable discrepancies between the bite marks on Photograph No. 4 and*

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

x x x x x x x x

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

95. It may be noted at this juncture that the prosecution has sought to establish the chain of custody for the generation of samples in respect of bite marks by examining the photographer **PW-66 Asghar Hussain**, who testified that on the instructions of the I.O. S.I. Pratibha, he had taken 10 photographs of different parts of the body of the prosecutrix at SJ Hospital on 20.12.2012 between 4:30 PM and 5:00 PM., which were marked as Ex.PW-66/B (Colly.) [10 photographs of 5" x 7" each] and Ex.PW-66/C (Colly.) [10

photographs of 8" x 12" each]. PW-66 also proved in Court the certificate provided by him in terms of Section 65B of the Evidence Act in respect of the photographs (Ex. PW-66/A).

96. PW-18 S.I. Vishal Choudhary testified to the fact he had collected the photographs and the dental models from Safdarjung Hospital on 01.01.2013 and duly deposited the same in the malkhana, after he (PW-18) had handed them over to the SHO Anil Sharma (PW-78). The same were thereafter entrusted to S.I. Vishal Choudhary (PW-18) on 02.01.2013, which is proved vide RC No.183/21/12, which is exhibited as Ex.PW-77/V. S.I. Vishal Choudhary (PW-18) further proves taking the said forensic material to SDM College of Dental Science in Karnataka on the same day and returning with the report on 09.01.2013. The testimony of this witness is corroborated by the SHO Inspector Anil Sharma (PW-78).

97. In view of the aforesaid evidence on record and in view of the further fact that no serious challenge has been raised by the defence to this evidence, **the prosecution alleges that the identification of bite marks found on the body of the prosecutrix further prove the involvement of accused Ram Singh and accused Akshay in the incident.**

98. Another scientific tool resorted to by the prosecution for inculpating the accused is **call detail analysis** of the mobile numbers of the complainant, the prosecutrix and accused Ram Singh, Pawan and Vinay to show the presence of the complainant and the prosecutrix in Saket and their movement towards Munirka. The analysis further shows the movement of the accused persons along

with the complainant and the prosecutrix in the bus to Munirka and then to Mahipalpur where both the victims were thrown out of the bus.

99. The Call Detail Records (hereinafter referred to as "CDR") of the mobile number of the prosecutrix (9818358144) are proved by **PW-19 Vishal Gaurav**, Nodal Officer, Bharti Airtel vide Ex.PW-19/B, and analysis of the same shows that the prosecutrix had received a message and a call at 21:09:26, i.e., at 9:09 PM which was covered by the cell tower corresponding to Cell ID No.115-52171 which is located at Lado Sarai. The Cell ID chart which corroborates the same was initially proved vide Ex.PW-19/D, which however mistakenly shows the site address location to be Firoz Shah Kotla. Subsequently, PW-19 filed an updated Cell ID chart exhibited as Ex.PW-19/E, which shows the site address to be Lado Sarai. The witness categorically stated that the site address mentioned in Ex.PW 19/E is exact and correct whereas in Ex.PW-19/D the said site location was due to non-updating of the data and because of human error. The requisite certificate as required under Section 65B, Indian Evidence Act was proved by him as Ex.PW-19/C.

100. It may be noted that PW-75, Asha Devi, the mother of the prosecutrix has proved through her deposition that the prosecutrix was in fact using the mobile number in question and this part of her testimony has not been seriously challenged.

101. As regards the ownership of mobile phone number 9868612958, the same has been proved by way of customer application form in the name of Ram Singh along with its related

documents by **PW-24 Rakesh Soni**, Nodal Officer, MTNL vide Ex.PW-24/D (Colly.).

102. The CDR analysis of the call records for the aforesaid mobile number, exhibited as **Ex.PW-24/A**, shows that at 21:16:20 i.e. at 9:16 PM the accused Ram Singh (since deceased) received a call in the area of Hauz Khas, which was covered by the tower having Cell ID No.3091 proved vide Ex.PW-24/C. The said call, as per the prosecution, was received by Ram Singh at the time when the accused including Ram Singh had already committed the offence recorded in FIR No.414/12, P.S. Vasant Vihar. The certificate under Section 65B in respect of the CDR is proved vide Ex.PW-24/B.

103. The call detail records proved by the prosecution further reflect the movement of the bus from Munirka to Mahipal Pur.

104. The ownership of phone No.9711927157 is proved by **PW-23 Deepak**, Nodal Officer, Vodafone vide Ex.PW-23/A as belonging to accused Pawan Kumar. The analysis of the call detail records vide Ex.PW-23/B shows that he had received a call at 21:32:11, i.e., at 9:32 PM, which shows movement of the bus from Naval Officer's Mess to Mehram Nagar being covered by Cell ID Nos.12602991-16654591 vide Ex.PW-23/D. The certificate under Section 65B with respect to the mobile phone number given by the witness in his capacity as Nodal Officer of the service provider is Ex.PW-23/C.

105. That the aforesaid call was received by accused Pawan Kumar on mobile No.9711927157 is corroborated by the testimony of an independent witness, namely, **PW-12 Santosh Kumar**, who, in his testimony, stated that at around 9 PM on 16.12.2012, at the instance

of the mother of the accused Pawan @ Kalu, who is having a shop adjacent to the shop of his father, he had made a call from his mobile phone No.9873540952 to her son Pawan @ Kalu.

106. It further emerges from the evidence that mobile phone No.7827917720 belonged to the complainant. **PW-20 Col. A.K. Sachdeva**, Nodal Officer from Reliance Communication Ltd. appeared in the witness box to prove the customer application form and other documents relating to the ownership of the said mobile connection as Ex.PW-20/A (Colly). The witness also proved on record the call detail records in respect of the same as Ex.PW-20/B (Colly) which show that at 21:35:40 i.e. at 9:35 PM when the mobile phone belonging to the complainant was in the possession of the accused, a call was received on his number which was covered by the tower at Mahipalpur Extension showing Cell ID No.1154-3. The requisite certificate under Section 65B with respect to the said number is proved vide Ex.PW-20/C.

107. Further, **PW-22 Shishir Malhotra**, Nodal Officer, Aircel in his deposition proved that mobile connection No.8285947545 (which was being used by accused Vinay) was registered in the name of Smt. Champa Devi, the mother of accused Vinay Sharma, vide customer application form and documents Ex.PW-22/A (Colly). The witness further proved on record the CDR of this phone number Ex.PW-22/B which shows that he (Vinay) made a call at 21:55:21, i.e., 9:55 PM which was recorded by the tower at NH-8, near IGI Airport, Mahipalpur having Cell ID No.55043 – Ex.PW-22/D (wrongly marked as Ex.PW-22/C which is the certificate under Section 65B of

the Indian Evidence Act). **The fact that the said number was being used by the accused at the time of the incident also finds support from the fact that an application was subsequently filed by the accused Vinay before the learned trial court for getting the said phone back, which had been seized from him at the time of his arrest.** Not only this, in the cross-examination of PW-78 Inspector Anil Sharma a suggestion was put to the witness to the effect that the said mobile phone number was being used by accused Vinay and the witness was shown the footage of a musical programme by accused Vinay, taken on his aforesaid mobile bearing No.8285947545. The CDR Ex.PW-22/B further shows that prior to 9:55 PM, i.e., at 7:58 PM and 8:19 PM (19:58:30 and 20:19:37) calls were made by him which got covered by the tower located at Sector-3, Ravi Dass Camp, R.K. Puram having cell ID No.13-5613. The analysis thus shows that after this only one call was made at 9:55 PM, referred to above, which shows his presence at NH-8, near IGI Airport, Mahipalpur and belies his claim of not being present at the spot alongwith with his co-accused.

108. The further analysis of CDR of phone No.9868612958 belonging to Ram Singh shows that at 22:04:57 and 22:06:25, i.e., at 10:04 PM and 10:06 PM, he received two calls which were got recorded by the towers having Cell Id Nos.47541 and 47633, which further shows the movement of the bus from Vasant Gaon towards Munirka. The location of the first call is shown to be at Vasant Gaon and the second call is shown to have been received at Munirka vide Ex.PW-24/C.

109. The learned Special Public Prosecutor contends that the above electronic analysis of the mobile phones of the victims and the accused persons clearly shows how the victims and the accused persons moved from different directions and converged at Munirka and their movement thereafter from Munirka to Mahipalpur, where after committing the offence both the victims were thrown out of the bus. The further call analysis of Ram Singh according to the prosecution shows the movement of the accused persons in the bus back to the area towards Ravi Dass Camp where they were residing. The electronic evidence when cross-referenced with the route map prepared on the pointing out of the accused Mukesh on 24.12.2012 by the Investigating Officer (Ex.PW-80/H), which, it is stated, is admissible under Section 27 of the Indian Evidence Act, shows the movement of the bus from Munirka bus stop to Mahipalpur flyover twice and when seen in conjunction with the CCTV evidence it puts the route map beyond any shadow of doubt.

110. The following chart is sought to be pressed into service to demonstrate that the electronic evidence on record completely corroborates the route of the bus and location of the accused and victims:-

*"**ELECTRONIC EVIDENCE CORROBORATING THE ROUTE, LOCATION OF ACCUSED AND VICTIMS***

Witness	***Evidence/Phone No.***	***Time***	***Cell ID***	***Location***
Rajinder Singh Bisht (PW-25) and Sandeep Singh (PW-26) Select City Mall, Saket	***CCTV Footage, Saket***	*6:15 P.M. to 8:57 P.M.*	*NA*	*Saket Select City Mall*
Vishal Gaurav, Airtel (PW-19) Note: Asha Devi (PW-75) proves that this phone was being used by the prosecutrix.	***9818358144*** *[Being used by the prosecutrix]*	*9:09 P.M. (SMS)*	*52171*	*Lado Sarai*
Rakesh Soni, Dolphin (PW-24)	***9868612958*** *[Registered in the name of accused Ram Singh]*	*9:16 P.M. (13 seconds)*	*3091*	*Hauz Khas*
Deepak, Vodafone (PW-23) Note: Santosh (PW-12) corroborates this call.	***9711927157*** *[Registered in the name of accused Pawan]*	*9:32 P.M. (54 seconds)*	*2991-4591*	*Naval Officer's Mess-Mehram Nagar*
Col. A.K. Sachdeva, GSM, Reliance (PW-20)	***7827917720*** *[Registered in the name of the complainant (PW-1)]*	*9:34 P.M. (2 seconds)*	*11541*	*Mahipalpur Extension*

Pramod Jha (PW-67)	***CCTV Footage, Hotel Delhi Airport***	*9:34 P.M. and 9:53/54 P.M.*		*Mahipalpur*
Shishir Malhotra, Aircel (PW-22)	***8285947545*** *[Registered in the name of Champa Devi and was admittedly being used by accused Vinay]*	*9:55 P.M. (58 seconds)*	*55043*	*NH-8, Near IGI, Mahipalpur*
Rakesh Soni, Dolphin (PW-24)	***9868612958*** *[Registered in the name of accused Ram Singh]*	*10:04 P.M. (51 seconds) and 10:06 (25 seconds) P.M.*	*47541-47633*	*Vasant Gaon-Munirka*

111. Suffice it to note at this juncture that no flaw or error could be pointed out by the defence in the aforesaid chart or even the CDR analysis placed on record. Thus, according to the prosecution, it may safely be presumed that the route chart (Ex.PW-80/H) prepared at the instance of accused Mukesh and the CDR Analysis refered to hereinabove as well as the CCTV footage complement and supplement each other, and **cumulatively taken the aforesaid electronic evidence substantiates the case of the prosecution**.

Medical Evidence

112. It is proposed next to deal with the medical evidence relating to the prosecutrix who was treated in the first instance by PW-49 Dr. Rashmi Ahuja on her arrival at Safdarjung Hospital. The relevant portion of the testimony of Dr. Rashmi Ahuja (PW-49) has already been reproduced hereinabove and her opinion vide Ex.PW-49/D,

opining that the injury to the recto-vaginal area of the victim was dangerous in nature.

113. The only issue which was raised in the cross-examination of PW-49 Dr. Rashmi Ahuja was as to why the medical history and MLC had the thumb impression of the prosecutrix and not her signature. The doctor has clearly explained it by stating that the patient was cold and clammy due to vaso-constriction and was shivering and had to be given IV line and warm saline. PW-49 Dr. Rashmi also explains that after giving initial treatment and stablising her, the patient was shifted to the operation theatre.

114. PW-50 Dr. Raj Kumar Chejara delineated the various surgeries conducted by him on the prosecutrix showing the nature of injuries and the damage to her internal organs. The first surgery was performed in the early hours of 17.12.2012 at approximately 4 AM, which the doctor describes as a damage control surgery. The record of the said surgery is in the OT Note running into two pages, exhibited as Ex.PW-50/A, and the noting made by Dr. Raj Kumar Chejara (PW-50) is Ex.PW-50/B. As per the notings of the doctor in Ex.PW-50/B, **the condition of the small and large bowel was extremely bad for any definitive repair**. As regards the OT notes Ex.PW-50/A, he testified:-

> *"These OT notes were prepared by Dr. Gaurav under my supervision. As per this record the diagnosis of surgery team was blunt trauma abdomen with sexual assault with complete perineal tear with hemoperitoneum & small and large bowel injuries. The operative findings were as under:*
>
> *a. Collection of around 500 ml of blood in peritoneal cavity.*
>
> *b. stomach pale,*

c. Duodenum contused.

d. Jejunum contused & bruised at whole of the length and lacerated & transected at many places. First transection was 5cm away from D J junction. Second was 2 feet from the D.J., after that there was transection and laceration at many places. Jejunal loop was of doubtful viability. Distal ileum was completely detached from the mesentry till ICJ (ileocaecal junction). It was completely devascularized.

e. Large bowel was also contused bruised and of doubtful viability. Descending colon was lacerated vertically downward in such a manner that it was completely open.

f. Sigmoid colon & rectum was lacerated at many places linearly, mucosa was detached completely at places, a portion of it around 10cm was prolapsing through perineal wound.

g. Liver and spleen was normal.

h. both sides retro peritoneal (posterior wall of the abdomen) haematoma present.

i. Mesentry & omentum was totally contused and bruised.

j. Vaginal tear present, recto vaginal septum was completely torn.

Gut was totally bruised and contused in such a manner that it could not be repaired so proximal jejunostomy was made.`

Laparostomy (abdomen was left open) was made."

115. According to PW-50 Dr. Raj Kumar Chejara, after performing the operation, the patient was shifted to ICU. Since the first surgery was damage control surgery, she was taken up for a second surgery on 19.12.2012. In the said surgery, doctors from the surgical, gynaecological and anaesthetic teams were associated. The findings were as follows:-

"Abdominal findings:

i. Rectum was longitudinally torn on anterior aspect in continuation with perineal tear. This tear was continuing upward involving sigmoid colon, descending colon which was splayed open. The margin were edematous. There were multiple

longitudinal tear in the mucosa of recto sigmoid area. Transverse colon was also torn and gangrenous. Hepatic flexure, ascending colon & caecum were gangrenous with multiple perforations at many pleaces. Terminal ileum approximately one and a half feet loosely hanging in the abdominal cavity, it was avulsed from its mesentry and was non viable. Rest of the small bowel was non existent with only patches of mucosa at places and borders of the mesentry was contused. The contused mesentry borders initially appeared (during 1st surgery) as contused small bowel.

ii. Jejunostomy stoma was gangrenous for approximately 2cm.

iii. Stomach and duodenum was distended but healthy.

Surgical procedure:

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

2. Resection of necrotic jejunal stoma with closure of DJ flexure in two layers by 3'0' vicryl.

3. Diverting lateral tube duodenostomy (viz 18f foley's catheter) brought through right flank.

4. Tube gastrostomy was added as another decompressive measure (28 size portex tube was used). Tube gastrostomy was brought from previous jejunostomy site.

5. Abdominal drain placed in pelvis.

6. Rectus sheath closed by using no. '1' – prolene, interrupted suture.

7. Skin closed by using 1 '0' nylon.

8. Perineal wound packed with Betadine soaked gauze piece.

9. Dressing was done."

116. PW-50 Dr. Raj Kumar Chejara further testified that the clinical notes Ex.PW-50/C formed part of the summoned medical record and were in the hand writing of Dr. Pintu, Sr. Resident, who was in his team and these notes were prepared under his supervision. During this surgery the notes prepared by the gynaecology team in his presence were Ex.PW-50/D which bear the signature of Dr. Rekha. According to PW-50, after the surgery the prosecutrix was shifted back to ICU and remained critical and on 23.12.2012 she had to be re-

operated (peritoneal lavage and placement of drain under general anaesthesia). He deposed that the clinical notes prepared on 23.12.2012 (Ex.PW-50/E) were in his handwriting and were signed by him. As per his further deposition, on 26.12.2012 the condition of the patient was again examined by a team of doctors and it was decided to shift her abroad for further management. The note prepared in this regard was proved by him as Ex.PW-50/F which he stated bears his signatures and also bears the signatures of the four other doctors, namely, Dr. Sunil Kumar, Dr. Aruna Batra, Dr. P.K. Verma and one other doctor. On the following day, i.e., on 27.12.2012, an application being Ex.PW-49/C was moved by the I.O. S.I. Pratibha for an opinion regarding the nature of the injuries and he (PW-50) opined that ***the abdominal injuries were sufficient to cause death in the ordinary course of nature***. His opinion in this regard was Ex.PW-50/G. After tendering this opinion, he forwarded this application to HOD (Gynae) for opinion about perineal injuries.

117. PW-50 Dr. Raj Kumar Chejara further testified that thereafter, on 02.01.2013, Inspector Anil Sharma (PW-78) moved an application being Ex.PW-49/F for obtaining opinion from the doctors regarding the weapons of offence. On examination of the weapons viz., the iron rods after the same were unsealed before him and the other doctors, including Dr. Sunil Kumar, Dr. Arun Batra, Dr. Rashmi Ahuja, Dr.Sachin Bajaj and Dr.Dheeraj Sharma who were treating the prosecutrix, the opinion of their team was that the injuries on the body of the prosecutrix could be caused by the weapons examined. Further, it was opined by them that ***"the perineal injury was severe"***

and there was a ***"complete tear involving lower 2/3rd of posterior vaginal wall, recto vaginal septum, anus, anal canal, anterior rectal wall extending upwards into adjoining large intestine. This injury could have been caused by thrusting of blunt rod like object forcibly through vagina and/or anus."*** Also, as per their opinion: ***"During the struggle and withdrawal of rod like structure from abdomen, intestines, prolapsed/herniated which led to irreparable damage, loss and severe injuries to large and small intestine."***

118. It is relevant to point out that the rods (Ex. P-49/1 and Ex. P-49/2) were shown to Dr. Rashmi Ahuja (PW-49), Dr. Chejara (PW-50) and Dr. Sachin Bajaj (PW-51), who identified the same during their examination in Court.

119. It may also be noted that two issues were raised in the cross-examination of PW-50 Dr. Raj Kumar Chejara. The first issue on which the witness was cross-examined was with regard to the reason for transporting the prosecutrix to Singapore and the second was that the cause of death was not the injuries, but the unhygienic conditions in the hospital. As regards the first issue, Dr. Chejara opined that the reason for the shift was on account of the need for critical care and the transplant of organs and since the effort was to provide the best medical aid to the prosecutrix, so she was sent abroad. As far as the second issue is concerned, the witness categorically denied the suggestion put to him that the prosecutrix suffered from septiceamia due to presence of any bacteria or due to mishandling such as leaving of foreign body in her body and clearly explained that the entire basis of the sufferings of the prosecutrix, which led to her untimely death,

was on account of the injuries caused, including the injuries to the rectum and colon and the nature of the weapons used for causing the said injuries.

120. At this juncture, it is relevant to notice the evidence of the Medical Superintendent, Safdarjung Hospital, Dr. B.D. Athani (PW-64).

121. On 20.12.2012, the I.O. moved an application before **PW-64 Dr. B.D. Athani** seeking the summary of the patient's medical status (Ex.PW-64/A), which was marked by PW-64 to the CMO, In-charge, Medical Record Department, SJ Hospital vide his endorsement Ex.PW-64/B. After getting the necessary inputs from the medical team, PW-64 Dr. B.D. Athani prepared the summary of the patient's medical status. The report itself is Ex.PW-64/C, which explains that on the date on which the said report was given the patient had suffered damage to the intestines and several life threatening injuries, which have been detailed in the evidence of Dr. Chejara (PW-50). Significantly, **Dr. Athani (PW-64) on being cross-examined stated that *'the inherent danger of septicaemia was seeded right at the time of the crime'*.** He also clarified that Dr. Trehan had visited the hospital in order to help in transporting the patient by air ambulance. He further clarified that the decision to shift the patient to Mount Elizabeth Hospital was on account of the organ transplant facility available there. PW-64 Dr. Athani further stated that Dr. P.K. Verma (PW-52) had accompanied the patient to Singapore.

122. PW-52 Dr. P.K. Verma, who was in-charge of the ICU, in the course of his testimony explained that he had accompanied the patient

to Singapore and in the course of cross-examination stated that not even one intestinal transplant had taken place in India so far and for that purpose and for managing her critical condition, the prosecutrix had to be shifted to Singapore. In further cross-examination, he clearly stated that the purpose of shifting was to give her advanced critical care and at a later stage organ transplant. He repeatedly stated that intestinal transplant has not taken place in any of the hospitals in India.

123. As regards the death of the prosecutrix at Singapore, **PW-34, Dr. Paul Chui**, Forensic Pathologist, Health Sciences Authority, Singapore deposed that the certified cause of death as given in his report was **sepsis with multi-organ failure following multiple injuries**. The post mortem report was exhibited as Ex.PW-34/A and scanned copy thereof as Ex.PW-34/B. **The witness in his cross-examination stated that he found that the septiceamia was due to the injuries sustained by her** and explained that his examination is detailed at pages 11 and 12 of the postmortem report Ex.PW-34/B. He also deposed that the prosecutrix was admitted to Mount Elizabeth Hospital on 27.12.2012 at about 8:30 to 9:05 AM and was treated by the team headed by Dr. Dennis Nyam. He categorically denied the suggestion that the patient was brought dead to Singapore.

124. A histopathological report was also tendered along with the postmortem report by Dr. Anjula Thomas, Medical Director and Consultant Pathologist, Parkway Laboratory Services Limited, Singapore (PW-35) and her report is Ex.PW-35/A.

125. After the postmortem, the body of the prosecutrix was returned to India by an Air India special flight on 30.12.2012. The relevant airway bills and manifest by which the same were handed over to the police are proved on record by **PW-63, Shri Satish Kumar**, Assistant Manager, Air India as Ex.PW-63/A to Ex.PW-63/C and that the consignee was the father of the victim who had signed the airway bill Ex.PW-63/A. He further proved on record the no objection certificate of the Government of India, the travel documents of the prosecutrix and permission to export her coffin (Ex.PW-63/D Colly.).

126. An attempt was made by the defence in the cross-examination to suggest to PW-63 Shri Satish Kumar that the coffin did not contain the body of the prosecutrix. Suffice it to state that the mother of the prosecutrix, PW-75 Ashadevi in her testimony clearly states that the coffin with the dead body of her daughter was handed over to her. Furthermore, PW-78 Inspector Anil Sharma also proved on record the various documents including the death report, copy of passport of the prosecutrix, embalming certificate and letter of permission to transport the coffin (Ex.PW-63/D-1, Ex.PW-63/D-2, Ex.PW-78/A and Ex.PW-78/B). As per him, all these documents were seized vide seizure memo Ex.PW-78/C, which bears his signatures. He further stated that he returned to IGI Airport in the same flight in which the coffin containing the dead body of the prosecutrix was transported.

127. From a cumulative reading of the evidence on record, including the evidence of Indian doctors as well as the Singapore doctors, it emerges that the prosecution has proved its case that certain organs of the prosecutrix had become gangrenous and had to be surgically

removed and analysis of the medical evidence would also clearly show, beyond any reasonable doubt, that the injuries sustained by the prosecutrix were extremely severe and would cause death in the ordinary course of nature, and that death ensued on account of her injuries and not due to any other cause, as alleged, such as unhygienic conditions in the hospital.

128. It is also relevant to note at this juncture that the evidence of the postmortem doctors has been recorded through video conferencing, for which purpose the service of summons has been effected through the MLAT process (Mutual Legal Assistance Treaty) and the note *verbale* confirming the same has been placed on record. This has been done in terms of the guidelines laid down by the Hon'ble Supreme Court in ***State of Maharashtra v. Praful Desai, (2003) 4 SCC 601*** and the proviso to Section 275(1) Cr.P.C.

129. Adverting next to the injuries suffered by the complainant, the complainant was treated by **PW-51 Dr. Sachin Bajaj** and his MLC is Ex.PW-51/A, which shows wounds over the scalp, left upper leg and right knee. PW-51 further proves that on 02.01.2013, Inspector Anil Sharma (PW-78) moved an application (Ex.PW-51/B) for obtaining an opinion regarding the weapon of offence. The doctor (PW-51) in his opinion (Ex.PW-51/C), has stated that the injuries on the body of the complainant could be caused by the said weapons of offence *viz.,* iron rods.

130. As regards the medical examination of the accused, suffice it to note that the sexual potency test of accused Ram Singh was done vide Ex.PW-2/DA which need not detain us as Ram Singh has since died.

The sexual potency test of accused Mukesh and collection of samples was done by **PW-3 Dr. Chetan Kumar**, who has proved on record his report Ex.PW-3/A; that of Vinay Sharma was done by **PW-6 Dr. Kulbhushan Prasad**, who has proved his report as Ex.PW-6/A; that of Akshay Thakur, was done by **PW-7 Dr. Shashank Pooniya**, who has proved his report as Ex.PW-7/A; and that of accused Pawan was done by **PW-10 Dr. Mohit Gupta**, who has proved his report as Ex.PW-10/A. The aforesaid medical reports clearly prove that all the accused were capable of performing sexual intercourse. This apart, PW-7 Dr. Shashank Pooniya proves in his report Ex.PW-7/A injuries on accused Akshay Thakur, which are suggestive of a struggle; in his report Ex.PW-7/B that the injuries present on the body of accused Pawan Kumar were about 2-3 days old and in his report Ex.PW-7/C that the injuries present on the body of accused Vinay Sharma were suggestive of a possible struggle.

131. On the basis of the aforesaid evidence on record, the prosecution contends that the evidence on record corroborates the fact that the prosecutrix was forcibly subjected to violent sexual assault by all the accused persons who were capable of performing sexual intercourse.

Statements of the accused and Defence Evidence

132. Before adverting to the evidence of the defence, a look first at the stand adopted by the accused persons in their respective statements recorded under Section 313 of the Code of Criminal Procedure.

133. Accused Mukesh in his statement recorded under Section 313 Cr.P.C. has corroborated the case of the prosecution in the following material particulars:-

(i) In answer to Question No.3, accused Mukesh admitted that he was driving the bus and that he stopped the bus when the complainant showed his hand to stop it. He further stated that it was the 3x2 sitter (seater) bus. One of the boys was sitting on the back side of the driver on the row of three seats whereas four boys were sitting in the driver's cabin with him.

(ii) In answer to Question No.4, he stated that accused Pawan and accused Vinay were sitting on the back side of the driver's seat whereas accused Akshay was sitting in the driver's cabin while his brother Ram Singh (since deceased) was asking for passengers.

(iii) In answer to Question No.5, he admitted as correct that the windows of the bus Ex.P-1 were having black film on it. He also admitted that his brother Ram Singh used to drive the bus daily and on that day since he was drunk heavily so he had gone to Munirka to bring him to his house and hence he was driving the bus on that day.

(iv) In answer to Question No.8, he admitted that a quarrel took place between the complainant and the other accused persons.

(v) In answer to Question No.10, he stated that the other accused persons put off the lights inside the bus at the flyover of Malai Mandir and thereafter he did not know what they had done with the prosecutrix or the complainant.

(vi) In answer to Question No.11, he stated that at about 12:30 AM he found torn clothes and other material inside the bus. Accused Akshay and the JCL had washed the bus which he had parked in front of Ravi Dass Mandir, Sector 3, Ravi Dass Camp, R.K. Puram, New Delhi.

(vii) In answer to Question No.17, he stated that the prosecutrix and the complainant were thrown out by stopping the bus at the spot near Mahipalpur flyover, though added that he did not know who had thrown them out of the bus as the light inside the bus was put off.

(viii) In answer to Question Nos.42 and 43 and on being asked as to whether he was taking water in cans inside the bus for the purpose of washing the bus from inside, he replied that he was only standing outside the bus.

(ix) In answer to Question Nos.55 and 56, he admitted that he was carrying his mobile phone No.9540967311 on that night and it was on this phone that accused Ram Singh had called him to Munirka and he had gone there with his nephew.

(x) In answer to Question No.67, he again admitted that he was driving the bus when it was boarded by the prosecutrix and her friend from Munirka while his brother Ram Singh and the JCL, (name withheld), were calling for passengers by saying "Palam/Dwarka Mod". He further admitted that the windows of the bus Ex.P-1 had black film; that Ram Singh used to drive the bus daily and on that day since he was drunk heavily he had gone to Munirka and was driving the bus and that the other

boys along with Ram Singh had already taken the bus from R.K. Puram.

(xi) In answer to Question Nos.68 and 69, he again admitted that he was driving the bus at that time.

(xii) In answer to Question No.149, he admitted that he had pointed out the place from where the victims had boarded the bus Ex.P-1 and the place where both were thrown out of the moving bus though stated that he had shown the said places to Inspector Ram Sahai and S.I. Gajender (PW-55) and not to S.I. Pratibha Sharma (PW-80).

(xiii) In answer to Question No.200, he stated that he had taken only one round while driving the bus Ex.P-1. He had taken the bus from Munirka to Dwarka and took a U-turn underneath a flyover at Palam and then drove the bus at NH-8 and then they went to Mahipalpur and from Mahipalpur he drove the bus to Munirka and then to R.K. Puram. To be noted that he does not say that the bus did not take two rounds.

(xiv) In answer to Question No.211, he admitted that PW-82 Shri Ram Adhar had boarded the bus Ex.P-1 on 16.12.2012 prior to the boarding of the bus Ex.P-1 by the complainant and the victim and in answer to Question No.213, he admitted that he was driving the bus at that time. He stated that PW-82 boarded the bus from Sabzi Mandi at Sector 4 of R.K. Puram on the main road, but stated that he did not know PW-82 was beaten by any of the co-accused as he was in the driver's cabin and driving the bus. His co-accused however brought PW-82 to the

front door of the bus Ex.P-1, saying that PW-82 should get down since he had no money to pay the bus fare.

134. Accused Pawan in his statement under Section 313 Cr.P.C. in response to Question No.3 and Question No.4 categorically stated that he was not in the bus Ex.P-1 at the time of the incident. In answer to Question No.58 pertaining to his mobile phone bearing No.9711927157, he admitted that the said mobile phone belonged to him, but stated that on 16.12.2012 he had taken liquor while he was in his jhuggi, and that in the late evening, while he was waiting outside his jhuggi, he met accused Vinay who was going to a musical party and he also accompanied him to the said musical party. There he again took liquor. Because of taking liquor "heavily", he had "convulsion" and lay down on a bench; he lost his mobile phone there. In answer to Question No.61 to the effect that the call detail records (Ex.PW-23/B) of mobile No.9711927157, registered in his name, reflect that on 16.12.2012 at 9:32 PM, he had received a call which shows the movement of the bus from the Naval Officers Mess to Mehram Nagar, being covered by Cell ID Nos.12602991-16654591, he reiterated that the said mobile phone belonged to him and repeated the story narrated by him in answer to Question No.58 with regard to the manner in which he had lost the said mobile phone. The very same story was again reiterated by him with embellishments in answer to Question No.219. He stated:

> *"In the evening when I came out of my jhuggi I saw the quarrel between accused Vinay and accused Ram Singh since deceased. I returned to my jhuggi since I had taken liquor.* ***After sometime I again came out of my jhuggi and I saw accused Vinay with his mother, sister and a neighbour, going to a***

> ***musical party. I accompanied them.*** *In the musical party I took more liquor and got intoxicated.* ***I lay down on a bench and my mobile phone was lost.****"*

135. It may be noted at this juncture that in his supplementary statement recorded on 16.08.2013 under Section 313 Cr.P.C., accused Pawan took a complete somersault from the stand taken by him in his aforesaid statement recorded under Section 313 Cr.P.C. as is evident from the answer given by him to Question No.9. In direct contradiction to what he had earlier stated, he stated that **he did not know if he had accompanied accused Vinay to the DDA District Park on that evening.** On the next day, his mother told him that his father had lifted him from the said park in the night.

136. A look now at the statement of accused Vinay Sharma recorded under Section 313 Cr.P.C. in which he introduced his plea of alibi that he was not present in bus Ex.P-1 as he had gone to attend a musical party at a park in Green Park and made a bid to explain the struggle marks detected on his person by PW-6 Dr. Kulbhushan Prasad during his medical examination. On being asked vide Question No.32 about his medical examination pursuant to his arrest, the accused introduced a case of fight with accused Ram Singh on 16.12.2012, **at about 8:30 P.M.** as Ram Singh had misbehaved with his sister. He further stated that both accused Mukesh and Ram Singh had threatened to implicate him in a false case. It may be noted that this is in direct contradiction to his answer to Question No.7 wherein he stated that he did not know accused Thakur or accused Mukesh. Further, as per him,

after the fight he had gone to attend a party. On being questioned with regard to his mobile phone vide connection No.8285947545 in the name of Champa Devi (his mother), resident of J-105, Ravi Dass Camp (Question No.57), he gave the following significant answer:-

> *"Though the phone no. 8285947545 belongs to my mother but its sim was **lost prior to 16-12-2012**. My friend had concealed my phone and when he returned it, **it was not having sim card and the memory card**."*

137. On being queried about the call detail records of the aforesaid mobile phone (Ex.PW-23/B), which showed that on 16.12.2012 at 9:55 PM, he had made a call which was recorded by the tower at NH-8 near IGI Airport, Mahipal Pur having Cell ID No.55043, he stated that he did not know anything about the call as his SIM had been lost. He had not filed any complaint but had telephoned the customer care to deactivate the SIM card. It may be noted at this juncture that he neither chose to summon any witness from the customer care nor summoned the records to show that he had asked for deactivation of the SIM card. Subsequently, in answer to Question No. 217, he took a complete somersault on his statement that the SIM Card was **lost prior to 16.12.2012,** as under:-

> *"**Q.217:** It is in evidence against you Vinay that at the time of your arrest a Nokia black colour mobile phone bearing IMEI No. 35413805830824/8 was recovered from your personal search, seized vide memo Ex.PW60/D, which you later got released on superdari. What do you have to say?*
>
> *Ans: It is correct that the said phone belongs to me but on 16-12-2012 at about 9:30 PM while I was in the party, one Vipin, a friend of accused Ram Singh, had taken my phone for making a call and left the party. Later on 17-12-2012, he returned my above phone on charging Rs.200/-*

*from me **but without sim card.** The recording of the party, prior to 9:30 PM, was in the said mobile phone, which I wanted to show to SI Pratibha Sharma and SI Mandeep but they did not look into it. It was not recovered in my personal search. The police had recovered this mobile phone from my house."*

138. Finally, in answer to Question No.221, he gave his version with regard to the events which took place on 16.12.2012 as under:-

"Q.221: Do you have anything else to say?
*Ans: On 16-12-2012 I was working in the Sab-fitness Gym at Srifort Complex, Khel Gaon Marg, New Delhi. I left the said gym at about 2:30 PM. At about 4:30/5 PM my friend told me that Ram Singh had teased my sister when she was going to purchase milk from the market. I along with my brother then went to find out Ram Singh but he did not meet us as he was not in the camp. Again at about 8/8:30 PM we again went to meet him and we found Ram Singh near his bus Ex.P1 near the Gurudwara of our Camp. He was drunk at that time and he started abusing us. Thereafter, we had a scuffle and we exchanged fist blows and blood started oozing out from my face. Even my clothes were torn. One of his friends, who was with Ram Singh, had also beaten me. Thereafter I returned to my jhuggi as I became afraid because one of the brothers of accused Ram Singh was also involved in a similar matter of rape and there being a criminal record of his brother. I then left for a musical party in a park at Green Park, New Delhi**. **I met Pawan and that my friend Ram Babu had prepared a video in that function. My sister and mother had also accompanied to the said park.** My other friends were also enjoying the said party. At about 11/11:30 PM I returned to my jhuggi and informed my parents about the scuffle I had with accused Ram Singh. I am innocent and I have not committed any crime. I have not done anything. I have been involved in this case because of the enmity with accused Ram Singh and his brother."*

139. Adverting to the statement of accused Akshay Kumar Singh @ Thakur, he too introduces his plea of alibi in his statement under Section 313 Cr.P.C. by stating in answer to Question No.2 that he had left Delhi on 15.12.2012. Again, in answer to Question No.70, he states that his name is not "Thakur" but is Akshay Kumar Singh

and he was not in Delhi on 16.12.2012, having left Delhi for his village on 15.12.2012 from New Delhi Railway Station, in Mahabodhi Express. It is his case that he was arrested from Tandwa in Bihar. In answer to Question No.122, he states so. The said question and answer being apposite are reproduced hereunder:-

> *"**Q.122:** It is in evidence against you that on 21.12.2012 it was informed that you accused Askhay had come to your house at village Kamaralangh. A raid was conducted and you were found present in your house. Your were apprehended, interrogated and arrested vide arrest memo **Ex.PW-53/A.** The information about your arrest was conveyed to your father vide memo **Ex.PW-53/B ;** your personal search was conducted vide memo **Ex.PW-53/C** and your disclosure **Ex.PW53/D** was also recorded. What do you have to say?*
>
> *Ans: On 21-12-2012 I had come to my house from the house of my Bua as the police had apprehended my father and he was made to sit in the police station Tandwa. I reached P.5 Tandwa at about 8:30 PM of 21-12-2012, where I was apprehended by the police. The timings of 9:15 PM of 21-12-2012, of my arrest, as shown in the arrest memo, are wrong."*

140. Significantly, in his statement under Section 313 Cr.P.C., accused Akshay @ Thakur does not dispute that he was working as a helper in bus Ex.P-1 owned by Shri Dinesh Yadav. On being questioned about the same, he concedes:-

> *"It is correct that I was working as a helper in the bus Ex.P1. I joined Ram Singh, since deceased as helper on 3-11-2012 but I left the company of Ram Singh on 15-12-2012 at about 10:30 AM and I left for my village at 11:30 am and I went to New Delhi Railway Station and I left Delhi in the train at about 2:30 PM."*

141. As regards his medical examination and his refusal to join the test identification parade, he states in response to Question No.199:-

> *"I do not remember if I was medically examined as I was beaten up very badly by Delhi Police team and I was not in senses at that time. I never opted for*

> *joining the TIP but I was shown to the complainant in the police station on the day of my arrival in Delhi, before the holding of the TIP and that the police had already taken my photographs and those were also shown to the complainant before the TIP."*

142. Thus, on behalf of three of the accused persons, namely, accused Akshay Kumar Singh @ Thakur, Pawan Gupta @ Kalu and Vinay Sharma, the plea of alibi has been pressed into service.

143. In the course of defence evidence, Pawan @ Kalu adduced the testimonies of DW-1 to DW-4 and to counter the rebuttal evidence adduced by the prosecution to which we shall presently advert also produced in the witness-box DW-16. Accused Vinay Sharma in his defence examined DW-5 to DW-10 and to counter the rebuttal evidence, examined DW-17. Accused Akshay @ Thakur examined DW-11 to DW-15 to prove his plea of alibi.

144. Needless to state that the defence plea of alibi taken by the aforesaid accused persons has been strongly rebutted on behalf of the prosecution as sham. Mr. Dayan Krishnan, learned Special Public Prosecutor has sought to establish the falsity of the plea through rebuttal evidence adduced by him by examining PW-83 Shri Angad Singh, Deputy Director, Horticulture (Division No.4), DDA, PW-84 Father George Manimala, St. Thomas Church and PW-85 Brother R.P. Samuel, Secretary, Ebenezer Assembly. Furthermore, it is urged by him that the settled legal position is that once he is able to prove the falsity of the plea of alibi set up by the defence, the very fact that the defence sought to raise a false plea of alibi will go against the accused persons.

145. As noticed above, accused Vinay Sharma and accused Pawan Gupta @ Kalu have stated that they had attended a musical event in the evening of 16.12.2012 and for the aforesaid purpose had entered the DDA District Park, Hauz Khas at around 8:30 PM/9 PM and left late in the night at about 11 PM with their parents and relatives, who were also in the District Park attending the event organized by a church; hence there was no possibility that they could have gone on a robbing and raping spree in bus Ex.P-1 or could have committed the alleged offences.

146. Accused Akshay Kumar Singh @ Thakur has taken a different plea of alibi. As per the said accused, he left Delhi for his native village *viz.*, Village Karmalangh, District Aurangabad, Bihar on 15.12.2012 and hence he could not have been in the bus Ex.P-1 on 16.12.2012 at the time of the commission of the alleged offences.

147. Learned defence counsel passionately argued that the testimonies of DW-1 to DW-10 proved beyond any iota of doubt the plea of alibi of accused Vinay Sharma and Pawan @ Kalu. The clinching evidence was the video footage of the musical programme recorded by DW-10 Ram Babu, a friend and neighbour of accused Vinay Sharma. The aforesaid evidence established the presence of witnesses at the Hauz Khas District Park in the musical progamme in which accused Vinay played the tabla. The defence witness who recorded the video clipping DW-10 Ram Babu had also been examined by the defence. The musical programme had been organized by the Small Christian

Unit of the Church (SCC), the objective being to take Christianity beyond the boundaries of the Christian community.

148. Needless to state Mr. Dayan Krishnan, learned Special Public Prosecutor relied upon the rebuttal evidence adduced by the prosecution, that is to say, the evidence of Deputy Director, Horticulture (PW-83), Father George Manimala of St. Thomas Church (PW-84) and Brother R.P. Samuel, Secretary of Ebenezer Assembly (PW-85) to contend that there was irrefutable evidence on record to show that musical programmes and other such functions were not permitted to be held by the authorities concerned in the District Park, Hauz Khas, the park being situate in a forest area protected by the provisions of the Forest Act. This apart, the Parish Priests of both the churches in the vicinity of the park had testified that no such musical programmes were ever organized by their churches in the said park. PW-84 Father George Manimala further testified that the precincts of St. Thomas Church were large enough to house 3,000 to 4,000 persons and there was, therefore, no necessity for the said church to organize any musical programme outside of the church. PW-85 Brother R.P. Samuel stated that the church to which he belonged was a protestant church which in any case did not organize musical programmes.

149. As already indicated above, supplementary statements of the accused persons under Section 313 Cr.P.C. were recorded, after the prosecution had adduced the aforesaid rebuttal evidence, in the course of which accused Vinay and accused Pawan @ Kalu chose to lead further evidence by examining DW-16 and DW-17. Suffice it to state

that there is not a whisper in the testimonies of DW-16 and DW-17 with regard to documents Ex.PW-84/A, Ex.PW-84/B, Ex.PW-85/A and Ex.PW-85/B, which conclusively show that no public functions were allowed to be held within the precincts of the District Park, Hauz Khas, which was a protected area within the meaning of the Forest Act; and in any event the Parish Priests of the churches in the vicinity in their testimonies categorically stated on oath that no such function was held by their respective church in the District Park on the evening of 16.12.2012. But more about the pleas of *alibi* later on.

Contentions of defence counsel and our findings thereon

150. At the threshold, a plea was raised by Mr. A.P. Singh on behalf of the convict Vinay Sharma that Vinay Sharma was a juvenile on the date of the incident. Before examining this plea, we note that no such plea was raised at the time arguments were addressed before the learned Sessions Judge, presumably for the reason that the issue already stood settled and decided by the order dated 10.01.2013 passed by the Metropolitan Magistrate (South), whereby the learned M.M. took on record the Age Verification Report of the accused Vinay Sharma, based on the certified copies of the admission register of the first attended school and the admission form of the first class of M.C. Primary Co-Ed. School, Sector-3, R.K. Puram, New Delhi, in addition to the statements of the parents of the accused wherein they had confirmed the age of their wards. It may be noted that the learned M.M. in her order has clearly recorded the fact that the parents of Vinay Sharma and Pawan Kumar had confirmed the age of their

respective wards as set out in the Report which included the written statement of the parents of both the accused persons. **Learned M.M. further noted that the counsel for accused Vinay Sharma and Pawan Kumar along with the said accused had not raised any objection to the Age Verification Report filed by the I.O. and the accused did not dispute their age to be above 18 years at the time of the commission of the offence.**

151. From the record it further emerges that the issue was once again raised before the learned Sessions Court, which passed a detailed order dated 24.01.2013 rejecting the prayer made by accused Vinay in an application filed on his behalf under Section 7-A of the Juvenile Justice Act for his further medical examination. **The Court in the said order noted that all the documents showed the date of birth of the accused to be 01.03.1994, which made him 18 years and more than 9 months old at the time of the incident.** Since the genuineness of the documents was not disputed by the accused and what the accused stated was that his parents may have given his wrong date of birth in school, and furthermore since the Investigating Officer had recorded the statements of Smt. Saroj Sharma, Principal of M.C. Primary Co-Ed. School, Sector-3, R.K. Puram, New Delhi and of Shri Hari Ram Sharma, father of accused Vinay Sharma, wherein they had categorically stated that the date of birth of Vinay Sharma was 01.03.1994, the learned Sessions Court held that the question of obtaining medical opinion with regard to the bone age of the accused did not arise. For arriving at the aforesaid

conclusions, the learned Sessions Court relied upon the judgment of the Hon'ble Supreme Court in ***Shah Nawaz vs. State of Uttar Pradesh and Another, (2011) 13 SCC 751***, the relevant extract whereof reads as under:-

> ***"****The documents furnished above clearly show that the date of birth of the appellant had been noted as 18-6-1989. Rule 12 of the Rules categorically envisages that the medical opinion from the Medical Board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the marksheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules."*

It was further observed that :

> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> *"We are also satisfied that Rule 12 of the Rules which was brought in pursuance of the Act describes four categories of evidence which have been provided in which preference has been given to school certificate over the medical report."*

152. The learned Sessions Court was also guided by the observations made by the Supreme Court in ***Ashwani Kumar Saxena vs. State of M.P., (2012) 9 SCC 750***, wherein the Hon'ble Supreme Court in the context of the procedure to be followed for enquiring into the claim of juvenility under Section 7-A of the Juvenile Justice Care and Protection Act, 2000 read with Rule 12 of the 2007 Rules held as under:-

> *"29. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7A read with Rule 12 of the 2007 Rules."*

30. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules.

31. We also remind all Courts/Juvenile Justice Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by ***obtaining*** *the certificate etc. mentioned in Rules 12 (3) (a) (i) to (iii). The courts in such situations act as a parens patriae because they have a* ***kind of guardianship over minors*** *who from their legal disability stand in need of protection.*

32. "Age determination inquiry" contemplated under section 7A of the Act read with Rule 12 of the 2007 Rules enables the court to ***seek evidence*** *and in that process, the court can* ***obtain*** *the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to* ***obtain*** *the date of birth certificate from the school first* ***attended*** *other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to* ***obtain*** *the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents).* ***The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable.*** *In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.*

33. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the juvenility on its determination.

34. …….There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. ***But court, Juvenile Justice Board or a committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those***

> ***certificates to examine the correctness of those documents****, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination."*

153. In the light of the above, we do not find any flaw in the reasoning of the learned M.M. as reflected in her order dated 10.01.2013 or in the order of the learned Sessions Court dated 24.01.2013. Even otherwise, both the aforesaid orders remain unchallenged on record and the plea of juvenility raised on behalf of accused Vinay Sharma, therefore, appears to us to be a last ditch effort made on his behalf to seek refuge under the Juvenile Justice Act in order to escape the criminal consequences of the offences committed by him.

154. Mr. A.P. Singh on behalf of accused Akshay Kumar next contended that the trial court did not summon crucial defence witnesses, and in particular mentioned Raju Paswan (a watchman of Village and PO Tandwa) and Abhay Kumar (brother of Akshay Kumar) as the significant defence witnesses who were not summoned. He further contended that crucial material pertaining to the plea of alibi raised by accused Akshay Kumar, such as CCTV footage of the New Delhi Railway Station on 15.12.12 and in particular of Platform No.9 from where Mahabodhi Express departed on the said date, and the ticket details of reservation of seats of Mahabodhi Express on 15.12.2012 in the name of Abhay Kumar Singh were not summoned from DRT of New Delhi Railway Station to prove the departure of the Appellant on the

said date. We find from the record that the aforesaid contention of Mr. A.P. Singh is specious, to say the least. The learned trial court in its detailed order dated 18.07.2013 has elaborately dealt with the issue of defence witnesses and the material aforesaid.

155. Insofar as Raju Paswan, watchman of Village and Post Office Tandwa is concerned, the said witness was held to be not essential as the place of arrest of accused Akshay Kumar was not in dispute and as a matter of fact subsequently accused Akshay Kumar himself stated in his statement recorded under Section 313 Cr.P.C. (in answer to Question No.122) that on 21.12.2012, he reached P.S. Tandwa and was arrested from there. Insofar as the ticket details of Abhay Kumar are concerned, as noted by the learned trial court in its order dated 18.07.2013, the said ticket details were not summoned by the trial court for the reason that it was not even the case of accused Akshay Kumar that he travelled on a ticket in his own name, and the case as set forth by him was that he had travelled on the reserved ticket of his brother Abhay Kumar. As regards the CCTV footage of 15.12.2012 of New Delhi Railway Station, as noted by the trial court in its order dated 19.7.2013, the CCTV footage though summoned by the learned trial court, could not be produced as the same had not been preserved by the concerned control room and a certificate to this effect was placed on the record of the trial court by the ld. Spl. PP.

156. Faced with the aforesaid situation, Mr. A.P. Singh attempted to argue that the prosecution had failed to produce Dr. Naresh Trehan as a witness and this rendered doubtful the medical report

Ex.PW-64/DA regarding the reasons for shifting the prosecutrix to Singapore for medical treatment.

157. We find from a perusal of the order dated 18.07.2013 (supra) that the learned trial court in its said order specifically noted the fact that Dr. Naresh Trehan need not be summoned since the purpose of his visit to Singapore had already been proved on record by the statement of Dr. P.K. Verma (PW-52). This apart, it is relevant to note that PW-64 Dr. B.D. Athani categorically stated in his cross-examination that the only role played by Dr. Naresh Trehan was in respect of the provision of air ambulance for the transportation of the prosecutrix to Singapore. The relevant extract of the cross-examination of the said witness is as under:-

> *"The final decision to send the victim abroad was taken after the visit of Dr Trehan. VOL:'The decision was already taken by the team of the treating doctors and since* ***the involvement of Dr. Trehan was required because of the facility of Air Ambulance, which they could arrange****. After consulting Dr. Trehan, the entire medical team treating the prosecutrix took a final decision to shift the patient abroad and then all the doctors informed me about this decision."*

158. Mr. A.P. Singh next submitted that the use of rods as weapons of offence was not mentioned in the MLC of the prosecutrix (Ex.PW-49/B) and furthermore the weapons used are not even mentioned in the complainant's MLC (Ex.PW-51/A) and this fact is completely destructive of the fabric of the prosecution version.

159. As already noted by us, the prosecutrix after being assaulted with lethal weapons/iron rods and gang raped was thrown out of

the moving bus on a cold winter night of 16.12.2012 and in such a condition, she has given a description of the incident, as much as she could, keeping in mind her extremely critical condition, before her first treating doctor, namely, Dr. Rashmi Ahuja (PW-49). It is apposite that PW-49 Dr Ahuja, in her cross-examination, when questioned as to why the MLC did not bear the signatures of the prosecutrix but a thumb impression was affixed thereon gave the following graphic description of the physical condition of the prosecutrix at the relevant time:-

> *"**When I had first seen the prosecutrix, she was cold and clammy i.e. whitish (due to vasoconstriction). I gave her IV line and warm saline. The purpose was to stabilize her pulse and BP. The pulse was weak and even her blood pressure was low.** ……. Since the prosecutrix was shivering and was cold so instead of taking her signature we asked the prosecutrix to give her thumb impression for consent."*

160. In such circumstances, in our view, when she was suffering from extreme trauma and her physical condition was extremely critical, it would be unreasonable to expect the prosecutrix to narrate intricate details of the incident to the treating doctor. Insofar as the complainant is concerned, the contention that the weapons used are not mentioned in the complainant's MLC is again wholly irrelevant. In any event, in the first statement recorded of the complainant (PW-1) by S.I. Subhash (PW-74) at about 3:45 AM on 17.12.2012 (PW-1/A), on the basis of which the First Information Report was registered, there is a clear mention of the use of iron rods as weapons of offence and thus by

no stretch it can be said that iron rods were subsequently introduced in the prosecution version of the incident.

161. At the risk of repetition, it deserves to be noted that the rods Ex.P-49/1 and Ex.P-49/2 were recovered at the instance of accused Ram Singh (since deceased). PW-80 SI Pratibha Sharma, the Investigating Officer of this case has deposed that accused Ram Singh had led her to the bus (Ex.P-1) and had taken out two iron rods from the shelf of the driver's cabin. The rods were having blood stains. The said rods were sealed with the seal of P.S. and after being deposited with the malkhana were sent for forensic examination. PW-45 Dr. B.K. Mohapatra, who prepared the DNA report testified to the fact that the DNA profile developed from the blood stains from both the iron rods was found consistent with the DNA profile of the prosecutrix. These rods were also mentioned in the two dying declarations of the prosecutrix recorded by the S.D.M. (PW-27/A) and the M.M. (PW-30/A) respectively. Further, the concerned doctors of SJ Hospital opined that the recto-vaginal injury of the prosecutrix could be caused by the rods Ex.P-49/1 and Ex.P-49/2 vide their medical opinion Ex.PW-49/G. Hence, the user of rods in the crime stands established to the hilt. The contention that the victims do not refer to the use of iron rods in their MLCs thus pales into insignificance. The subsequent statements of the victims establishes the user of the rods Ex.P-49/1 and Ex.P-49/2, which also stands corroborated by the medical and scientific evidence on record.

162. With reference to the first statement of the complainant (Ex.PW-1/A) on the basis of which First Information Report was recorded, Mr. A.P. Singh submitted that as per this statement made by the complainant there were four plus two persons in the bus, in addition to the driver, and this is clearly contradictory to the case of the prosecution. We find that this contention is *ex facie* wrong as a reading of the document clearly shows that after the word '*char*' the numerical 4 is mentioned in brackets. This is also clear from the fact that the words used are ***"Driver ke saath char ladke bethe the",*** **meaning thereby that there were four boys in all, including the driver.** Further, subsequently in the same document (Ex.PW-1/A), the complainant states that when the bus was ascending the flyover to the Airport, three boys came from the cabin and asked him in foul language "*Where are you going with the girl at night*" and they started swearing at him in foul language. One of those boys slapped him and he (the complainant) too slapped him. Then all the three started beating him. Just then, the other two boys also came there. All of them started beating and hitting him jointly. This portion of the statement of the complainant clearly shows that apart from the driver there were five other boys present in the bus as per the complainant's version in document Ex.PW-1/A. Even otherwise, the complainant's statement (Ex.PW-1/A) recorded at about 3:45 AM on 17.12.2012 has to be read in conjunction with his statements made immediately thereafter on the same day, i.e., at 7:30 AM and at 12:00 Noon (Ex.PW-80/D-1 and Ex.PW-80/D-3),

all of which were recorded in close proximity with each other. In his second supplementary statement Ex.PW-80/D-3, the complainant clearly stated that in the cabin of the bus in addition to the driver, three boys were seated and outside the cabin one boy was seated on the side of the bus having two seats and one boy was seated on the side of the bus having three seats, that is, in all 6 boys. This statement was recorded at 12:30 P.M. on 17.12.2012 and Ram Singh, who was the first of the accused persons to be arrested, was arrested at 4:15 PM on the same day.

163. Mr. A.P. Singh next contended that the evidence of the prosecution is replete with innumerable glaring contradictions, inconsistencies, discrepancies, deficiencies, drawbacks and infirmities, which are not minor discrepancies on the fringe. The depositions of the prosecution witnesses were neither cogent nor coherent and do not inspire confidence. Still the learned trial court has relied upon their statements. The reliability of the witnesses, who have made improvements and have been confronted with their previous statements, has not been adjudged by the trial court keeping in mind the basic principles of appreciation of evidence applicable to a criminal trial.

164. Reliance was placed by Mr. Singh in this context upon the judgments of ***Maharaj Singh vs. State of U.P. (1991) 28 ACC 506, Padigi Narasimha vs. State, 1996 Criminal Law Journal (AP) 2997*** and ***Zamir Ahmed vs. State, 1996 Criminal Law Journal (Delhi) 2354***.

165. In ***Maharaj Singh's*** case ***(supra)***, the Allahabad High Court held that by virtue of the explanation to Section 162(2) Cr.P.C., an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

166. In ***Padigi Narasimha (supra)*** too, reference was made to the proviso to Section 162(1) and the explanation added to the Section and it was held that it was clear therefrom that both the omission and contradiction have to be proved either by the prosecution or by the accused, as the case may be, depending upon the circumstances in each case. The Court, however, entered the following caveat:-

> *"22. When the accused or the defence did not take any interest in establishing such contradictions or omissions in accordance with law, he is not entitled to take such contentions in this Court that there has been improvement in the case of the prosecution, due to omissions or contradictions."*

167. In ***Zamir Ahmed (supra)***, a Division Bench of this Court made the following observations which we note are of no avail to the Appellants in the instant case:-

> *"(14) The second question which arises for adjudication in the instant case is as to whether the contradictions pointed out by the learned counsel for the appellant are so material as to set at naught the entire case of the prosecution? Our reply to the above query is an emphatic 'no'. It would be a hard nut to crack to find out a case which is bereft of embellishment, exaggeration, contradictions and inconsistencies. The said things are natural. Such contradictions and inconsistencies are bound to creep in with the passage of time. If the witnesses are not tutored they would come out with a natural and spontaneous version on their own. The two persons on being asked to reproduce a particular incident which they have*

witnessed with their own eyes would be unable to do so in like manner. Each one of them will narrate the same in his own words, according to his own perception and in proportion to his intelligence power of observation.

(15) The above view which we are taking finds support from the opinion of the Hon'ble Supreme Court. It was opined in ***Boya Ganganna v. State of Andhra Pradesh, AIR 1976 SC 1541 : (1976 Cri LJ 1158)*** *……. "Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence."*

168. Mr. Dayan Krishnan, learned Special Public Prosecutor, on the other hand, relied upon the judgments of the Hon'ble Supreme Court in ***Jaswant Singh vs. State of Haryana, (2000) 4 SCC 484***, ***Subodh Nath vs. State of Tripura, (2013) 4 SCC 122*** and ***Pudhu Raja vs. State, (2012) 11 SCC 196***. In ***Jaswant Singh (supra)***, the Supreme Court while opining that the omissions were not contradictions in the said case made the following pertinent observations:- (SCC, page 501)

"47. Section 161(2) of the Code requires the person making the statements "to answer truly all questions relating to such case, put to him by such officer....". It would, therefore, depend on the questions put by the police officer. It is true that a certain statement may now be used under Section 162 to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. Previously, the law was as enunciated in Tahsildar Singh v. State of Uttar Pradesh [AIR 1959 SC 1012] as:

> *"(i) omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box;"*

> *48. Now the explanation to Section 162 provides that an omission to state a fact in the statement may amount to a contradiction. However, the explanation makes it clear that the omission must be a significant one and "otherwise relevant" having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.*
>
> *49. Reading Section 161(2) of the Criminal Procedure Code with the explanation to Section 162, an omission in order to be significant must depend upon whether the specific question, the answer to which is omitted, was asked of the witness. In this case the Investigating Officer, PW 13 was not asked whether he had put questions to Gurdeep Kaur asking for details of the injuries inflicted or of the persons who had caused the injuries."*

169. In the case ***Subodh Nath (supra)*** a question arose whether an eye-witness testimony can be discarded only on the basis of some discrepancies when it is corroborated in material particulars. Answering the question in the negative, the Supreme Court opined:- (SCC, page 128 to 129)

> *"16. Once we find that the eye witness account of PW 13 is corroborated by material particulars and is reliable, we cannot discard his evidence only on the ground that there are some discrepancies in the evidence of PW 1, PW 2, PW 13 and PW 19. As has been held by this Court in* ***State of Rajasthan v. Kalki (1981) 2 SCC 752****, in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses……"*

170. In ***Pudhu Raja (supra),*** the Supreme Court made the following pertinent observations:- (SCC, page 202)

> *"18. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not affect the core of the case of the prosecution, must not be made a*

ground for rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same again, without providing justifiable reasons for the same. [Vide ***State vs. Saravanan, (2008) 17 SCC 587****]*

19. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witness also makes material improvements before the court, in order to make the evidence acceptable, it would not be safe to rely upon such evidence…..."

171. In a recent judgment rendered by the Supreme Court in ***Essa @ Anjum Abdul Razak Memon vs. The State of Maharashtra, JT 2013 (6) SC 1***, the Hon'ble Supreme Court dwelt at length on the aspect of improvements, discrepancies and contradictions which do not touch the core of the prosecution case as follows:- (JT, page 160 to 162)

*"**276.** It is contended on behalf of the appellant that evidence of the aforesaid eye witnesses is unreliable, untrustworthy and without any basis in order to reach to the conclusion of any guilt to justify the detention of the appellant any further in custody. It is further submitted that substantial improvements have been made by these witnesses during their evidence. We are unable to accept the same. All the eye-witnesses to the said incident have consistently deposed that the appellant came out of the van which came to Fishermen's Colony at Mahim. They identified the appellant before the Court during dock proceedings as well as in the test identification parade. They further identified the Maruti Van bearing number MP-D-13-385 as the vehicle in which the appellant along with other co-accused came to the scene of the crime. The contradictions pointed out by the counsel on behalf of the appellant are minor contradictions and does not go to the root of the matter. With regard to the same, the following observations of this Court in* ***State of Uttar Pradesh v. Krishna Master, [JT 2010 (8) SC 240 : (2010) 12 SCC 324]*** *are relevant.*

*"**15.** Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach*

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

16. *If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.*

17. *In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It*

is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."

277. *In* ***State of H.P. v. Lekh Raj, [JT 1999 (9) SC 43 : (2000) 1 SCC 247****, it was observed:*

"7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in ***Ousu Varghese v. State of Kerala*** *held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In* ***Jagdish v. State of M.P.*** *this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in* ***State of Rajasthan v. Kalki*** *held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to*

normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.

8. Referring to and relying upon the earlier judgments of this Court in ***State of U.P. v. M.K. Anthony, Tahsildar Singh v. State of U.P., Appabhai v. State of Gujarat*** *and* ***Rammi v. State of M.P.****,this Court in a recent case* ***Leela Ram v. State of Haryana*** *held:*

> *"There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence....*
>
> *The court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."*

278. *In* ***Waman v. State of Maharashtra, (2011) 7 SCC 295****), it was observed:*

> *"35. It is clear that not all the contradictions have to be thrown out from consideration but only those which go to the root of the matter are to be avoided or ignored. In the case on hand, as observed earlier, merely on the*

basis of minor contradictions about the use and nature of weapons and injuries, their statements cannot be ignored in toto."

To sum up, there are bound to be some discrepancies between the narrations of different witnesses and unless the contradictions are of a material dimension, the same should not be used to disbelieve the evidence in its entirety. In view of the above, we are of the view that the contradictions pointed out by the counsel on behalf of the appellant are minor contradictions and does not render the evidence unbelievable."

172. In ***State of U.P. v. Naresh and Others, (2011) 4 SCC 324,*** the Supreme Court after considering a large number of its earlier judgments held: (SCC, page 334)

"30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide ***State vs. Saravanan, Arumugam vs. State, Mahendra Pratap Singh vs. State of***

U.P. and Sunil Kumar Sambhudayal Gupta (Dr.) vs. State of Maharashtra].”

173. Thus, the law is well settled that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored. In case however the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence. In the instant case, learned defence counsel has failed to demonstrate from the evidence of the eye-witness/complainant and the evidence of other prosecution witnesses such discrepancies, omissions, improvements and the like as would enable us to reject their testimonies after testing the same on the anvil of the law laid down by the Apex Court.

174. Mr. A.P. Singh next contended that the whole of the case of the prosecution deserved to be discarded as no public witnesses were joined in the investigation by the investigating agency either at the time of the arrest of the accused persons or at the time of the recoveries effected from them. Insofar as the absence of public witnesses at the time of arrest is concerned, it may be noted that the only requirement in law at the time of arrest is for the arresting officer to comply with the provisions of Section 41B of the Code of Criminal Procedure. In the present case, suffice it to note that the provisions of Section 41B have been complied with in that at the time of the arrest of Ram Singh and Mukesh vide arrest memos Ex.PW-74/D and Ex.PW-58/B respectively, the relatives

informed were Suresh (brother) and Raju (brother). At the time of arrest of accused Pawan vide arrest memo Ex.PW-60/A, the relatives informed were Hira Lal Gupta (father) and Raju (neighbour). Arrest memo (Ex.PW-60/B) in respect of accused Vinay shows that Hari Ram Sharma (father) and Raju (neighbour) were informed while arrest memo Ex.PW-53/A of accused Akshay shows that Saryu Singh (father) was informed.

175. In context of the contention with regard to non-joining of public witnesses at the time of recovery, reference may usefully be made to the judgment of the Supreme Court in ***State, (Govt. of NCT of Delhi) vs. Sunil, (2001) 1 SCC 652***. In the said case, two sex meniacs libidinously ravaged a female child of four like wild beasts and finished her off. The recovery of blood stained knickers of the deceased on the basis of the statement made by the accused before the police was evidenced by the seizure memo prepared by the Investigating Officer which was sought to be assailed by the defence on the ground of absence of independent witnesses when the Investigating Officer recorded the statement of the accused. The Supreme Court brushing aside the said argument held that the circumstance relating to the recovery of the blood stained knickers of the ravished child was a formidable one and the mere absence of an independent witness when the Investigating Officer recorded the statement of the accused and the knickers were recovered pursuant to the said statement was not a sufficient ground to discard the evidence under Section 27 of the Evidence Act. The relevant extract of the judgment reads as under:- (SCC, page 661)

*"**19.** In this context we may point out that **there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code**. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that a search is made to find out a thing or document about which the searching officer has no prior idea as to where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guesswork that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts the search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. **But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code.** This Court has indicated the difference between the two processes in the Transport Commr., A.P., Hyderabad v. S. Sardar Ali [(1983) 4 SCC 245 : 1983 SCC (Cri) 827 : AIR 1983 SC 1225] . Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition: (SCC p. 254, para 8)*

> *"Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of sub-sections (4) and (5) of Section 100 of the Criminal Procedure Code. In the case of a seizure under the Motor Vehicles Act, there is no provision for preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself."*

> ***20. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the investigating officer contemporaneous with such recovery must necessarily be attested by the independent witnesses.*** *Of course, if any such statement leads to recovery of any article it is open to the investigating officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.*
>
> ***21.*** *We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around."*

176. In ***Dr. Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205***, the Supreme Court relying upon its earlier judgment in the case of ***Sunil (supra)*** reiterated the law laid down by it in the said judgment. In the said case, the Appellant-accused had made a disclosure statement, on the basis of which a panchnama was prepared and recovery panchnamas were also made. The evidence on record revealed that the same were duly signed by two police officials, and one independent panch witness, who was admittedly not examined. Therefore, a question arose regarding the effect of non-examination of the said panch witness, and also the sanctity of the evidence, in respect of recovery made only by two police

officials. Referring to the law laid down in the case of ***Sunil (supra)***, the Supreme Court opined that the non-examination of the panch witness would not render the discovery incredible. It was observed that no question having been put to the Investigating Officer in his cross-examination, as to why the prosecution had withheld the said witness and the I.O. being the only competent person to answer the query, the non-examination of the said panch witness was inconsequential and sanctity of evidence in respect of recovery made only by two police officials was not affected thereby.

177. In ***Ashok Kumar Chaudhary and Others vs. State of Bihar, (2008) 12 SCC 173*** dealing with the contention of the Appellants that the incident having taken place at a public place in the evening, prosecution ought to have examined some independent witnesses and having failed to do so, the evidence of the related witness should be discarded, the Supreme Court observed that:- (SCC, Page 176)

> *"7. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.*
> *Though it is true that the incident having taken place near the market around 6 p.m. on 17-7-1988, the prosecution should have attempted to secure public witnesses who had witnessed the incident, but at the same time one cannot lose sight of the ground realities that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise creditworthy, cannot be relied upon unless corroborated by public witnesses."*

178. In ***Pramod Kumar vs. State (Government of NCT of Delhi), (2013) 6 SCC 588***, the Supreme Court once again repelled the

submission that the whole case of the prosecution should be thrown overboard because of non-examination of independent witnesses and reliance on the official witnesses cannot be accepted. It was held (SCC, Page 593):-

> *"13. This Court, after referring to **State of U.P. v. Anil Singh** [1988 Supp SCC 686 : 1989 SCC (Cri) 48] , **State (Govt. of NCT of Delhi) v. Sunil** [(2001) 1 SCC 652 : 2001 SCC (Cri) 248] **and Ramjee Rai v. State of Bihar** [(2006) 13 SCC 229 : (2007) 2 SCC (Cri) 626] has laid down recently in **Kashmiri Lal v. State of Haryana** [(2013) 6 SCC 595 : 2013 AIR SCW 3102] that there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the court can definitely act upon the same."*

179. Next, it was strongly contended by Mr. A.P. Singh that a shadow of doubt was cast on the prosecution version with regard to the seizure of the bus as the secret information received by the I.O. with regard to the location of the bus has not been disclosed by the prosecution, though the case of the prosecution is that the bus was seized pursuant to secret information received by the Investigating Officer from Ravi Dass Camp, Sector-3, R.K. Puram. Suffice it to note in this regard that Indian Evidence Act, 1872 provides that no police officer shall be compelled to disclose secret information received by him/her. (See Sections 124 and 125 Evidence Act, 1872).

180. Mr. A.P. Singh then contended that the story of the investigating agency that ash was recovered by the investigators from near the place where the bus was seized and the said recovery led to the seizure of the ash and the partly burnt clothes, was an entirely concocted one. We are afraid the aforesaid contention of the learned

defence counsel is contrary to the record in that the seizure memo (Ex.PW-74/M) clearly shows the recovery of partly burnt clothes (*kaprey ke tookrey*). Further, in the CFSL report the relevant parcel Exhibit 13 is described to contain partly burnt cloth pieces along with ash. Thus, the seizure memo Ex.PW-74/M and the CFSL report (Ex.PW-76/E) completely negate this contention of the defence as well.

181. In the context of refusal of the accused-Appellant Vinay to participate in TIP, Mr. Singh relied upon the following judgments in support of his contention that refusal of the Appellant Vinay Sharma to participate in the Test Identification Parade was not sufficient to inculpate him:-

(i) ***Mohd. Abdul Hafeez vs. State of Andhra Pradesh, (1983) 1 SCC 143.***

(ii) ***State vs. Maqsood Ahmed @ Ashraf Abbu Mujahid, ILR (2010) 1 Del 614 : (2009) 163 DLT 39.***

(iii) ***Hukam Singh vs. State (NCT of Delhi), 2011 (3) Crimes 278 (Del.).***

(iv) ***Prahlad Singh vs. State of Madhya Pradesh, (1997) 8 SCC 515.***

(v) ***State of Madras vs. Hussaini, 1987 (1) Crimes (MP) 4112.***

(vi) ***Sadhoo alias Sadhuram vs. State of M.P., 1997 Crl. L.J. 2809.***

182. A careful perusal of the law laid down in the aforesaid judgments shows that what in effect has been held by the Courts from

time to time is that identification of the accused during Test Identification Proceedings is a relevant evidence lending assurance to a Court of an accused being correctly identified by a witness and refusal to participate in the same without any justifiable cause is an incriminating piece of evidence, but a conviction in a criminal trial cannot be sustained merely on an accused refusing to participate in the Test Identification Proceedings even on an unjustifiable ground. Nor can conviction be sustained where the accused is identified in Court after a long delay in cases where no Test Identification Parade has been held and there is nothing to connect the accused with the crime. Test Identification Proceedings are also rendered meaningless where the accused is shown to the witness prior to the conduct of the Test Identification Proceedings.

183. We pause here to note the legal position in respect of identification by way of TIP and dock identification as enunciated by the Supreme Court in the case of ***Dana Yadav v. State of Bihar (2002) 7 SCC 295*** where after an elaborate discussion on the subject, the Supreme Court summed up its conclusions as under:- (SCC, page 315)

> *"38. In view of the law analysed above, we conclude thus*
>
> *(a) If an accused is well known to the prosecution witnesses from before……*
>
> *(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him.*
>
> *……*
>
> *(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test*

identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of the accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

184. In a recent judgment rendered in ***Sheo Shankar Singh vs. State of Jharkhand, (2011) 3 SCC 654***, their Lordships have lucidly reviewed the legal position with regard to identification as under (SCC, Page 671):-

"46. It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak

character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation."

47. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.

48. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] : (SCC pp. 751-52, para 7)

> *"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the*

Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. [See ***Kanta Prashad v. Delhi Admn., AIR 1958 SC 350, Vaikuntam Chandrappa v. State of A.P., AIR 1960 SC 1340, Budhsen v. State of U.P., (1970) 2 SCC 128 and Rameshwar Singh v. State of J and K., (1971) 2 SCC 715****).*

49. We may also refer to the decision of this Court in Pramod Mandal v. State of Bihar [(2004) 13 SCC 150 : 2005 SCC (Cri) 75] where this Court observed: (SCC p. 158, para 20)

> *"20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."*

50. The decision of this Court in Malkhansingh case [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] and Aqeel Ahmad v. State of

U.P. [(2008) 16 SCC 372 : (2010) 4 SCC (Cri) 11] adopt a similar line of reasoning."

185. The aforesaid aspect has also been perspicaciously dealt with in ***Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1***, wherein the Hon'ble Mr. Justice Sathashivam (as his Lordship then was) while writing the judgment, after noting that the reason given by accused Manu Sharma for his refusal to participate in TIP, being that he had been shown to the witnesses, was false, opined: (SCC, page 93)

> ***"In the absence of any defence, refusal of TIP on this ground is totally unjustified and an adverse inference ought to be drawn in this regard."***

186. The Court further observed as under:- (SCC, page 99)

> ***"258. The learned Solicitor General submitted that, even otherwise, an adverse inference ought to be drawn against the appellants for their refusal to join the TIP. This view has found favour time and again by this Court. It is pertinent to note that it is dock identification which is substantive piece of evidence. Therefore even where no TIP is conducted no prejudice can be caused to the case of the prosecution.***
>
> ***259. In Mullagiri Vajram v. State of A.P it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the depositions of the witnesses in court were reliable and could sustain a conviction. The photo identification and TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court on oath."***

187. In view of the aforesaid, we conclude this aspect of the case by noting that insofar as accused Ram Singh, accused Vinay and accused Pawan are concerned, the said accused persons refused to participate in TIP and this circumstance can by no means have any adverse bearing on the case of the prosecution. **Of necessity, an adverse**

inference is required to be drawn against them for their refusal without justifiable cause to participate in the TIP.

188. On the aspect of recovery of blood stained clothes and the weapon of offence being the iron rods, Mr. Singh placed reliance upon the judgment of this Court in ***Raj Kumar @ Raju vs. State, (2010) 169 DLT 517 (DB)*** to contend that the said recoveries were in the nature of "weak evidence". We extract hereinbelow the portion of the judgment in the said case pertaining to recoveries:- (DLT, page 520)

> *"15. As regards the recovery of counterfoils of bank deposit slips from the appellant and the co-accused it would be of importance to note that the diary Ex.P-9 was admittedly recovered from the pocket of the deceased and there is a possibility that the said counterfoils may have been recovered from the diary and later on planted. Way back in the year 1943, in the decision* ***AIR 1943 Null 5, Shera vs. Emperor*** *the Court had cautioned of such kind of ordinary articles being planted.*
>
> *16. As regards the recovery of the hammer Ex.P-3 and the leather bag Ex.P-4 from near the scene of the crime, it assumes importance that when the dead body was detected in the evening of 29.7.2004 not only the investigating officer but even the crime team had accessed the place and we find it strange that nobody could detect the said hammer or the leather bag nearby.*
>
> *17. Now, as the case set up by the prosecution, the appellant runs a tea stall and probably acts as a postal agent, thus his being possessed with Rs.4,500/- is not a fact wherefrom eye-brows had to be raised; it be noted that with reference to the number on the currency notes nobody has been able to link the same to the deceased.*
>
> *18. The recoveries of blood-stained clothes at the instance of the appellant have to be viewed in light of various decisions of the Supreme Court where such kind of recoveries have been held to be very weak evidence.*
>
> *19. In the decision reported as AIR 1963 SC 1113 Prabhu vs. State of U.P. recovery of a blood-stained shirt and a dhoti as also an axe on which human blood was detected was held to be*

extremely weak evidence. Similarly, in the decision reported as (1977) 4 SCC 600(1) : AIR 1977 SC 1753 Narsinbhai Haribhai Prajapati etc. vs. Chhatrasinh & Ors. the recovery of a blood-stained shirt and a dhoti as also the weapon of offence a dhariya were held to be weak evidence. In the decision reported as 1993 Supp.(1) SCC 208 = AIR 1994 SC 110 Surjit Singh & Anr. vs. State of Punjab the recovery of a watch stated to be that of deceased and a dagger stained with blood of the same group as that of the deceased were held to be weak evidence. As late as in the decision reported as JT 2008 (1) SC 191 Mani vs. State of Tamil Nadu recoveries of blood stained clothes and weapon of offence stained with blood were held to be weak recoveries.

20. We may only add that the part of the disclosure statement of the accused that the clothes which he was wearing at the time when he committed the crime got stained with blood of the deceased and his getting the clothes recovered attracts Section 27 of the Evidence Act limited to the extent that the accused got recovered blood stained clothes. Independent evidence has to be led to prove that the said clothes were being worn by the accused at the time when the crime was committed and said fact cannot be proved through his disclosure statement."

189. We are constrained to observe that the above case turns on its own peculiar facts in that as observed in the judgment itself two issues arose. Firstly, whether the recoveries inspired confidence and secondly the effect thereof. It was a case of circumstantial evidence in which the star witness was the brother of the deceased, who deposed that the deceased had left the house at a particular time to visit the Appellant and he had to purchase some tickets from the Appellant, who knew the co-accused Abhimanyu. Subsequently, the dead body of the deceased was reported lying at a spot adjoining the railway track. Appellant Raj Kumar @ Raju and co-accused Abhimanyu were apprehended the next morning. The prosecution alleged that the recoveries aforesaid had been effected from the accused persons. It was in these circumstances where there was no

other evidence to connect the accused with the crime that the Court held that independent evidence was required to be led to prove that the blood stained clothes were worn by the accused at the time when the crime was committed and the said fact cannot be proved through his disclosure statement.

190. In contradistinction to the above case, we note that in the present case the recovered clothes have been independently proved to be the clothes worn by the accused at the relevant time through DNA analysis, and recovered articles have been duly identified in test identification proceedings by the complainant which have not been challenged before the learned trial court. It is a settled position of law that the portion of a statement made by accused which relates to a specific discovery in consequence of the information received from the accused may be proved. The Hon'ble Supreme Court in ***State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600*** in this regard held as under:- (SCC, page 699)

> *"119. We have noticed above that the confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. Of course, a confession made in the immediate presence of a Magistrate can be proved against him. So also Section 162 CrPC bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses. Such confessions are excluded for the reason that there is a grave risk of their statements being involuntary and false. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent by allowing proof of information of a specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 (vide Udai Bhan v. State of*

U.P. [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251]).”

191. The Supreme Court further analysed the prerequisites to prove such a portion of the disclosure as under: (SCC, page 700)

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

192. It is pertinent to note that the Supreme Court in the aforesaid judgment observed that discovery under Section 27 of the Evidence Act encompasses different kinds of discoveries, including but not limited to: (a) Knowledge of the place of discovery. (b) Knowledge of the actual deposit of the article and (c) Knowledge about the article itself. It was also observed that in order to become a disclosure under Section 27, pointing out by the accused is not necessary.

193. ***Navjot Sandhu (supra)*** has also re-iterated the test in ***Pulukuri Kottaya v. Emperor AIR 1947 Privy Council 67*** that the discovery of the fact cannot be equated to the object produced or found. It is more than that. The discovery of the fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. It is often described as confirmation by subsequent event.

194. In ***Ismail v. Emperor, AIR 1946 Sind 43***, Davis C. J. went so far as to say that where as a result of information given by the accused another co-accused is found by the police, the statement by the accused to the police as to the whereabouts of the co-accused is admissible under Section 27 as evidence against the accused. To quote:

> *"The finding of Karimdino by the police as a fact as the result of Ismail's confession discovered makes the statement of Ismail as to the whereabouts of Karimdino admissible under S. 27, Evidence Act, as evidence against Ismail and cannot altogether be ignored…… In the result, therefore, the convictions and sentences passed upon Ismail and Karimdino are confirmed and their appeals dismissed."*

195. Applying the aforesaid law to the instant case, Ram Singh's disclosure, which was first in point of time and which mentioned the names of all the accused persons and gave the whereabouts of accused Pawan and Vinay Sharma could well be regarded to be admissible under Section 27 Evidence Act. This has been noted by us keeping in mind Section 10 of the Evidence Act, though we are

conscious of the fact that the case against Ram Singh has since abated.

196. Mr. Singh also relied upon the following judgments in support of his contention that a confession made by a co-accused cannot be the sole basis for conviction; it can only be used in support of other evidence:-

(i) ***Sidharth & Others vs. State of Bihar, 2005 (4) Crimes 135 (SC) = (2005) 12 SCC 545.***

(ii) ***Bijoy Kumar Mohapatra and others vs. The State, (1982) Criminal Law Journal (Orissa) 2162.***

(iii) ***Haricharan Kurmi vs. State of Bihar, AIR 1964 SC 1184 = (1964) 2 Criminal Law Journal 344.***

(iv) ***Madaiah vs. State by Yelander Police, 1992 Criminal Law Journal (Kant) 502.***

(v) ***Lal Khan vs. Emperor, AIR 1948 Lahore 43 = 1949 Criminal Law Journal 977.***

(vi) ***Mottai Thevar Vs. State, AIR 1952 Madras 586 = 1952 Criminal Law Journal 1210 = 1951 MWN (Crl) 274***

197. We are not inclined to dwell upon these judgments for the reason that the ld. Spl. PP concedes there is no confession as such in the present case and the judgments in this respect are, therefore, of no relevance.

198. On the aspect of appreciation of evidence, Mr. Singh relied upon the judgments in ***Dalbir Singh and others vs. State of Punjab, AIR 1987 SC 1328 = (1987) 3 SCC 360; Poolakkal Kunchu vs. State, 1986 (2) Crimes (Kerala) 225; State vs. Musa, 1991 (3)***

Criminal Law Journal (Orissa) 2168; Palanisamy Gounder vs. State, 1993 (3) Crimes (Madras) 107; State of Rajasthan vs. Chathu Ram, (1998) Criminal Law Journal (Rajasthan) 1528; Dudh Nath Pandey vs. State of Uttar Pradesh, AIR 1981 SC 911 = (1981) 2 SCC 166 and ***Shyamraj vs. State, 1995 Criminal Law Journal (Calcutta) 3363.***

199. In ***Dalbir Singh (supra)***, it was held that no hard and fast rule could be laid down on the question of appreciation of evidence. It was observed:

> *"It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case."*

200. In ***Poolakkal Kunchu (supra)***, a Division Bench of the Kerala High Court observed that in appreciating the evidence the Court will have to be definitely guided by human probabilities, even though exceptions could be made in cases where clinching evidence deviating from human probabilities is available. It was laid down:- (Crimes, page 229)

> *"In appreciating the evidence of this sort courts will be jealous in finding guilt bearing in mind the cardinal rule of criminal prudence that even at the risk of many possible victims escaping one innocent man should not be sent to the gallows. A case may create sensation or arouse public concern. A general feeling among the public that in all probability a man might have committed a heinous crime may give room for public dissatisfaction when the case ends in acquittal. But such considerations cannot influence the court in deciding the guilt which could only be on the basis of acceptable legal evidence based on legal testimony. A moral conviction that in all probability the accused might have murdered his wife by third degree methods cannot be allowed to influence the judicial mind of the court. ……"*

201. In ***State vs. Musa (supra)***, it was reiterated that in the absence of evidence, benefit of doubt lies in favour of the appellant in the following manner:- (Crl.L.J., page 169)

> *"9. In a prosecution of an accused for an offence Under Section 376, IPC totality of circumstances are to be considered distinguishing grain from the chaff. If the remaining materials which are grain lead to an inference that accused committed the offence, he is to be convicted. While assessing evidence it is to be remembered that our criminal jurisprudence puts the onus on the prosecution to prove beyond reasonable doubt that accused has committed the offence since several accused persons may be acquitted but one innocent person should not be convicted. Apart from punishment imposed, in our society conviction attaches indelible stigma and a person is looked down upon. Even arrest on account of allegations though not punishment has some retarding effect on the person so far as his place in society. Hence, onerous duty is cast on the Presiding Officer of the court to be scrutinising (sic.) for convicting an accused. More heinous the offence, graver is the stigma."*

202. In the cases of ***Palanisamy Gounder vs. State*** and ***State of Rajasthan vs. Chathu Ram (supra)***, what was laid down was that while appreciating the evidence of a witness, who has partially spoken truth and partially spoken untruth, Courts are to be on guard. In ***Chathu Ram (supra)***, it was further observed:-

> *"It is well established that the maxim "falsus in uno falsus in omnibus" does not apply in our country. The evidence of a witness cannot be discarded on the ground that some portion of the statement of that witness is false. It is the duty of the Court to find out which portion of the statement of the witness is true and which portion of the statement of the witness is false."*

203. In ***Dudh Nath Pandey vs. State of UP (supra)***, the Hon'ble Supreme Court held that if witnesses on whose evidence the life of an accused hangs in the balance, do not choose to reveal the whole truth, the Court, while dealing with the question of sentence, has to step in

interstitially and take into account all reasonable possibilities, having regard to the normal and natural course of human affairs. It was further held that (SCC, Page 173):-

> *"Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses."*

204. In ***Shyamraj vs. State (supra)***, Calcutta High Court relying upon ***Dudh Nath Pandey(supra)*** reiterated that the Court while considering the probability of the defence version ought to overcome their traditional instinctive disbelief in defence witnesses and that the defence witnesses were entitled to equal treatment with those of the prosecution.

205. Insofar as the law with regard to appreciation of evidence is concerned, we are of the view that the rules that a Court would apply while appreciating the evidence of the prosecution as well as of the defence, are well settled and need no adumberation. Certainly, no hard and fast rule can be laid down with regard to the appreciation of evidence and most certainly the Court has a bounden duty to sift the grain from the chaff, the truth from the falsehood, and in doing so the Court must be guided by human probabilities, to make exceptions only in cases where there is clinching evidence deviating from human probabilities. There is also no manner of doubt that the prosecution must prove its case beyond any reasonable doubt and that the witnesses of the defence must be treated at par with the witnesses of the prosecution. Thus far, there is no difficulty, but it is at the same

time undesirable that a defect here and improbability there wash away the evidence of a witness who is otherwise credible.

206. Mr. Singh also sought to urge that the accused are entitled to reap the benefit of doubt and for the aforesaid purpose pressed into service the decisions in ***Surendra Rai vs. State of Bihar, 2013 Criminal Law Journal 1847 (Patna)*** and ***Jayanta Kalai and Others vs. State of Tripura, 2013 Criminal Law Journal 1864 (Guwahati).*** We do not find the aforesaid decisions to be of any avail to the defence. In the first case, there were major contradictions in the evidence of the informant who was the victim of the crime and the Court accordingly came to the conclusion that her evidence could not be relied upon safely without corroboration. In the latter case also, the evidence did not bring home the guilt of four of the five accused, apart from the fact that two out of the three witnesses who had identified the accused in the Test Identification Parade did not identify three of the accused in the dock and the dock identification of the fourth accused was made by the third witness after three years, who also stated that he had visited the jail several times to see the miscreants. Such identification, it was held, could not be made the basis of returning the finding of conviction qua the four accused persons.

207. Mr. A.P. Singh next sought to urge that the plea of alibi taken by the Appellant Akshay Kumar stood fully established through the testimonies of DW-11 to DW-15 and in this context relied upon the judgment of the Supreme Court rendered in ***Ashish Batham vs. State of MP, (2002) 7 SCC 317***. In the said case, the accused took a plea

that on the date of the incident he was not present at the place of the occurrence and had instead gone to another city along with his sister. For the aforesaid purpose, he examined his sister as a defence witness with whom he had travelled and a tenant in the house where he had lived. The prosecution, on the other hand, withheld vital evidence with regard to the taking of finger prints and foot prints, the result of lie detector test to which the Appellant was subjected, the materials to evidence the actual journey of the Appellant with his sister in its possession and the materials gathered and conclusions of the CID investigation in the very case, claiming privilege for its production. The Court below, however, chose to summarily reject the defence of the Appellant faulting him for not examining the railway officials, ignoring the fact that though a police official of the rank of an Inspector had collected the materials relating to his reservation and travel, he was not examined by the prosecution. In such circumstances, the Supreme Court opined that different and contradictory standards of appreciation of evidence had been adopted to the detriment of the accused resulting in grave miscarriage; and that in the absence of any clinching material brought on record by the prosecution to show that the Appellant did not, as a matter of fact, travel as per the reservations made by him along with his sister, it was not permissible for the Courts below merely to disbelieve the defence witnesses for no valid reason and to surmise most unjustifiably that the Appellant was clever enough to prepare the material for the defence of alibi, which, according to them, remained unsubstantiated. It was observed:-

> *"8. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."*

208. The aforesaid dicta was laid down by the Supreme Court in the peculiar facts of the case. We do not see how the aforesaid decision comes to the rescue of the Appellant Akshay Kumar, for, the said decision was rendered by the Supreme Court having regard to the fact that the Courts below had rejected the defence evidence without any justifiable cause and had completely ignored the fact that the prosecution had suppressed material evidence in its possession to the detriment of the accused.

209. We hasten to add that the case of the appellant Akshay Kumar is on an altogether different footing. He, no doubt, has taken the plea that he was not in Delhi at the time of the commission of the offence but was in his native village at Karmalangh (Aurangabad), but his case is that he travelled on the reserved ticket of his brother Abhay Kumar Singh with his sister-in-law (wife of Abhay Kumar Singh), whereas in the case of ***Ashish Batham (supra),*** relied upon by Mr.

Singh, the Appellant had travelled on a ticket reserved in his own name with his sister. Significantly also, there is no credible evidence to establish that Abhay Kumar Singh did not travel on the ticket reserved in his name or the circumstances in which he was prevented from doing so.

210. We also note that it was incumbent upon the defence to have proved the plea of alibi with absolute certainty so as to exclude the possibility of the presence of the accused at the place of occurrence. Time and again, it has been reiterated by the Courts that strict proof is required for establishing the plea of alibi. It is also well settled that if the plea of alibi taken by the accused is rejected as being without any substance, the Court is entitled to draw adverse inference against the accused.

211. Significantly also, with regard to the plea of alibi of the Appellant Vinay Sharma learned defence counsel was not able to pin point the church which organized the musical programme. All that was urged by counsel was that a Small Scale Christian Unit had organized the programme. Not a single member of the said Small Scale Christian Unit was examined to state that he belonged to the same Small Scale Christian Unit which had organized the programme and in fact the record does not show who were the organizers of the programme. The defence instead has chosen to examine the close relatives and friends of the accused persons to establish the plea of alibi. It is settled law that the evidence of related and interested witnesses has to be scrutinized with care and caution and on thus scrutinizing the same we find material contradictions in the evidence

of the defence witnesses who profess to have attended the musical programme in which the Appellant Vinay Sharma claims he played the *'tabla'*.

212. In ***Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283***, the Supreme Court described the plea of alibi as a rule of evidence and lucidly discussed the law with regard to the said plea as under:- **(SCC, Page 293)**

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

> *accused would, no doubt, be entitled to the benefit of that reasonable doubt.* ***For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath Pandey v. State of U.P.*** *[(1981) 2 SCC 166 : 1981 SCC (Cri) 379] ;* ***State of Maharashtra v. Narsingrao Gangaram Pimple*** *[(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]."*

213. The Supreme Court in the case of ***Jitender Kumar Vs. State of Haryana, (2012) 6 SCC 204*** while rejecting the plea of alibi taken by the Appellants as being without any substance, including the documentary evidence produced by them to substantiate the said plea, held that where the testimonies of natural witnesses to the occurrence (husband and brother of the deceased) were found to be trustworthy, the plea of alibi faded into insignificance. In para 71, it was held that:- (SCC, Page 226)

> *"**71.** Once PW 10 and PW 11 are believed and their statements are found to be trustworthy, as rightly dealt with by the courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the* ***appellants*** *and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi.* ***The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives.*** *(Ref. Sk. Sattar v. State of Maharashtra [(2010) 8 SCC 430 : (2010) 3 SCC (Cri) 906] .)"*

214. In ***Sahabuddin v. State of Assam, (2012) 12 SCALE 241***, the plea of alibi taken by the Appellants and sought to be proved through defence witnesses was rejected by the trial court and the High Court as nothing but a falsehood. The Supreme Court on reconsideration of the evidence held that where the Court disbelieves the plea of alibi,

the Court is entitled to draw adverse inference against the accused and this fact would support the case of the prosecution. To put it differently, it would be an additional circumstance in favour of the prosecution and against the accused. It was observed:- (SCALE, page 250)

> ***"25. Once, the Court disbelieves the plea of alibi and the accused does not give any explanation in his statement under Section 313 CrPC, the Court is entitled to draw adverse inference against the accused."***

215. Even in cases of circumstantial evidence it has been held that a false alibi set up by the accused would be a link in the chain of circumstances on which a conviction could be based. Thus, in the case of ***Babudas Vs. State of M.P. (2003) 9 SCC 86***, the Court held**:** (SCC, Page 91)

> *"**4. ……**……. We agree with the learned counsel for the respondent State that in a case of circumstantial evidence, a false alibi set up by the accused would be a link in the chain of circumstances as held by this Court in the case of Mani Kumar Thapa but then it cannot be the sole link or the sole circumstance based on which a conviction could be passed."*

216. Tested on the anvil of the aforesaid law laid down by the Supreme Court, we do not find any substance in the plea of alibi sought to be pressed into service by accused Vinay and accused Pawan @ Kalu. We are also not impressed with the video clipping which forms the mainstay of this defence as we are of the considered opinion that the video clip in the instant case does not satisfy the conditions prescribed for admissibility of video recorded/tape recorded events. The law in this regard is too well settled for us to dilate at any great length on it. We would,

however, be failing in our duty if we do not note the conditions stipulated by the Supreme Court for the admissibility of electronic evidence. A three Judge Bench of the Supreme Court in ***Ram Singh and Others vs. Col. Ram Singh, 1985 (Suppl) Supreme Court Cases 611*** dealing with this aspect held as under:- (SCC, page 623)

> ***"32.*** *Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows:*
>
> *(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.*
> *(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence — direct or circumstantial.*
> *(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.*
> *(4) The statement must be relevant according to the rules of Evidence Act.*
> *(5) The recorded cassette must be carefully sealed and kept in safe or official custody.*
> *(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."*
>
> ***{See: Yusufalli Esmail Nagree Vs. State of Maharashtra, (1967) 3 SCR 720; N.Sri Rama Reddy Vs. V.V. Giri, (1970) 2 SCC 340; R.M. Malkani Vs. State of Maharashtra, (1973) 1 SCC 471; 1973 SCC (Cri) 399; Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra, (1976) 2 SCC 17; R. Vs. Maqsud Ali, (1965) 2 All ER 464; R. Vs. Robson, (1972) 2 All ER 699, relied on}***

217. In ***Ram Singh's case (supra)***, the Supreme Court further noted the American Jurisprudence on the subject as under:-

"35. In American Jurisprudence 2d (Vol. 29) the learned Author on a conspectus of the authorities referred to in the foot-note in regard to the admissibility of tape-recorded statements at p. 494 observes thus:

> *The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:*
>
> *(1) a showing that the recording device was capable of taking testimony;*
>
> *(2) a showing that the operator of the device was competent;*
>
> *(3) establishment of the authenticity and correctness of the recording;*
>
> *(4) a showing that changes, additions, or deletions have not been made;*
>
> *(5) a showing of the manner of the preservation of the recording;*
>
> *(6) identification of the speakers; and*
>
> *(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.*
>
> *... **However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said.**"*
>
> *(emphasis supplied)*

218. In ***Tukaram S. Dighole Vs. Manikrao Shivaji Kokate, (2010) 4 SCC 329,*** the Supreme Court discussed the admissibility of electronic evidence/tape records referring to earlier decisions on the subject as follows:- **(SCC, Page 338)**

> ***"24.*** *In Yusufalli Esmail Nagree v. State of Maharashtra [AIR 1968 SC 147 : 1968 Cri LJ 103 : (1967) 3 SCR 720] this Court observed that since the tape-records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness. It is necessary that such evidence must be received with caution. The court must be satisfied,*

beyond reasonable doubt that the record has not been tampered with.

25. *In R. v. Maqsud Ali [(1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA)] it was said (QB p. 701 D-E) that it would be*

> *"wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded [are] properly identified…. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case."*

26. *In Ziyauddin Burhanuddin Bukhari [(1976) 2 SCC 17], relying on R. v. Maqsud Ali [(1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA)], a Bench of three Judges of this Court held that the tape-records of speeches were admissible in evidence on satisfying the following conditions: (SCC p. 26, para 19)*

> *"(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.*
>
> *(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.*
>
> *(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."*

Similar conditions for admissibility of a tape-recorded statement were reiterated inRam Singh v. Col. Ram Singh [1985 Supp SCC 611] and recently in R.K. Anand v.Delhi High Court [(2009) 8 SCC 106 : (2010) 2 SCC (Cri) 563] .

27. *Tested on the touchstone of the tests and safeguards enumerated above, we are of the opinion that in the instant case the appellant has miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent. Admittedly, the appellant did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the respondent or his agent. On a careful consideration of the evidence and circumstances of the case, we are convinced that*

the appellant has failed to prove his case that the respondent was guilty of indulging in corrupt practices."

219. We have taken care to note the aforesaid conditions laid down by the Supreme Court for the reason that there is no evidence on record suggestive of the fact that the conditions for the admissibility of the video clip as laid down by the Hon'ble Supreme Court in the case of ***Ram Singh (supra)*** were proved by the defence. This being so, the necessary corollary is that the video clip must be held to be inadmissible in evidence. The inadmissibility of this exhibit notwithstanding, we took pains to view the video clip produced before us and found the same to be inaudible, indistinct and visually unclear.

220. Unfortunately, therefore, the plea of alibi taken by accused Vinay Sharma in his statement under Section 313 Cr.P.C. and sought to be corroborated by leading defence evidence cannot bear scrutiny. As delineated above, the prosecution has proved the call detail records Ex.PW-23/B of the mobile phone of accused Vinay Sharma, having SIM No.8285947545, which was admittedly in the name of his mother, Smt. Champa Devi, but in the possession of accused Vinay Sharma in the evening of 16.12.2012. Allegedly, this phone was snatched by one Vipin at the music party and returned to Vinay Sharma in the morning of 17.12.2012. The call detail records (Ex.PW-23/B) show otherwise. As per the call detail records, the accused had been making calls to one particular number *viz.*, 8601274533 from 15.12.2012 till 20:19:37 A.M. on 17.12.2012. The authenticity of the CDR is proved under Section 65-B of the Indian

Evidence Act, 1872. The question which arises is if the accused was not having a SIM card in his phone No. 8285947545, then how could he call from this SIM on 15.12.2012, then on 16.12.2012 and in the morning of 17.12.2012 till about 8:23:42 PM.

221. Then again, as regards the location of the accused on the fateful day, as noted above, his mobile phone registered a call for 58 seconds at 9:55:21 and the location of the said call was found near IGI Airport, i.e., road covered by the Route Map Ex.PW-80/H, where the bus Ex.P-1 was moving on that night. This altogether belies the story of the accused that his mobile phone had been snatched from him at the party by one Vipin at 9:30 PM. What sounds the death knell of the story concocted by the accused that he had no memory card and SIM card in his mobile phone, is the video clip produced in evidence by him. If, as per him, he had no memory card in his mobile phone, then the question of making a video clip from his mobile phone by his friend DW-10 Shri Ram Babu cannot arise. Of equal significance is the fact that the personal search memo Ex.PW-60/D of accused Vinay Sharma does not show that the said mobile phone, when seized, had any memory card in it. What befuddles the mind is how this memory card was produced later on by the accused, i.e after the accused had taken his mobile phone on superdari from the malkhana. The learned trial Judge in this context has rightly noted that this rather shows that the memory card was inserted in the said phone only after the phone was taken on superdari. Finally, it appears to us to be a strange coincidence that both accused Vinay and accused Pawan merrily went to a party where one lost his mobile and the other's mobile was

snatched by a friend. Ironically, that friend (Vipin) has not appeared in the witness box to testify to the fact that it was he who had snatched the mobile of Vinay Sharma on the fateful night and to save him from the clutches of law. All this leads us to presume that the mobile phones of both the aforesaid accused persons were lost/snatched to suit their convenience and to save them from implication in the present case.

222. As regards the veracity of the three dying declarations made by the prosecutrix, Mr. A.P. Singh contended as follows:-

(i) The prosecutrix was medically unfit at the time of recording of all her three dying declarations, which are nothing but manipulated statements to serve political exigencies created by the incident. This is evident from the fact that the first dying declaration viz., the MLC Ex. PW 49/B does not bear the signature of the prosecutrix and contains only her thumb impression.

(ii) Alternatively, the brief history given by the prosecutrix at the time of her medical examination is the only worthwhile statement made by the prosecutrix. In the later stages, her statements became tutored either by the family members as all the family members and relatives of the complainant were professional criminal lawyers or by the police officials. So, her subsequent dying declarations (Ex.PW-27/A and Ex.PW-30/D-1) be looked at with suspicion as the same may be the result of tutoring.

(iii) At the time of recording of the brief history of the assault in the MLC, the prosecutrix was alert and her vitals were stable and she could speak the truth, but after medication, she was under the effect of medicines and till then her near and dear ones and the police officials had tutored her so that a suitable prosecution story could be worked out against the accused persons.

(iv) The prosecutrix had failed to disclose the names of any of the accused persons in the brief history given by her to the doctor in MLC Ex.PW-49/A and also failed to give other details of the incident. As a matter of fact, in her statement given to PW-49 Dr. Rashmi Ahuja, the prosecutrix stated there were around 4-5 men in the bus, that she remembers intercourse two times and rectal penetration also. From the aforesaid statement of the prosecutrix to PW-49 Dr. Rashmi Ahuja, it is clear that there were only two men who raped the prosecutrix though there were 4-5 men in the bus when the couple boarded the bus.

(v) The second dying declaration of the prosecutrix Ex. PW-27/A was not authentic as it was recorded after 9 days of the incident. [It may be noted that the second dying declaration was recorded on 21.12.2012, i.e., after 5 days whereas it was Ex.PW-30/D-1 which was recorded on 25.12.2012, i.e., after 9 days].

(vi) The dying declaration of the prosecutrix recorded by PW-27 Smt. Usha Chaturvedi, SDM, i.e., Ex.PW-27/A cannot be

relied upon. The prosecutrix throughout her treatment was on ventilation. When this query was put to PW-27, she simply replied that the prosecutrix was on oxygen. This was clearly indicative of the fact that the prosecutrix was having breathing problems and in such a situation could not have given a lengthy statement running into four pages wherein she narrated each and every minor detail.

(vii) PW-27 Smt. Usha Chaturvedi, SDM at the time of recording of the dying declaration had not asked the prosecutrix about her fitness and whether she was giving her statement willingly. PW-27 deposed before the Court that the prosecutrix was comfortable, happy and willing to record her statement. It is inconceivable that a patient who is on ventilator due to breathing problems and in pain due to multiple organ failure, can be comfortable and happy. In fact, PW-27 in the course of her cross-examination admitted that she had not stated at the start of the proceedings recorded by her (Ex.PW-27/A) that she had put questions regarding voluntariness of the prosecutrix to give her statement.

(viii) The second dying declaration was recorded at the instance of the Delhi Police and a complaint in this context had been made by the SDM, Smt. Usha Chaturvedi to the Chief Minister, Delhi, which had been forwarded by the Chief Minister to the Home Minister. This clearly indicates that the Delhi Police had forced PW-27 to record the statement of the prosecutrix and submit her report (Ex.PW-27/A) in the

manner Delhi Police wanted and PW-27 did the same, after which she went on leave.

(ix) The dying declaration Ex.PW-27/A is a worthless document. No such dying declaration was recorded on 21.12.2012. In fact, the so-called dying declaration recorded by PW-27 was already recorded on paper and the date of the previous day was mentioned when the document was prepared, but later on the said date was corrected by someone and mentioned as 21.12.2012 and PW-27 simply called it *"a human error"*.

(x) The statement recorded on 21.12.2012 was recorded in the presence of PW-1 (the complainant) and in fact was the statement given by PW-1 and not by the prosecutrix because the prosecutrix never regained consciousness after her admission in hospital.

(xi) The learned trial Judge failed to appreciate that the prosecutrix was continuously on morphine ever since the prosecutrix was admitted in the hospital and her treatment was started, since the injuries mentioned in the MLC and the postmortem report can generate severe pain, and without the administration of morphine a patient cannot bear such pain. PW-52 Dr. P.K. Verma cannot be believed when he states that injection morphine was given at 6:00 PM on 20.12.2012 and its effect would have lasted only for 3 to 4 hours. The prosecutrix being a para-medical student, PW-52 Dr. P.K. Verma was at pains to hide the fact that she was not fit for making the statement.

(xii) It defies logic that when the dying declaration of the prosecutrix had been recorded by the SDM on 21.12.2012, where was the necessity to hurriedly record another dying declaration on 25.12.2012.

(xiii) The alleged third dying declaration recorded on 25.12.2012 ought to have been videographed.

(xiv) There is nothing on record to suggest that the learned Metropolitan Magistrate (PW-30) had directed the Investigating Officer of the case, who had been called for identification of the prosecutrix, to vacate the room and close the door of the ICU.

(xv) At the time of the recording of her statement Ex.PW-30/D-1, which was recorded by PW-30 Shri Pawan Kumar on 25.12.2012, the prosecutrix was unfit for statement both physically and mentally. The condition of the prosecutrix was extremely serious on 25.12.2012 as is evident from document Ex.DW-64/DA wherein it is stated:-

> *"Considering the further deterioration in the patient's condition on 25th December, 2012 night due to cardiac arrest, which was promptly resuscitated, a team of doctors, which included, Dr. Sandeep Bansal, HOD, Cardiology and Dr. S. Raghavan, HOD Neurology opined that patient be shifted abroad for further management."*

Further, the document Exhibit PW-30/B shows that at 12:35 PM on the relevant day, i.e., 25.12.2012, Dr. P.K. Verma opined that patient had endotracheal tube in place (that

is, in larynx and trachea) and was on ventilater and hence could not speak. At 12:40 PM on the same day, there is an endorsement made on the said document (Ex.PW-30/B) by PW-28 Dr. Rajesh Rastogi to the effect that the patient is conscious, cooperative, meaningfully communicative, oriented, responding through non-verbal gestures, she is fit to give statement. Learned defence counsel vociferously contended that it is inconceivable that the prosecutrix who was on life support system at 12:35 P.M., within five minutes, i.e., at 12:40 PM was opined to be conscious, cooperative and fit to give statement. Such change in the medical condition within a short span of five minutes only was to say the least unprecedented in medical history. The question before the Court is whether it is possible for a patient put on ventilation to be conscious, oriented, meaningfully communicative through verbal gestures, and how did PW-28 Dr. Rajesh Rastogi put questions to the prosecutrix to know that she is fit to answer through verbal gestures correctly? The fitness given by PW-28 Dr. Rajesh Rastogi is, therefore, not worthy of credence. Hence, the dying declaration recorded by PW-30 Sh. Pawan Kumar, learned Metropolitan Magistrate is of no value and is inadmissible in evidence (Ex.PW-30/D-1).

(xvi) None of the statements given by the prosecutrix can be treated as dying declarations of the prosecutrix as she expired on 29.12.2012 and before her death, no statement

of the prosecutrix was recorded at Mount Elizabeth Hospital, Singapore.

(xvii) None of the statements given by the prosecutrix can be treated as dying declarations since the prosecutrix was never administered oath and hence her dying declarations are not admissible in evidence. Even otherwise, the said statements/ dying declarations are not in the form prescribed by the Delhi High Court Rules as set out in Chapter XIII, which envisage recording of the dying declaration by the Judicial Magistrate and that too such recording is required to be done at once.

(xviii) In any event, the third dying declaration made by gestures cannot be relied upon as a dying declaration by signs, gestures or nods is to be recorded by an expert. In the instant case, the dying declaration was recorded by the learned Metropolitan Magistrate, who had no certificate of training to record such type of declaration by gestures, signs or nods.

223. It is proposed to deal with the aforesaid contentions pointwise:-

(i) With regard to the contention of the defence that the first dying declaration, *viz.*, MLC Ex.PW-49/B does not bear the signature of the prosecutrix and contains only her thumb impression, it is apposite that PW-49 Dr. Rashmi Ahuja in her cross-examination when questioned in this regard, gave a cogent explanation for the same and we see no justifiable ground to discard the said explanation, which appears to us to

be worthy of credence. In her cross-examination, PW-49 Dr. Rashmi Ahuja states:-

> ***"When I had first seen the prosecutrix , she was cold and clammy i.e. whitish (due to vasoconstriction). I gave her IV line and warm saline…….Since the prosecutrix was shivering and was cold so instead of taking her signature we asked the prosecutrix to give her thumb impression for consent."***

PW-49 Dr. Rashmi Ahuja further proved Ex.PW-49/E, which is a statement given by her on 02.01.2013, on an application filed by the police seeking clarification whether the facts stated in the MLC were stated by the victim herself. The doctor clearly states in her response, at portion 'A' to 'A' of Ex.PW-49/E, that the assault history and related events were told by the victim herself. We see no reason not to give credence to the statement of PW-49 Dr.Rashmi Ahuja who maintained in her response that it was the prosecutrix who had given answers recorded in the Casualty Sheet (Ex.PW-49/A). As stated hereinabove, this document has been specifically referred to and corroborated by the evidence of the SHO, Inspector Anil Sharma (PW-78).

(ii) and (iii) Contentions (ii) and (iii) are being dealt with together for the reason that both these contentions seek to cast a cloud of suspicion on dying declarations Ex.PW-27/A and Ex.PW-30/D-1 by tainting them as *"tutored"*. There is however nothing forthcoming on record to suggest that the prosecutrix was tutored as is sought to be made out. It is even

otherwise hard to believe that the near and dear ones of the prosecutrix and the police officials had tutored her so that the accused persons could be inculpated and the real culprits let loose.

(iv) As regards contention No.(iv), the fact that the prosecutrix did not name her assailants in the MLC nor could immediately recall how many times she was raped and by how many men and on a rough estimate stated that they were 4 or 5 in number appears to us to be of no significance for the reason that she was under great trauma and suffering from vasoconstriction on account of the loss of blood. A bare look at the MLC Ex.PW-49/B bespeaks her perilous state. Her extremely critical condition has also been affirmed by PW-49 Dr. Rashmi Ahuja in the MLC as well as in the witness box. She states that the prosecutrix on account of the loss of blood was shivering and was cold and clammy, unable even to affix her signatures on the MLC. She had suffered a perineal tear, a tag of vagina 6 cms in length was hanging outside the introitus, there was profuse bleeding from vagina and in the posterior vaginal wall there was a tear of about 7 to 8 cms, rectal tear of about 4 to 5 cms communicating with the vaginal tear was also visible on local examination. The patient was referred to the OT for complete perineal repair. It also emerges from the record that during the same night i.e. in the night intervening 16th and 17th December, 2012 jejunostomy was performed by PW-50 Dr. Raj Kumar Chejara (Surgeon).

In such a condition, to expect the prosecutrix to give details of the incident defies logic and appears to us to be highly irrational.

(v) As regards the contention of the defence that the second dying declaration of the prosecutrix Ex.PW-27/A was not authentic as it was recorded after 5 days of the incident (wrongly mentioned as 9 days), the medical record of the prosecutrix shows that the prosecutrix remained unfit for recording of her statement on 17th December, 18th December, 19th December and 20th December, 2012. It was only on 21st December, 2012 at about 6 p.m. that she was declared fit for recording of her statement. In her said statement recorded by the SDM, she has given the names of her six assailants and has specified the exact role played by each of them and the barbaric manner in which they defiled her body.

(vi) As regards the fitness of the prosecutrix at the time of the recording of her dying declaration Ex.PW-27/A, the sequence of events leading upto the recording of the statement of the prosecutrix on 21.12.2012 is as follows:-

On 21.12.2012, the I.O. SI Pratibha Sharma moved an application (Ex.PW-27/DB) before the Medical Superintendent, Safdarjung Hospital **PW-64 Dr. B.D. Athani**, seeking recording of statement of the victim by the Sub-Divisional Magistrate. PW-64 Dr. B.D. Athani, Medical Superintendent, Safdarjung Hospital marked the said

application to Dr. P.K. Verma, Incharge, ICU, for doing the needful and his endorsement to this effect appears at Point 'C' on Ex.PW-27/DB. PW-52 Dr. P.K. Verma, who received the application of the Investigating Officer Ex.PW-27/DB with the endorsement of PW-64 Dr. B.D. Athani declared the prosecutrix fit to give her statement. Dr. P.K. Verma (PW-52) in his evidence states as follows:

> *"…The said application was addressed to the Medical Superintendent, S.J. Hospital. It was marked to me by the M.S. S.J. Hospital for doing the needful. Accordingly,* ***I examined the prosecutrix and found her to be fit, conscious, oriented and meaningfully communicative for making statement. Accordingly, I made an endorsement regarding her fitness at point "A" on the application Ex. PW-27/D-B.*** *It bears my signature at point B."*

Nothing has emerged from the cross-examination of PW-52 Dr. P.K. Verma to discredit his aforesaid statement in any manner. He categorically denied the suggestion put to him that the prosecutrix was throughout unfit for recording of her statement by stating:-

> *"It is 100% wrong to suggest that throughout her treatment from 16.12.2012, the prosecutrix was under drowsiness, having difficulty in breathing or was having slow or laboured breathing, till the time she was taken to Singapore."*

On a specific query put to PW-52 Dr. P.K. Verma as to whether the prosecutrix was on life support system on 21.12.2012 when applicatoin Ex.PW-27/DB for recording her statement was placed before him, he gave the following reply:-

> *"The endo-tracheal tube was removed at about 1:30 PM to 2 PM, as she did not require it further at that time. She was only getting oxygen through mask. No ventilator was being used at that time. We were giving I.V. fluids, medication and parentral nutrition to the prosecutrix through the intravenous canula."*

From the aforesaid evidence on record, it clearly emerges that the prosecutrix who was on oxygen was in a position to make the statement Ex.PW-27/A.

(vii) With regard to contention No.(vii), there is on record the evidence of PW-27 Smt. Usha Chaturvedi, SDM to the effect that before recording the dying declaration of the prosecutrix, she had ascertained her voluntariness to make the statement and also the fact that she was medically fit. She thereafter recorded her statement Ex.PW-27/A. Her deposition to this effect is as under:-

> ***"On reaching the hospital I inquired from ACP Vasant Vihar as to if the patient has been fit for statement or not. He told me that the patient has been declared fit for statement.***
>
> ***After being satisfied, I recorded the statement of prosecutrix****. Same running into 4 page in 2 sheets are Ex. PW-27/A which bears my signature at points A. The prosecutrix appended her signature on all the pages in my presence and on the last page she also wrote the date and time. I identify her signature at points B on statement Ex. PW-27/A."*

In the course of her cross-examination, she further stated as under:-

> *"It is wrong to suggest that the prosecutrix was on ventilator or was under extreme pain and she was not able to speak at that time. It is wrong to suggest*

that the prosecutrix was not capable of breathing properly. VOL: When she was speaking with me, it can not be said that she was not able to breathe. While talking she used to remove her oxygen mask at times.

……..

It is wrong to suggest that the prosecutrix was incapable of giving long answers to my questions or that I made additions in her answers at the instance of police.

It is true that I had not stated in the start of my proceedings Ex.PW27/A that I had put questions regarding voluntariness or pressure upon the prosecutrix, if any, but after recording the statement I had put a note at the end wherein she had stated that she is giving the statement without any pressure and in complete senses. It is wrong to suggest that she had not stated to me that she is giving her statement without any pressure or in complete senses as mentioned in ExPW27/A.

……..

It is wrong to suggest that prosecutrix was in severe pain, vomiting, coughing, having breathing problem or was on ventilator at that time.

……

The prosecutrix before signing had read her statement Ex. PW-27/A herself. Even I read over the said statement to her and then only she signed after the bed was raised from her back portion."

We may usefully note that a similar contention raised by the defence in the case of ***Goverdhan Raoji Ghyare Vs. State of Maharashtra 1993 Supp (4) SCC 316***, was rejected outright by the Supreme Court. In the said case the dying declaration was recorded by the Taluka Magistrate after obtaining a certificate from the doctor that the deceased was in a fit state of mind to make the statement. A distinction was, however, sought to be made out by the learned Sessions Judge dealing with the said case that *'fit state of mind'* and *'conscious state of mind'* were not the same thing. The

Supreme Court, while declaring that such a distinction as was sought to be made out by the learned Sessions Court was too hyper-technical in the facts and circumstances of the case, observed:-

> *"The learned Magistrate put the questions to the deceased and then recorded the statement. It will be wholly unjustified to hold that simply because the Magistrate did not put a direct question to the deceased as to whether she was in a fit state of mind to make the statement, the dying declaration was required to be discarded."*

(viii) As regards contention No.(viii) that the statement recorded by the SDM had been recorded at the behest of the Delhi Police and in the manner suggested by the Delhi Police, containing the facts to suit them, and that the SDM (PW-27 Usha Chaturvedi) had filed a complaint against the Delhi Police because of this reason, this is strongly refuted by the SDM (PW-27) herself. She categorically stated in her cross-examination that the Delhi Police did not ever ask her to record the statement of the prosecutrix in a particular manner, and that she had recorded the statement of the prosecutrix on her own after asking questions from her and by noting down her answers. She volunteered to state that no police officer or the Investigating Officer was with her at the time of the recording of the statement of the prosecutrix. Rather, she had bolted the door of the cabin within the ICU at the time of the recording of the statement.

The further contention of the defence that the report filed by the SDM against the Delhi Police in the aforesaid context

was sent by the Chief Minister of Delhi to the Home Minister was also strongly refuted by PW-27 Usha Chaturvedi. She clarified in her cross-examination that the report which she had made was *qua* some issues raised in relation to coordination/administration problem and she had submitted her said report to her seniors. She had not filed any report against the Delhi Police to the Chief Minister of Delhi. As regards the voluntary nature of the statement of the prosecutrix, she stated:-

> *"After recording the statement I had put a note at the end wherein she had stated that she is giving the statement without any pressure and in complete senses. It is wrong to suggest that she had not stated to me that she is giving her statement without any pressure or in complete senses as mentioned in ExPW27/A."*

(ix) As regards the contention of the defence that Ex.PW-27/A was a worthless document as no such dying declaration was recorded on 21.12.2012 and the so-called dying declaration recorded by PW-27 was in fact recorded on the previous day as evidenced from the overwriting of the date on the said document, we see no reason to disbelieve the statement made by PW-27 (the SDM) that the statement was recorded on 21.12.2012 and that the overwriting on the date was a human error. We reproduce hereunder the relevant part of her cross-examination:-

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

(x) In the context of contention No.(x), suffice it to note that as regards the presence of PW-1 at the time of recording of her statement, PW-27 Smt. Usha Chaturvedi, the SDM categorically denied the suggestion put to her that the complainant was tutoring the prosecutrix or that she had recorded the statement of the prosecutrix at the instance of the complainant PW-1. She in fact stated that she had not met the complainant at all. We see no reason to disbelieve the SDM nor any reason could be pointed out by the defence.

(xi) Adverting to the contention No.(xi) that the prosecutrix was being administered injection morphine at the time of the recording of her second dying declaration and this rendered her unfit for making any statement, PW-52 Dr. P.K. Verma has more than satisfactorily explained this aspect of the matter in his cross-examination. He specifically states that injection morphine was not given to the patient on 21.12.2012, i.e. on the day on which her statement was recorded. He further states that the dose of morphine was last given at 6 P.M. on 20.12.2012 (i.e the previous day) and explains that the effect of morphine lasts only for 3-4 hours. The ICU recovery chart for the aforesaid dates (Ex.PW-52/D-A) which affirms this statement made by the doctor, was relied upon by him in this regard. The following extract from the cross-examination of PW-52 Dr. P.K. Verma is relevant in the context of the

prosecutrix not being under the influence of morphine at the time of recording of her statement:-

> *"The Inj. morphine was given SOS on 19-12-2012 and that on 20-12-2012 the dose of Inj Morphine was reduced from 3 mg to 1 mg every six hourly and that only two doses i.e at 10 am and 4 PM were given. I had put cross on Injection Morphine 3 mg to re-write it as 0.5 mg but looking at the condition I even put a cross on 0.5 mg and increased the dose to 1 mg, as shown in the ICU Recovery Chart dated 20-12-2012. I may say that the ICU Recovery Chart is prepared at 6 AM on the same day by the Staff Nurse on the night duty taking into consideration the medication given to the patient a day before. Then the doctor who comes on duty, checks the patient and if he intends to decrease or increase any medication he may do so by changing the said medication by cutting in the chart prepared at 6 AM by the staff nurse and that is why though the dosage of Inj Morphine was shown to be 3 mg by the staff nurse but when I examined the patient I reduced it firstly to 0.5 mg but then decided to give 1 mg, as stated in the chart."*

In his subsequent cross-examination, PW-52 Dr. P.K. Verma on a specific question put to him in this regard stated that he had most certainly examined the patient **after** the receipt of the application Ex.PW-27/D-B and made endorsement on the said application regarding her fitness. He further stated that he had examined the patient for 10-15 minutes before giving his endorsement regarding her fitness. An analysis of Dr. P.K. Verma's statement thus demolishes the theory of the defence that on account of the administration of injection morphine the prosecutrix was not in a position to make statement. In fact, the doctor has clearly proved that the last dose of morphine was administered at 6.00 P.M. on the previous day and as per the record the statement before the

SDM (PW-27) was recorded after 7.00 P.M. on the following day, i.e., on 21.12.2012. An analysis of Dr. P.K. Verma's statement further shows that the patient was fit to record her statement before the learned SDM. The doctor is also categorical in this respect when he states as under:-

> *"It is 100% wrong to suggest that throughout her treatment from 16.12.2012, the prosecutrix was under drowsiness, having difficulty in breathing or having slow or laboured breathing, till the time she was taken to Singapore."*

It would be apposite at this juncture to note that the defence went to the extent of suggesting to the witness (PW-52 Dr. P.K. Verma) that SJ Hospital did not have the licence to give morphine injections to the patient. This too was rebutted by PW-52 in his evidence dated 26.04.2013 by submitting that he had brought the licence for administration of morphine injections as given to the patients in Safdarjung Hospital, and he produced a copy of the same before the learned Trial Court.

(xii) In the context of contention No.(xii) that there was no necessity to record another dying declaration on 25.12.2012, suffice it to note that the statement recorded on 25.12.2012 was the statement of the prosecutrix under Section 164 Cr.P.C., which was recorded by the learned Metropolitan Magistrate under the mandate of law. In any event, there is no material variation or contradiction

between the statement recorded by the SDM and the Metropolitan Magistrate.

(xiii) As regards the contention of the defence that the third dying declaration recorded on 25.12.2012 ought to have been videographed, suffice it to note that the mere fact that the recording of the statement by the Metropolitan Magistrate was not videographed cannot be interpreted to mean that the said statement was not an authentic one. In any event, the provision for videography was inserted by the Criminal Law (Amendment) Act, 2013 (Act No.13 of 2013) with effect from 03.02.2013 in the proviso to the newly added Sub-Section 5(A) of Section 164 and hithertobefore, i.e., on 21.12.2012 when the statement of the prosecutrix was recorded the provision for videography was not mandated by the legislature.

(xiv) With regard to the contention of the defence that there is nothing on record to suggest that the learned Metropolitan Magistrate had directed the Investigating Officer of the case to vacate the room at the time of the recording of the statement of the prosecutrix, we find from the record that PW-30 Shri Pawan Kumar, Metropolitan Magistrate, in his deposition, has made a categorical assertion that after making preliminary enquiries, which are at point Q to Q1 in Ex.PW-30/C, he directed the I.O. to leave the ICU. He and the prosecutrix remained alone in the ICU though due to certain precautions he allowed Dr. Ranju Gandhi

(Anaesthetist) to remain so as to monitor the medical equipment. He further deposed that his noting in this regard is at point R to R1 in Ex.PW-30/C.

(xv) With regard to contention (xv) which relate to the medical fitness of the prosecutrix at the time of the recording of her statement Ex.PW-30/D-1, though this contention appears to us to be at first blush attractive, on closer scrutiny of the evidence on record we are constrained to observe that beguilingly simple though this argument is it lacks substance. PW-52 Dr. P.K. Verma has given a complete answer to the aforesaid argument by the following cogent and lucid explanation given by him on this aspect in his examination-in-chief:

> *"I had examined the prosecutrix at 12:35 PM on 25-12-2012. Thereafter, the prosecutrix was also examined by Dr. Rajesh Rastogi at 12:40 P.M. who had also concurred my opinion. Both Dr Rastogi, myself and other members of the team examined the prosecutrix together. Although our opinions were written at different times."*

The following extract from the cross-examination of PW-52 Dr. P.K. Verma is also apposite:-

> *"It is correct that in Ex. PW-28/A, I had not endorsed that the prosecutrix was conscious, cooperative, meaningfully communicative, oriented and (fit) to make statement through non verbal gesture.* ***As a team we all doctors examined the prosecutrix together and then thereafter we made our endorsement(s) on the application Ex. PW-30/B at different times i.e. firstly I wrote my endorsement and then Dr. Rastogi had given his endorsement."***

On a specific query put to him:

> *"Q : How the prosecutrix became fit to give statement at 12.40PM when she was not fit to make statement at 12.35PM ?"*

He answered:

> ***"A. : I had never said that she was unfit to give statement at 12.35P.M., rather I had said that he was on ventilator and hence cannot speak. In fact we all doctors examined in the same time, though the endorsement was made by us one after the another.***
>
> ***The Ld. MM had inquired from me, if the prosecutrix was fit enough to make statement, I replied that we are examining the prosecutrix and would let him know. Thereafter we made the necessary endorsement on application Ex. PW-30/B."***

The aforesaid explanation given by PW-52 Dr. P.K. Verma who was at the relevant time the incharge of the ICU in Safdarjung Hospital shows that the contention of the defence counsel, which at first appeared invincible, is wholly specious in nature. Further, it is evident from document Ex.PW-64/DA that it was in the intervening night of 25th and 26th December, 2012 that the condition of the prosecutrix became extremely critical.

(xvi) With regard to contention No.(xvi), suffice it to state that no statement of the prosecutrix was recorded at Mount Elizabeth Hospital, Singapore for the reason that the prosecutrix was wholly unfit to make any statement at that point of time.

(xvii) The aforesaid contention being legal in nature, ***at the outset,*** it is essential to deal with the scope of Section 32(1) of the Indian Evidence Act, 1872, which reads as under:

> ***"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-*** *Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:*
>
> *(1) When it relates to cause of death - When the statement is made by the person as to the cause of his death or as to any of the* ***circumstances of the transaction which resulted in his death****, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question."*

The highlighted phrase, that is, '**circumstances of the transaction which resulted in his death'** has been subject matter of a number of judgments of the Privy Council and the Hon'ble Supreme Court. A five Judge Bench of the Privy Council gave the defining judgment on the issue in ***Pakala Narayana Swami v. King Emperor 1939 AIR PC 47***. Lord Atkin speaking for the Bench elucidated the point as follows, (AIR, Page 50):

> *"The first question with which their Lordships propose to deal is whether the statement of the widow that on 20th March the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues was admissible under S. 32(1) of the Indian Evidence Act, 1877. That section provides:*
>
> > *"Statements written or verbal of relevant facts made by a person who is dead……are themselves relevant facts in the following cases (1) when the statement is made by the person as to the cause of his*

death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.

A variety of questions has been mooted in the Indian Courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. ***The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed****. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence:*

though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose."

The above view has been consistently followed and reiterated by the Hon'ble Supreme Court time and again. In the judgment in ***Amar Singh v. State of Rajasthan (2010) 9 SCC 64*** (SCC, Page 69), it has been held as under:

> ***"****18. Clause (1) of Section 32 of the Evidence Act provides that statements made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant facts. In the present case, the cause of death of the deceased was a question to be decided and the statements made by the deceased before PW 4 and PW 5 that the appellant used to taunt the deceased in connection with the demand of a scooter or Rs. 25,000 within a couple of months before the death of the deceased are statements as to "the circumstances of the transaction which resulted in her death" within the meaning of Section 32(1) of the Evidence Act.*
>
> *19. In* ***Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66 : AIR 1939 PC 47]*** *Lord Atkin held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has been quoted in the judgment of Fazal Ali, J. in* ***Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487]*** *and His Lordship has held that Section 32 of the Evidence Act is an exception to the rule of hearsay evidence and in view of the peculiar conditions in the Indian society has widened the sphere to avoid injustice. His Lordship has held that where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statements would clearly fall within the four corners of Section 32 and, therefore, admissible and*

the distance of time alone in such cases would not make the statements irrelevant."

On the aforesaid touchstone, we have no hesitation in concluding the statements made by the victim/prosecutrix to PW-49 Dr. Rashmi Ahuja, PW-27 Smt Usha Chaturvedi, SDM and PW-30 Sh. Pawan Kumar, MM are all dying declarations.

As regards the non-administration of oath to the victim in the present case, the question which arises for consideration is as to whether the SDM or the M.M. was required to administer oath while recording a dying declaration? We think not. No requirement of oath is mandated in a dying declaration nor there is any statutory format for the same. In this context, reference may usefully be made to the judgment of the Constitution Bench in ***Laxman (Supra),*** the relevant portion whereof is reproduced below (SCC, Page 113):

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however,

has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

In view of the aforesaid law enunciated by the Constitution Bench in the case of ***Laxman v. State of Maharashtra (Supra),*** which has been reiterated in ***Shudhakar v. State of M.P. (2012) 7 SCC 569*** and ***M. Sarvana v. State of Karnataka (2012) 7 SCC 636***, it is clear that issues of oath and cross-examination are dispensed with while recording a dying declaration. It is specifically highlighted in ***Laxman v. State of Maharashtra (Supra),*** that no oath is necessary and there is no statutory format for the recording of a dying declaration by a Magistrate or a doctor or a police officer. As regards a dying declaration recorded by a Magistrate, be it noted that the Code of Criminal Procedure does not require any format for such a dying declaration and, in fact, there is no requirement of compliance either under Section 164 Cr.P.C. or under the Punjab Police Rules. Learned defence counsel have questioned the complexity of the Punjab Police Rules and adherence thereto. It is, however, well-settled that the Punjab Police Rules are only a guide for police officers in the State and nothing more. Reference in this context may be made with advantage to the judgment of Supreme Court in ***Paramjit Singh v. State of Punjab (2007) 13 SCC 530.*** The relevant extract of the said judgment is as under (SCC, Page 537):-

> *"18. The Punjab Police Rules do not in any manner override the provisions of the Code of Criminal Procedure. The said Rules are meant for the guidance of the police officers in the State and supplement the provisions of the Code of Criminal Procedure but do not supplant them. In our considered opinion the truth and veracity of contents of FIR cannot in all cases be tested with a reference to*

the entries made in the police station daily diary which is maintained under the Punjab Police Rules. This avoidable controversy need not detain us any further since it is well settled that even a defect, if any, found in investigation, however serious has no direct bearing on the competence or the procedure relating to the cognizance or the trial. A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation."

(xviii) In the context of recording dying declaration by gestures, the settled legal position is that a dying declaration by gestures can be recorded and the same possesses evidentiary value. It was so held in the case of ***Meesala Ramakrishan Vs. State of A.P. (1994) 4 SCC 182***. In the said case, the Supreme Court categorically held a dying declaration recorded by gestures to be admissible. In paras 20 and 21, it was held as under: (SCC, Page 188)

"20. On the basis of what has been noted above, we hold that dying declaration recorded on the basis of nods and gestures is not only admissible but possesses evidentiary value, the extent of which shall depend upon who recorded the statement, what is his educational attainment, what gestures and nods were made, what were the questions asked — whether they were simple or complicated — and how effective or understandable the nods and gestures were.

21. In the present case, the questions being simple and short, the recorder being a Magistrate, the certifier of mental conscious state of the deceased being a doctor, nods being effective and meaningful, we are satisfied that full reliance could have been placed on the statement of the deceased as recorded by PW 11 to find the appellant guilty under Section 302."

The dying declaration in question in the instant case having been recorded by a Magistrate, the aforesaid law laid down in ***Meesala Ramakrishan Vs. State of A.P. (Supra)***

applies on all fours to the present case. While approving of the law laid down in ***Meesala Ramakrishan Vs. State of A.P. (Supra),*** the Supreme Court in case of ***Laxman v. State of Maharashtra (Supra)*** held as under:-

> ***"A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."***

In the case of ***B. Shashikala v. State of A.P. (2004) 13 SCC 249***, it was again observed that if the concerned Magistrate was in a position to observe gestures of the person giving a dying declaration, it could compensate for the fact that he was not fluent in the native tongue of the deceased. The Court held as under (SCC, Page 253):

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

In ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh (2007) 15 SCC 465,*** the Supreme Court reiterated the position with regard to the use of gestures in a dying declaration as under (SCC, Page 475):

> *"25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on*

> *assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures."*

It was further stated as under:-

> *"26. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition—mentally and physically—to make such statement."*

224. Reference was next made by Mr. A.P. Singh, in the context of multiple dying declarations, on the decisions of the Supreme Court rendered in ***Mohanlal Gangaram Gehani vs. State of Maharashtra, (1982) 1 SCC 700, Kamla vs. State of Punjab, (1993) 1 SCC 1*** and ***Kundula Bala Subrahmanyam and Anr. vs. State of Andhra Pradesh, (1993) 2 SCC 684***. The aforesaid decisions, in our view, turn on their own peculiar facts and are of no assistance to Mr. Singh's clients.

225. In the case of ***Mohanlal Gangaram Gehani (supra)***, which was a case under Section 326 IPC simpliciter, the doctor concerned had made a note of the injuries received by the complainant in the note sheet of the hospital register and also mentioned the fact that the injured had named his assailant as one Tiny or Tony. The evidence showed that Tiny or Tony was undoubtedly a known person who was

living in a locality near the place of occurrence and was not a fictitious red herring as was sought to be made by the prosecution. Subsequently, the injured alleged that the name of the Appellant was disclosed to him by his friend Saleem who was present at the spot. The Court was faced with the piquant situation of having to disbelieve either the doctor (and the hospital register) or the injured. In such circumstances, it was held that the reason given by the High Court for distrusting the evidence of the doctor was wholly unsustainable and the statement of the injured to the doctor being the first statement in point of time ought to have been preferred to any subsequent statement that the injured may have made. Furthermore, the disclosure made by Saleem (who was now dead) being the source of information of the injured would be of doubtful admissibility as it was not covered by Section 32 of the Evidence Act. Further, since the injured did not know the Appellant before the occurrence and no Test Identification Parade was held and he was also shown by the police before he identified the Appellant in Court, his evidence with regard to identification was absolutely valueless. We are unable to decipher from this judgment, what Mr. Singh would have us believe that the law with regard to multiple dying declarations is that the first statement made by the injured to the doctor must in all cases be accepted as gospel truth to the exclusion of all subsequent statements made by the deceased.

226. In the case of ***Kamla (supra)***, the deceased gave four dying declarations not one of which was made before a judicial officer. Three of the dying declarations were recorded by the doctors and one

by the police Sub-Inspector. There were glaring inconsistencies between the four dying declarations as to who exactly poured kerosene on the victim and had set her on fire or whether she had caught fire accidently, as stated by her in one of the four dying declarations. The trial court and the High Court discarded the other statements and relied upon the statement wherein she implicated only her mother-in-law. The Supreme Court opined that a dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars. It was held that under the circumstances, the dying declarations being inconsistent, it would be highly unsafe to pick out one statement and base the conviction of the Appellant on the sole basis of such a statement. The aforesaid decision also does not come to the aid of the Appellants as in the instant case there are no such material inconsistencies between the three dying declarations of the deceased, two of which have been recorded by highly responsible officers such as the SDM and the Metropolitan Magistrate.

227. In ***Kundula Bala Subrahmanyam (supra)***, relied upon by Mr. A.P. Singh, two dying declarations were made by the deceased, the first dying declaration before a neighbour and the second dying declaration to her brother. Both the dying declarations were oral. In view of the close relationship of the witnesses to whom they were made, they were carefully scrutinized and after such scrutiny both the dying declarations were held to be consistent with each other and to have been voluntarily made by the deceased in the natural course of

events. They were opined to have a ring of truth about them. The Supreme Court held that the prosecution had successfully established a very crucial piece of circumstantial evidence in the case that the deceased had voluntarily made the dying declarations implicating both the Appellants and disclosing the manner in which she had been put on fire shortly before her death. It was held as under:-

> *"If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. Having read the evidence of PWs 1-3 with great care and attention, we are of the view that their testimony is based on intrinsic truth. Both the dying declarations are consistent with each other in all material facts and particulars. That the deceased was in a proper mental condition to make the dying declarations, or that they were voluntary has neither been doubted by the defence in the course of cross-examination of the witnesses nor even in the course of arguments, both in the High Court and before us. Both the dying declarations have passed the test of creditworthiness and they suffer from no infirmity whatsoever. We have therefore no hesitation to hold that the prosecution has successfully established a very crucial piece of circumstantial evidence in the case that the deceased had voluntarily made the dying declarations implicating both the appellants and disclosing the manner in which she had been put on fire shortly before her death. This circumstance, therefore, has been established by the prosecution beyond every reasonable doubt by clear and cogent evidence."*

228. We are wholly unable to glean from the aforesaid judgment any dicta which can be of assistance to the defence.

229. Adverting to the contentions of Mr. M.L. Sharma, at the threshold, Mr. Sharma on behalf of the Appellants Mukesh and Pawan Kumar Gupta, submitted that Section 167(2) of the Code of Criminal Procedure envisages that the arrestee is 'an accused' or 'accused person' against whom there is well-founded information or

accusation, requiring an investigation in the manner envisaged under Section 2(h) of the Code. He contended that in the instant case, the Appellants had been arrested without the collection of evidence relating to the commission of the offence. The search of the places of seizure of things considered necessary for the investigation was also not carried out. For his aforesaid submissions, Mr. Sharma relied upon the judgment of the Supreme Court rendered in ***Directorate of Enforcement v. Deepak Mahajan and Anr., (1994) 3 SCC 440.***

230. Reliance was also placed on the aforesaid case by Mr. M.L. Sharma for explaining the word 'investigation' and in particular on para 108 of the judgment wherein it is laid down, relying upon the case of ***H.S. Rishbud vs. State of Delhi, AIR 1955 SC 196,*** that under the Code, investigation consists generally of the following steps:- (i) Proceeding to the spot, (ii) Ascertainment of the facts and circumstances of the case, (iii) Discovery and arrest of the suspected offender, (iv) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (v) Formation of opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge sheet under Section 173. Mr.Sharma contended that in the instant case charge-sheet had been filed without the collection of evidence relating to the offence and before the completion of

investigation. To illustrate the aforesaid contention, Mr. Sharma stated that though the chargesheet in the instant case was filed on 3.1.2013, the same was filed without waiting for the CFSL report regarding fingerprint examination.

231. We do not find any force in the aforesaid argument of Mr. Sharma. A bare glance at the report pertaining to fingerprint examination **(Ex.PW46/D)** shows that the said report is dated 3.1.2013 and that the report is mentioned at Serial No.50 of the list of documents enclosed with the chargesheet, meaning thereby that the CFSL report in respect of fingerprint was filed alongwith the chargesheet on 3.1.2013. This is also reflected in the order dated 3.1.2013 which shows that the chargesheet was filed on 3.1.2013 before the Duty M.M. at 5:30 PM. Further, the near exhaustive list of documents enclosed with the chargesheet is also reflective of the fact that the chargesheet was prepared and filed after collection of sufficient evidence against the accused persons.

232. Mr. Sharma next contended that the trial proceedings were vitiated *qua* the Appellants Mukesh and Pawan Gupta on account of breach of their fundamental right as guaranteed under Articles 21 and 22 of the Constitution of India of fair trial. He submitted that the impugned judgment dated 10.9.2013 has been procured by the prosecution under torture of the accused persons. Reference was made by him in this regard to the affidavit of one Bhagwan Singh, a retired Indian soldier lodged in Tihar Jail in January, 2013, who professed to have witnessed the custodial torture inflicted upon the

Appellant Mukesh. The said affidavit is stated to have been filed in W.P.(Crl.) No.516/13 as Annexure P-1.

233. Mr. Sharma also contended that the trial court had caused serious miscarriage of justice to the Appellants by its failure to record the true and correct facts and the evidence pertaining thereto. In this context, reference was made by him to the order of the learned Additional Sessions Judge dated 18th April, 2013.

234. Assailing the aforesaid order, Mr. Sharma contended that the learned trial court gravely erred in passing the aforesaid order closing the cross-examination of PW-59 and PW-65 on the ground of alleged failure of the counsel to cross-examine the said PWs and further erred in appointing an *amicus curiae* to represent the Appellant Mukesh. He referred to the orders passed by a Full Bench of this Court in FAO(OS) No.364/11 ***Weizmann Ltd. v. M.S. Shoes East Ltd. and Others*** to urge that on April 9, 2013, April 11, 2013 and April 18, 2013, he was engaged in the aforesaid matter before the Full Bench of the High Court and submitted that on 11th April, 2013 the Full Bench while fixing the hearing on 18th April, 2013 had issued *dasti* copy of the order to him (M.L. Sharma) to file it before the trial court to exempt him from appearance in the trial court on 18.4.2013.

235. Mr. Sharma next contended that when any person is arrested, he is deprived of his liberty, and the procedure laid down in Clause (1) of Article 22 of the Constitution must then be followed, and he must be allowed **the right to be defended by a counsel of his choice**. Article 22(1) reads:-

> *"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."*

236. In the instant case, Mr. Sharma contended that the aforesaid constitutional right afforded to the Appellants to consult a legal practitioner of their choice had been infringed and as such the trial itself *qua* the Appellants stood vitiated. The learned trial court had no right to appoint Mr. Rajiv Jain, Advocate as *amicus curiae* for the Appellant Mukesh against the wishes of the Appellant himself. The said *amicus curiae* had cross-examined the following prosecution witnesses against the wish of the Appellants:-

Srl.No.	For Whom	Number of PW	Name	Date 2013
1.	Mukesh	PW-50	Dr.Raj Kumar Chejara	22.4.13
2.	Mukesh	PW-52	Dr.P.K.Verma	22.4.13
3.	Mukesh	PW-54	SI Sushil Sawariya	20.4.13
4.	Mukesh	PW-56	Shri Sandeep Dabral	22.4.13
5.	Mukesh	PW-58	SI Arvind	20.4.13
6.	Mukesh	PW-61	SI Jeet Singh	20.4.13
7.	Mukesh	PW-64	Dr.B.D.Athani	23.4.13
8.	Mukesh	PW-80	WSI Pratibha Sharma, IO	8.7.13

9.	Mukesh	PW-83	Angad Singh	14.8.13
10.	Pawan Kumar	Part final argument		

237. Referring to the decision of the Constitution Bench of the Supreme Court in ***State of Madhya Pradesh v. Shobharam and Others 1966 (Suppl) SCR 239***, Mr. Sharma contended that the Constitution Bench had clearly delineated the constitutional right conferred by Article 22(1) on a person arrested to be defended by a legal practitioner of his choice as well as one who, though not arrested, runs the risk of loss of personal liberty as a result of a trial. He submitted that the Appellant Mukesh had filed an affidavit before the Sessions Court dated 3.4.2013 [filed in W.P.(Crl.) 516/13] to contend that the Appellant was under torture compelled to put his thumb impression on the vakalatnama in favour of Mr. V.K. Anand, Advocate. Reference was also made by the counsel to five vakalatnamas in his favour filed at pages 67, 68, 69, 70 and 71 of the additional grounds of appeal. It was contended by him that he (M.L. Sharma) was the counsel of the choice of the Appellants, but the Appellants had been deprived of his services in clear violation of the constitutional mandate contained in Article 22(1) of the Constitution. It was also sought to be contended that though he (M.L. Sharma) had filed a transfer petition in the Supreme Court for transfer of the trial from Delhi to another State, but when the transfer petition was listed before the Hon'ble Supreme Court on 23rd January, 2013, Mr. V.K. Anand, Advocate made a statement that he did not want to get the

case transferred from Delhi. On 28th January, 2013, the Appellant Mukesh had signed fresh vakalatnama in his favour and in favour of N. Raja Raman. However, the same could not be shown by him (M.L. Sharma) to the Supreme Court on account of the dire threats extended to the Appellant and his family and as such the transfer petition was dismissed by the Supreme Court on 29.1.2013. In March, 2013, the Appellant Mukesh again appointed him, i.e., M.L. Sharma, Advocate as his counsel, but on 18.4.2013 at the behest of the prosecution the learned Sessions Judge appointed another Advocate as *amicus curiae* against the wishes of the Appellant. On 20th April, 2013, the police again tortured the Appellant Mukesh and procured his signatures upon a fresh vakalatnama in favour of Mr. V.K. Anand, Advocate, and the latter was imposed upon the Appellant Mukesh as his counsel in the trial proceedings against his wishes. It was further contended that under police torture and conspiracy hatched in the course of trial, Mr. V.K. Anand, Advocate succeeded in procuring the statement of the Appellant Mukesh under Section 313 Cr.P.C. wherein he admitted that he was driving the bus **Ex.P-1** at the relevant time.

238. Reliance was also placed by Mr. M.L. Sharma, Advocate on the decision of a three-Judge bench of the Supreme Court in ***Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi)*** reported in ***(2012) 9 SCC 408*** to contend that the matter was required to be remanded for a *de novo* trial so that justice is secured to the Appellants. On the strength of this judgment, it was contended that Section 303 of the Criminal Procedure Code confers a right upon any

person accused of an offence before a criminal court to be defended by a pleader of his choice. This right is conferred by the legislature consequent to the constitutional mandate contained in Article 22(1) of the Constitution read with Article 39-A of the Constitution, which articulates the policy of free legal aid to be provided by the State. Section 304 of the Code further mandates legal aid to the accused at State's expense in a trial before the Court of Session where the accused is not represented by a pleader and where it appears to the Court that the accused has not sufficient means to engage a pleader. The Appellants having been denied due process of law and the trial held against them being contrary to the procedure prescribed under the provisions of the Code, the re-trial of the Appellants in the circumstances is indispensable.

239. Mr. M.L. Sharma also heavily relied upon the judgment of the Hon'ble Supreme Court rendered in ***Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1*** to contend that the State is under a constitutional obligation to provide free legal services to an indigent accused such as the Appellant not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time, provided the accused person does not object to the provision of State lawyer. Specific reliance was placed by Mr. Sharma on the following observations made in ***Khatri (2) v. State of Bihar, (1981) 1 SCC 627*** quoted in paragraph 470 and 472 of the judgment in ***Mohd. Ajmal Amir Kasab (supra)***. The said paragraphs read as under:- (SCC, page 185)

*"**470.** In para 6 of the judgment, this Court further said: [Khatri (2) case [(1981) 1 SCC 627 : 1981 SCC (Cri) 228], SCC p. 632, para 6]*

> *"6. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. … The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. … We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State."*
>
> *(emphasis added)*

471. *x x x x x x x*

472. *As noted in Khatri (2) [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial."*

240. It was next contended by Mr. M.L. Sharma on behalf of the Appellants that denial of liberty to the Appellants to cross-examine the Investigating Officer through a counsel of their own choice tantamounted to denying opportunity to the defence to test the veracity of the prosecution case and its witnesses. In this context, he referred to the judgment of a Division Bench of the Patna High Court in ***Hazari Choubey and Ors. v. State of Bihar, 1988 Crl. Law***

Journal 1390 (Patna). In the said case, while setting aside the conviction of the Appellants and acquitting the Appellants of the charges levelled against them under Sections 395 of the Indian Penal Code, the Patna High Court held that since non-examination of the Investigating Officer had denied to the defence opportunity to test the veracity of the prosecution case and the veracity of the evidence of the prosecution witnesses, their conviction for the offence under Section 395 of the Indian Penal Code by the learned Sessions Judge was not sustainable. Re-trial after a lapse of 8 years would amount to miscarriage of justice as "the right to speedy and public trial" was enshrined in Article 21 of the Constitution.

241. On a conspectus of the above, we find that Mr. M.L. Sharma has raised the following issues in respect of the right to legal defence insofar as the aforesaid two accused whom he represents are concerned:-

A. Whether his clients were entitled to be defended by a counsel of their choice and whether in fact were defended by a counsel of their choice?

B. Whether the *amicus curiae* appointed by the learned trial court had cross-examined any of the prosecution witnesses on behalf of the said accused persons and the legality thereof?

C. Legal position with respect to Section 309 Cr.P.C.

242. In order to satisfy ourselves that the accused persons in the present case were defended by counsel of their choice and also had recourse to legal aid at all stages of the trial, we have

carefully examined the trial court record with the assistance of Mr. Dayan Krishnan, learned Special Public Prosecutor. The record chronologically reveals the following:-

(1) The charge sheet was filed on **03.01.2013** before the Duty M.M., Saket Sh.S.M. Grover at 5:30 PM.

(2) On **06.01.2013**, accused Pawan Kumar, Vinay Sharma, Ram Singh and Mukesh were produced before the Duty M.M./Saket Jyoti Kler. Ms. Anurag Rita, learned counsel from legal aid was present. **The learned M.M. has noted in the proceedings that all the accused persons were informed that they can seek legal aid from the State if they have not yet engaged any counsel.** Accused Ram Singh and Mukesh submitted that they had not yet engaged a counsel and may be provided legal aid. Accordingly, Ms. Anurag Rita was provided as legal aid counsel to them. Accused Pawan Kumar @ Kalu and accused Vinay Sharma refused to take services of legal aid counsel and submitted that they want to become witnesses on behalf of the State. (Vide order dated 06.01.2013)

(3) On **07.01.2013**, all the accused persons were produced before the learned ACMM, where they were again informed by the Court that they have a right of legal assistance and they have a right to be defended by legal counsel of their choice. Accused persons sought time to arrange for counsel. In any event, Ms. Anurag Rita was

present for their legal assistance. The matter was then listed for 10.01.2013 in order to give them time to arrange counsel for themselves. (Vide order dated 07.01.2013)

(4) On **10.01.2013,** all the accused persons were produced from judicial custody and private counsel for each accused of their choice were present in the Court as reflected by the order sheet. Ms. Anurag Rita, LAC was also present in the Court to watch the interest of the accused persons. (Vide order dated 10.01.2013)

(5) On **14.01.2013**, all the accused persons were present and represented by private counsel of their choice and applications were filed on behalf of all the accused persons by their respective counsel for the supply of deficient copies. Mr. M.L. Sharma was present on behalf of accused Mukesh. (Vide order dated 14.01.2013)

(6) On **17.01.2013**, a fresh vakalatnama was filed by Mr. M.L. Sharma on behalf of accused Mukesh. The matter was committed to the Sessions Court. (Vide order dated 17.01.2013)

(7) On **21.01.2013**, the matter came up before the Sessions Court. Mr. M.L. Sharma appeared on behalf of accused Mukesh and the matter was listed for arguments on charge for 24.01.2013. (Vide order dated 21.01.2013)

(8) On **23.01.2013, the Hon'ble Supreme Court passed orders in Transfer Petition (Criminal No.D-2322 of**

2013) wherein the learned Sessions Judge was directed, *inter alia,* to give a report on the following:

> **"(d) to determine from accused Mukesh as to his choice of Advocate;** (e) whether accused Mukesh would like to continue with Shri M. Rajaraman as his Advocate-on-Record in his Transfer Petition; (f) to find out if he has any complaint with regard to the manner in which he has been treated in custody."

(9) On **24.01.2013**, in compliance with the orders of the Hon'ble Supreme Court dated 23.01.2013, all the accused persons were produced before the learned Sessions Judge in his chamber to ascertain whether they were represented by counsel of their choice. Accused Mukesh was also produced in the chamber to ascertain his choice of counsel. **He stated that earlier he had appointed Shri Manohar Lal Sharma, Advocate vide vakalatnamas dated 08.01.2013 and 09.01.2013 but now would like to change his counsel and has appointed Mr. V.K. Anand, Advocate as his counsel before the court.** The vakalatnama of Mr. V.K. Anand, Advocate was filed by him. Shri Manohar Lal Sharma, Advocate was accordingly discharged by the learned Sessions Judge. **The accused Mukesh informed the learned Sessions Judge that he did not intend to avail**

the services of Shri N. Rajaraman, Advocate-on-Record in the Transfer Petition pending before the Hon'ble Supreme Court and that he had requested Shri V.K. Anand, Advocate to be his counsel even in the Supreme Court and to engage some other Advocate-on-Record. **The learned Sessions Judge also inquired from accused Mukesh if he has any complaint regarding the manner in which he has been treated in custody but he replied that he has no complaint in this regard.** The learned Sessions Judge noted that questions to accused Mukesh had been put in Hindi language to make him understand as to why he should answer them. The statement of accused Mukesh was also separately recorded in this regard. It may be relevant to point out that in respect of accused Pawan Gupta, Mr. Sada Shiv Gupta, Advocate and Mr. Vivek Sharma, Advocate appeared to defend him in the trial and he executed vakalatnama dated 08.01.2013 in their favour. Mr. Sada Shiv Gupta, Advocate continued to appear for accused Pawan throughout the trial and even before the High Court. (Vide order dated 24.01.2013)

(10) On **5th February, 2013**, the date on which copies of the supplementary charge sheet and CD of E-challan were filed and handed over to learned counsel for all the accused persons, an application was filed for recording of the evidence by way of audio-video

electronic means on behalf of accused Ram Singh and accused Mukesh in the interest of fair trial. While disposing of the said application, the learned Sessions Court specifically noted:

> *"The crux of the arguments is that the application needs to be allowed for the fair trial of the accused. I do not understand as to why the learned defence counsel is so apprehensive that the accused may not get fair trial.* ***All accused are represented by the counsels of their choice……."***

(11) On **14.03.2013**, fresh vakalatnama was filed by Shri Ram Kumar, Advocate on behalf of accused Pawan Gupta.

(12) On **20.03.2013**, a fresh vakaltnama was filed by Mr. M.L. Sharma, Advocate on behalf of accused Mukesh and accused Akshay Kumar Thakur which was taken on record. (Vide order dated 20.03.2013)

(13) On **21.03.2013**, the cross-examination of **PW-56** Shri Sandeep Dabral was deferred at the request of Mr. M.L. Sharma. The cross-examination of **PW-57** ASI Kapil Singh, **PW-58** SI Arvind Kumar, **PW-59** Inspector Raj Kumari and **PW-60** H.C. Mahabir was also deferred at the request of the accused persons. (Vide order dated 21.03.2013)

(14) On **22.03.2013**, the cross-examination of **PW-62** SI Mahesh Bhargava was deferred on behalf of accused

Mukesh and Akshay by Advocate, Shri M.L. Sharma. (Vide order dated 22.03.2013)

(15) On **23.03.2013,** a request was made by Mr. M.L. Sharma, Advocate that he be allowed to have meetings with the accused persons in the jail, which request was allowed, subject to the rules. (Vide order dated 23.03.2013)

(16) On **25.03.2013**, **PW-62** S.I. Mahesh Bhargava was tendered for cross-examination but Mr. M.L. Sharma, Advocate submitted that he would only cross-examine the witness after his application under Chapter 23 Cr.P.C. was heard and decided. Accordingly, the matter was listed on 26.03.2013 for arguments. (Vide order dated 25.03.2013)

(17) On **26.03.2013**, the learned Sessions Judge heard arguments on the application on behalf of the accused Mukesh on the issue that hearing should take place on alternate days among other reliefs. The matter was then directed to be put up for 28.03.2013. (Vide order dated 26.03.2013)

(18) On 28.03.2013, the aforesaid application moved by Mr. M.L. Sharma, Advocate was dismissed. However, at 12:30 PM, when the trial began, Mr. M.L. Sharma was not present and the matter was posted for 2 PM. At 2 PM, again he was not present, and it is noted by the learned Sessions Judge that the MHC(M) of P.S. Vasant Vihar informed the Court that he had received a message

on his phone from Shri M.L. Sharma that he was not well. The learned Sessions Judge further noted that none of his associates, i.e., Ms. Suman, Advocate, Shri J.P. Mishra, Advocate and Shri Jitender Vidyarthi, Advocate who had also signed the vakalatnama filed on 19.03.2013 were present. Further, Mr. A.P. Singh, Advocate on behalf of accused Vinay informed the Court that Mr. M.L. Sharma was present in Patiala House Court in case FIR No.414/12. It was further noted by the court that though the court was empowered by the fourth proviso to sub-section (2) of Section 309 IPC to dispense with the cross-examination of the witnesses present in the Court in view of the unexplained absence of the counsel, but in the interest of justice one more opportunity was given to Mr. M.L. Sharma and cross-examination of **PW-64** Dr. B.D. Athani and **PW-65** Constable Kirpal was deferred to 01.04.2013. The Court also directed that the accused persons be brought to Court at 11 AM everyday. (Vide order dated 28.03.2013)

(19) On 01.04.2013, whereas the other counsel cross-examined the witnesses present in the Court, Mr. M.L. Sharma did not cross-examine the witnesses stating that he was not able to do so due to his ill-health. He also moved an application seeking adjournment of the matter on the ground that he intends to file a revision petition against the order dated 28.03.2013, which was dismissed

and the matter was posted to 02.04.2013 for the cross-examination of PW-48, PW-62, PW-63 on behalf of accused Mukesh and accused Akshay. The other counsels had completed their cross-examination with respect to these witnesses. (Order dated 01.04.2013)

(20) On **02.04.2013,** Mr. M.L. Sharma made several excuses for not conducting the cross-examination, *inter alia*, being that he is not able to take instructions from his clients to cross-examine the witnesses, as is evident from a bare perusal of the said order sheet. **The learned trial court observed that from 20.03.2013 ever since M.L. Sharma has filed his vakalatama he has not cross-examined a single witness. The matter was also listed on 21.03.2013, 22.03.2013, 23.03.2013, 25.03.2013, 26.03.2013, 28.03.2013 and 01.04.2013, on all of which days the accused persons were present in Court and were available to the learned counsel to seek instructions.** Thereafter, part cross-examination was done. (Vide order dated 02.04.2013)

(21) On **04.04.2013,** Mr. A.P. Singh, Advocate who was initially representing accused Akshay and had been replaced by Mr. M.L. Sharma filed a fresh vakalatnama on behalf of accused Akshay Thakur. (Vide order dated 04.04.2013)

(22) On **05.04.2013,** Mr. M.L. Sharma makes submission to the Court which is recorded in the order that he would

not be available on 06.04.2013 and the Presiding Officer should also, therefore, take leave. (Vide order dated 05.04.2013)

(23) On **08.04.2013**, only one witness was cross-examined by Mr. M.L. Sharma as he stated that he had not prepared to cross-examine the other witness present in the Court. (Vide order dated 08.04.2013)

(24) On 09.04.2013, **PW-60** was cross-examined on behalf of the other accused persons but his cross-examination on behalf of accused Mukesh was deferred as his counsel was not available. (Vide order dated 09.04.2013)

(25) On 10.04.2013, the matter was listed for 12:30 PM for Mr. M.L. Sharma, Advocate to cross-examine **PW-55** and **PW-65** but he did not appear. The matter was then posted for 2 PM. Mr. M.L. Sharma then cross-examined PW-55 but thereafter stated that he has a matter on 11.04.2013 before the High Court and he cannot appear. The Court then passes an order that Mr. M.L. Sharma can cross-examine the witness from 12:30 to 1:30 PM on 11.04.2013 to accommodate him on his request. (Vide order dated 10.04.2013)

(26) On 11.04.2013, Mr. M.L. Sharma, Advocate failed to appear at 12:30 PM and on the matter being posted for 2 PM, he again failed to appear. The learned trial court, however, adjourned the matter to 12.04.2013. (Vide order dated 11.04.2013)

(27) On **16.04.2013**, Mr. M.L. Sharma was again absent and the learned trial court passed a detailed order expressing its anguish, but deferred the cross-examination of the witnesses present in the Court to 17.04.2013. (Vide order dated 16.04.2013)

(28) On **17.04.2013** also, counsel for accused Mukesh, Mr. M.L. Sharma was absent and claimed through Mr. Vivek Sharma, Advocate that he was held up in the Supreme Court in the transfer petition of the present case. The matter was then adjourned by the learned trial court to 18th April, 2013 after discharging the witnesses present in the Court and granting last opportunity to Mr. M.L. Sharma, Advocate to cross-examine **PW-59** W/Inspector Raj Kumari, who, it was noted, was appearing before the Court on a daily basis. (Vide order dated 17.04.2013)

(29) On **18.04.2013**, Mr. M.L. Sharma was again absent. The Court then passed a detailed order keeping in mind the provisions of Section 309 Cr.P.C. **and appointing an amicus in order to assist the Court in complying with its obligations under Section 309 Cr.P.C.**

It is relevant to note that the Court did not discharge Mr. M.L. Sharma. The said order being apposite is reproduced hereunder:-

> *"18-4-2013 (12:45 PM)*
>
> *Shri M.L Sharma, Ld. Counsel for accused Mukesh has appeared and has filed an application seeking adjournment saying that he is busy in the*

Hon'ble High Court of Delhi. He has been requested to appear at 2 PM.

Sd/-
(Yogesh Khanna)
ASJ(Special Fast Track Court),
Saket Courts, New Delhi
18-04-2013

Matter called at 2 PM.

PW 59 Inspector Raj Kumari and PW65 Ct. Kripal are present for their cross examination on behalf of accused Mukesh but neither Shri M.L Sharma, Ld. Counsel for accused Mukesh nor his associate is present.

*In the order dated 28-3-2013, I had specifically quoted the **4th** proviso of sub-section **2** of section **309** Cr.P.C which empowers the court to dispense with the cross examination of the witnesses in the absence of the counsel, but on that day, despite the absence of Shri M.L Sharma, Advocate, one more opportunity, in the interest of justice, was granted to him to cross examine the witnesses. Even on **16-4-2013,** witness PW59 W/Inspector Raj Kumari and PW65 Ct. Kripal were present for their cross examination, but Shri M.L Sharma, Advocate did not appear. The fact that he has been seeking adjournments has been elaborately mentioned in my order dated 16-4-2013. Yet again he did not appear on **17-4-2013** nor sent any of his associate(s) to inform about him. Today also, instead of cross examining **PW59** and **PW65,** he had appeared at 12:45 PM, despite the matter being already listed at **2 PM** and had filed an application for adjournment and thereafter left the court, despite being asked to appear at 2 PM.*

*It is 2 PM. Witnesses **PW59** Inspector Raj Kumari and **PW65** Ct. Kripal are present for their cross examination.*

*The application filed by Shri M.L Sharma, Advocate seeking adjournment on the plea that he is busy in another court, can not be allowed in view of Clause-b of **4th** proviso of subsection **2** of section **309** Cr.P.0 which says **the engagement of the pleader of a party in another court, shall not be a ground for adjournment.** Further Clause **-c** of the said proviso to sub section 2 of section **309** Cr.P.0 says that **where a witness is present in the court***

but a party or his pleader is not present *or if present not inclined to cross examine the witnesses,* ***the court may, if it thinks fit, record the statement of the witnesses and pass such orders as it thinks fit dispensing with the*** *examination in chief or* ***cross examination of the witnesses,*** *as the case may be.*

Opportunities have since been granted to Shri M.L Sharma, Ld. Counsel for accused Mukesh for cross examining these two witnesses, appearing practically, everyday since examined in chief so no further adjournment can be granted to Shri M.L Sharma, Advocate to cross examine the present witnesses.

I have also perused the deposition of PW59 Inspector Raj Kumari, who on 16-12-2009 on information, had visited Safdarjung Hospital, New Delhi and had collected the MLC and exhibits of the prosecutrix and then handed it over to the Investigating Officer. She has already been ***extensively*** *cross examined by the ld counsels for other three accused person.*

Likewise PW65 Ct. Kripal had taken the Rukka to the police station and had got the ***FIR*** *registered, has also been cross examined by the ld counsels for the other accused person.*

So, considering the nature of the evidence given by these two witnesses, being ***general*** *and also considering the fact that these witnesses have already been* ***extensively cross examined*** *by the ld counsels for other accused person and also taking in view the fact that Shri M.L Sharma, Advocate is not present to cross examine these witnesses on behalf of accused Mukesh, the witnesses cannot be asked to come again. Thus, considering the above facts* ***I*** *think it fit to dispense with further cross examination of* ***PW59*** *and* ***PW65.*** *Hence, their cross examination on behalf of accused Mukesh stands closed.*

I had inquired from accused Mukesh yesterday if he intends to have any other lawyer from Delhi Legal Services Authority (DLSA) but he replied in negative.

Looking at the fact that Shri M.L Sharma, Advocate is not appearing regularly and that since the trial is being conducted on day to day basis, I feel it

appropriate to appoint an Amicus Curiae to assist the court in future, in case such situation arises.

Hence, I deem it fit to appoint Shri Rajeev Jain, Advocate, Saket Court Complex, New Delhi, as an Amicus Curiae to assist the court in future. He has appeared today. The copy of the charge sheet and all connected documents, including the evidence so recorded till date, be handed over to Ld. Amicus Curiae to assist the court, during the course of trial……..

Matter is adjourned and now shall be taken up on 20-4-2013 at 10:30 AM. Dasti."

(30) On **20.04.2013,** the matter was fixed for 10:30 AM, but counsel Mr. M.L. Sharma, Advocate did not appear at all and in exercise of the powers conferred upon the Court under section 309 Cr.P.C., the learned trial court with the assistance of Shri Rajiv Jain, Advocate appointed as *amicus curiae*, proceeded with the court examination of witnesses. At this stage, accused Mukesh filed an application bearing his signatures and thumb impression, stating that he intends to change his counsel and wishes to engage Shri Rajiv Jain, Advocate as his counsel. The court thereupon enquired as to whether accused Mukesh was doing so voluntarily and on being satisfied, PW-61 Jeet Singh, PW-54 Sushil Sawariya and PW-58 SI Arvind were cross-examined on behalf of accused Mukesh and the Court discharged Mr. M.L. Sharma. (Vide order dated 20.04.2013)

(31) On **23.04.2013**, Mr. V.K. Anand, Advocate filed vakalatnama on behalf of accused Mukesh in his

presence and henceforth accused Mukesh was represented by Shri V.K. Anand, Advocate before the learned trial court as well as initially before the High Court. (Vide order dated 23.04.2013).

243. The above-mentioned chronological sequence of events makes it amply clear that the accused were represented by counsel of their choice at every stage including accused Mukesh.

244. The judgment in the case of ***State of MP vs. Shobha Ram (supra)*** relied upon by Mr. Sharma, thus has no relevance to the facts of the present case, inasmuch as the record clearly bespeaks of the fact that the accused were represented by counsel of their choice throughout. Even otherwise, we find that ***Shobha Ram*** is rendered in the context of MP Panchayats Act which barred legal representation, and this fact is explained by the learned Chief Justice in the very beginning of the judgment by stating that this will have no relevance to the Code in as much as the Code in any case provides for legal representation to an accused person. As regards the reliance placed upon the judgment in the ***Kasab case (supra)***, and the emphasis laid by the counsel for the defence on the observations made by the Supreme Court to claim that the Supreme Court has laid down very strict guidelines in respect of criminal trials, we find that firstly, there has been no aberration of any kind in the present case and secondly, Mr.Sharma has not been able to point out to us or show any prejudice caused to the accused in the course of the trial. In such circumstances and where the record bespeaks of the thorough manner in which the

prosecution witnesses have been examined, we have no hesitation in holding that **the defence had effective and adequate legal representation at every stage of the trial and in any event no prejudice is shown to have been caused to the accused persons** despite the habitual non-attendance of the counsel engaged by the accused themselves from time to time.

245. As noted hereinabove, Mr. M.L. Sharma, learned counsel for accused Mukesh and Pawan in the additional grounds of appeal filed by him has made a submission relying on a table that the *amicus curiae* had cross-examined various witnesses on behalf of accused Mukesh and accused Pawan when he was not the counsel of their choice. The submission of Mr. Dayan Krishnan, learned Special Public Prosecutor is that this is contrary to the record, inasmuch as the examination of the witnesses was done by the Court in terms of Section 309 Cr.P.C. *albeit* with the assistance of the amicus as is evident from each of these depositions. Reference in particular was made by the learned SPP to order dated 20.04.2013 to urge that when after being absent for a number of days, as indicated therein, Mr. M.L. Sharma continued to remain absent, the Court in exercise of its powers under Section 309 Cr.P.C., with the assistance of the amicus proceeded with the court examination of the witnesses. Mr. Krishnan was at great pains to point out that on the very same day, i.e., on 20.04.2013 accused Mukesh moved an application seeking Rajiv Jain as his Advocate. The contention of Mr. Sharma that the examination of witnesses on behalf of accused Mukesh by Mr. Rajiv Jain on

22.04.2013 and 23.04.2013 was not conducted by counsel of his choice, therefore, has no substance.

246. In respect of accused Pawan, the learned Special Public Prosecutor submitted that the proceedings of the learned trial court dated 08.07.2013 clearly record the reasons why court examination of the I.O. (PW-80 S.I. Pratibha Sharma) was conducted. The order dated 08.07.2013 also clearly shows that the Court had conducted the court examination of PW-80 with the assistance of the amicus exercising powers under Section 309 Cr.P.C. Likewise, regarding PW-83 Angad Singh, the proceedings of the learned trial court dated 14.08.2013 clearly record the reasons why court examination of the said witness was conducted. On the said date, i.e., on 14.08.2013 also, the Court conducted the court examination with the assistance of the amicus exercising powers under Section 309 Cr.P.C. Regarding the fact that part arguments on behalf of accused Pawan were addressed by the amicus on 31.08.2013, learned Special Public Prosecutor submitted that the record shows that full opportunity was nevertheless given to Mr. Vivek Sharma, learned counsel for accused Pawan to argue the case on 2nd September, 2013, which is reflected in the order sheet of the said date and hence the contention of Mr. M.L. Sharma that part arguments on behalf of accused Pawan were addressed by the amicus is meaningless.

247. In the context of the table filed by Mr. M.L. Sharma, learned counsel for accused Mukesh and Pawan to contend that at the behest of the State the learned trial court imposed Shri Rajiv Jain as *amicus*

curiae upon the Appellant Mukesh against his wishes, we find from the record that the factual position is as follows:-

> PW-54 S.I. Sushil, PW-58 S.I. Arvind and PW-61 S.I. Jeet Singh were examined by the Court under Section 309 Cr.P.C. with the assistance of the amicus on 20th April, 2013 on behalf of accused Mukesh. On 22nd April, 2013 on behalf of accused Mukesh, PW-50 Dr. Raj Kumar Chejara, PW-52 Dr. P.K. Verma and PW-56 Shri Sandeep Dabral were examined by the legal aid counsel appointed on the asking of accused Mukesh. On 23.04.2013, PW-64 Dr. B.D. Athani was cross-examined by the same legal aid counsel appointed at the behest of accused Mukesh. On behalf of accused Pawan, PW-80 S.I. Pratibha Sharma was examined on 8th July, 2013 by the Court in exercise of the powers conferred upon it under Section 309 Cr.P.C. Likewise, on 14.08.2013, PW-83 Angad Singh was examined on behalf of accused Mukesh and Pawan by the Court in exercise of its powers under Section 309 Cr.P.C. As regards part arguments addressed by the amicus on behalf of accused Pawan, as noted above, on account of the non-availability of Mr. Vivek Sharma, Advocate on 31st August the *amicus curiae* initiated the arguments. However, on 2nd September, 2013, the matter was fully argued on behalf of accused Pawan by his counsel Shri Vivek Sharma, Advocate and thus the

partial address made by the *amicus curiae* on 31st August, 2013 was rendered meaningless.

248. It is now proposed to examine the legality of the cross-examination of certain witnesses adverted to hereinbefore by the Court in exercise of its powers under Section 309 Cr.P.C.

249. In ***State of U.P. vs. Shambhu Nath Singh, (2001) 4 SCC 667***, the Supreme Court has laid down clear guidelines to trial court to ensure strict implementation to Section 309 Cr.P.C. as follows:- (SCC, page 673)

> *"**12.** Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.*
>
> ***13.** Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. **We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code.***
>
> ***14.** If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with*

due to the non-cooperation of the accused or his counsel the court can adopt any of the measures indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case).

……..

18. *It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309 of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with such legislative mandates. The precept in the old homily that a lazy workman always blames his tools, is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for their tardiness in coping with such directions."*

250. Recently, in ***Akil vs. State (NCT of Delhi), (2013) 7 SCC 125***, the Hon'ble Supreme Court noting that one of the most material witnesses *viz.*, PW-20 was examined-in-chief on 18.09.2000 and was cross-examined after two months, i.e., on 18.11.2000, solely at the instance of the Appellant's counsel on the simple ground that the counsel was engaged in some other matter in the High Court, rued the impropriety of such delay used by the Appellant to induce PW-20 to resile from his stand and change his testimony, exonerating the Appellant, and the fact that the adjournment granted by the trial court at the relevant point of time disclosed that the Court was oblivious of

the specific stipulation contained in Section 309 Cr.P.C. In paragraph 43 of its judgment, the Supreme Court observed:- (SCC, page 149)

> *"**43. It is unfortunate that in spite of the specific directions issued by this Court and reminded once again in Shambhu Nath [State of U.P. v. Shambhu Nath Singh, (2001) 4 SCC 667 : 2001 SCC (Cri) 798] such recalcitrant approach was being made by the trial court unmindful of the adverse serious consequences flowing therefrom affecting the society at large.** Therefore, even while disposing of this appeal by confirming the conviction and sentence imposed on the appellant by the learned trial Judge, as confirmed by the impugned judgment of the High Court, **we direct the Registry to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision in Raj Deo Sharma** [(1998) 7 SCC 507 : 1998 SCC (Cri) 1692 : 1998 Cri LJ 4596] and **reiterated in Shambhu Nath [State of U.P. v. Shambhu Nath Singh, (2001) 4 SCC 667 : 2001 SCC (Cri) 798] by issuing appropriate circular, if already not issued.** If such circular has already been issued, as directed, ensure that such directions are scrupulously followed by the trial courts without providing scope for any deviation in following the procedure prescribed in the matter of a trial of sessions cases as well as other cases as provided under Section 309 CrPC. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result."*

251. In ***Lt. Col. S.J. Chaudhary v. State (Delhi Administration), AIR 1984 SC 618 = (1984) 1 SCC 722***, it was held that:-

> *"It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piece-meal……. Once the trial commences, except for a very pressing reason which makes an adjournment inevitable, it must proceed de die in diem until the trial is concluded."*

252. In **Mohd. Khalid v. State of West Bengal,** ***(2002) 7 SCC 334***, the Supreme Court held that when a witness is available and his

examination-in-chief is over, unless compelling reasons are there, the trial Court should not adjourn the matter on the mere asking. While deciding the said case, the court placed great emphasis on the provisions of Section 309 Code of Criminal Procedure and reliance on its earlier judgments in **Shambhu Nath Singh (Supra)** and **N.G. Dastane v. Shrikant S. Shivde,** ***(2001) 6 SCC 135***. In the ***Shambhu Nath Singh*** case, the Court deprecated the practice of the courts adjourning the cases without examination of witnesses when they are in attendance. In ***N.G. Dastane*** case ***(Supra)***, it was observed by the Court that the trial court should realize that witnesses are responsible citizens who have other work to attend to for eking out a livelihood, and they cannot be told to come again and again just to suit the convenience of the advocate concerned. It was further observed that seeking adjournments for postponing the examination of witnesses, who are present in Court even without making other arrangement for examining such witnesses amounts to dereliction of an advocate's duty to the Court as that would cause much harassment and hardship to the witnesses. Tactics of filibuster, if adopted by an advocate, is also a professional misconduct.

253. In view of the aforesaid enunciation of the law, this Court has no hesitation in holding that given the habitual absence of Mr. M.L. Sharma, learned counsel for the accused Mukesh, as delineated above, and his refusal to cross-examine the witnesses despite repeated adjournments granted to him for the aforesaid purpose, the learned trial court was left with no option except to exercise the powers vested in it under Section 309 Cr.P.C. It is relevant to point out that

the judgment of the Supreme Court in ***Akil (supra)*** was passed on 06.12.2012 which was circulated to all the High Courts to ensure strict compliance by the trial courts of the instructions issued by the Supreme Court in ***Shambhu Nath Singh (supra)*** without providing scope for any deviation as provided under Section 309 Cr.P.C. The learned trial Judge in the circumstances had two options:-

(a) To remain oblivious of the aforesaid judgments of the Supreme Court and the directions of the High Court and to sweep them aside, and

(b) To follow the mandate of the law by examining the witnesses himself as laid down in Section 309 Cr.P.C.

254. We, therefore, cannot fault the learned trial Judge in adopting the latter course. The inevitable corollary is that we reject the contention of Mr. M.L. Sharma, Advocate that the learned Sessions Judge had no authority in law to examine the witnesses with the assistance of the amicus as was done by him in the instant case in respect of the witnesses enumerated above. The course of action followed by the learned trial court, we find, was strictly in accordance with Section 309 Cr.P.C. and was the only correct approach given the circumstances of the case.

255. Mr. Sharma next contended that non-adherence to the provisos to sub-section (1) of Section 154 is fatal to the case of the prosecution in that the statement of the prosecutrix should have been videographed and recorded by a lady officer. We deem it appropriate to refer to sub-section (1) of Section 154 and the provisos thereto, which read as under:-

*"**154. Information in cognizable cases –** (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*

Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that –

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information may be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under Clause (a) of sub-section (5A) of section 164 as soon as possible."

256. At the outset, we note that both the provisos to sub-section (1) were inserted in the Code of Criminal Procedure by the

Criminal Law (Amendment) Act, 2013 (Act No.13 of 2013) with effect from 03.02.2013 and the charge sheet in the instant case was filed on 03.01.2013. Therefore, the provisos to Section 154 Cr.P.C. have no application to the present case. That said, we find that the investigating agency in the instant case has substantially complied with both the aforesaid provisos, in that the statement of the prosecutrix was reduced into writing in the first instance by Dr. Rashmi Ahuja (PW-49) and thereafter by the SDM Usha Chaturvedi (PW-27) and since this could not have been done at the residence of the prosecutrix, it was done at SJ Hospital. True, the recording of such information was not videographed, but this was not the mandate prior to the amendment which came into effect from 3rd February, 2013. The fact that the statement of the prosecutrix was subsequently recorded by a Judicial Magistrate under Clause (a) of sub-section (5A) of Section 164 [as provided by Clause (c) of the second proviso to sub-section (1) of Section 154] is, to our mind, sufficient reassurance to this Court about the authenticity and veracity of the prosecution case. The mere fact that the recording of the statement was not effected by a woman police officer is meaningless when the recording was done by a woman doctor and a woman Sub-Divisional Magistrate and subsequently by a Judicial Magistrate under Section 164 Cr.P.C.

257. Mr. Sharma further contended that the statement of the prosecutrix recorded in the MLC ought to have formed the basis of the F.I.R. as this was the first information of the incident. In this context, he relied upon the judgment of the Constitution

Bench in ***Lalita Kumari vs. Govt. of UP and Ors., 2013 (13) SCALE 559*** and the judgments in ***Thulia Kali vs. State of Tamil Nadu, (1972) 3 SCC 393*** and ***CBI vs. Tapan Kumar Singh (2003) 6 SCC 175.***

258. We find from the record that the first statement of the complainant/eye-witness, (Ex.PW-1/A) was recorded in the morning of 17.12.2012 by PW-74 S.I. Subhash Chand who gave the rukka to Ct. Kripal and sent him at 5:10 AM to police station on the basis of which FIR was registered. **The rukka Ex.PW-74/A clearly mentions about the MLC of the prosecutrix and the facts narrated by the prosecutrix herself of the assault and rape to the treating doctor, PW-49 Dr. Rashmi Ahuja.** The endorsement on the rukka (Ex.PW-74/A) reads as under:-

> *"To*
> *The Duty Officer*
> *P.S. Vasant Vihar*
>
> *Sir,*
>
> *It is officially submitted that today on receipt of DD No.6-A, I, the SI alongwith Ct. Kirpal no.3926/SD reached S.J. Hospital for the purpose of investigation where S.I. Mahesh and Inspector Raj Kumari ATO/Vasant Kunj (North) were present. One Jyoti d/o Badri Nath Singh aged 23 years r/o 174, Street No.27, Mahabir Enclave, Delhi was admitted in the hospital vide MLC No.37758. Thereafter, I obtained the aforesaid MLC collected by Inspector Raj Kumari. The doctor had written on the MLC No.37758(GRR) of Jyoti, "alleged H/o gang-rape in a moving bus by 4-5 men while she was coming from a movie with her boy friend. She was slapped on her face, kicked on her abdomen and bitten over lips, cheek, breast and vulval region. She remembers intercourse two times and rectal penetration also. She was forced to suck their penis but she refused. All this continued for half an hour and then she was thrown off from the moving bus with her boyfriend.* ***The victim was not in the position to make her statement due to injuries……..****"*

259. Faced with this situation, Mr. Sharma sought to contend that the complaint/tehreer Ex.PW-1/A not being written in the hand of the complainant, no FIR could be registered on the basis thereof. We find this to be an argument of desperation as there is no such requirement in law and Section 154 Cr.P.C. clearly envisages that information may also be received orally. In any event, reference may usefully be made to Ex.PW-1/A which shows that the complainant PW-1 signed the same. PW-1 in his testimony in Court corroborates this and identifies his signature on the tehreer:-

> *"My first statement was recorded in the hospital. I had signed twice. Today I have seen my statement. It bears my signature at point A and the same is Ex.PW-1/A."*

260. Relying upon the decision of the Supreme Court in ***Ishwar Singh vs. State of U.P., AIR 1976 SC 2423***, Mr. Sharma then sought to contend that there was considerable delay in the registration of the First Information Report. At the outset, we note that the case of ***Ishwar Singh*** is of no help to the defence as in the said case there was inordinate and unexplained delay in dispatching the First Information Report to the Magistrate. The FIR was stated to have been lodged at 9:05 AM on February 14, 1973 but the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby and thus it became difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. On this basis, it was contended in the said case that the First Information Report was recorded much later than the stated date and hour, affording sufficient time to the prosecution to introduce

improvements and embellishments and set up a distorted version of the occurrence. In the present case, the FIR was registered at the earliest i.e. at 5:40 AM and in any event no question has been put to the Investigating Officer in respect of any delay in the registration of the FIR.

261. Reliance was also placed by Mr. M.L. Sharma in the context of delay upon the decision of the Supreme Court in ***Jai Prakash Singh vs. State of Bihar and Anr., (2012) 4 SCC 379***. In paragraph 12 of the said judgment, the Court opined:-

> *"**12.** The FIR in a criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide Thulia Kali v. State of T.N. [(1972) 3 SCC 393 : 1972 SCC (Cri) 543 : AIR 1973 SC 501] , State of Punjab v. Surja Ram [1995 Supp (3) SCC 419 : 1995 SCC (Cri) 937 : AIR 1995 SC 2413] , Girish Yadav v. State of M.P. [(1996) 8 SCC 186 : 1996 SCC (Cri) 552] and Takdir Samsuddin Sheikh v. State of Gujarat [(2011) 10 SCC 158 : (2012) 1 SCC (Cri) 218 : AIR 2012 SC 37] .)"*

262. The aforesaid case too has no application to the facts of the present case as the test laid down in the extracted portion reproduced hereinabove are fulfilled in the present case and the sequence of events in respect of registration of FIR shows that there is no delay in the registration of the FIR. In order to place

matters beyond the pale of controversy, however, we set out hereunder the sequence of events leading to the registration of the FIR:-

(i) **DD No. 4-A PS Vasasnt Kunj (North)**

S.I. Mahesh Bhargav (PW-62) of Police Station Vasant Kunj (North) received **DD Entry No.4-A at 12:45 AM**. The said DD stated that one boy and girl were found naked in front of GMR Gate, Mahipalpur. On receipt of this DD, the said witness reached the spot. However, he did not find anyone there as the PCR had already taken the injured persons to the Hospital. S.I. Mahesh Bhargav (PW-62) thereafter proceeded to Safdarjung Hospital wherein he was informed by the Duty Constable that the complainant had been referred to Ward 'B', whereas the prosecutrix had been sent to the GRR (Gynae Ward). The said witness also received MLC of the complainant (PW-51/A) and later handed over the same to the Investigating Officer.

(ii) Inspector Raj Kumari, ATO, Vasant Kunj, PW-59 (Anti-Terrorist Officer, an officer of the rank of an Addl. SHO), also reached Vasant Kunj as she was on patrolling duty and had received information from the Duty Officer that one boy and girl had been admitted in Safdarjung Hospital in an injured condition. Raj Kumari (PW-59) collected the MLC and exhibits of the prosecutrix and handed over the same to the Investigating Officer Pratibha Sharma which were seized by a seizure memo (Ex.59/A).

(iii) **DD No. 6-A PS Vasant Vihar**

Further, consequent to the information transmitted, the Duty Officer, Vasant Vihar Police Station, A.S.I. Kapil Singh (PW-57) received DD No.6-A (Ex. PW-57/A). The substance of the said DD was that at 1:12 AM information was received from mobile number 9717890175 that a girl and a boy were found without any clothes just after the Mahipal Pur flyover on the way towards Delhi in the service lane. The DD was then handed over by PW-57 to S.I. Subhash (PW-74). **The said DD recorded the fact of the victims lying near the Mahipalpur flyover and that it was recorded at 01:12 AM.**

(iv) **DD No. 7-A PS Vasant Vihar**

PW-57, A.S.I. Kapil Singh the Duty Officer of Vasant Vihar Police Station received a further call, noted down as **DD No.7-A, which was from the Duty Constable, Safdarjung Hospital at 1:20 AM about the admission of the victims to Safdarjung Hospital**. The information about the said DD No.7-A (Ex.57/B) was also given to S.I. Subhash.

(v) After admission, the complainant and the victim were admitted to separate casualties. The complainant was admitted to the general casualty, while the victim was admitted to the Gynae casualty. The complainant was examined by Dr. Sachin Bajaj (PW-51) and other doctors and the MLC was drawn up in the handwriting of Dr. Dheeraj, whose signature is identified by Dr. Sachin Bajaj (PW-51). The same was later on handed over to I.O. S.I. Pratibha Sharma. The victim (prosecutrix) was

attended to by Dr. Rashmi Ahuja (PW-49) and her MLC was drawn up, which is Ex.PW-49/B. The evidence of PW-59 Inspector Raj Kumari shows that the MLC was handed to S.I. Pratibha Sharma.

(vi) S.I. Subhash, P.S. Vasant Vihar (PW-74) after ascertaining that the complainant was fit for recording his statement proceeded to record the statement of the complainant/eye witness (PW-1) at Safdarjung Hospital. He then sent the said rukka/tehreer to Vasant Vihar Police Station through Constable Kirpal Singh (PW-65) at 5:10 A.M. The said rukka/tehreer is Ex.PW-1/A; having endorsement, which is Ex.PW-57/E.

(vii) **DD No. 11-A PS Vasant Vihar**

On receipt of the said rukka/tehreer, DD No.11-A, which is Ex.PW-57/C, was recorded and thereafter an FIR was registered, being FIR No.413 of 2012 at Police Station Vasant Vihar (Ex.PW-57/D) at 5:40 A.M., which was signed by the Duty Officer.

263. The aforesaid evidence, in our view, completely rules out the possibility of any manipulation and in fact proves and corroborates the FIR. We also note that there is no suggestion by the defence in the cross-examination about manipulation in the FIR. In any event, it is settled law that an FIR is not an encyclopedia but only the starting point of the investigation.

264. Reference may usefully be made in this context to a recent decision of the Supreme Court rendered in the case of ***Hari***

Harivadan Babubhai Patel v. State of Gujarat, (2013) 7 SCC 45. In the said case, the incident had taken place on 23.1.2006, yet the FIR was lodged only on 25.1.2006. It was, however, clearly proven that the informant was engaged in search for the deceased and he had not apprehended that the life spark of the deceased would be extinct. The issue arose as to whether delay in lodgment of FIR had no significant bearing on the case of the prosecution or whether such delay had resulted in the creation of a coloured version in the FIR, which was answered by the Supreme Court as follows:-

> *"12. In this context, we may refer with profit to the authority in **State of H.P. v. Gian Chand** [(2001) 6 SCC 71 : 2001 SCC (Cri) 980] wherein a three-Judge Bench has opined that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay. If the explanation offered is satisfactory and there is no possibility of embellishment, the delay should not be treated as fatal to the case of the prosecution.*
>
> *13. In **Ramdas v. State of Maharashtra** [(2007) 2 SCC 170 : (2007) 1 SCC (Cri) 546] it has been ruled that when an FIR is lodged belatedly, it is a relevant fact of which the court must take notice of, but the said fact has to be considered in the light of other facts and circumstances of the case. It is obligatory on the part of the court to consider whether the delay in lodging the report adversely affects the case of the prosecution and it would depend upon the matter of appreciation of evidence in totality.*
>
> *14. In **Kilakkatha Parambath Sasi v. State of Kerala** [(2011) 4 SCC 552 : (2011) 2 SCC (Cri) 355 : AIR 2011 SC 1064] it has been laid down that when an FIR has been lodged in a belated manner, inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened. Similar view has also been expressed in Kanhaiya Lal v. State of Rajasthan [(2013) 5 SCC 655 : (2013) 6 Scale 242].*
>
> *15. Scrutinised on the anvil of the aforesaid enunciation of law, we are disposed to think that there had been no embellishment in the FIR and, in fact, there could not have been any possibility*

> *of embellishment. As we find, the case at hand does not reveal that the absence of spontaneity in the lodgment of the FIR has created a coloured version. On the contrary, from the other circumstances which lend support to the prosecution story, it is difficult to disbelieve and discard the prosecution case solely on the ground that the FIR was lodged on 25-1-2006 though the deceased was taken by the accused persons sometime on 23-1-2006. The explanation offered pertaining to the search of the deceased by the informant has been given credence to by the learned trial Judge as well as by the High Court and, in our considered opinion, adjudging the entire scenario of the prosecution case, the same deserves acceptation. Hence, the said submission is sans substance."*

265. Thus, in the instant case, the delay, if any, in lodgement of the FIR has no possible bearing on the case of the prosecution. In any event, during the course of the trial, no embellishment in the FIR has been proved.

266. Mr. M.L. Sharma next contended that it was indeed surprising that all the senior officers were present at SJ Hospital including Inspector Raj Kumari (PW-59) and ACP Mr. Mahender Singh Malik, though FIR had yet to be registered. This, Mr. Sharma stated, was borne out from the testimony of PW-59 Inspector Raj Kumari, who stated in cross-examination that she reached the hospital within 20 minutes of the recording of the first daily diary entry and the night G.O. of the District, ACP Mr. Mahender Singh Malik was also present, and in further cross-examination stated that many senior officers, i.e., SHOs and ACP had reached SJ Hospital by then and the DCP had also come to the hospital before she left at about 4/5 AM. The question arises as to who had informed the senior officers?

267. We find the aforesaid argument specious in nature for it is well known that the standard operating practice is that information in respect of all cases of heinous crime is simultaneously transferred by the control room to all the relevant police stations as well as on wireless to all officers on the wireless net. There is a night gazetted officer of DCP rank for the entire city and a night gazetted officer of ACP rank for each district who is informed by the control room and who in turn transmits it to the concerned district DCP both through telephone as well as through the wireless net. The aforesaid aspect has been affirmed before us by the learned Special Public Prosecutor and need not detain us any further.

268. Mr. Sharma then emphatically contended that the prosecution version that the prosecutrix was found naked at the time of her rescue is not at all worthy of credence for the reason that a torn *shameez* was collected from the prosecutrix by PW-49 Dr. Rashmi Ahuja and this fact stands documented by the concerned doctor in Ex.PW-49/A. We are of the opinion that not much ado can be made of the fact that a torn *shameez* was found on the body of the prosecutrix and in order to satisfy ourselves on this score, we had sent for the said garment which was produced before us and was found by us to be just a shred of cloth, black in colour, incapable of hiding or concealing any part of the body of the prosecutrix. As a matter of fact, we find the recovery of the torn *shameez* corroborates the statement made by the prosecutrix, recorded by PW-49 Dr. Rashmi Ahuja (Ex.PW-49/A) as well as

her statement given to the SDM PW-27 (Ex.PW-27/A). In both her aforesaid statements, the prosecutrix categorically states that her clothes were torn by the accused persons. Further, it emerges from the record that the witnesses, who saw the victims in semi-darkness, stated that they were naked with some torn inner clothing.

269. Mr. Sharma further contended that the entire prosecution case was a fabricated and concocted story as is obvious from the fact that as per the prosecution, one **Mohd. Zeeshan (PW-44)** came to the police station and handed over one SIM card of IDEA to the Investigating Officer by saying that he had found this SIM card in Noida, UP. Mr. Sharma urged that it was wholly ununderstandable as to how the SIM card (Ex.PW-44/1) was found at Noida when the entire incident took place in Delhi.

270. We are constrained to say that there is no substance in the aforesaid contention of Mr. Sharma for the reason that PW-81 Dinesh Yadav, the owner of the bus bearing registration No.DL1PC-0149, in which the offence was committed, has categorically stated in his cross-examination that bus Ex.P-1 was being used for ferrying the students in the morning and thereafter as a chartered bus for taking the officials of M/s. Net Ambit from Delhi to Noida. He further stated in cross-examination that on 17.12.2012, the bus took the staff of M/s. Net Ambit from Delhi to Sector 132, Noida, UP. Quite apparently, therefore, accused Ram Singh as disclosed by him had thrown the SIM card nearabout the bus stand of Sector 37, where according to PW-44

Mohd. Zeeshan, it was found at the noon hour. Since it is not in dispute that accused Ram Singh was the driver of the bus and this fact stands fully established by the evidence on record, Noida was possibly found by him to be the safest destination to dispose of the SIM card.

271. Mr. Sharma next contended that in view of the fact that the bite marks on the body of the prosecutrix, other than those of Ram Singh and Akshay Kumar, have not been identified, the necessary corollary is that the remaining four accused persons were not involved in the commission of the crime. The police having failed to investigate the aforesaid bite marks, the investigation could not have been wrapped up by implicating the remaining four accused persons. We have carefully considered the aforesaid argument and we find the same to be sans substance. The report of the Department of Forensic Odontology shows that out of the samples provided for analysis (being photographs Nos.1 to 10) only photographs 1, 2, 4 and 5 yielded results. The said report clearly discloses that photograph Nos.1 and 2 on comparison were found to be the bite marks of one of the accused persons, namely, Ram Singh. Photograph No.3 was found to be out of focus and, therefore, could not be utilized for further analysis. Photograph No.4 was found to be of the bite marks of accused Ram Singh. Photograph No.5 was found to tally with the dental model of accused Akshay. In photograph No.6, the scale was not found on the same plane as the bite mark caused by the lower jaws teeth; therefore, this photograph was not used for further analysis. In

photographs Nos.7 and 8, since the marks were relatively isolated and diffused, these photographs were not used for the purpose of analysis. Likewise, in photograph Nos.9 and 10, since the tooth marks were of clustered nature and precluded the identification of the causative teeth, these photographs were also not used for further analysis. Thus, in the samples provided for analysis, only photographs 1, 2, 4 and 5 were used for the purpose of analysis. These photographs, as noted above, pertain to accused Ram Singh (photographs 1, 2 and 4) and to accused Akshay Kumar (photograph No.5), but it would be wholly illogical to surmise therefrom that the remaining photographs preclude the possibility of the bite marks belonging to the remaining accused persons or that the remaining accused persons were not involved in the commission of the crime.

272. Mr. M.L. Sharma also sought to contend that the lights having been put off in the bus Ex.P-1, there was no question of identification of the accused persons by PW-1 Awninder Pratap Singh. This argument of Mr. Sharma's, though appealing at first blush, loses sight of the entirety of the evidence on record. Thus, PW-1 Awninder Pratap Singh in his deposition in Court clearly states that as he boarded the bus he saw that besides the boy who was insisting upon their boarding the bus, there were two other persons sitting in the driver's cabin along with the driver of the bus, who was of blackish complexion. He further states that as he entered the bus he found that it was a 3 x 2 seater bus, i.e., there was a three seats' row behind the driver's seat and a two seats'

row on the other side. One person was sitting on the left side, i.e., on the two seats and another was sitting on the right side, i.e., on the three seats just behind the driver's seat. He and his friend sat behind the person who was sitting on the left side, i.e., on the two seats' row. **After entering bus, he noticed that the seat covers of the bus were of red colour and it had curtains of yellow colour and the windows of the bus had black film on it. He further states that he paid an amount of ₹ 20/- as bus fare to the conductor, i.e., ₹ 10/- per head. Subsequently, he states that as the bus started, the accused put off the lights inside the bus, but by then he had already noted the aforementioned facts and paid the fare of the bus.**

273. The aforesaid deposition of PW-1 stands corroborated by the statement of the prosecutrix given to PW-27 Usha Chaturvedi, SDM (Ex.PW-27/A), where in answer to question No.9, she stated that **after five minutes when the bus started climbing the Malai Mandir flyover, the conductor switched off the lights of the bus.** Further, we find from the statement given by the prosecutrix to PW-30 Pawan Kumar, Metropolitan Magistrate (Ex.PW-30/C) that on a specific query put to the prosecutrix by the Metropolitan Magistrate as to whether she had seen the staff of the bus, the prosecutrix replied in the affirmative.

274. In the context of dying declarations of the prosecutrix, Mr. M.L. Sharma more or less argued on the same lines as Mr. Singh adopting the contentions of Mr. Singh. Mr. M.L. Sharma, like Mr. A.P. Singh, contended that the MLC Ex.PW-49/B was the only

worthwhile statement of the prosecutrix. The following additional arguments were, however, put forth by Mr. M.L. Sharma:-

(i) The prosecution story with regard to the looting of articles from the two victims is belied by the 'brief history' given by the prosecutrix in the MLC EX. PW 49/B, in which she has nowhere stated that any article was looted from her or her friend.

(ii) Additionally, in document EX. PW 49/A, the doctor lists the articles seized by her (PW-49 Dr. Rashmi Ahuja) from the prosecutrix and the wrist watch of the prosecutrix is specifically mentioned. In her second dying declaration, however, the prosecutrix specifically mentions "watches" (*ghadiyan*) to be among the looted articles. This too points the needle of suspicion on her aforesaid dying declaration.

(iii) The fact that there is no mention of insertion of rods by the accused persons in the first dying declaration viz., MLC Ex.PW-49/B, but the slaps administered to her by the accused persons are specifically mentioned by the maker of the statement, shows that the whole story about the insertion of rods in the recto-vaginal area of the prosecutrix, as set out in her second and third dying declarations, is a concocted one.

(iv) The testimony of PW-30 Sh. Pawan Kumar, M.M. cannot be read in evidence on account of non-administration of oath to the said witness at the time of recording of his statement in Court.

(v) In her third dying declaration while it is the claim of the prosecution, that the prosecutrix in her own handwriting wrote down the names of the accused persons vide Ex.PW-30/E, the said document has not been proved to be in the handwriting of the prosecutrix by sending the same to the handwriting expert. Additionally, the name of accused Pawan does not find mention in document Ex.PW-30/E and instead one 'Vipin' is introduced for the first time, which goes to show that document Ex.PW-30/E is an interpolated document. The said 'Vipin' does not at all figure in the prosecution story.

275. It is proposed to deal with the aforesaid contentions pointwise:-

(i) In the context of contention No.(i), suffice it to note that the prosecutrix at the time of her admission to hospital was in a critical condition as detailed hereinabove and was suffering from vaso-constriction. In such circumstances, for her not to disclose the looting of articles cannot be construed to mean that the Appellants in fact were not guilty of the same. An MLC like an FIR is not meant to be an encyclopaedia and in fact in the case of an MLC it is all the more so when the condition of the patient is critical and the patient has undergone severe trauma as in the instant case.

(ii) In the context of contention No.(ii), it may profitably be noted that it is not the case of the prosecution that the watch of the prosecutrix was amongst the looted articles.

There is a recovery memo in respect of the watch of the complainant (PW-1) but there is no such document in respect of the watch of the prosecutrix and hence the use of the word *'ghadiyan'* in the statement of the prosecutrix must be construed in the singular rather than in the plural. This in fact is corroborated by document Ex.PW-49/A which is a list of articles prepared by PW-49 Dr. Rashmi Ahuja, in SJ Hospital, in which the watch of the prosecutrix finds mention. Thus, evidently the prosecutrix was wearing her watch at the time of her admission in the hospital and the said watch is not shown to have been recovered from any of the accused.

(iii) In the context of contention No.(iii), suffice it to note that in her dying declaration recorded by the S.D.M. the prosecutrix has accurately described the incident and explained the manner in which the accused not only repeatedly inserted iron rods in her rectal and vaginal region, but also stated that her internal organs were pulled out with the rods as well as the hands of the accused. This is the manner in which she describes her plight:-

> *"Lohey ki rod se mujhe mere paet par maara aur poore shareer par danto se kata. Is se pehle mere dost ka saman - mobile phone, purse, credit card, debit card, ghadi aadi cheen liye. But total chhey (6) log the jinhoney bari-bari se oral (oral) vaginal (through vagina) aur pichhey se (anal) balatkar kiya. In logo ne lohe ki rod ko mere sharer ke andar vaginal guptang aur guda (pichhey se) (through rectum) dala aur phir bahar bhi nikala. Aur mere guptango haath aur lohe ki rod dal kar mere shareer ke andruni hisson ko bahar nikala aur chot pahunchayi. Chhey logo ne bari-bari se mere saath kareeb ek ghante*

tak balatkar kiya. Chalti huyi bus mein he driver badalta raha taaki woh bhi balatkar kar sake."

True it is that in the MLC Ex.PW-49/B there is no mention made by her about the insertion of rods in her vagina and rectum and the pulling out of the internal organs with the said rods and with hands. It is, however, beyond cavil that her MLC itself bears testimony to the savage manner in which she had been brutalized in that at the risk of repetition it is noted that a tag of the vagina 6 cms. long was hanging out of the introitus resulting in profuse bleeding, the vaginal wall had a tear of about 7 to 8 cms, the rectal tear was of about 4 to 5 cm communicating with the vaginal tear and she was immediately referred to OT for complete perineal tear repair. The injury to her rectovaginal area was opined by Dr. Rashmi Ahuja (PW-49) as ***"dangerous in nature"***. The manner in which she was brutalized is also set out in her second dying declaration and her aforesaid statement is fully corroborated by the medical evidence given by all the doctors, including Dr. Rashmi Ahuja (PW-49) and Dr. Raj Kumar Chejara (PW-50).

Then again, the Investigating Officer had sought the opinion of the doctors with regard to the weapons of offence, *viz.*, the rods Ex.PW-49/1 and Ex.PW-49/2, which were shown to both Dr. Rashmi Ahuja (PW-49) and Dr. Raj Kumar Chejara (PW-50). Both the said doctors identified the rods shown to them in the course of investigation and opined that the injuries sustained by the prosecutrix could have been caused by

thrusting of the said rods forcibly through vagina and/or anus, as opined by them in their report Ex. PW-49/G. The findings rendered by PW-50 Dr. Raj Kumar Chejara, who conducted the surgery on the prosecutrix in respect of the abdominal injuries sustained by the prosecutrix are also apposite in that this medical evidence fully corroborates the prosecution version with regard to the rods being the weapon of offence. The said findings have been reproduced hereinabove and are not being restated to avoid prolixity.

Thus, the mere circumstance that there is no mention made of the rods by the prosecutrix in the MLC cannot be used by the counsel for the defence to yield any advantage to the accused persons, as the insertion of the rods in the interns of the prosecutrix is fully corroborated by the medical evidence on record. Apart from this, it is further corroborated by the DNA analysis. Here again, since we have already dealt with the DNA reports at some length, at this juncture we rest content by noting that upon analysis of the DNA profile developed from the blood-stains on the rods, the same was found to be consistent with the DNA profile of the prosecutrix.

We are, therefore, not inclined to accept the contention of the defence that the non-mention of the 'rods'in the MLC of the prosecutrix shows that 'rods'were not used as weapon of offence. The findings of the learned trial court with regard to the weapon of offence, *viz.*¸ the iron rods in this regard appear to us to be in order and we fully endorse the same.

We may also note at this juncture that in the first statement recorded of the complainant by SI Subhash (PW-74) on 17.12.2012 (Ex.PW-1/A), the complainant (PW-1) has made a clear mention of the user of iron rods as weapons of offence albeit in the context of injuries inflicted upon him, and this statement was recorded nearly 12 hours before the arrest of accused Ram Singh, the first of the accused persons to be arrested.

(iv) As regards the defence plea relating to non-administration of oath to PW-30, Shri Pawan Kumar, Metropolitan Magistrate, it only requires to be noted that due to inadvertence, oath was not administered to the said witness by the learned trial Court in the first instance. However, thereafter, oath was administered and his entire examination-in-chief was recorded afresh. Even otherwise, non-administration of oath to a witness has absolutely no bearing on his testimony. This is all the more so in the case of a Magistrate who is deposing in respect of judicial proceedings. The law in this regard has been enunciated in a recent judgment of the Supreme Court rendered in the case of ***State of Rajasthan v. Darshan Singh @ Darshan Lal (2012) 5 SCC 789***, wherein it is held that the omission of administration of oath or affirmation does not invalidate any evidence in view of the clear provisions of Section 7 of the Oaths Act, 1969. In the said case, the Court noted the legal position as under (SCC, Page 797):-

> *"24. This Court in Rameshwar v. State of Rajasthan [AIR 1952 SC 54 : 1952 Cri LJ 547] has categorically held that the main purpose of administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility. However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence."*

(v) In context of the discrepancy in the names set out in the second and third dying declarations of the prosecutrix, it needs to be borne in mind that the prosecutrix did not know the accused prior to the incident. She in fact gathered the names of the accused while overhearing them calling out to each other during the incident (an incident in which they were the tormentors and she the tormented) and, therefore, could not be expected to remember their names accurately, more so when she herself was precariously poised between life and death. Thus, in the third dying declaration, there is no mention of the Appellant Pawan Kumar and instead one 'Vipin' has been mentioned. But is this solitary circumstance sufficient to discard her statement in its entirety? We think not. The reasons are set out hereunder.

The medical record of the prosecutrix shows that the prosecutrix remained unfit for recording of her statement on 17th December, 18th December, 19th December and 20th December, 2012. It was only on 21st December, 2012 at about 6 p.m, that she was declared fit for recording of her statement. In her said statement recorded by the SDM, she has given the

names of her six assailants accurately and has specified the exact role played by each of them and the barbaric manner in which they defiled her body. At the time of the recording of her third dying declaration, however, the medical record of the prosecutrix shows that she had again taken a turn for the worse and as testified by the concerned doctors her bowels had turned gangrenous. The third dying declaration was recorded on 25.12.2012 and on the following day, i.e., on 26.12.2012, it was decided to remove her to Singapore keeping in view her dangerous condition. In such circumstances, though she managed to correctly name five out of her six assailants, the last name was erroneously mentioned by her as 'Vipin' instead of 'Pawan', presumably on account of her flagging energy resources towards the end. Be that as it may, we are persuaded to hold that the fact that the document mentions one of the names wrongly only goes to prove the authenticity of the document and not the contrary. Had this been an interpolated document, there would have been no difficulty in correctly recording the name 'Pawan' instead of 'Vipin'.

Not much importance can also be attached, in our view, to the somewhat belated plea raised by learned defence counsel that document Ex.PW-30/E was not sent for forensic examination to determine the handwriting of the prosecutrix. Had the defence counsel shown the same anxiety for forensic examination of the document at the relevant stage, there might have been some weight in this contention, but this would have

obviously meant the running of a huge risk by the defence. The defence chose not to tread thin ice and given the circumstances there does not appear to us to be any reason for us to doubt the statement of the learned Metropolitan Magistrate (PW-30) that document Ex.PW-30/E was scribed by the prosecutrix in her own handwriting, more so when there is ample evidence on record, including scientific evidence, to nail the real culprits.

276. In the aforesaid context, in a recent judgment rendered by the Hon'ble Supreme Court in the case of ***Rakesh and Another Vs. State of Haryana (2013) 4 SCC 69,*** the Supreme Court, while examining the credibility of a dying declaration recorded by the Judicial Magistrate opined (SCC, Page 76):-

> ***"20. The claim that there was wrong description of names in the dying declaration*** **and** ***some of the relatives were present at the time of recording of the dying declaration are not material contradictions which would affect the prosecution case."***

277. Per contra, Mr. M.L. Sharma heavily relied upon the decision in ***Mehiboobsab Abbasabi Nadaf vs. State of Karnataka, (2007) 13 SCC 112*** to contend that no credence could be attached to any of the dying declarations of the prosecutrix. This was a case in which the deceased herself had taken contradictory and inconsistent stand in four different dying declarations and in fact there was a total divergence in her statements with regard to the manner in which the incident took place. Hence it was held that the same should not be accepted on their face value; that consistency in the dying

declarations apart from voluntariness is the relevant factor for placing full reliance thereupon, and that caution was, therefore, required to be applied. In the present case, we do not find any such inconsistency in the three dying declarations of the deceased as to render them unworthy of credence.

278. Mr. M.L. Sharma further relied upon the decision of ***State of Madhya Pradesh vs. Dal Singh and Others, (2013) 7 SCALE 513***. This was a case in which it was alleged that there were discrepancies in the two statements of the deceased, one recorded in the first information report and the other before the Executive Magistrate, as to who set the deceased on fire and who poured kerosene oil on her. However, the deceased in the FIR as well as in her statement recorded before the Executive Magistrate had implicated all the three accused persons. The trial court convicted all the accused. On appeal, the High Court acquitted all the accused. On further appeal, the Supreme Court restored the judgment of the trial court holding that the contradictions raised by the defence in the two dying declarations, as regards who had put the kerosene oil on her, and who had lit the fire had been carefully examined and explained by the trial court. Furthermore, in such a state of mind, one cannot expect that a person in such a physical condition, would be able to give the exact version of the incident, as she had been suffering from great pain and physical agony. This judgment further reiterates the legal position enunciated in ***Laxman vs. State of Maharashtra, (2002) 6 SCC 710.*** We are not able to see as to how this judgment is of any assistance to the defence.

279. Reliance was next placed by Mr. Sharma on a recent decision of the Supreme Court rendered in ***Kashi Vishwanath vs. State of Karnataka, (2013) 8 SCALE 620***. In this case, the Taluka Executive Magistrate recorded the first statement of the deceased as to who had set her ablaze in her matrimonial home. The second dying declaration was recorded by the police Sub-Inspector while the third statement was recorded by the Investigating Officer. The Supreme Court after observing that there were glaring inconsistencies in the said three dying declarations allowed the appeal of the Appellant. The Supreme Court noted that in the first dying declaration, the deceased stated that she had sustained burn injuries when her husband had a fight with her and instigated her to pour kerosene upon her body and when she poured kerosene on her body, her husband further poured kerosene upon her and put her on fire with the match box. In the second dying declaration, she stated that her husband started quarrelling with her at the behest of one Laxmi and along with Laxmi poured kerosene on her body and put her on fire by using match stick; while in the third dying declaration she stated that her husband poured kerosene on her and the aforesaid Laxmi lit the match stick and threw it upon her body as a result of which the flames spread all over her body. Suffice it to note that this case rests on its own peculiar facts and has no application whatsoever to the facts of the present case in which all three dying declarations of the deceased are in the same strain.

280. The law on multiple dying declarations has been elaborately dwelt upon by the Supreme Court in a large number of cases and it

has been consistently held that it is not required for multiple dying declarations to be identical with each other to pass the test of admissibility. The Court, in the facts of each case, will examine the nature of inconsistencies, if any, to see if they are material or not. It has been further held that even if the dying declarations are inconsistent, the version that corroborates as nearly as may be the version of the prosecution can be admitted into evidence.

281. In ***Abrar Vs. State of Uttar Pradesh (2011) 2 SCC 750,*** a three Judge Bench of the Supreme Court noted that minor discrepancies in dying declarations recorded at multiple intervals is normal because of the pain and suffering the victim is enduring; such discrepencies are not required to be given undue weightage or blown out of proportion. The relevant extract of the judgment is reproduced below (SCC, Page 754):-

> *"12. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To our mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. We, particularly, notice that the dying declaration had been recorded by the Tahsildar after the doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. We are, therefore, of the opinion, that no fault whatsoever could be found in the dying declarations."*

282. In a recent judgment rendered by the Supreme Court in ***Ashabai and Another Vs. State of Maharashtra (2013) 2 SCC 224***, the Supreme Court while upholding the evidentiary value of multiple dying declarations recorded in the said case, pointed out that the law

does not require corroboration for dying declarations and even if there are variations between different dying declarations, the same cannot be rejected. The relevant extract of the said judgment reads as under (SCC, Page 230),:-

> ***"15.*** *……... It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration.* ***When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assessed independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variations in the other.***
>
> ***16.*** *We have already noted that in the present case, the prosecution relied on four dying declarations of the deceased. We have also noted that at the time of recording of these statements, medical officers on duty had certified that the deceased was fully conscious and was in a fit state of mind to make the same. As a matter of fact, the deceased has given proper replies to the questions put to her by various authorities. Further, it is not in dispute that the incident occurred on 5-3-2003 and she sustained 54% burns and, ultimately, she died only on 18-4-2003. In other words, she survived for about 1½ (one-and-a-half) months which speaks for the fitness of the declarant to make a statement. The persons who recorded the four dying declarations were examined as PWs 14, 7 and 6 and they were also cross-examined about the statement made by the deceased and recorded by them. In such circumstances, we fully endorse the view expressed by the trial court and affirmed by the High Court about the acceptability of four dying declarations implicating the mother-in-law and sisters-in-law (the appellants herein)."*

283. In the case of ***Shudhakar v. State of M.P. (Supra)***, the Supreme Court while dealing with the aforesaid aspect of the matter broadened the horizons of the law relating to dying declarations by holding that even if there was a large variance between the dying declarations, the Court would apply its mind and rely on the one which must closely corroborates the version of the prosecution. The relevant portion of the judgment is reproduced herein below (SCC, Page 580):-

> ***"21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the court in such matters.***
>
> ***22.*** *In* ***Lakhan*** *[(2010) 8 SCC 514 : (2010) 3 SCC (Cri) 942] this Court provided clarity, not only to the law of dying declarations, but also to the question as to which of the dying declarations has to be preferably relied upon by the court in deciding the question of guilt of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under: (SCC pp. 518-19 & 522-24, paras 9-10, 23-24, 26 & 30).*
>
> > *9. The* ***doctrine*** *of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means 'a*

man will not meet his Maker with a lie in his mouth'. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as 'the Evidence Act') as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide Khushal Rao v. State of Bombay [AIR 1958 SC 22 : 1958 Cri LJ 106] , Rasheed Beg v. State of M.P. [(1974) 4 SCC 264 : 1974 SCC (Cri) 426] , K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618 : 1976 SCC (Cri) 473] , State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455 : 1981 SCC (Cri) 364] , Uka Ram v. State of Rajasthan [(2001) 5 SCC 254 : 2001 SCC (Cri) 847] , Babulal v. State of M.P. [(2003) 12 SCC 490 : 2005 SCC (Cri) 620] , Muthu Kutty v. State [(2005) 9 SCC 113 : 2005 SCC (Cri) 1202] , State of Rajasthan v. Wakteng [(2007) 14 SCC 550 : (2009) 3 SCC (Cri) 217] and Sharda v. State of Rajasthan [(2010) 2 SCC 85 : (2010) 2 SCC (Cri) 980] .)

***23**. The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police*

(PW 19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under:

'On Sunday, in the morning, at about 5.30 a.m., my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my sari afire with the help of a chimney, due to which I got burnt.'

She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her. The said dying declaration was recorded after getting a certificate from the doctor stating that she was in a fit physical and mental condition to give the statement.

***24**. As per the injury report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttocks and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body.*

***26.** Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt Madhu Nahar (DW 1), immediately after admission of the deceased Savita in the hospital and the doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her father-in-law and mother-in-law and the medical report does not support her first dying declaration, the trial court and the High Court have rightly discarded the same.*

30. Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact:

*(c) The second dying declaration was recorded by a police officer on the instruction of the Superintendent of **Police** after getting a certificate of fitness from the doctor, which is corroborated by the medical evidence and is free from any suspicious circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW 1), father and Sushila (PW 3), mother."*

> ***27.*** *Thus, in our considered view, the second and third dying declarations are authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. These dying declarations, read in conjunction with the statement of the prosecution witnesses, can safely be made the basis for conviction of the accused."*

284. In the afore-mentioned case, after referring to a large number of judgments including those rendered in ***Laxman v. State of Maharashtra (Supra)***, the Court held the second and the third dying declarations to be authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. It further held that these dying declarations read in conjunction with the statement of prosecution witnesses, can safely be made the basis for conviction of the accused. In substance, it was held that each dying declaration has to be considered independently on its own merits so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In other words, where the deceased makes dying declarations which are mutually at variance with each other, it is the duty of the court to examine each one of them in its correct perspective to assess where it can be made a foundation for the conviction of the accused. Just as in the case of the testimony of the witnesses, which may be classified into three categories:- (a) Wholly reliable; (b) Wholly unreliable; (c) Neither wholly reliable nor wholly unreliable, vide ***Lallu Manjhi Vs. State of Jharkhand (2003) 2 SCC 401***, multiple dying declarations are also to be viewed and evaluated

for their probative value in the fine scale of credibility. The rejection of one dying declaration as not voluntary and not made by the free will of the deceased does not result in automatic rejection of the other dying declarations made by the deceased, which have to be independently evaluated before accepting them as worthy of credence by rejecting them as wholly unreliable.

285. In the present case, the evidence on record shows that apart from the fact that the names of the accused and certain other details are not mentioned in the MLC by the prosecutrix, all three dying declarations of the prosecutrix corroborate each other in material particulars.

286. It is also noteworthy that the evidence on record further corroborates various aspects of the dying declaration, namely, (1) the fact that the victims went to the Select City Mall in Saket; (2) the fact that they reached Munirka bus stand; (3) the fact that the iron rods were used; (4) the fact that they were dumped opposite Hotel Delhi 37 on NH 8 near Mahipalpur (5) the fact that the incident took place in a bus and (6) the fact that the crime was committed by the five accused arrayed in the present charge sheet, have all been independently proved.

287. Mr. Sharma next contended that no reliance could be placed on the DNA results to link the Appellants with the commission of the crime as the prosecution has not disclosed the date and time when the blood sample of the prosecutrix was taken. We find this contention to be contrary to the record as the record shows that the blood sample of the prosecutrix was taken for the first time by

PW-49 Dr. Rashmi Ahuja in the night of 16.12.2012 itself along with the other medical exhibits of the prosecutrix. The said fact is mentioned in the Casualty Sheet (Ex.PW-49/A) at serial No.20 as well as in the MLC (Ex.PW-49/B). Furthermore, the seizure memo of the medical exhibits of the prosecutrix (Ex.PW-59/A) affirms that the blood sample formed part of the seized exhibits among other exhibits.

288. Mr. M.L. Sharma then sought to contend that there was an irregularity in the arrest of the Appellant Mukesh, who, though arrested at District Karoli on 18.12.2012 was not produced before the nearest Magistrate within 24 hours of his arrest as mandated by law. Instead, he was brought to Delhi on 18th December and produced before the Magistrate in Delhi on 19th December.

289. We propose to advert to the testimony of PW-58 S.I. Arvind Kumar to demonstrate that there was no irregularity in the arrest of the Appellant Mukesh. PW-58 S.I. Arvind Kumar in his deposition stated that *"the involvement and address of accused Mukesh was disclosed by his brother Ram Singh (since deceased)."* PW-58 further deposed that first of all they went to the local police station and gave them the information and from there they went to the house of accused Mukesh where he was found present. The accused was first examined and then apprehended. At that time he was having a mobile make Samsung Duos which was switched off at that time and was not having any SIM. He was first brought to P.S. Vasant Vihar and from there on their coming to know that the I.O. S.I. Pratibha was at SJ

Hospital, they reached SJ Hospital and handed over the mobile and accused Mukesh to S.I. Pratibha Sharma, and thereafter he was formally arrested. The I.O. then checked the IMEI number of the mobile and it connected with the mobile of the complainant, which mobile was then seized vide memo Ex.PW-58/A. Appellant was arrested vide memo Ex.PW-58/B at SJ Hospital and his personal search conducted vide memo Ex.PW-58/C.

290. Interestingly, however, the Appellant Mukesh in his statement under Section 313 Cr.P.C., in answer to Question No.132, claims that he was not apprehended in his village, i.e., Village Karoli, Rajasthan but was apprehended at Ravi Dass Camp and that the mobile Ex.P-6 was lying in his jhuggi kept by his brother, Ram Singh (since deceased) which was seized by the police.

291. In any event, it is a settled proposition of law that any irregularity in arrest has no bearing on the trial. In a celebrated decision given by the Privy Council in ***Parbhu vs. Emperor, AIR (31) 1944 Privy Council 73***, the contention of the Appellant was that his arrest, having been effected in the territory of Jind by a British Indian Officer, was illegal and that the illegality of his arrest vitiated the whole subsequent proceedings. Lord Macmillan repelled the aforesaid contention as under (SCC, Page 74):-

> *"**In their Lordships' view, the validity of the trial and conviction of the appellant was not affected by any irregularity in his arrest.** When the appellant was presented for trial at Rohtak he had been validly surrendered to the Court there by the Jind authorities and so far as that Court was concerned everything was regular and in order".*

292. In ***Lumbhardar Zutshi and Another vs. The King, AIR (37) 1950 Privy Council 26***, the argument was that the trial and conviction of the Appellants was void because the police investigation which led upto the trial was conducted illegally. Their Lordships of the Privy Council opined (SCC, Page 27),:

> *"Such a fault in procedure might have important consequences but it could not in their Lordships' judgment deprive the Chief Presidency Magistrate of his jurisdiction to try the appellants."*

293. The Supreme Court in ***H.N. Rishbud and Inder Singh vs. State of Delhi, (1955) 1 SCR 1150 = AIR 1955 SC 196,*** considered the question as to whether defect or illegality in investigation vitiated the trial. Referring to the provisions of Section 537 of the Code of Criminal Procedure, it observed:- (SC, page 204)

> *"If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in* ***Prabhu v. Emperor*** *and* ***Lumbhardar Zutshi v. The King****. These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice had been caused thereby."*

294. In ***Mobarik Ali Ahmed vs. The State of Bombay, 1958 SCR 328 = AIR 1957 SC 857,*** the contention was raised that the trial stood vitiated in view of the fact that the appellant was brought over from England, where he happened to be by virtue of extradition proceedings, in connection with another offence, the trial for which was then pending in the Sessions Court at Bombay and accordingly he could not be validly tried and convicted for a different offence, that is, for the offence under Section 420 read with Section 34 of the Indian Penal Code. The Supreme Court relying upon the decisions of the Privy Council (supra) and its earlier decision in **Rishbud's case (supra)** held:-

> *"We are unable to accede to that contention. It may also be mentioned that even if his arrest in India for the purpose of a trial in respect of a fresh offence is considered not to be justified, this by itself cannot vitiate the conviction following upon his trial. This is now well-settled by a series of cases. (See* ***Parbhu v. Emperor; Lumbhardar Zutshi v. The King; and H.N. Rishbud v. State of Delhi****). This contention must accordingly be overruled."*

295. Next, a somewhat feeble attempt was made by Mr. Sharma to contend that the testimony of PW-60 Head Constable Mahabir was not worthy of credence since as per the testimony of this witness, he was present with the Investigating Officer at Thyagraj Stadium and he is also shown as a signatory to the arrest memo of the Appellant Mukesh who was arrested at Safdarjung Hospital at the same time. We find this contention to be entirely devoid of force. The learned counsel has clearly misread the testimony of the witness. PW-60 Head Constable Mahabir in his cross-

examination in Court clearly stated that on that day, that is, on 18.12.2012 he had gone to Thyagraj Stadium with the Investigating Officer at 5.00 P.M. and thereafter to Safdarjung Hopsital. **He further clarified that he actually went to Thyagraj Stadium twice. Once before going to the hospital and then from S.J. Hospital. In cross-examination, he stated that they left Thyagraj Stadium at about 8:30 PM and returned to S.J. Hospital** where they stayed for about 30/45 minutes before returning to the poice station at about 10.00 P.M.

296. In the context of non-mention of the names of the Appellants in the First Information Report, Mr. M.L. Sharma contended that this circumstance by itself was fatal to the case of the prosecution. He relied upon the following decisions:-

(i) ***Mitter Sen and Others vs. State of U.P., AIR 1976 SC 1156***

(ii) ***Devinder vs. State of Haryana, 1997 SCC (Crl.) 570***

(iii) ***State vs. Ramesh, 1998 Criminal Law Journal 4233***

(iv) ***Rehmat vs. State of Haryana, 1997 Criminal Law Journal 764 = AIR 1997 SC 1526***

(v) ***Jagir Singh v. State of Delhi, 1975 SCC (Cri.) 129***

(vi) ***Husna vs. State of Punjab, (1996) 7 SCC 382***

297. Suffice it to note that in the first five cases, the parties were known to each other. These cases, therefore, are of no assistance to the defence. In the last case, the Supreme Court came to the conclusion that the prosecution was not able to satisfactorily establish the case against the Appellant Rupa beyond reasonable doubt as his presence at the time of occurrence was not

satisfactorily proved. The Court, however, came to the conclusion that the evidence on the record had brought home the charge against Appellant Husna beyond every reasonable doubt and his conviction and sentence for the various offences as recorded by the trial court called for no interference.

298. Relying upon the decision of the Supreme Court in ***Sunil Kumar Sambhudayal Gupta vs. State of Maharashtra, (2010) 13 SCC 657***, Mr. Sharma further contended that where the complainant in the FIR or the witness in his statement under Section 161 Cr.P.C. has not disclosed certain facts but meets the prosecution case first time before the Court, such version lacks credence and is liable to be discarded. Reference was made by him in this context to paragraph 33 of the said judgment. We are constrained to state that the said paragraph cannot be read in isolation with the rest of the judgment for in the succeeding paragraphs, i.e., paragraphs 34 to 37, the Court has held that marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. It further held that the omissions which amount to contradictions in material particulars, i.e., go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discarded. No such contradictions or improvements have been poined out to us in the instant case and this judgment, therefore, has no application to the facts of the present case.

299. Mr. Sharma further contended that if two views are possible on the evidence adduced in the case, the view which is favourable

to the accused should be adopted. Reliance in this context was placed by him upon the judgment of the Supreme Court in ***Bihari Nath Goswami vs. Shiv Kumar Singh and Others, (2004) 9 SCC 186***, wherein it is laid down that the golden thread which runs through the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. It is noteworthy that the aforesaid observations were made in a case where the appeal was against the acquittal of the accused and the Court held that a miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In any event, this judgment will have absolutely no relevance where the prosecution proves its case beyond reasonable doubt and no alternative hypothesis is established by the defence.

300. Another contention sought to be raised by Mr. M.L. Sharma was that the FIR in the instant case was lodged after the police had already visited the spot. For the aforesaid contention, Mr. Sharma relied upon a judgment of the Madhya Pradesh High Court in ***Mantram vs. State of M.P., 1997 (2) Crimes 550 (M.P.)***. In the cited case, the finding of the Court essentially rests on the fact that the maker of the FIR (PW-3) had not proven the same. The case proceeded on the basis that the report had been lodged with the police by one Mathurabai whereas the FIR was lodged later on by one Kashiram (PW-7) who was also an injured witness. The Court came to the conclusion that it was on learning about the incident obviously

from Mathurabai that the investigating agency had come into motion and reached the spot and thereafter they had brought in two eye witnesses and Ex.P-19 was recorded to which no sanctity could be attached firstly because it cannot be treated to be an FIR and secondly it was not even proved through the maker thereof. It further opined that the said report was brought into being after deliberations with the prosecution witnesses and implicit reliance cannot be placed on the testimony of such partisan witnesses. This case turns on its own facts and has no relevance to the present case. In the present case, the FIR was lodged at 5:40 AM on 17.12.2012 and only after the registration of the FIR, the Investigating Officer went to the spot.

301. On the aspect of disclosure, Mr. M.L. Sharma, learned defence counsel relied upon the following decisions, all of which are wholly inapplicable to the facts of the present case:-

(i) ***Shanker Raju Banglorkar vs. State of Goa, 1992 Criminal Law Journal 3034*** – In this case, the Court came to the conclusion from the evidence on record that the alleged disclosure was made by the accused in the police station while he was in handcuffs and that it was the outcome of duress, pressure or threats given by the police and, therefore, not admissible in view of Article 20 of the Constitution. Disbelieving the prosecution that the accused had led the police to the place where the charas had been kept in his house, the Court quashed the conviction and set it aside. Suffice it to note that this case turns on its own peculiar facts in which the Court

found that the entire case of the prosecution was an unreal one, fraught with inconsistencies and improbabilities which have been detailed in the judgment itself.

(ii) ***Meghaji Godadji Thakore vs. The State of Gujarat, 1993 Criminal Law Journal 730*** – In this case, it was held that a joint statement by two accused persons leading to discovery is not *per se* inadmissible but is a very very weak piece of evidence as it would be difficult to come to the conclusion which of the two accused persons gave any specific and definite information to the police and panchas, which related distinctly to the discovery of the place of the complainant from where the offence of house breaking was committed. In this view of the matter, the aforesaid discovery evidence cannot be used against the accused persons in order to connect them with the crime in question. In the instant case, there is no joint statement and hence this case has no relevance.

(iii) ***State of Karnataka vs. M.V. Mahesh, (2003) 3 SCC 353*** – In this case, the Supreme Court expressed doubt as to whether the statement made by the Appellant really led to the discovery of the bones of the deceased, inasmuch as the police had already information through another witness and that circumstance was strongly relied upon by the High Court. The High Court held that the

statement made by the Respondent did not lead to any discovery since the information was already in possession of the police and that reasoning was endorsed by the Supreme Court. This case again has no relevance to the facts of the present case.

(iv) ***Kailash Potlia vs. State of Andhra Pradesh, (2008) 13 SCC 266*** – It was held that the evidence regarding alleged extra judicial confesion and recoveries made in pursuance of Section 27 Evidence Act did not inspire confidence as also the testimony of the recovery witness. From the tenor of the cross-examination and answers given by the sole recovery witness, the Court found that it was clear that he did not know the place of recovery. This case is based on its own peculiar facts.

(v) ***Harish Chander and Billa vs. State, 1995 Criminal Law Journal 3036*** – The alleged recovery of a nylon rope at the instance of the accused was held to be doubtful in this case as the recovery was made from an open public place and no evidence was led by the prosecution to show that the said piece of nylon rope was kept hidden there. This case also has no relevance to the present case.

EVIDENCE AGAINST EACH OF THE ACCUSED PERSONS

302. The primary evidence against accused Ram Singh, Akshay Kumar, Vinay, Pawan and Mukesh is the testimony of PW-1 Awninder Pratap.

303. Before we reproduce the testimony of PW-1, however, the first aspect which deserves to be highlighted is that the complainant/eye witness also happens to be an injured witness. The narration of events described by him thus assumes great significance when it is kept in mind that the settled legal position is that the version of an injured eye witness carries greater evidentiary value than the statement of an eye witness simpliciter ***[Akhtar v. State of Uttaranchal (2009) 13 SCC 722]***. The second aspect which is required to be borne in mind is that the statement of PW-1 recorded in Court more or less reiterates the entire incident almost verbatim as narrated by the witness to the Metropolitan Magistrate at the time of the recording of his statement under Section 164 Cr.P.C. (Ex.PW-1/B). The third aspect which is required to be highlighted is that the record reveals that all aspects of the testimony of PW-1 have been independently corroborated by other witnesses examined by the prosecution. With the aforesaid background, we proceed to examine the version of the complainant given by him before the learned trial court. In his statement made to the Court, PW-1 testified as follows.

304. On 16.12.2012, at about 3.30 PM, he (PW-1) took the prosecutrix from the bus stand of Sector-1, Dwarka, New Delhi to Select City Mall at Saket in an auto. After reaching the said Mall, they watched the movie "Life of Pi" for the show at 6.30 PM. At about 8.30 PM, they left Select City Mall, Saket. As they could not get an auto for Dwarka, they hired an auto for Munirka bus stand from where they could get a bus of Route No.764, for Dwarka. At about 9.00 PM, they reached at

Munirka bus stand and found a white colour bus on which 'YADAV' was written. The bus had yellow and green stripes on it. The entry gate of the bus was ahead of the front tyre, as is usually the case in luxury buses, and the front tyre was not having a wheel cover. A boy in the bus was calling out for commuters for Dwarka/Palam Mod, which boy insisted on their boarding the bus. Both of them boarded the bus and as they boarded, they saw that besides that boy two other persons were sitting in the driver's cabin along with the driver of the bus. The driver was of "blackish" complexion. As they entered the bus, they found that it was a 3 x 2 seater bus, i.e., three seats behind the driver's seat and two seats on the other side. One person was sitting on the left side, i.e., on the two seats and another one was sitting on the right side, i.e., on three seats just behind the driver's seat. The complainant and his friend sat behind the person who was sitting on the left side of the bus, i.e., on the two seats row. After entering the bus, he (PW-1) noticed that the seat covers were of red colour, the curtains were of yellow colour and the windows of the bus had black film on it. The windows were at quite a height, as in luxury buses. As he sat down inside the bus, he noticed that the persons who were sitting in the driver's cabin were coming and returning to the driver's cabin. He paid an amount of ₹ 20/- as bus fare to the conductor, i.e., ₹ 10/- per head.

305. After boarding the bus, he had a ***feeling*** that the persons aforesaid did not allow anyone else to board the bus and immediately started the bus and left Munirka bus stand. As the bus started, the

accused put off the lights inside the bus and thereafter three persons came towards him, i.e., the accused Ram Singh, the accused Akshay Kumar (identified by him to be the persons who were sitting in the driver's cabin along with the driver) and the third being the Juvenile in Conflict with Law (JCL) [not being tried by this Court]. All three persons started abusing them and asked him (PW-1) where he was taking the girl (prosecutrix) in the night. All three then started giving him fist blows on his face. He got up from his seat and grappled with them. As he was resisting them, these persons, called the other accused persons by name, namely, accused Vinay and accused Pawan and asked them to bring the iron rods. Accused Pawan Kumar was identified by the complainant as the person who was sitting in front of him in the two seats row of the bus and accused Vinay Sharma as the one who was sitting on the three seats row just behind the driver's cabin. Thereafter, all these four accused persons and the JCL (not being tried by this court) gave beatings to him with two iron rods. On account of the beatings administered to him, he got injuries on his head, both his legs and all parts of his body. His friend (the prosecutrix) during this period was shouting and calling for help and was helping him. As she tried to call the police on her mobile phone, the accused persons snatched away their mobile phones. He had two mobiles with him, the numbers whereof were 9540034561 and 7827917720, and the prosecutrix had one mobile with her. Both his mobiles were of dual SIM facility but at that time he had only one SIM in each mobile, and both were of 'Samsung' make.

306. The further testimony of PW-1 is that because of the beatings given to him, he fell on the floor of the bus and two of the accused, namely, accused Pawan and accused Vinay, then pinned him down and robbed him of all his belongings, including his purse, containing a City Bank credit card, ICICI Bank debit card, identity card issued by his company, metro card and ₹ 1,100/- in cash; his watch of 'Titan' make; one gold ring studded with jewels and one silver ring studded with pearl; black colour 'Hush Puppy' shoes, black colour 'Numero-Uno' jeans; a grey pullover and a brown (khaki) blazer. As he was pinned down by two of the accused, the other two accused persons, namely, Ram Singh (since deceased) and Akshay along with the third one, i.e., JCL (not being tried by this Court) had taken the prosecutrix to the back side of the bus, from where he could hear her voice saying "*Chod do, Bachao*". He also heard sounds of the prosecutrix being beaten by the other accused persons. As and when he tried to reach the back side of the bus, he was again beaten up by the accused persons by giving him leg and fist blows. At that time, his friend was crying and shouting in a loud voice and some time he could hear her voice oscillating. Accused Ram Singh and Akshay @ Thakur and the third one, i.e., JCL (not being tried by this Court) committed rape upon the prosecutrix one by one. After sometime, these accused came and pinned him down; and then accused Vinay and Pawan went towards the back side of the bus and raped the prosecutrix. Earlier the bus was moving at a fast speed, but after sometime the speed of the bus was reduced and then he saw the accused who

was driving the bus (Mukesh) come near him and he hit him with the iron rod and he went to the back side of the bus and raped the girl. He had heard one of the accused saying *"Mar Gayee, Mar Gayee"*. As the accused were beating him, they took off all his clothes and he was left in his under garment, i.e., his underwear.

307. PW-1 further deposed that the accused persons had not only stripped him of his belongings but had also taken away all the belongings of his friend, including her grey colour purse having an Axis Bank ATM card and had even taken off all her clothes. Not satisfied, they even took off his underwear and again gave beatings to him with iron rod, exhorting that they should not be left alive. They then pulled him near the rear door and put his friend on him. The rear door was closed at that time, which they tried to open but could not. The accused persons exhorted that they should be thrown out of the bus from the rear gate and asked Ram Singh to bring the key of the rear gate, which he brought, but the rear gate could not be opened. Thereafter, they pulled him and his friend (the prosecutrix) by their hair and brought both of them to the front gate. They were then thrown out of the bus at the place opposite to Hotel Delhi 37. After they were thrown out, the accused persons took a turn and tried to crush them under the wheels of the bus. He (PW-1), however, managed to save himself and his friend from the wheels of the bus. When he set eyes on his friend for the first time after they were thrown out of the moving bus, he found her naked and bleeding from all parts of her body.

308. The further testimony of PW-1 is to the effect that both he and the prosecutrix were shifted to the hospital in a police Gypsy drenched in blood. His first statement was recorded in the hospital, which he had signed twice and which was Ex.PW-1/A. After the recording of his statement, he had taken the Investigating Officer to Munirka Bus Stand and had shown her the spot. At his instance, she prepared the site plan of the spot. He then took the Investigating Officer to the place where he and the prosecutrix were thrown out of the moving bus by the accused persons. By then, the crime team had also reached at that place. The Investigating Officer prepared the site plan of the said spot and collected the exhibits, including the blood lying at the spot in the presence of the Crime Team. The IO then made inquiries from the nearby hotels, if they had any CCTV installed in their premises, so that she could get the CCTV footage, but to no avail. Ultimately, they came to the Delhi Airport Hotel and he identified the CCTV footage of the bus which he had boarded with his friend-the prosecutrix. The said bus was seen in the footage twice. He, identified the bus bearing No.DL-1PC-0149 as Ex.P-1, which at the relevant time was lying parked near the lock-up.

309. Further, he stated that on 19.12.2012, he had come to the Court of Shri Prashant Sharma, Metropolitan Magistrate, on which date his statement under Section 164 Cr.PC was recorded, which he identified after unsealing of the same in the trial Court as Ex.PW-1/B (six pages). He stated that he had come to the Court for TIP proceedings in the course of which he had identified his wrist watch

and his shoes. The Test Identification Proceedings and his signatures thereon were identified by him as Ex.PW-1/C (two pages). He further identified one pair of shoes of make 'Hush Puppy' (Ex.P-2) and one wrist watch make 'Sonata' (Titan) as Ex.P-3, which were unsealed in Court. He stated that on 28.12.2012, he had again visited the Saket court for identification of his ring and metro card and identified the TIP proceedings regarding the ring as Ex.PW-1/D, his silver ring as Ex.P-4 and his metro card as Ex.P-5. He stated that he had gone for identification of the accused persons to Tihar Jail. **On 20.12.2012 he had identified accused Mukesh and on 26.12.2012 accused Akshay.** The TIP proceedings regarding accused Mukesh bearing his signatures were identified by him as Ex.PW-1/E and those of accused Akshay as Ex.PW-1/F. His mobile phone make 'Samsung Galaxy Duo' was identified by him as Ex.P-6 and on unsealing he identified the currency notes of denomination of ₹ 500/- (two notes) and one currency note of denomination of ₹ 100/- as Ex.P-7.

310. With regard to the testimony of PW-1, suffice it to state that despite being extensively cross-examined by defence counsel, no dent could be caused by the defence in the statement of PW-1. From time to time, he was confronted with his statements made in the course of investigation. Nevertheless, the defence failed to establish any contradictions in his testimony and at the most was able to establish an embellishment here and a flourish there. The testimony of PW-1 has the ring of truth in it and is, therefore, resonatry of the entire incident.

311. Adverting next to the dying declarations of the prosecutrix made before the first treating doctor (PW-49 Dr. Rashmi Ahuja), the Sub-Divisional Magistrate (PW-27 Smt. Usha Chaturvedi) and the learned Metropolitan Magistrate (PW-30 Shri Pawan Kumar). As discussed above, all the three aforesaid statements made by the prosecutrix are in line with each other and there is no such inconsistency in the said statements as would enable us to discard one or the other of the statements. It is no doubt true that the names of the assailants have not been disclosed by the prosecutrix before the first treating doctor (PW-49 Dr. Rashmi Ahuja) but the reasons for her not doing so have been dealt with by us at great length hereinabove and are not being repeated herein to avoid prolixity. Suffice it to note that at the time of her admission in the hospital the prosecutrix was in a critical condition and in no position to give intricate details of the incident such as the names of her assailants. The names of all the accused persons were disclosed by her at the very first instance when she was declared fit for statement for the first time on 21st December, 2012 before the learned Sub-Divisional Magistrate as *'Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay'*. In her statement recorded before the learned M.M. also, the prosecutrix named her assailants by writing down their names with precision except that one of the names was wrongly given by her as *'Vipin'* instead of *'Pawan'*. This aspect having been dealt with at great length hereinabove, we refrain from further elaborating on this aspect.

312. Then again, there is the evidence of ***res gestae*** against all the accused persons. It is in evidence against the accused, as testified by H.C. Ram Chander (PW-73), that on the way to Safdarjung Hospital the victims described the incident to him and the fact that they were beaten up, robbed, the prosecutrix gang raped and both thrown out of the bus on the road near Mahipalpur flyover. The rule of *res gestae* rests on the principle of law embodied in Section 6 of the Evidence Act and has been elucidated by the Hon'ble Supreme Court in ***Gentela Vijayavardhan Rao and Anr. vs. State of A.P., (1996) 6 SCC 241***. Thus, "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" 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."

313. The prosecution has also established through DNA analysis the involvement of bus Ex.P-1, the use of rods Ex.P-49/1 and Ex.P-49/2 and the dumping spot where the victims were thrown out of the bus as follows:-

(i) The DNA profile developed from hair and blood stained pieces of paper recovered from the offending bus matched with the DNA profile of the complainant.

(ii) The DNA profile developed from the blood stained dried leaves collected from the place where the victims were thrown out of the bus matched with the DNA profile of the complainant.

(iii) The DNA profile developed from the blood stains on both the iron rods (Ex. P-49/1 and Ex. P49/2) matched with the DNA profile of the prosecutrix.

(iv) The DNA profile developed from the blood stains from curtains of the bus matched with the DNA profile of the prosecutrix.

(v) The DNA profile developed from the blood stained seat covers of the bus matched with the DNA profile of the prosecutrix.

(vi) The DNA profile developed from the bunch of hair recovered from the floor of the bus below sixth row seat, blood stains from the roof of the bus near back gate, blood stains from the floor of the bus near back gate, blood stains from side of rear stairs of the bus, blood stains from the inner side of the rear door of the bus, matched with the DNA profile of the prosecutrix.

314. As regards the identification of the accused, accused Ram Singh (since deceased) has been identified in Court by PW-1 Awninder Pratap and PW-82 Ram Adhar. On 18.12.2012, he refused to participate in TIP proceedings Ex.PW-17/B conducted by PW-17

Shri Sandeep Garg, Metropolitan Magistrate. It is also in evidence against him that he was not unknown to the other co-accused. Thus, co-accused Mukesh was the younger brother of the accused, co-accused Akshay was the helper of the offending bus (Ex.P-1) of which Ram Singh was the assigned driver, and accused Vinay and Pawan were neighbours of this accused. Apart from this, there is scientific evidence against accused Ram Singh showing the location of the accused at the time of the incident. The movement of the accused on 16.12.2012, as proved by CDR analysis (Ex.PW-24/A) of phone No.9868612958 shows that at 10:04 PM and 10:06 PM, he received two calls which were recorded by tower ID No.47541 and No.47633 respectively, which show the movement of the accused from Vasant Gaon towards Munirka. The movement of the bus has been captured by CCTV footage, recorded by the CCTV installed at Hotel Delhi Airport, seized from PW-67 Pramod Jha, the owner of the said hotel vide seizure memo Ex.PW-67/A, which is proved by the complainant (PW-1), SI Subhash (PW-74) and Gautam Roy (PW-76). The bite marks found on the body of the prosecutrix, as photographed in photograph Nos.1, 2 and 4 were found to be of accused Ram Singh with **reasonable medical certainty** (highest degree of certainty) after forensic analysis by Dr. Ashith B. Acharya (PW-71). Further, on DNA analysis, the rectal swab collected from the prosecutrix matched with the DNA profile developed from the blood sample of accused Ram Singh. The DNA profile developed from the blood stains on the underwear of accused Ram Singh matched with the DNA of the prosecutrix. The DNA profile

developed from the blood stains found on the recovered T-shirt (Ex.P-74/6) and slippers (Ex.P-74/7) seized vide seizure memo Ex.PW-74/L worn by the accused at the time of the incident, pursuant to the disclosure made by him (Ex.PW-74/F), matched with the DNA profile of the prosecutrix. The recovery of partially burnt clothes of the victims and ash, pursuant to the disclosure made by the accused, seized vide seizure memo Ex.PW-74/M, matched with the DNA profile of the complainant. The recovery of the iron rods (Ex.P-49/1 and Ex.P-49/2), pursuant to the disclosure made by the accused, seized vide memo Ex.PW-74/G, matched with the DNA profile of the prosecutrix. As per the opinion of the doctors (Ex.PW-51/C), the injury suffered by the complainant (PW-1) could be caused by the two iron rods recovered at the instance of the accused, which could be the weapon of offence which caused the severe perineal injury and complete tear of posterior vaginal wall, recto vaginal septum, anus and anal canal, anterior rectal wall as well as irreparable damage and loss and severe injury to large and small intestines. Further, PW-2 Dr. Akhilesh Raj in his report Ex.PW-2/A has opined that the injuries found on the body of accused Ram Singh at the time of his medical examination could be possible due to struggle. Accused Ram Singh has been specifically named by the prosecutrix as one of the persons who had assaulted and raped her in her second dying declaration recorded by PW-27 Smt. Usha Chaturvedi, SDM on 21.12.2012 as well as in her third dying declaration recorded by PW-30 Shri Pawan Kumar, the learned Metropolitan Magistrate. From the looted articles, the recovery of the Indian Bank debit card (Ex.P-74/3) taken

from the possession of the prosecutrix, seized vide seizure memo Ex.PW-74/H, from accused Ram Singh is proved on record by PW-75 Smt. Asha Devi, the mother of the prosecutrix.

315. As regards accused Mukesh, the complainant/eye-witness (PW-1) has testified that the accused was driving the offending bus (Ex.P-1) which had picked up the prosecutrix and the complainant from Munirka bus stand. The complainant/eye-witness (PW-1) has further testified that after sometime the accused driving the bus came and hit him with the rod and thereafter went to the rear of the bus and raped the prosecutrix. The accused Mukesh has been identified in Court by PW-1 Awninder Pratap and PW-82 Ram Adhar, PW-48 H.C. Giri Raj and PW-58 S.I. Arvind Kumar. **Accused Mukesh was also identified by the complainant/eye-witness (PW-1) during the TIP proceedings conducted on 20.12.2012 at Tihar Jail**, by PW-17 Shri Sandeep Garg, learned Metropolitan Magistrate, which proceedings were recorded as Ex.PW-1/E. It is also in evidence against the accused that he was not unknown to the other co-accused. He was the younger brother of co-accused Ram Singh, a neighbour of co-accused Pawan and Vinay and also known to co-accused Akshay, who worked as a helper in the bus (Ex.P-1) driven by accused Ram Singh. As regards the scientific evidence against accused Mukesh, the movement of the bus has been captured by CCTV footage recorded by the CCTV installed at Hotel Delhi Airport, seized from PW-67 Pramod Jha, the owner of the said hotel vide seizure memo Ex.PW-67/A which is proved by the complainant (PW-1), SI Subhash (PW-74) and Gautam Roy (PW-76). On DNA analysis, the

DNA profile developed from the blood stains found on the pair of pants, T-shirt and jacket recovered from the accused and seized vide seizure memo Ex.PW-48/B matched with the DNA profile developed from the sample of the blood of the prosecutrix. Accused Mukesh after his abscondance though was apprehended from Karoli, Rajasthan on 18.12.2012, his formal arrest was effected at SJ Hospital at 6:30 PM by the I.O. S.I. Pratibha on confirmation that it was the complainant's mobile phone (Samsung Galaxy Duos Ex.P-6) which was recovered from him. Accused Mukesh has been specifically named by the prosecutrix in her second dying declaration recorded by PW-27 Smt. Usha Chaturvedi, SDM on 21.12.2012 (Ex.PW-27/A) as well as in her third dying declaration recorded by PW-30 Shri Pawan Kumar, the learned Metropolitan Magistrate recorded on 25.12.2012 as one of the persons who raped her, inflicted injuries on her person and that of the complainant, robbed them of their belongings and threw them out of the bus believing them to be dead. Significantly, accused Mukesh in his statement recorded under Section 313 Cr.P.C. has corroborated the case of the prosecution in material particulars.

316. As regards accused Vinay, the complainant/eye-witness (PW-1) has testified that accused Vinay along with accused Pawan had pinned down the complainant inside the offending bus Ex.P-1 and beaten him up. He further testified that accused Vinay and Pawan went to the rear of the bus and raped the prosecutrix after the other accused had raped her and had come in front to pin him down. The accused was identified in Court by the complainant/eye-witness (PW-

1), Ram Adhar (PW-82), H.C. Mahabir (PW-60) and S.I. Vishal Chaudhry (PW-18). **Accused Vinay refused to participate in TIP proceedings Ex.PW-17/B conducted by Mr. Sandeep Garg, learned M.M. (PW-17) on 19.12.2012 without giving any reason whatsoever. The identity of this accused has also been established through fingerprint matching.** Chance print marked as Q-1 found in the offending bus (Ex.P-1) is found identical with the left palm print specimen of accused Vinay, and chance print marked as Q-4 identical with the right hand thumb impression of accused Vinay. PW-46 Mr. A.D. Shah, CFSL, CBI has proved on record the finger print matching report in Court, which is marked as Ex.PW-46/D. It is also in evidence against the accused that he was not unknown to the other co-accused. He was a neighbour of co-accused Ram Singh, Mukesh and Pawan and, therefore, also known to co-accused Akshay who worked as a helper in bus Ex.P-1 driven by accused Ram Singh. The identity of accused Vinay is also established by the prosecution through scientific evidence. The analysis of the CDR (Ex.PW-22/B) shows that two calls were made with the Nokia mobile phone of the accused with IMEI No.354138058308218 at 7:58 PM and 8:19 PM which were covered by the tower located at Ravi Dass Camp, Sector-3, R.K. Puram. This proves that till 8:19 PM, the accused was at Ravi Dass Camp. The analysis of the CDR (Ex.PW-22/B) further shows that he made a call at 9:55 PM, which was covered by tower No.55043 located at NH-8 near Mahipalpur. The application filed by the accused for return of his mobile phone bearing No.8285947545 proves that the said phone belonged to the accused. The movement of

the bus has been captured by CCTV footage recorded by the CCTV installed at Hotel Delhi Airport seized from PW-67 Pramod Jha, the owner of the said hotel vide seizure memo Ex.PW-67/A, which is proved by the complainant (PW-1), SI Subhash (PW-74) and Gautam Roy (PW-76). On DNA analysis, the DNA profile developed from the stains found on the under garments of the accused matched with the DNA profile developed from the sample of the blood of the prosecutrix. The DNA profile developed from the blood stains found on the jacket of the accused also matched with the DNA profile developed from the sample of the prosecutrix. A separate DNA profile developed from the blood stains found on the jacket of the accused matched with the DNA profile developed from the sample of the blood of the complainant. The DNA profile developed from a pair of slippers of the accused matched with the DNA profile developed from the sample of the blood of the prosecutrix. Accused Vinay is mentioned by name in the dying declaration of the prosecutrix recorded by PW-27 Smt. Usha Chaturvedi on 21.12.2012 and the dying declaration of the prosecutrix recorded by the Metropolitan Magistrate on 25.12.2012 and named as one of the persons who raped her, inflicted injuries on her person and that of the complainant, robbed them of their belongings and threw them out of the bus believing them to be dead. From the looted articles, pursuant to disclosure Ex.PW-60/H made by the accused, the complainant's 'Hush Puppy' shoes (Ex.P-2) and the 'Nokia' mobile phone belonging to the prosecutrix (Ex.P-68) were recovered from the possession of the accused. The injury marks found on the person of

the accused, recorded in his MLC (Ex.PW-7/C) are opined to be suggestive of struggle. It is also relevant to mention that the answers given by this accused during his examination under Section 313 Cr.P.C. before the Court and the evidence led in defence to prove his plea of alibi have been established to be false by the rebuttal evidence adduced by the prosecution and this too is a circumstance which must go against the accused.

317. As regards accused Pawan, the complainant/eye-witness (PW-1) has testified that accused Pawan along with accused Vinay pinned down the complainant inside the offending bus Ex.P-1 and had beaten him up. The complainant/eye-witness (PW-1) has further testified that accused Pawan and Vinay went to the rear of the bus and raped the prosecutrix after the other accused had raped her and had come in front to pin him down. The accused was identified in the dock by the complainant/eye-witness (PW-1), Ram Adhar (PW-82), H.C. Mahabir (PW-60) and H.C. Giri Raj (PW-48). **It is on record that he refused to participate in the TIP proceedings (Ex.PW-67/B) conducted by PW-17 Mr. Sandeep Garg, learned Metropolitan Magistrate on 19.12.2012 without giving any reason whatsoever.** It is also in evidence against the accused that he was not unknown to other co-accused. He was a neighbour of co-accused Ram Singh, Mukesh and Vinay and, therefore, also known to co-accused Akshay, who worked as a helper in the bus Ex.P-1 driven by accused Ram Singh. As regards the location of the accused at the time of the incident, call detail records (Ex.PW-23/B) of the accused show the movement of the accused on 16.12.2012 at 9:32 PM from Naval Officers Mess to

Mehram Nagar. The evidence of PW-12 Santosh Kumar affirms this fact. PW-12 Santosh Kumar, a neighbour of the accused, in his deposition has stated that around that time, at the instance of the mother of the accused, he had called the accused from his mobile phone No.9873540952. The movement of the bus has been captured by CCTV footage recorded by the CCTV installed at Hotel Delhi Airport seized from PW-67 Pramod Jha, the owner of the said hotel vide seizure memo Ex.PW-67/A, which is proved by the complainant (PW-1), SI Subhash (PW-74) and Gautam Roy (PW-76). On DNA analysis, the DNA developed from the sweater of accused Pawan matched with the DNA profile developed from the sample of the blood of the prosecutrix. A separate DNA profile developed from the sweater of the accused matched with the DNA profile developed from the sample of the blood of the complainant. The DNA profile developed from the pair of shoes worn by the accused at the time of the incident matched with the DNA profile developed from the blood of the prosecutrix. The prosecutrix in her dying declaration recorded on 21.12.2012 by the SDM Smt. Usha Chaturvedi has specifically named accused Pawan as one of the persons who raped her, inflicted injuries on her person and that of the complainant, robbed them of their belongings and threw them out of the bus believing them to be dead. From the looted articles, recovery of the complainant's wrist watch make Sonata (Titan) [Ex.P-3] pursuant to the disclosure made by the accused and recovery of two currency notes (Ex.P-7) of the denomination of ₹ 500/- each looted from the complainant seized vide seizure memos Ex.PW-60/G and Ex.PW-68/G and respectively,

are proved on record. The MLC of the accused Ex.PW-10/A shows that on the date of the said MLC the injuries found on the body of the accused were proved to be 2-3 days old by PW-7 Dr. Shashank Punia (Ex.PW-7/B). It is also relevant to mention that the answers given by this accused during his examination under Section 313 Cr.P.C. before the Court and the evidence led in defence to prove his plea of alibi have been established to be false by the rebuttal evidence adduced by the prosecution and this too is a circumstance which must go against the accused.

318. As regards accused Akshay, the complainant/eye-witness (PW-1) has testified that soon after he boarded the bus with the prosecutrix from Munirka bus stand, the accused came towards him (along with accused Ram Singh and the JCL), and started abusing and giving fist blows on his face. Then the accused beat him with iron rods as a result of which he got injuries on his head, legs and other parts of the body. The complainant/eye-witness (PW-1) has further testified that accused Akshay (along with accused Ram Singh and the JCL) took the prosecutrix towards the rear side of the bus and that he could hear her cries for help. The complainant/eye-witness (PW-1) also testified that he heard the sounds of the prosecutrix being beaten up at the rear of the bus by the accused, and sometimes her voice was oscillating. He further testified that accused Akshay, accused Ram Singh and the JCL, had commited rape upon the prosecutrix one by one. The complainant/eye-witness (PW-1) further testified that accused Akshay (along with accused Ram Singh and the JCL) then came towards the complainant and pinned him down. Accused Akshay was identified

in the dock during his testimony by the complainant/eye-witness (PW-1), Ram Adhar (PW-82) and also by S.I. Jeet Singh (PW-61). **The accused was also identified by the complainant/eye-witness (PW-1) in TIP proceedings (Ex.PW-1/F) conducted on 26.12.2012 at Central Jail No.4, Tihar Jail complex by the learned Metropolitan Magistrate Monika Saroha (PW-8). A bite mark found on the body of the prosecutrix photographed in photograph No.5 is most likely found to be that of the accused on forensic analysis by Dr. Ashith B. Acharya (PW-71) in his report Ex.PW-71/C.** It is also in evidence against the accused that he was not unknown to other co-accused. He worked as a helper in the bus Ex.P-1 driven by accused Ram Singh and was, therefore, known to accused Mukesh who was the younger brother of accused Ram Singh, and accused Pawan and Vinay who lived in the same neighbourhood. The movement of the bus has been captured by CCTV footage recorded by the CCTV installed at Hotel Delhi Airport seized from PW-67 Pramod Jha, the owner of the said hotel vide seizure memo Ex.PW-67/A which is proved by the complainant (PW-1), SI Subhash (PW-74) and Gautam Roy (PW-76). On DNA analysis, the DNA profile developed from the breast swab from the prosecutrix matched with the DNA profile of the accused. This also tallies with the analysis of the bite mark in the report of the forensic expert PW-71 Dr. Ashith B. Acharya. The DNA profile developed from the blood stains found on the T-shirt and pair of slippers of accused Akshay matched with the DNA profile developed from the sample of the blood of the prosecutrix. The DNA profile developed from the

blood stained jeans of the accused matched with the DNA profile developed from the sample of the blood of the complainant. In her dying declarations Ex.PW-27/A recorded by the SDM Smt. Usha Chaturvedi on 21.12.2012, the prosecutrix has named the accused as one of the persons who had assaulted and raped her and had also assaulted the complainant and thrown them out of the moving bus. In her dying declaration recorded on 25.12.2012 by PW-30 Shri Pawan Kumar, learned M.M. also the accused has been named by the prosecutrix. From the looted articles, the recovery of the complainant's silver ring (Ex.P-1) pursuant to the disclosure of the accused Ex.PW-63/I on 27.12.2012, seized vide memo Ex.PW-68/M, the recovery of the complainant's metro card (Ex.P-5) on 27.12.2012 pursuant to the disclosure made by the accused seized vide memo Ex.PW-68/M from the residenc of his brother at House No.1943, Gali No.3, Rajeev Nagar, Gurgaon further inculpates the accused. The MLC of the accused Ex.PW-7/A reflects injury suggestive of a struggle. The abscondence of the accused and his arrest after five days, i.e., on 21.12.2012 at 9 PM from village Karmalangh, P.S. Tandwa, District Aurangabad, Bihar (Ex.PW-53/A) is established by his answer to Question No.122 given at the time of recording of his statement under Section 313 Cr.P.C. in which he admitted that his arrest was made from Tandwa, Bihar on 21.12.2012. It is also relevant to mention that the answers given by this accused during his examination under Section 313 Cr.P.C. before the Court and the evidence led in defence to prove his plea of alibi have been established to be false by the rebuttal evidence adduced by the

prosecution and this too is a circumstance which must go against the accused.

319. From the aforesaid, it stands established on record that all the accused persons have committed the several offences under the Indian Penal Code for which they have been tried and convicted by the learned trial court with the exception of accused Ram Singh proceedings against whom abated in the course of trial.

CONCLUSIONS

320. The prosecution in the instant case claims that the identity and involvement of each of the accused persons has been established beyond doubt both by the traditional method of proving identity and by scientific methods. The defence naturally contends to the contrary.

321. At the risk of repetition, it may be reiterated that the main thrust of the defence with regard to the identification of the accused is that the accused were not identified by the victims in the first instance and it was only after the registration of the First Information Report that the investigators implicated the accused through manipulation as by then the incident had attracted the attention of the public and the media and political pressure had mounted on the Government to such an extent that the investigators who were unable to apprehend the real culprits succumbed to the easier course of putting the accused, who were innocent persons, in the dock to suit their own purposes.

322. The question which arises for consideration is:

> "Has the identity of the accused been proved beyond any iota of doubt or is there some force in the contention of the defence that the real culprits have not been nailed?"

323. For answering the aforesaid extremely vital matter, we have with the utmost care gleaned through the voluminous evidence on record, pausing at each juncture to test the veracity of the same. Indubitably, the names of the accused persons do not find mention either in the MLC of the prosecutrix or in the first statement made by her companion before the police, which statement was treated as the rukka in the instant case and given the shape of the First Information Report. There is, however, no denying the fact that the victims when brought to Safdarjung Hospital had suffered trauma to an extent which an ordinary mortal possibly cannot visualize. PW-1 had been badly beaten up with iron rods on his head, face, eyes, knees and all parts of his body and the prosecutrix had been gang raped by six able-bodied men, one after the other, beaten with rods and bitten all over her body. When she arrived at the hospital, she had a tag of six cms. long vagina hanging out of her introitus, her vaginal and rectal walls were torn and her insides had been culled out with the hands of her tormentors, who had used iron rods as well. She was vasoconstricted, clammy and cold on account of the loss of blood as she was bleeding profusely. Her vital parameters were far from stable, and as reflected by her MLC she was suffering from drowsiness and unable to recollect how many times she had been subjected to sexual intercourse. She stated that she remembered sexual intercourse twice

and the fact that she was subjected to vaginal and anal intercourse but she was rendered unconscious after that. The MLC further shows that she was immediately referred to the Surgical department after infusion of I.V fluids and administration of warm saline on account of the huge loss of blood suffered by her. In such a situation, to expect from her to recapitulate the names of her assailants with which names she was not familiar would possibly be stretching it too far.

324. It is a settled legal proposition that mere non-mention of the names of the assailants and/or their overt acts elaborately or details of injuries said to have been suffered by the victim/s would not render the FIR vague or unreliable. The FIR is not after all an encyclopaedia of all facts; and when a large number of accused are involved, it is quite natural that the names and details may not be given in the FIR.

325. Great emphasis was placed by Mr. A.P. Singh, learned defence counsel, on the statement made by PW-49 Dr. Rashmi Ahuja in her cross-examination that she had asked the girl the names of her assailants but she did not remember them. Mr. M.L. Sharma, learned defence counsel has also highlighted the fact that in his first statement made before the police, PW-1 Awninder Pratap did not mention the names of the accused persons though the injuries sustained by him were subsequently opined to be simple in nature. We are unable to find any force in the aforesaid submissions made by learned defence counsel. At the relevant time, the victims were beaten, traumatized and assaulted in an unimaginable manner before being thrown out of the bus. There was considerable time lag between the time when they were thrown out of the bus and the time they were rescued. The

incident had transpired much before 10 PM and their arrival at Safdarjung Hospital has been documented to be at 11.00-11:30 PM. Their throbbing injuries and the rigors of the weather coupled with the state of their minds must have at that point of time brought forth their instinct of survival and self preservation. The desire to have apprehended their assailants and to mete out just desserts to them could not have been their priority. A look at the MLC of PW-1, (the complainant) shows that though he may not have sustained injuries of the nature sustained by his companion, he had been beaten all over his body with iron rods, apart from being beaten with hands and fists. He was called upon to defend the honour and the physical form of the girl he was accompanying, but he was one against six. That he yet attempted to protect her from the savagery of the six bespeaks of the valiant front put up by him against all odds. The prosecutrix has in her dying declarations clearly stated that each time she was raped, he was pinned down by two to three of the accused persons by beating him with iron rods. In the circumstances, therefore, we are not inclined to attach too much importance to the fact that the names of the accused persons were not disclosed precisely at 11:30 PM when the victims were brought to the hospital. It is, however, beyond cavil that it is for the prosecution to lend us assurance that the accused persons were indeed the much maligned culprits in the instant case.

326. In the aforesaid backdrop, we embark upon examining the evidence adduced by the prosecution to establish the identity of the accused. At the risk of repetition, it is highlighted that the first arrest made in the instant case was that of Ram Singh (since deceased). The

arrest memo shows that Ram Singh was arrested at 4 P.M. from Ravi Dass Camp, R.K. Puram, New Delhi. Much prior to his arrest and possibly as soon as PW-1, the complainant recovered his senses after being administered medical aid, he described the bus in which the occurrence had taken place in great detail. His statement with regard to the description of the bus was recorded by the I.O. S.I. Pratibha at about 7.30 a.m., as soon as she took over the reins of the investigation. Shortly thereafter, at around 12 noon, he named the accused persons as Ram Singh, Raju, Pawan, Vinay, Mukesh and Thakur. **Thus, more than four hours prior to the arrest of the first of the accused persons, i.e., Ram Singh, the names of all the culprits had been entered in the daily diary of the police delineating the precise role played by them in the incident.**

327. The victim-girl also disclosed the names of the culprits at the earliest. There is medical evidence on record to establish that she was unfit for statement for a duration of four days, after undergoing surgery (jejunostomy) in the night intervening 16.12.2012 and 17.12.2012, i.e. on the 17th, 18th, 19th and 20th of December, 2012. It was on 21st December, 2012, therefore, that she was declared fit for statement for the first time after the occurrence and the Investigating Officer who had been seeking opinion from the doctors on her medical status on a daily basis was given clearance for recording her statement. The Investigation Officer immediately sprung into action by sending for the Sub-Divisional Magistrate to do the needful. **In her statement recorded by the Sub-Divisional Magistrate on 21st December, the victim disclosed the names of all the six accused**

persons as *'Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay'*. At the time of the recording of her subsequent statement by the Metropolitan Magistrate under Section 164 Cr.P.C., on 25th December, 2012, she chose to write down the names of the accused persons since she was not in a position to communicate verbally, but had been declared fit by the concerned doctors for non-verbal communications through gestures and the like. The said sheet of paper on which she scribed the names of the accused persons reveals the names to be *'Ram Singh, Mukesh, Vinay, Akshay, Raju and Vipin'*. This sheet of paper Ex.PW-30/E was scribed by her in the presence of the Metropolitan Magistrate and bears her signatures. The contention of the learned defence counsel with regard to this document is that it is a fabricated one, in that the victim was not in a position to write the names of the accused persons. It is also sought to be contended that without forensic examination the document cannot be allowed to stand. As already discussed above, we do not see any reason why this document should be discarded from consideration. The signature of the prosecutrix appears on each and every page of her statement made before the learned Magistrate. True, she was not in a position to verbally communicate on account of the fact that she had an endo- tracheal tube in her larynx and trachea, but as opined by the doctors she was otherwise fit to make her statement. **If she was in a position to affix her signature on each and every page of her dying declaration made before the Magistrate, she certainly could have written down the names of the accused persons.** The fact that the name of one of the accused

persons 'Pawan' is not mentioned in this document and instead 'Vipin' is mentioned by her is not sufficient in our opinion to discredit the statement of the Magistrate that the names were written by her in his presence. The Magistrate had no axe to grind insofar as the accused persons were concerned and why he should be a party to the fabrication of a document is, therefore, beyond our comprehension. Had he been inclined to fabricate, there was nothing to prevent him from mentioning the correct name in the allegedly fabricated document. It appears to us that the very fact that one of the names has not been correctly given in the said document is an assurance that the document is not a fabricated one. At the most, we are put to caution with regard to the accused whose name has been wrongly mentioned in this document, namely, accused Pawan and a heavier burden will, to our mind, lie on the prosecution to establish the identity of this particular accused person.

328. We also note that the argument that document Ex.PW-30/E is a fabricated document which ought to be put to the handwriting expert, had it been raised at the relevant time before the learned trial court, there is no reason why the trial court would not have sent the document to the handwriting expert, but in that case the accused persons would have run a heavy risk, and possibly for this reason though one application after another was filed before the learned trial court on behalf of the accused persons on various grounds, the learned defence counsel wisely chose not to apply for the examination of the document by a handwriting expert. For the defence to turn round at this juncture and urge to the contrary in the hope of

deliverance would amount to allowing them to make capital out of the situation.

329. With the aforesaid aspects in mind, it is now proposed to examine one by one the methods adopted by the prosecution, traditional as well as scientific, to establish the identity of the culprits and to gauge the extent of their success or otherwise in doing so.

330. For the purpose of dock identification of the accused persons, the prosecution has principally relied upon the testimonies of **PW-1 Awninder Pratap Pandey and PW-82 Ram Adhar**.

331. Awninder Pratap Pandey, the complainant/injured eye witness (PW-1) has identified all the accused persons during his deposition in Court. He identifies accused Mukesh to be the person who was sitting on the driver's seat and as driving the bus; accused Ram Singh and accused Akshay Kumar to be the persons who were sitting in the driver's cabin along with the driver; accused Pawan Kumar as the person sitting in front of him in the two seats' row of the bus and accused Vinay Sharma as the person sitting on the three seats' row just behind the driver's cabin. PW-1 also testified that the conductor who was calling out to passengers to board the bus was not amongst the accused persons present in the Court (the JCL, who was tried separately by the Juvenile Justice Board). In his further testimony (which is not being reproduced again in order to avoid prolixity), he graphically delineated the role played by each of the accused persons by name.

332. Adverting to the dock identification of the accused persons by **PW-82**, Ram Adhar, the said witness, who is also the complainant in

case FIR No.414/2013, P.S. Vasant Vihar, clearly described the incident which took place with the same accused persons being the key players and in which he was the unfortunate victim. He testified that on 16.12.2012, he finished his work at Munirka at 8.30 PM and was proceeding towards Sangam Vihar. He boarded the bus from Subzi Mandi, which was across the road from his work place. When he was standing at the bus stop, a white bus came there and the helper was calling "Khanpur Khanpur". He boarded the bus and when the bus started moving out, he was told by one of the occupants that the bus was going to Nehru Place. He tried to get down from the bus, but was administered beatings by one of the persons in the bus who was having burn injury on one limb. Another person inside the bus pulled him towards the back side of the bus, where the accused persons gave beatings to him and snatched all his belongings, i.e., a mobile having two Sims and ₹ 1,500/- in cash.

333. PW-82 Ram Adhar identified accused Akshay in the dock as the person who had pulled him behind when the person having burn injury on his hand gave blow on his body (deceased Ram Singh). He further identified accused Mukesh as the person who was driving the bus, accused Vinay as the person who gave beatings to him and removed his possessions and accused Pawan who also gave beatings to him. He further stated that the person whose hand was burnt was not present in the Court and the JCL was also not present in the Court. He testified to the fact that the accused persons had torn his clothes and thrown him out from the moving bus at the

IIT flyover in such a manner that he should come under the wheels of a truck moving by the side of the bus.

334. From the aforesaid statement of PW-82 Ram Adhar, it stands established on record that apart from identifying all the accused persons in the dock (accused in case FIR No. 413/2012 as well), he clearly defined the role played by each of the accused persons in the earlier incident, which transpired immediately prior to the occurrence in the present case. The testimony of this witness was sought to be brushed aside by the learned defence counsel on the ground that no complaint was made by him to the police after the incident, but we find that this aspect has been satisfactorily explained by the witness in the course of his cross-examination in which a specific query was put to him by learned defence counsel as to why he did not go to the police. The witness, though an illiterate one being a carpenter by profession, explained that after he had taken initial treatment at his house by applying lukewarm salty water, he saw the news about the bus in question, having registration No.0149, and then he telephoned one Sanjeev Bhai of Munirka in the evening of 17.12.2012. The latter asked him to reach his office on the next day, i.e., on 18.12.2012. He did so and then both of them went to the police station and met a lady officer who lodged his report. His statement was then recorded and he was taken to SJ Hospital for his medical examination. In his further cross-examination, he stated that on 17.12.2012 also he had telephoned the police. There is thus nothing in the testimony of

this witness to discredit the version of the incident given by him, the role played by each of the accused persons in the said incident in which he was the sole victim and his identification of the said persons as the persons who were aboard the bus in question at the relevant time.

335. We note also that the above testimony of PW-82 establishes also the fact that the pattern of the subsequent incident in which PW-1 and the prosecutrix were the victims was exactly the same as the incident which had transpired with PW-82. The modus operandi adopted by the accused persons on the second occasion was no doubt somewhat varied to suit their convenience since in the later incident they had ensnared a girl victim as well. This apart, the manner in which they entrapped their victims by inducing them to board the bus, ripping them of their material possessions, tearing off their clothes and then throwing them out of the moving bus in such a manner as to eliminate them, shows the working of the minds of the culprits, which, it is inconceivable could have been replicated by another set of persons on the same very night. The entire sequence of both the incidents of trapping, beating, robbing and eliminating is discomfitingly identical, the eliminating being for the purpose of destruction of vital human evidence against them. To the incident in the instant case, raping has been added. The brutality with which the rape victim in the instant case has been dealt with was also quite obviously for the purpose of ensuring her annihilation, and it is only when they had assured themselves

that she had met her maker (as is obvious from the use of the words "***Mar gayee, Mar gayee***" by them) that the accused persons threw out the complainant and what was to them the dead body of the girl from the moving bus, thereafter turning the bus in such a manner as to ensure that the complainant also met his end and the twain were rendered incapable of making any disclosure of the horrible crime committed upon them.

336. Apart from the dock identification of the accused persons by PW-1 Awninder Pratap Singh and PW-82 Ram Adhar, the accused persons have been identified in the dock by other witnesses as follows:-

(i) Accused Pawan and Vinay have been identified by **Head Constable Mahabir (PW-60)**, who testified that he had seen accused Pawan and Vinay at the time of their arrest on the pointing out of accused Ram Singh on 18.12.2012.

(ii) Accused Pawan and Vinay have also been identified by **S.I. Vishal Choudhary (PW-18)** as he was a part of the police party which had gone to arrest accused Vinay and Pawan, along with accused Ram Singh pursuant to the disclosure of the latter.

(iii) Accused Pawan is also identified by **H.C. Giri Raj (PW-48)**, who testified that though the accused was in muffled face when the witness had taken him for medical examination, when he was being examined by the doctor, he had removed his muffler.

(iv) **Head Constable Giri Raj (PW-48)** also identified accused Mukesh and testified that he had seen accused Mukesh on 23.12.2012 while he was pointing out and taking out the articles

from Garage No.2, Anupam Apartments, Saket as at that time he had removed his muffler, though he was in muffled face when he had led the police party to the place of recovery.

(v) Accused Mukesh was also identified by **S.I. Arvind Kumar (PW-58)**, who had apprehended him from Karoli, Rajasthan and handed him over to the I.O. at Safdarjung Hospital on 18.12.2012.

(vi) Accused Akshay is identified by **S.I. Jeet Singh (PW-61)**, being a witness to the arrest of the accused at Tandwa, Bihar.

337. The sole ground on which the TIP of accused Akshay Kumar is sought to be challenged is that the counsel for the accused was not present with him when he was produced by the Assistant Superintendent, Tihar Jail, and he was not provided with legal aid at the time of the conduct of the TIP. At the time of hearing, learned defence counsel was unable to point out any requirement in law that the defence counsel should be present when the TIP is conducted or even that any legal aid is required to be provided to the accused at the stage of TIP.

338. We note that no element of coercion or unwillingness to join the TIP proceedings on the part of accused Akshay has been brought forth in evidence nor has the defence shown that any prejudice whatsoever was caused to the accused person with regard to the manner in which the TIP was conducted. The same applies with equal force to the TIP proceedings qua accused Mukesh.

339. Apart from the dock identification of the accused persons and the identification of two of the accused persons in test identification proceedings, the DNA reports conclusively establish the identity of the accused persons and even assuming the traditional methods of identification are ignored, the DNA findings by themselves are sufficient to prove the identity of the accused and to further establish the fact that the bus in question was the scene of occurrence, the iron rods were the weapons of offence and the Mahipalpur Flyover was the dumping spot where the victims were dumped after the occurrence. The DNA profiles further establish the fact that the prosecutrix was subjected to sexual intercourse per vagina as well as per rectum and was bitten by some of the accused persons and rods were inserted into her body as evidenced by the blood on the said rods which was consistent with the DNA profile of the prosecutrix.

340. It deserves to be mentioned at this juncture that though DNA testing obtained legislative recognition in India through the Code of Criminal Procedure (Amendment) Act, 2005 by addition of Sections 53 and 53A, which expanded the scope of the term "*examination*" to include DNA profiling, as early as in the year 2001, the Supreme Court in the case of ***Kamti Devi v. Poshi Ram, (2001) 5 SCC 311*** **held that the method of proving identity through DNA profiling was scientific and accurate.**

341. In ***Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh, (2009) 14 SCC 607***, the Supreme Court on the submission of learned defence counsel in that case that the report of DNA should not be relied upon and cannot be accepted examined the question:

"What is DNA?" in detail. The relevant extract of the judgment reads as under (SCC, Page 617):-

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

342. In ***Santosh Kumar Singh Vs. State through CBI, (2010) 9 SCC 747***, the Supreme Court, accepting the DNA report in the said case as scientifically accurate and the DNA science as an exact science, held that the trial court had been swayed by irrelevant considerations into ignoring the complexity of the issue on a highly

technical subject and substituting its own opinion for the opinion of expert witnesses. In paragraph 71, it was observed (SCC, Page 772):-

> *"71. We feel that* ***the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as*** *held by this Court in Kamti Devi v. Poshi Ram [(2001) 5 SCC 311 : 2001 SCC (Cri) 892 : AIR 2001 SC 2226] . In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9."*

343. In the case of ***Vinay Kumar v. State, 2012 (4) JCC 2857***, a Division Bench of this Court reiterated that the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. Reliance was placed by the Division Bench upon the decision of the Apex Court in ***State of H.P. V. Mast Ram (2004) 8 SCC 660*** wherein it was held that the report of DNA fingerprint cannot be rejected on the ground that the government scientific expert, who has issued the same, is not enumerated under sub-section (4) of Section 293 of the Criminal Procedure Code. The Supreme Court in the said case opined that the report of the DNA fingerprint has to be admitted under sub-section (1) of Section 293 as a report, which is issued under the hand of the government scientific expert.

344. The Division Bench in ***Vinay Kumar (supra)*** also laid down certain guidelines in respect of forensic examination of biological evidence. The Court further held that **in cases involving biological**

evidence, "chain of custody" needs to be established. There must not be any missing links. The relevant observations with regard to the chain of custody made in the said case read as under (JCC, Page 18):-

> *"70. In cases involving biological evidence the concept of "chain of custody" needs to be established. "Chain of custody" means the complete record of biological evidence from the place of its extraction and up to its presentation in the Court and its complete documentation at every stage. The possession, time and date of transfer, and location of evidence from the time it is obtained to the time it is presented in the Court is called the "chain of custody".*

345. In the light of the above, we conclude that in order to prove the authenticity and correctness of DNA analysis, the prosecution must establish the following:-

(i) The process of generation of DNA profiles from the samples taken from the victims and the accused persons individually.

(ii) The chain of custody from the generation of the samples to their deposit with the CFSL Laboratory and upto its presentation in the Court must be established beyond any doubt. That is to say, to prove the DNA matching, it is necessary to establish that the various exhibits which were used for the purpose of DNA analysis were received by the expert/laboratory without any tampering. In other words, there was no manipulation with the exhibits from the time of their generation till the time they were received for forensic examination and

thereafter till the time the complete record of biological evidence is presented in the Court.

(iii) The process of matching the DNA through the concerned expert, thus linking the accused with the victims, the scene of crime, the dumping spot and the weapons of offence.

346. In the aforesaid backdrop, we have examined with utmost care the evidence of the relevant prosecution witnesses, the authenticity and veracity of the DNA reports Ex.PW-45/A, Ex.PW-45/B and Ex.PW-45/C and the findings rendered by the author of the said reports - Dr. B.K. Mohapatra (PW-45).

347. Adverting to the evidence of the prosecution with regard to the authenticity of the biological samples as well as the fact that there was no possibility of their contamination, we find that the chain of custody of biological samples from the point of their generation to the point of their being deposited with the CFSL is sought to be established by the prosecution in the following manner:-

A. Re: Blood samples of the complainant, through the testimonies of:

(i) PW-15 D.Kamran Faizal;

(ii) PW-42 Ct.Suresh Kumar;

(iii) PW-77 HC Rajender Prasad Meena;

(iv) PW-31 SI Nand Kishore

B. Re: Samples of the prosecutrix collected from (1) Debris collection (dust, grass present in hair, dust in clothes), (2)

Debris from in between fingers, (3) Debris from nails, (4) Nail clippings, (5) Nail scrapings, (6) Breast swab, (7) Body fluid collection (swab from Saliva), (8) Combing of public hair, (9) Matted public hair, (10) Clipping of public hair, (11) Cervical mucus swab, (12) Vaginal secretion, (13) Vaginal culture, (14) Washing from vagina, (15) Rectal swab, (16) Oral swab, (17) Urine and oxalate blood, (18) Blood samples, (19) Outer clothing/sweater, (20) Inner clothes of prosecutrix, (21) Bed sheet of prosecutrix, through the testimonies of:

(i) PW-49 Dr.Rashmi Ahuja
(ii) PW-59 Inspector Raj Kumar
(iii) PW-74 S.I. Subhash Chand
(iv) PW-77 HC Rajender Prasad Meena [the MHC(M)]
(v) PW-18 S.I Vishal Choudhary
(vi) PW-11 Dr.Pintu Kumar Singh
(vii) PW-55 SI Gajender Singh
(viii) PW-29 Dr.Ranju Gandhi

C. **Re: Samples of accused Ram Singh** including a penile swab, blood in gauze, underwear, saliva in T-Shirt and slippers, through the testimonies of:

(i) PW-2 Dr.Akhilesh Raj
(ii) PW-39 Ct.Murari
(iii) PW-77 HC Rajender Prasad Meena [the MHC(M)]
(iv) PW-74 SI Subhash

D. **Re: Samples of accused Pawan Kumar** including blood sample in gauze piece, saliva on whatmans filter paper, nail

clippings, pubic hair, swab glans of penis and urethra and single stray hair found on the body of the accused and biological samples from sweater, pants, underwear and shoes of accused, through the testimonies of:

(i) PW-10 Dr.Mohit Gupta

(ii) PW-48 HC Giri Raj

(iii) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(iv) PW-74 SI Subhash Chand

E. **Re: Samples of accused Vinay Sharma** including blood sample in gauze piece, nail clippings of both hands, urethral swab, glans swab, pubic hair, saliva, single long stray hair, mons pupis, undergarments, one blue coloured jeans, one black jacket, one black full-sleeved T-Shirt and a pair of blue coloured plastic slippers, through the testimonies of:

(i) PW-36 Ct.Sandeep

(ii) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(iii) PW 74 SI Subhash Chand

F: **Re: Samples of accused Mukesh** including gauze cloth piece, nail clippings of both hands, urethral swab, glans swab, pubic hair, saliva on whatman paper, stray hair found on body, one dirty blue and green coloured striped underwear, one grey coloured full pants, one green coloured half-sleeved T-shirt and one blue coloured full sleeved jacket, through the testimonies of:

(i) PW-3 Dr.Chetan Kumar

(ii) PW-37 Ct.Sanjeev

(iii) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(iv) PW-74 SI Subhash Chand

G: Re: Samples of accused Akshay including gauze cloth piece, penile swab, nail scrapings and clippings, red coloured banian, dark brown underwear, scalp hair, pubic hair and one dirty blue coloured jeans, through the testimonies of:

(i) PW-7 Dr.Shashank Poonia

(ii) PW-40 ASI Surinder Kumar

(iii) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(iv) PW-53 SI Upender Singh

(v) SI Subhash Chand

H: Re: Blood samples from the weapons of offence viz. iron rods Ex.PW.49/1 and Ex.PW.49/2, through the testimonies of:

(i) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(ii) PW-80 SI Pratibha Sharma (I.O)

(iii) PW-74 SI Subhash Chand

I: Re: DNA samples from ash and partly burnt clothes of the victims, through the testimonies of:

(i) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(ii) PW-80 SI Pratibha Sharma (I.O)

(iii) PW-74 SI Subhash Chand

J: Re: Samples lifted from the bus Ex.P1, through the testimonies of:

(i) PW-45 Dr.B.K.Mohapatra

(ii) PW-74 SI Subhash Chand

(iii) PW-32 SI Vishal Choudhary

(iv) PW-33 SI Vikas Rana

(v) PW-77 HC Rajender Prasad Meena [the MHC(M)]

(vi) PW-60 HC Mahabir

K: A number of samples were also collected by the investigating agency from the spot where the prosecutrix and the complainant were thrown off the bus **near Mahipalpur flyover for DNA examination** viz., blood stained leaves, blood stained grass blades, leaves without blood, blades of grass without blood, blood stained dust along with leaves and grass. In the context of the aforesaid samples, the chain of custody is established by the prosecution of examining the following prosecution witnesses:-

(i) PW-41 Inspector Naresh Kumar

(ii) PW-43 Ct.Jai Veer

(iii) PW-74 SI Subhash Chand

(iv) PW-77 HC Rajender Prasad Meena [the MHC(M)]

348. In the light of the above evidence on record, the prosecution claims that there is no possibility of any contamination of the biological samples obtained from the complainant, the biological samples obtained from the prosecutrix and the biological samples of the accused persons, i.e., accused Ram Singh (since deceased) and the Appellants Pawan Kumar, Vinay Sharma, Mukesh and Akshay Kumar as well as the biological samples lifted from the weapons of

offence, the partly burnt clothes and ashes, the bus Ex.P-1 and the dumping spot. **No reason has been pointed out by the defence at the time of hearing suggestive of the fact that the samples were tampered with at any point of time.** The continuous chain of custody of the biological samples recovered from the complainant, the prosecutrix and all the aforesaid accused persons at the time of preparation of their respective MLCs and from the clothes recovered which they were wearing at the time of the incident thus stand proved.

SENTENCE

349. The Appellants were given full opportunity to defend themselves on the question of quantum of sentence before the learned trial court. We have also heard both the sides on the point of sentence at length. Learned Special Public Prosecutor contends that looking at the crime committed by the convicts, there is no valid ground for interference in the sentence. However, it is the vehement contention of learned counsel for the defence that the facts and circumstances of this case are not sufficient to categorize the present case as the rarest of rare cases justifying the imposition of death penalty.

350. Mr. A.P. Singh, learned counsel for convicts Vinay Sharma and Akshay Thakur referred to the judgments of the Hon'ble Supreme Court in ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684*** and ***Machhi Singh v. State of Punjab, (1983) 3 SCC 470*** to submit that in the backdrop of the aforesaid judgments, the mitigating circumstances relating to the convicts deserve to be kept in mind by this Court, including:

(i) the young age of the convicts,

(ii) the socio-economic conditions of the convicts they being poor and their impecunious circumstances being a determinative factor,

(iii) their clean antecedents and the chance of their reformation,

(iv) the presumption of innocence being in their favour,

(v) life imprisonment being the rule and death being an exception and there being no such reasons to award death sentence, and

(vi) they being convicted only on the ground of conspiracy and not their individual acts.

351. Mr. Singh submitted that this Court was required to draw a balance sheet of aggravating and mitigating circumstances, and if such balance sheet was drawn and the parameters laid down by the Constitution Bench of the Supreme Court in the case of ***Bachan Singh*** and the three-Judge Bench in ***Machhi Singh*** meticulously applied, the only justifiable sentence would be life imprisonment and not death sentence as imposed by the learned trial court. The following observations of M.K. Gandhi, Father of the Nation made over 40 years ago in the *Harijan* (March 19, 1937) were relied on:

> *"I do regard death sentence as contrary to ahinsa. Only he takes life who gives it. All punishment is repugnant to ahinsa. Under a State governed according to the principles of ahinsa, therefore, a murderer would be sent to a penitentiary and then given every chance of reforming himself. All crime is a kind of disease and should be treated as such."*

352. The learned Special Public Prosecutor, on the other hand, highlighted the fact that the repeated incidents of gang rape in Delhi and Mumbai had led to the widespread feeling that women in the two metropolitans were unsafe. **By giving the maximum sentence the message to the society would be that deviant behavior of an extreme kind will not be tolerated.** By not handing out the maximum sentence, the message would be loud and clear that criminals can get away with incidents like this.

353. The learned Special Public Prosecutor emphasized that the Hon'ble Supreme Court has repeatedly held that where there is grotesque, diabolical and barbaric behavior, death sentence must be awarded. In this case, the prosecution has proved not just the existence of extreme brutality, but grotesque, diabolical and barbaric behavior on the part of the accused. The offence of gang rape in the instant case has been compounded with murder and Courts have repeatedly awarded the death sentence in cases of brutal rape and murder. Also, where depravity and extreme brutality shock the collective conscience of the society, death sentence has been held to be warranted. Young age of the accused is not a determinative factor against awarding of the death sentence nor can the socio-economic status of the accused be considered a mitigating factor in sentencing in a case of gang rape coupled with murder. Learned Special Public Prosecutor further submitted that each case turns on its own facts and no two cases can be alike, specially for considerations of sentencing. In the present case, when an exercise is undertaken to balance the aggravating circumstances relating to the crime and the mitigating

circumstances in respect of the accused, it would be abundantly clear that the scale decisively turns towards awarding of the death sentence. This being so and it being settled law that as long as the death penalty is on the statute book and held to be constitutional, the Courts are duty bound to award it in befitting cases, this Court irrespective of its predilictions has no alternative but to affirm the death sentence awarded to the accused in the instant case.

354. Learned Special Public Prosecutor contended that the prosecution had completely discharged the onus placed upon it of proving that the accused demonstrated extreme depravity as they lured the victims into the bus, brutally gang raped the girl, inflicted inhuman torture and threw the defenceless victims out of the moving bus in a naked condition on a cold winter night with the prosecutrix bleeding profusely from the vagina. It was a pre-meditated, unprovoked crime. There is no denying the fact that this hair raising incident had shocked the collective conscience of the nation, which is held to be one of the significant tests for determining if a case falls in the rarest of rare category. In the light of the evidence against each accused, the brutality of the crime which is evident from the statements of the victims as well as the medical evidence of the treating doctors, each of the accused must be awarded the death sentence. If this is not a rarest of rare case, there is none which can be given that epithet.

355. As regards the young age of the convicts, which the defence states is a mitigating factor, learned Special Public Prosecutor contended it has time and again been emphasized by the Supreme

Court that the young age of the accused is not by itself a determinative factor against the award of the death sentence. The cumulative circumstances have to be taken together and a comprehensive view taken after proper weightage being given to each circumstance. In the following among other cases, the Supreme Court in spite of the young age of the accused felt impelled to confirm the death sentence:-

(i) ***Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra, (2012) 9 SCC 1.***

(ii) ***Atbir v. State (NCT of Delhi) (2010) 9 SCC 1.***

(iii) ***Vikram Singh v. State of Punjab (2010) 3 SCC 56.***

(iv) ***Shivu v. High Court of Karnataka (2007) 4 SCC 713.***

(v) ***Jai Kumar v. State of M.P. (1999) 5 SCC 1.***

(vi) ***Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220.***

356. It is noteworthy that the cases of ***Shivu (supra)*** and ***Dhananjoy Chatterjee (supra)*** were cases based on circumstantial evidence. ***Shivu's*** case was for the offence of gang rape coupled with murder while ***Dhananjoy Chatterjee*** was a case of rape coupled with murder.

357. Regarding socio-economic status of the accused not being a determinative factor, learned Special Public Prosecutor relied upon the decision in the case of ***Shimbhu vs. State of Haryana (supra)***, which was a case of rape simpliciter (not gang rape and not coupled with murder), and in particular upon the following observations made by the Supreme Court in the said case:- (SCALE, page 596)

> *"Thus, the law on the issue can be summarized to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste,* ***economic or social status of the accused or victim*** *or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute."*

358. Reliance was also placed by learned Special Public Prosecutor upon a recent judgment rendered in ***State of Rajasthan vs. Vinod Kumar, (2012) 6 SCC 770*** wherein the Supreme Court reiterated the law as under:- (SCC, page 780, para 23)

> *"**23.** Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste,* ***economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment****. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed.* ***Conduct and state of mind of the accused*** *and age of the sexually assaulted victim* ***and the gravity of the criminal act are the factors of paramount importance.*** *The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case."*

359. Reference was next made to the case of ***State of Karnataka v. Krishnappa (supra)***. In the said case, a three-Judge Bench of the Supreme Court on the issue of sentencing held as under:- (SCC, page 83, para 18)

> *"**18.** The High Court, however, differed with the reasoning of the trial court in the matter of sentence and, as already noticed, the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the "discretion had not been properly exercised by the trial court". There is no warrant for such an observation.* ***The High Court justified the reduction of sentence on the ground that the accused-respondent was an "unsophisticated and illiterate citizen belonging to a weaker section of the society"; that he was "a chronic addict to drinking" and had committed rape on the girl while in a state of "intoxication" and that his family***

> ***comprising of "an old mother, wife and children" were dependent upon him.*** *These factors, in our opinion, did not justify recourse to the proviso to Section 376(2) IPC to impose a sentence less than the prescribed minimum.* ***These reasons are neither special nor adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim*** *or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with.* ***The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence.*** *The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. The High Court, in the facts and circumstances of the case, was not justified in interfering with the discretion exercised by the trial court and our answer to the question posed in the earlier part of the judgment is an emphatic — No."*

360. As regards the defence plea of clean antecedents of the convicts, the chance of their reformation and the presumption of innocence being in their favour, it was pointed out by learned Special Public Prosecutor that this aspect of the matter has been adequately dealt with by the learned trial court in his order on sentence, the relevant portion of which reads as follows:

> *"The submission* ***qua clean antecedents*** *or a chance of reformation, I may refer to the following judgments where the accused were first offenders but were awarded death for the acts they had committed viz., (a) Mohd Anis Kasab (Supra) and (b) Dhananjay Chatterjee (Supra). Rather, I may refer to the*

deposition of PW82 Shri Ram Adhar wherein he had deposed about dacoity committed with him by the convict person along with their associates in the same bus on the time just prior to the incident belies the claim of the convicts that they had clean antecedents. ***Qua the plea of reformation*** *I may add that in Sunder's case (supra) the Hon'ble Supreme Court observed that the method adopted by the accused may disclose the traits of outrageous criminality in the behaviour of accused.*

Further, the plea of presumption of the innocence in favour of the convicts is now not available to them since they stand convicted. I may also put the record straight that convict person are not convicted only on account of conspiracy but also for their overt acts. Lastly, the plea of convict Mukesh that he had helped the system by admitting that he was present inside the bus, is probably to seek misplaced mercy as he took this contradictory stand in his statement under section 313 Cr.P.C to save himself after he found the chain of circumstances being proved against him too."

361. Learned Special Public Prosecutor also laboriously took us through the entire gamut of case law to bring home his submissions. We propose to examine the parameters laid down by the Supreme Court in the precedents cited by him and others which have come to our notice and we now embark upon this exercise, bearing in mind the fact that there is nothing more irrevocable than death itself and that human judgment is not infallible, but also that proof beyond reasonable doubt is a guideline, not a fetish, and meticulous hyper-sensitivity to the dogma that to eliminate a rare innocent a hundred guilty men must be allowed to escape may prove to be destructive of the social fabric and render justice completely sterile.

362. Learned Special Public Prosecutor contended at the outset that Courts have repeatedly awarded stringent punishment in cases of gang rape. In a recent judgment in ***Shimbhu vs. State of Haryana, 2013 (10) SCALE 595***, the Hon'ble Supreme Court has held that in

incidents of gang rape no leniency should be shown by the Courts. In this case, when the prosecutrix in the early hours of the morning came out of her house to attend the call of nature, she was accosted by the two accused, threatened with dire consequences by pointing of a knife at her and taken inside the shop of one of the accused, where she was repeatedly raped by the accused, turn by turn, on that day and the following day by confining her in the said shop. Subsequently, however, it transpired that a compromise was arrived at between the parties and the victim was happily married and blessed with children. The accused relying upon these circumstances and the fact that the occurrence of the incident dated back to the year 1995 sought to press into service the proviso to Section 376(2)(g) of the Penal Code that the Court may for adequate and special reasons impose sentence of imprisonment for a term of less than 10 years. A three-Judge Bench of the Hon'ble Supreme Court, after noting that the legislature through the Criminal Law (Amendment) Act, 2013, had not only deleted this proviso in the wake of increasing crimes against women, but also enhanced the minimum sentence to twenty years, which may extend to life which shall mean imprisonment for the remainder of that person's natural life and with fine, observed: (SCALE, page 603)

> *"24. This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape under Section 376 IPC, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) Indian Penal Code. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases."*

363. It may be noted that in the aforesaid case, the Supreme Court affirmed its earlier decisions rendered in ***State of M.P. vs. Bala @ Balaram, (2005) 8 SCC 1*** and ***State of Karnataka vs. Krishnappa, (2000) 4 SCC 75***, wherein it was held that to show mercy in the case of such a heinous crime as gang rape, a crime against society, a crime against human dignity, one that reduces a man to an animal would be a travesty of justice and an affront to society notwithstanding the long pendency of the criminal trial or offer of the rapist to marry the victim or the socio-economic status, religion, race, caste or creed of the accused, which are irrelevant circumstances.

364. Learned Special Public Prosecutor contended that the emphasis placed by the Supreme Court in the case of ***Shimbhu (supra)*** that in incidents of gang rape no leniency should be shown by the Courts in the award of sentence assumes special significance in the present case. In that case, the degree of deviance was lesser, inasmuch as it was not gang rape coupled with murder. In the present case, there is much higher degree of deviance coupled with brutality which is hithertobefore unknown in the history of criminal law. The entire intestine of the prosecutrix was perforated, splayed and cut open due to repeated insertions of rods. The accused, in the most barbaric manner, pulled out her internal organs with their bare hands as well as the rods and caused irreparable injuries resulting in an agonizing and traumatic death for the victim. If this is not the rares of rare case, there is none. The Courts have repeatedly awarded the death sentence in cases of brutal rape and murder.

365. Reliance was placed by learned Special Public Prosecutor, in this context, upon the judgment in the case of ***B.A. Umesh vs. Registrar General, High Court of Karnataka, (2011) 3 SCC 85*** where the victim, mother of a 7 year old child, was subjected to violent sexual assault when she was alone in the house and then smothered to death. The Hon'ble Supreme Court held as under:- (SCC, page 108, para 83)

> *"On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as awarded by the trial court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in Bachan Singh case or in Machhi Singh case are present in the facts of the instant case. ……."*

366. We note that in the above mentioned case, the rape of the victim was coupled with robbery in the house. The victim was found lying naked on the floor with her genitals exposed and blood oozing out of her vagina. The post mortem examination disclosed lacerations on the vagina and abrasions all over the body. We further note that the conviction in ***Umesh (supra)*** was based entirely on circumstantial evidence. **The case on hand, in addition to being a case of gang rape, rests on much stronger direct evidence and involves extreme brutality which has seen no comparison.**

367. Reliance was next placed by learned Special Public Prosecutor upon the judgment in ***Ankush Maruti Shinde vs. State of Maharashtra, (2009) 6 SCC 667.*** In this case, a group of six persons barged into a house, demanding money and valuables. Five membes

of a family were brutally murdered who were not even known to the accused and there was no animosity towards them and the accused raped two, one being a young girl aged 15 years who was dragged to the open field, gang-raped and done to death. The High Court confirmed the death sentence awarded to three accused convicted for offences under Sections 376(2)(g) and 302 IPC, while three others were convicted under Section 302 IPC but acquitted under Section 376(2)(g) IPC and were awarded life sentences. The Supreme Court allowing the State appeals and awarding death sentence to all the six accused, concluded as under:- (SCC, page 680, paras 31 to 35)

> ***"31.*** *The case at hand falls in the rarest of rare category. The depraved acts of the accused call for only one sentence that is death sentence.*
>
> ***32.*** *The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 and 4; but held that in the case of others it was to be altered to life sentence.*
>
> ***33.*** *The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenceless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged to the open field, gang-raped and done to death.*
>
> ***34.*** *There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick for A-2, A-3 and A-5. In fact, A-3 was the main person. He assaulted PW 1 and took the money from the deceased.*

> ***35.*** *Above being the position, the appeals filed by the accused persons deserve dismissal, which we direct and the State's appeals deserve to be allowed. A-2, A-3 and A-5 are also awarded death sentence. In essence all the six accused persons deserve death sentence."*

368. In the ***Ankush Maruti Shinde case*** (***supra***), the Supreme Court relied upon its earlier judgments and in particular upon the following extract from the judgment rendered in ***State of Madhya Pradesh vs. Munna Choubey, (2005) 2 SCC 710***:- (SCC, page 714)

> ***"9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: 'State of criminal law continues to be — as it should be — a decisive reflection of social consciousness of society'. Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix.*** *By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P. this Court while refusing to reduce the death sentence observed thus: (SCC p. 82, para 6)*
>
> > ***It will be a mockery of justice to permit [the accused] to escape the extreme penalty of***

law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.

10. Therefore, ***undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed****, etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of T.N.*

11. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in McGautha v. State of California that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

14. In Jashubha Bharatsinh Gohil v. State of Gujarat [(1994) 4 SCC 353] it has been held by this Court that in the matter of death sentence, the courts are required to answer new challenges and mould the sentencing system to meet these challenges. ***The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.*** *Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.*

15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

369. Further discussing the appropriateness of death sentencing, the Supreme Court relied upon and quoted the following extract from its judgment in ***Union of India vs. Devendra Nath Rai, (2006) 2 SCC 243***:- (SCC, pp.247-49)

> *"23. Lord Justice Denning, Master of the Rolls of the Court of Appeal in England said to the Royal Commission on Capital Punishment in 1950:*
>
> > *'Punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventive and nothing else. … The truth is that* ***some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'***
>
> *In J.J. Rousseau's The Social Contract written in 1762, he says the following:*
>
> > *Again, every rogue who criminously attacks social rights becomes, by his wrong, a rebel and a traitor to his fatherland. By contravening its laws, he ceases to be one of its citizens: he even wages war against it. In such circumstances, the State and he cannot both be saved: one or the other must perish.* ***In killing the criminal, we destroy not so much a citizen as an enemy. The trial and judgments are proofs that he has broken the social contract, and so is no longer a member of the State."***

370. The learned Special Public Prosecutor next relied upon the case of ***Dhananjoy Chatterjee vs. State of West Bengal, (1994) 2 SCC 220*** which is yet another case in which the Court observed that **the punishment awarded by the Courts must reflect the public abhorrence of the crime and must be proportionate to the**

atrocity committed on the victim. This case pertains to the rape and murder of a helpless and defenceless school-going girl of 18 years by a security guard of the building in which the girl was residing. Affirming the fact that the case fell in the category of "rarest of rare" category, which called for capital punishment, the Court made the following observations:- (SCC, page 239, paras 15 and 16)

> *"In our opinion,* ***the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.***
>
> *The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that* ***a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years.*** *If the security guards behave in this manner who will guard the guards?* ***The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscience.*** *There are no extenuating or mitigating circumstances whatsoever in the case.* ***We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard***

> ***certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death imposed upon the appellant for the offence under Section 302 IPC.*** *The order of sentence imposed on the appellant by the courts below for offences under Sections 376 and 380 IPC are also confirmed along with the directions relating thereto as in the event of the execution of the appellant, those sentences would only remain of academic interest. This appeal fails and is hereby dismissed."*

371. Reference was next made by the learned Prosecutor to the case of ***Shivu vs. The Registrar General, High Court of Karnataka, (2007) 4 SCC 713,*** wherein the Hon'ble Supreme Court once again relying on the principle of proportionality in sentencing, sentenced two young accused to death for the offence of rape coupled with murder. Noting that the accused, aged about 20 and 22 years respectively, who were sexually obsessed youngsters and who had prior to the alleged incident attempted to rape two girls of the same village and thus emboldened had committed rape on the deceased, a young girl of hardly 18 years, and to avoid detection committed the heinous and brutal act of her murder, the Supreme Court observed that ***"anything less than a penalty of greatest severity for any serious crime"*** must be thought to be a measure of toleration that is unwarranted and unwise. It was further observed that quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. ***"Proportion between crime and punishment was thus a goal to be respected in principle in spite of errant notions."*** It may be noted that this was a case which rested on circumstantial evidence alone.

372. The learned Special Public Prosecutor next referred to a three-Judge Bench decision of the Supreme Court in ***Molai vs. State of M.P., (1999) 9 SCC 581*** in which the Supreme Court awarded death sentence to both the accused persons upon conviction for offences under Sections 376(2)(g), 302, 34 and 201 IPC for rape of a sixteen year old girl. It is noteworthy that the said case was also based entirely on circumstantial evidence. The conclusions arrived at in the said case read as under:- (SCC, page 593, para 36)

> *"**36.** We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and **in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of the accused.** It cannot be overlooked that Naveen, a 16-year-old girl, was preparing for her Class 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp-edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused (appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."*

373. Significantly in the aforesaid case, pre-meditation was held by the Supreme Court not to be a pre-requisite for the award of death penalty. The present case stands on a better footing since in the present case the victims were lured into the bus for the purpose of robbing, raping and eliminating. Pre-meditation was thus writ large

and the crime was the result of a conspiracy hatched by the accused well in advance of the commission of the crime. The depravity and extreme brutality with which the crime was committed reflects the mind set of the accused, a mind set which was incapable of reformation.

374. The learned Special Public Prosecutor vehemently contended that the Supreme Court has in a string of decisions emphasized that depravity of the mind of the convict/s and the brutality demonstrated in committing the offence constitute "special reasons" required for the award of death sentence. A look now at the law cited by him which substantiates this contention.

375. Reference at the outset was made to the Constitution Bench decision in ***Bachan Singh vs. State of Punjab (supra)*** wherein it is held that when culpability assumes the proportion of extreme depravity that constitutes legitimate "special reasons" for award of death sentence:- (SCC, page 748, paras 201 and 202)

> *"201. ……..… As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'.* ***In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments.*** *In a sense, to kill is to be cruel and therefore all murders are cruel.* ***But such cruelty may vary in its degree of culpability. And***

> ***it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.***
>
> *202. …….…… **Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:***
> *(a) if the murder has been committed after **previous planning** and involves **extreme brutality**; **or***
> *(b) if the murder involves **exceptional depravity**; or*
> *(c)……*
> *(d)……"*

Suffice it to note that both (a) and (b) exist in the present case.

376. Reference was next made to a three-Judge Bench decision in ***Machhi Singh vs. State of Punjab (supra)*** wherein the Hon'ble Supreme Court recorded its reflections on the question of death penalty and held that **inhuman acts of torture or cruelty to bring about the death of the victim arouse intense and extreme indignation of the society and warrant death sentence.** It further held that **when the collective conscience of society is shocked, the holders of judicial power are expected to award the death sentence.** The rationale was explained in the following terms:- (SCC, page 487, paras 32 and 33)

> *"**32.** The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, **the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it.** The very existence of the rule of law and the fear of being brought to book operates*

as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or ***when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty.*** *But the community will not do so in every case.* ***It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:***

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. *For instance,*

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) ***when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.***

(iii) ……"

377. In ***Machhi Singh (supra)***, the following five tests were laid down as parameters for the assistance of the Courts in determining whether a case falls in the category of rarest of rare:- (SCC, page 488)

I. Manner of commission of murder.

II. Motive for commission of murder.

III. Anti-social or socially abhorrent nature of the crime.

IV. Magnitude of crime.

V. Personality of victim of murder.

378. Suffice it to note that all the five indicators laid down in ***Machhi Singh (supra)***, which are relied upon by the prosecution, are against the accused in the instant case and the each of the five indicates towards imposition of the death penalty. The manner of commission of the offences was extremely brutal; the motive was exceptionally depraved being a combination of sexual obsession and avarice for material objects; the nature of the crime undoubtedly shocked the conscience of the society and the nation; the magnitude of the crime was such that the incident created widespread concern with regard to the safety and security of women all over the country and instilled fear in the mind of the common man; and the victim was a helpless young girl, who was in what may be described a hapless situation, not in a position to call for help and not in a position to run, being confined to a moving bus with her tormentors.

379. We note that in ***Devender Pal Singh v. State (NCT of Delhi) (2002) 5 SCC 234,*** the Supreme Court once again highlighted that the principle culled out from ***Bachan Singh (supra)*** and ***Machhi Singh (supra)*** is that when the collective conscience of the community is shocked, the Courts must award the death sentence. The dastardly acts of the accused in the said case were opined by the Court to be diabolic in conception and cruel in execution. The relevant extract of the judgment is as under:- (SCC, page 271, para 58)

> *"**58.** From Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab **the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded.**"*

380. A similar view was taken in the case of ***Mahesh vs. State of M.P. (supra)***, where the conviction was under Section 302 IPC, and where the ghastly murders were considered shocking to the judicial conscience. Affirming the death sentence, the Supreme Court held as under:- (SCC, page 82, paras 5 and 6)

> *"**5.** It is against this background that the request of the appellants' counsel for interference with the sentence has to be considered. The High Court observes that the **act of the appellant "was extremely brutal, revolting and gruesome which shocks the judicial conscience". And again as "in such shocking nature of crime as the one before us which is so cruel, barbaric and revolting, it is necessary to impose such maximum punishment under the law as a measure of social necessity which work as a deterrent to other potential offenders".***
>
> ***6.** We share the concern of the High Court. We also feel that **it will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts.** In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. When we say this, we do not ignore the need for a reformative approach in the sentencing process. But here, we have no alternative but to confirm the death sentence. Accordingly, we dismiss the appeal."*

381. In ***Ram Singh vs. Sonia & Ors., (2007) 3 SCC 1,*** the Supreme Court once again held that **it would be a failure of justice not to award the death sentence in a case where the crime was executed in the most grotesque and revolting manner**. At paragraph 66, the Court held as under:- (SCC, page 32, para 66)

> *"**66.** The instant case is one wherein accused Sonia, along with accused Sanjiv (her husband) has not only put an end to the lives of her stepbrother and his whole family, which included*

> *three tiny tots of 45 days, 2½ years and 4 years, but also her own father, mother and sister in a very diabolic manner so as to deprive her father from giving the property to her stepbrother and his family. The fact that murders in question were committed in such a diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims.* ***The brutality of the act is amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of the most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mindset which can be amenable for any reformation. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so. In view of these facts we are of the view that there would be failure of justice in case death sentence is not awarded in the present case as the same undoubtedly falls within the category of the rarest of the rare cases*** *and the High Court was not justified in commuting death sentence into life imprisonment."*

382. In ***C. Muniappan vs. State of Tamil Nadu, (2010) 9 SCC 567,*** the Supreme Court while referring to the guidelines laid down in ***Bachan Singh, Machhi Singh*** and ***Devender Pal Singh (supra)*** emphasized that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct. The accused in the said case had burnt a bus carrying college girls as part of a public demonstration as a result of which three girls died. Dismissing the appeal and maintaining the award of death sentence to the Appellant, the Court observed as under:- (SCC, pages 599 and 600, para 92)

> *"**92.** Life imprisonment is the rule and death penalty an exception. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to a convict. The court has to consider whether any other punishment would be completely inadequate and what would be the mitigating and aggravating circumstances in the case.*

> ***Murder is always foul, however, the degree of brutality, depravity and diabolic nature differ in each case.*** *Circumstances under which murders take place also differ from case to case and there cannot be a straitjacket formula for deciding upon circumstances under which death penalty must be awarded. In such matters,* ***it is not only the nature of crime, but the background of criminal, his psychology, his social conditions, his mindset for committing offence and effect of imposing alternative punishment on the society are also relevant factors****."*

It further observed:- (SCC, pages 600 and 601, para 96)

> *"**96.** The aggravating circumstances in the case of Nedu @ Nedunchezhian (A-2), Madhu @ Ravindran (A-3) and C. Muniappan (A-4) are that this offence had been committed after* ***previous planning and with extreme brutality.*** *These murders involved exceptional depravity on the part of Nedu @ Nedunchezhian (A-2), Madhu @ Ravindran (A-3) and C. Muniappan (A-4).* ***These were the murders of helpless, innocent, unarmed, young girl students in a totally unprovoked situation. No mitigating circumstances could be pointed to us, which would convince us to impose a lesser sentence on them. Their activities were not only barbaric but inhuman of the highest degree. Thus, the manner of the commission of the offence in the present case is extremely brutal, diabolical, grotesque and cruel. It is shocking to the collective conscience of society.*** *We do not see any cogent reason to interfere with the punishment of death sentence awarded to Nedu @ Nedunchezhian (A-2), Madhu @ Ravindran (A-3) and C. Muniappan (A-4) by the courts below. Their appeals are liable to be dismissed."*

383. It may be noted that the Supreme Court in ***C. Muniappan (supra)*** referred to its earlier judgments rendered in ***Mahesh vs. State of M.P. (supra); State of Punjab vs. Rakesh Kumar, (2008) 12 SCC 33; Sahdev vs. Jaibar, (2009) 11 SCC 798, Bantu vs. State of U.P., (2008) 11 SCC 113*** and ***Sevaka Perumal vs. State of T.N., (1991) 3 SCC 471***. In all the aforesaid decisions, the Hon'ble Supreme Court has deprecated the practice of imposing inappropriate sentence as it

would render the justicing system suspect and undermine public confidence in the efficacy of law.

384. In its judgment rendered in ***Ajitsingh Harnamsingh Gujral vs. State of Maharashtra, (2011) 14 SCC 401***, also relied upon by the learned Special Public Prosecutor, the Hon'ble Supreme Court in a case of circumstantial evidence again held that gruesome, ghastly or horrendous murders belong to the category of rarest of rare cases where death sentence must be awarded. The Court, at paragraphs 93 and 94, observed as under:- (SCC, page 433, paras 93 and 94)

> *"**93.** In our opinion **a distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former, the latter belongs to the category of the rarest of rare cases, and hence death sentence should be given.** This distinction has been clarified by a recent judgment of my learned brother Hon'ble C.K. Prasad, J. in Mohd. Mannan v. State of Bihar, wherein it has been observed: (SCC pp. 322-23, paras 23-24)*
>
> > *"23. It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard-and-fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. Nevertheless it is widely accepted that in deciding this question the number of persons killed is not decisive.*
> >
> > *24. Further, crime being brutal and heinous itself does not turn the scale towards the death sentence. **When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when***

collective conscience of the community is petrified, one has to lean towards the death sentence. *But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck.* ***So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court had laid down for imposition of the death penalty.****"*

94. We fully agree with the above view as it has clarified the meaning of the expression the "rarest of rare cases"*. To take a hypothetical case, supposing A murders B over a land dispute, this may be a case of ordinary murder deserving life sentence. However, if in addition to murdering B, A goes to the house of B and wipes out his entire family, then this will come in the category of the "rarest of rare cases" deserving death sentence. The expression the "rarest of rare cases" cannot, of course, be defined with complete exactitude. However, the broad guidelines in this connection have been explained by various decisions of this Court.* ***As explained therein, the accused deserves death penalty where the murder was grotesque, diabolical, revolting or of a dastardly manner so as to arouse intense and extreme indignation of the community, and when the collective conscience of the community is petrified, or outraged.*** *It has also to be seen whether the accused is a menace to society and continues to do so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused cannot be reformed or rehabilitated and shall continue with his criminal acts. Thus a balance sheet is to be prepared in considering the imposition of death penalty of the aggravating and mitigating circumstances, and a just balance is to be struck."*

385. In ***Sangeet and Anr. vs. State of Haryana, (2013) 2 SCC 452***, the Supreme Court noted that the Constitution Bench in ***Bachan Singh*** laid down that not only the relevant circumstances of the crime should be factored in, but due consideration must also be given to the circumstances of the criminal. It further noted that the Constitution Bench in ***Bachan Singh*** had expressed the hope that in view of the "broad illustrative guidelines" laid down with regard to aggravating and mitigating circumstances, the Courts:

> *"209. … will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) [of CrPC] viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."*

It further observed:

> *"**29.** Despite the legislative change and **Bachan Singh** discarding Proposition (iv)(a) of **Jagmohan Singh**, **this Court in Machhi Singh revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory.** In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. **A balance sheet cannot be drawn up of two distinct and different constituents of an incident.** Nevertheless, the balance sheet theory held the field post **Machhi Singh**.*
>
> ***33.** Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in **Bachan Singh**. It appears to us that even though **Bachan Singh** intended "principled sentencing", sentencing has now really become Judge-centric as highlighted in **Swamy Shraddananda** and **Bariyar**. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in **Bachan Singh** seems to have been lost in transition.*
>
> ***34.** Despite **Bachan Singh**, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in **Bachan Singh** appear to have taken a bit of a*

*back seat in the sentencing process. This was noticed in **Bariyar** with reference to **Ravji v. State of Rajasthan**. It was observed that "curiously" only characteristics relating to the crime, to the exclusion of the criminal were found relevant to sentencing. It was noted that Ravji has been followed in several decisions of this Court where primacy has been given to the crime and circumstances concerning the criminal have not been considered. In para 63 of the Report it is noted that Ravji was rendered per incuriam and then it was observed that: (Bariyar case, SCC p. 529)*

> *"63. … It is apparent that Ravji has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to the criminal are not pertinent."*

386. In ***Sandesh alias Sainath Kailash Abhang vs. State of Maharashtra, (2013) 2 SCC 479***, the Supreme Court reiterated:

> *"**22.** …… it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354(3) CrPC for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion."*

387. In a recent judgment rendered in the case of ***Gurvail Singh alias Gala and Anr. vs. State of Punjab, (2013) 2 SCC 713***, after noting the law laid down in ***Bachan Singh case*** and ***Sangeet case***, the Supreme Court laid down the test and factors for the award of death sentence as follows:

> *"**19.** ……..**To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the court has to finally apply the rarest of rare cases test (R-R Test), which depends on the perception of the society and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crime or not.** While applying this test, the Court has to look into variety of*

factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. ***Courts award death sentence, because the situation demands, due to constitutional compulsion, reflected by the will of the people, and is not Judge-centric.****"*

388. In another recent decision rendered in the case of ***Sunder vs. State, (2013) 3 SCC 215,*** the Supeme Court while dismissing the appeal by the convict and affirming the award of death sentence, in paragraph 42 of its judgment culled out the following factors which it considered as aggravating circumstances:- (SCC, pages 239-240)

(a) The accused had been held guilty of two heinous offences, which independently of one another, provide for the death penalty *viz.* under Section 364-A and Section 302 of the Penal Code.

(b) The facts and circumstances of the case did not depict any previous enmity between the parties. There was no grave and sudden provocation which had compelled the accused to take the life of the prosecutrix, an innocent child of seven years.

(c) On account of non-payment of ransom, a minor child's murder was committed. This circumstance demonstrated extreme mental perversion not worthy of human condonation.

(d) The manner in which the victim was murdered and the approach and method adopted by the accused, disclosed the traits of outrageous criminality in the behaviour of the

accused. It was a well thought out and well-planned murder. The approach of the accused revealed a brutal mind set of the highest order.

(e) Murder was committed not of a stranger, but of a child with whom the accused was acquainted.

(f) Extreme misery caused to the aggrieved party to be regarded as an add on to the aggravating circumstances.

389. It deserves to be noted that in ***Sunder's*** case (supra), a male child of about seven years was kidnapped for ransom and when the ransom was not paid the Appellant strangulated him, put his dead body in a gunny bag and threw it in a tank from where it was subsequently fished out. The Court noted that kidnapping the only male child was to induce maximum fear in the mind of his parents, agony which is unfathomable and the extreme misery caused to the aggrieved party certainly added to the aggravating circumstances. Suffice it to note that in the instant case the extreme misery and trauma caused to the aggrieved party (the victim), and misery of a nature which can never be effaced from the minds of the parents of the victim, is of critical significance and hence it needs to be considered by this Court whether the option of awarding any alternate punishment, however harsh, is foreclosed.

390. In the case of ***Deepak Rai vs. State of Bihar, (2013) 10 SCC 421***, a three-Judge Bench of the Supreme Court, while noting the penological shift in the present Code legislated in 1973 making imprisonment for life a rule and death sentence an exception, dwelt upon the words "special reasons" for award of sentence of death

mandated by the provisions of Section 354(3) of the Code. It noted that in ***Bachan Singh case***, in the context of the said provision, special reasons were construed to mean "exceptional reasons" founded on the exceptionally grave circumstances relating to the crime as well as the criminal. It further noted that the Constitution Bench in ***Shashi Nayar vs. Union of India, (1992) 1 SCC 96*** observed that the "special reasons clause" means reasons, specific to the facts of a particular case, which can be catalogued as justifying a severe punishment and unless such reasons are not recorded death sentence must not be awarded. It summed up with great perspicacity the objects and purpose of the legislative mandate of assigning special reasons and the judicial approach to be adopted in assigning such reasons as follows: (SCC, page 448)

> *"**51.** The aforesaid would reflect that under this provision the legislature casts a statutory duty on the court to state reasons for choice of the sterner sentence to be awarded in exceptional cases as against the rule of life imprisonment and by necessary implication, a legal obligation to explain them as distinguished from the expression "reasons" follow. The legislative mandate of assigning "special reasons" assures that the imposition of the capital punishment is well considered by the court and that only upon categorisation of the case as the "rarest of rare", thus leaving no room for imposition of a less harsh sentence, should the court sentence the accused person to death.*
>
> ***52.** Incontrovertibly, the judicial approach towards sentencing has to be cautious, circumspect and careful. The courts at all stages—trial and appellate—must therefore peruse and analyse the facts of the case in hand and reach an independent conclusion which must be appropriately and cogently justified in the "reasons" or "special reasons" recorded by them for imposition of life imprisonment or death penalty. The length of the discussion would not be a touchstone for determining correctness of a decision. The test would be that reasons must be lucid and satisfy the appellate court that the court below has considered the case in toto and thereafter, upon balancing all the mitigating and aggravating factors, recorded the sentence.*

x x x x x

> ***60.*** *This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award death sentence. Since such circumstances cannot be laid down as a straitjacket formula but must be ascertained from case to case, the legislature has left it open for the courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence."*

391. Learned Special Public Prosecutor next contended that the existence of death penalty on the statute book and its constitutionality having been upheld by the Apex Court, courts are duty bound to award it in befitting cases. Reference in this context was made by him to the Constitution-Bench in ***Bachan Singh v. State of Punjab (supra), Ajit Singh Harnamsingh Gujral v. State of Maharashtra (supra)*** and to the more recent decision of the Supreme Court in ***Mohammed Ajmal Mohammed Amir Kasab @ Abu Mujahid v. State of Maharashtra (2012) 9 SCC 1***.

392. In its judgment in ***Bachan Singh (supra)***, the Hon'ble Supreme Court held as under:

> *"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose.* ***If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators,***

jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware — as we shall presently show they were — of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest*…"***

393. In ***Ajitsingh Harnamsingh Gujral v. State of Maharashtra (supra)***, the Supreme Court after examining the entire gamut of case law summed up the position in paragraph 96 of its judgment as under:- (SCC, page 434, para 96)

*"**96.** It is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law as that is in the domain of the legislature vide Common Cause v. Union of India [(2008) 5 SCC 511] (vide paras 25 to 27). The very fact that it has been held that death penalty should be given only in the rarest of rare cases means that in some cases it should be given and not that it should never be given. As to when it has to be given, the broad guidelines in this connection have been laid down in Machhi Singh case [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] which has been followed in several decisions referred to above."*

394. In ***Mohammed Ajmal Mohammed Amir Kasab @ Abu Mujahid (supra)***, in para 577, the Hon'ble Supreme Court observed:

> *"Putting the matter once again quite simply, in this country death as a penalty has been held to be constitutionally valid, though it is indeed to be awarded in the "rarest of rare cases when the alternative option (of life sentence) is unquestionably foreclosed". Now, as long as the death penalty remains on the statute book as punishment for certain offences, including "waging war" and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty……."*

395. Courts of law have been faced with the eternal strife between the humanistic approach reflected in death sentence-in-no-case doctrine favoured by the Abolitionists and the retributive approach reflected in the death penalty in all heinous crimes favoured by the Retentionists. In India particularly there is a deep divide between the Abolitionists and the Retentionists for the death penalty. The present position regarding capital punishment is to use it as sparingly as possible, i.e., in the rarest of rare cases – and this is the system as it stands in India. True it is that it cannot be predicated that a crime-free society will dawn if the hang-man is kept feverishly busy, but it is equally true that barbariac rapes and heinous murders have become the order of the day and inadequate punishment may lead to the sufferings of the community at large. Society's abhorrence to the atrocious crimes perpetrated upon innocent and helpless victims has resulted in the death penalty being retained on the statute book to remind such criminals in the society that human life is very precious and one who dares to take the life of others must lose his own life. No litmus test has been formulated to discern precisely what are the rarest of rare cases in which the alternative option of awarding life

sentence must be regarded as unquestionably foreclosed. Adherence to the guidelines laid down by the Supreme Court from time to time is the advisory for resolving the dilemma of the Judge in every murder case: Death or life imprisonment for the murderer? The judiciary in India has been vested with the discretion to impose or not to impose the death penalty – one of the greatest burdens it must carry till the death penalty remains on the statute book. Predilictions of the Judge must of necessity have no role to play.

396. The inevitable conclusion, therefore, is that it needs to be examined in each individual case as to whether there is no other alternative except to impose the death penalty in the larger public interest and to maintain the integrity of life, the greatest gift bestowed upon mankind, which cannot be allowed to be frittered away by flagitious criminality.

397. Having noticed the legislative mandate laid down in Section 354(3) and the decisions of this Court on the aspect of imposition of death sentence in the rarest of rare cases, we deem it expedient to revert to the factual position in the instant case in our quest for the appropriate sentence. The offence in the present case has indubitably been committed in an extremely fiendish, demoniac, barbaric and nefarious manner. Also the manner in which the offence has been committed is demonstrative of exceptional licentiousness and perversion of a superlative degree. Further, the time, place, manner of execution and the motive behind the commission of the crime speaks volumes of the pre-meditated and callous nature of the offence. The medical evidence charters the hellish misery and trauma

inflicted upon the prosecutrix before her death. Incontrovertibly also, pain of an unparalleled order was inflicted upon her family members and her companion (PW-1, the eye-witness), who were compelled to watch her die many deaths before being certified dead. What makes matters worse is that Debauchery, avarice, profligacy and viciousness appear to be the only impelling forces behind the commission of the crime. Most certainly, the crime was not committed to alleviate poverty or the pangs of hunger and starvation, nor were the convicts in such impecunious circumstances as is sought to be portrayed. Undoubtedly they did not belong to the cream of the society, but they were neither beggars nor vagabonds nor even ruffians for whom crime is a means of self-preservation and is in fact reflective of the social injustice meted out to them. They were in fact men who were usefully and gainfully employed and were not expected to stoop so low in their lust for money and in order to satiate their egregious sexual appetite. Undeniably, the shocking incident left an indelible scar on the social order and became a burning societal issue. An enraged and infuriated society took to the streets to avenge the affront inflicted upon it. Social abhorrence could not have been more manifest nor the national shock at the incident more perceptible. It would be no exaggeration or hyperbole to state that the shocking incident had ramifications which crossed the national borders into international terrain. The barbariety with which the internal organs of the victim were pulled out with bare hands coupled with the twisting of iron rods through every orifice in her body exhibits outlandish mental perversion not worthy of human condonation. The medical

reports of the victim reflect that her entire intestine was perforated, splayed and cut open due to repeated insertions of rods and hands, causing her irreparable injuries, leading to gangrenous bowels and her ultimate death. In the postmortem report Ex.PW-34/A, besides other serious injuries, various bite marks were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals, depicting satantic beastliness. Further, the convicts did not stop even after this vile orgy but proceeded to drag the victims, one piled on the other, first to the rear gate of the bus, and on finding the rear gate to be jammed, dragged the victims by their hair to the front gate to be unceremoniously thrown out of the bus. Not satisfied, an attempt was then made to run over the victims so as to eliminate any chance of their living to tell their woeful tale. Their conscience unpricked by the gruesome crime and the infernal torture inflicted by them, they coolly proceeded to divide the looted articles amongst themselves, to wash the bus which was stained with the blood of the victims on its seat covers, curtains, stairs, floor, roof and back gate and to burn unabashedly the clothes stripped off the backs of the victims by lighting a bonfire. To expect society to be a sanguine spectator to this kind of depraved behaviour of the outlandish variety and to continue to extend its protective arm to the convicts would be both unnatural and ludicrous.

398. Thus, we are constrained to hold that the mitigating circumstances, elaborated upon by the defence by way of highlighting the comparatively young age of the convicts, their socio-economic

background, their clean antecedents and their chances of reformation, fade into insignificance in the light of the aggravating circumstances and the fact that we are of the considered view that the instant case without a shadow of doubt falls in the category of the rarest of rare cases where culpability has assumed the proportion of extreme depravity. The entire incident is completely revolting, gruesome and spine chilling. As regards the lack of criminal antecedents, we draw strength from the following observations made by the Hon'ble Supreme Court in the case of ***Deepak Rai (supra)***: (SCC, page 463)

> *"**94.** Further, in respect of the mitigating factors of lack of criminal antecedents or probabilities of the appellants to be menace to the society, we would reiterate the observations of this Court in **Gurdev Singh v. State of Punjab** that it is indeed true that the underlying principle of our sentencing jurisprudence is reformation and there is nothing in evidence to show that the appellants have been a threat or menace to the society at large besides the FIR regarding the theft of buffalo. **It is also true that we cannot say that they would be a further menace to the society or not as we live as creatures saddled with an imperfect ability to predict the future. Nevertheless, the law prescribes for future, based upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools.**"*

399. We conclude by stating the obvious that a strong message needs to be sent to the perpetrators of grotesque and ghastly crimes against women that such crimes shall not be countenanced, though we confess that we are not aware of any case in which a crime of such dimensions has been committed hithertobefore. We cannot also but be conscious of the fact that the gruesome manner of the execution of the crime in the instant case is in a sense unparalled in the history of criminal jurisprudence and that if the rising trend towards such crime is not nipped in the bud and arrested at its inception, the poison is

likely to spread like wild fire through the social order, rendering it hapless and defunct. Exemplary punishment is, therefore, the need of the hour, for, if this is not the rarest of rare cases there is likely to be none.

400. For the reasons afore-recorded, Death Sentence Reference No.6/2013 made by the trial court is accepted. The death sentence awarded to accused Mukesh, Akshay @ Thakur, Pawan @ Kalu, and Vinay is affirmed. Resultantly, Crl. A. No.1398/2013 filed by accused Pawan @ Kalu, Crl. A. No.1399/2013 filed by accused Mukesh and Crl. A. No.1414/2013 filed by accused Vinay and Akshay @ Thakur are dismissed.

REVA KHETRAPAL
JUDGE

March 13, 2014
km /k/sk

PRATIBHA RANI, J.

1. I have had the advantage of going through the judgment proposed by my esteemed sister Reva Khetrapal, J. answering the Death Reference and confirming the death penalty awarded to the four convicts in the infamous 16th December, 2012 gang rape case and dismissal of their Appeals. While fully endorsing and concurring with the judgment of my learned sister Reva Khetrapal, J., in addition, I propose to record my views as to why the death penalty should be awarded to the convicts.

2. Ever since the hearing of the Death Reference and the connected Appeals commenced, Mr.Dayan Krishnan, learned ASC for the State, while contending that offences against all the convicts stand proved beyond reasonable doubt, seeks confirmation of death penalty as the unprecedented brutality with which the crime was committed by the convicts, has shocked not only the nation but even the international community. Mr.A.P.Singh, Advocate representing convicts Akshay & Vinay Sharma and Mr.M.L.Sharma, Advocate representing convicts Pawan Kumar Gupta and Mukesh are in unison with learned ASC for the State that the brutality with which the crime was committed brings it in the category of 'rarest of the rare cases'. However, the learned counsel for the convicts have been seeking acquittal for all the four convicts on the ground of framing up the innocent poor persons for the acts done by someone in connivance with the complainant and efforts of State machinery to shield the real offenders.

3. The incident of gang rape in the running bus on the night of 16th December, 2012 when brought to light by Media, sparked an unprecedented public movement when people from every strata of Society in the Country came on common platform demanding justice for the victim. The outcry was for safety of women and punishment proportionate to the crime for the offenders. Public demand was for amending penal law thereby prescribing death sentence in deserving cases of rape/gang rape.

4. The victim of gang rape committed in the moving bus is known as 'Nirbhaya/Damini'. Section 228-A of the Indian Penal Code, 1860

makes disclosure of identity of the victim of certain offences punishable. National and international community are more familiar with the identity of the victim being described as 'Nirbhaya'. To respect the anonymity of the victim which is also the requirement of law, wherever required, the victim would be referred as 'Nirbhaya'.

5. While delicate physique of a woman has made her vulnerable, her place and role in the growth of society has made her command utmost respect. These characteristics of a woman have been depicted by great Hindi Poet Jai Shankar Prasad in his epic 'Kamayani'as :

'Yeh aaj samajh to paayi hoon,
Main durbalta mein nari hoon,
Avyay ki sunder komalta,
Lekar main sabse haari hoon.'

(This I understand today,
I am a woman, in weakness,
The delicate beauty of my limbs,
Because of them, I lose to all.)

Nari! tum kewal shraddha ho,
Vishwas-rajat-nag-pal-tal mein,
Piyush srot si baha karo,
Jeevan ki sundar samtal mein.

(Oh woman! You are honor personified,
Under the silver mountain of faith,
Flow you, like a river of ambrosia,
On this beautiful earth.)

6. Nirbhaya was on the verge of completing her Physiotherapy Course and provide healing touch to many patients in need of physiotherapy. Her fragile physique as a young girl rendered her

totally helpless when the convicts took turn to rape her. She could only look towards her friend (PW-1) for help who was also pinned down and assaulted by the convicts to prevent him from coming to her rescue.

7. The convicts did not spare any cavity in her body as they not only satisfied their lust by committing rape per vagina and anal, but also put their male organ in her mouth. They did not stop there and after satisfying their lust, to draw sadistic pleasure, they inserted rods in her private part. After being gang raped and insertion of the rods, she was further tortured in most inhuman and barbaric manner by inserting hand in her vagina and pulling out her internal organ. She was not spared even thereafter and despite she being critical, they pulled her hair and dragged her from rear portion of the bus to the front gate and threw her out of the bus alongwith her friend in nude condition, in the bushes, on the road side. Nirbhaya and PW-1 were left there to die in a cold winter night in mid December (16th December) with no ray of hope in sight to get any assistance from the moving vehicles or passers-by to come to their rescue.

8. Perhaps the convicts were familiar with the insensitive attitude of this metro city which also finds reflection in the couplet :

'Lagta hai sheher mein aaye ho naye,
Ruk gaye ho raah, hadsa dekh kar.'

Nirbhaya and her friend PW-1 were obviously dumped under the belief that seeing a young male and female in nude condition on the road side at night, even the passers-by noticing them in that condition

might feel hesitant to help them. Further, even if PW-1 could gather the courage to stand-up and support Nirbhaya to get up, being nude due to shame, they would not be able to move ahead to seek help from the persons in the moving vehicles on the road by signaling them to stop and remove them to some hospital for necessary medical aid.

9. The volcano that erupted in the form of protest in Delhi dispelled above notion. On the public outcry, a Judicial Committee headed by Justice J.S.Verma was set up by the Government to suggest amendment to Criminal Law to deal with sexual assault cases. Need of the hour was to satisfy the rage of the Society so that people continue to have faith in the Judicial System and are dissuaded to take law in their hands in an anxiety to deliver quick and instant justice. The Criminal Law Amendment Act, 2013 was passed amending Indian Penal Code to provide death penalty in rape cases that lead to death of the victim or leave her in a vegetative state.

10. Seldom does a crime lead to far reaching changes in law as was notified and effected in rape laws in the aftermath of infamous 16th December, 2012 gang rape case. Within days of incident, Fast Track Courts were ordered to be set up in all part of the Country to deal with the cases relating to sexual assault against women. Overnight, safety of women became a cause of concern for all, as irrespective of age, sex, caste and creed, public came on the streets on knowing about the gang rape and brutal assault on a young paramedical student who was returning with her friend (PW-1) after seeing the movie 'Life of Pi'. How a young boy and a carnivorous (tiger) comfort each other in

adversity and despite both being hungry and nothing available for their survival, did not harm each other, must be etched in her mind.

11. The macabre chain of events that occurred in the moving bus on 16th December, 2012 need not be repeated. From the un-curtaining of the gruesome events, it is manifest that on the date of occurrence, the night slowly and intensely developed into real darkness for the victim as the convicts, to satisfy their lust, not only found easy prey when the victim alongwith her friend boarded the contract bus with a hope to have comfortable journey at an affordable fare, little realizing what the destiny had in store for them. While boarding the contract bus with some persons sitting on passengers' seats, she expected a comfortable return journey to her home in the company of her friend. The luxury bus with dark window panes proved haven for the convicts to commit the gruesome act without bothering to find a suitable place to commit the rape and risking them to identification. While the close doors and windows of the bus prevented the screams of the victim to be heard by persons moving on the road, switching of the lights prevented detection by other moving vehicles on the road.

12. When the horrific details of the crime committed on Nirbhaya in a moving bus on the night of 16th December, 2012 came in public domain, it evoked a reaction from the public that was unprecedented. From common man to persons in power had only one demand i.e. justice for victim who succumbed to the injuries suffered at the hands of the convicts due to their barbaric acts. The crime was horrendous. Delhi earned the title of 'Rape Capital'.

13. While hearing the Death Reference, it has to be considered whether the death sentence is required to be confirmed by examining presence or absence of special reasons requiring confirmation of death sentence or commutation to life imprisonment. If on such consideration, such special reasons can be discerned from the facts and circumstances of the case, death sentence has to be confirmed and in the absence thereof, only imprisonment to life should be awarded. In a recent report ***State of Rajasthan vs. Jamil Khan 2013 (12) SCALE 200***, the Supreme Court had the occasion to examine this aspect and make the following observations :

> *'23. The detailed procedure would clearly show the seriousness with which the High Court has to consider a reference for the confirmation of death sentence. In a recent decision in* ***Kunal Majumdar v. State of Rajasthan*** *MANU/SC/0736/2012 : (2012) 9 SCC 320, a coordinate Bench of this Court has held that it is a special and onerous duty of the High Court. To quote:*
>
> > *"18...A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-`-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the reference in order to ensure that the ultimate outcome of the reference would instill confidence in the minds of peace-loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes."*

14. The learned Addl. Session Judge has considered the aggravating and mitigating circumstances referred to hereinafter and applied the R-R Test as per the guidelines laid down in ***Gurvail Singh @ Gala & Anr. Vs. State of Punjab (2013) 2 SCC 713***. The aggravating and mitigating circumstances have been recorded as under :

Aggravating circumstances :

(i) intense and extreme indignation of society.
(ii) demonstration of exceptional depravity and extreme brutality
(iii) extreme misery inflicted upon the prosecutrix
(iv) grave impact of crime on social order

Mitigating circumstances :

(i) young age of the convicts
(ii) socio economic status as also the plea of reformatory approach
(iii) clean antecedents

15. The learned Addl. Session Judge referred to various decisions of the Supreme Court wherein young age, first offender, socio economic condition and state of intoxication were not considered as mitigating circumstances. To bring on record that the facts of the instant case satisfy even the R-R test, learned Addl. Session Judge recorded that (i) in most barbaric manner, the convicts, pulled out internal organs of prosecutrix with their bare hands as well as by rods; (ii) the entire intestine of prosecutrix was perforated, splayed and cut open due to repeated insertions of rods and hands; (iii) after luring the victims into the bus, the convicts brutally gang raped the victim, inflicted inhuman torture and threw defenceless victims out of the

moving bus in naked and profusely bleeding condition in a cold winter night and their unprovoked crime demonstrated exceptional depravity of mind of the convicts.

16. The learned Addl. Session Judge recorded that the sufferings inflicted on the prosecutrix was unparallel calling for extreme penalty.

17. The constitutional validity of Section 302 Indian Penal Code, which prescribes death as one of the punishments, was considered by the Constitution Bench in ***Bachan Singh vs. State of Punjab (1980) 2 SCC 684***. By a majority of 4:1, the Constitution Bench declared that Section 302 Indian Penal Code was constitutionally valid. It is well settled that awarding of life sentence is a rule and death is an exception.

18. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof.

19. The condition of providing special reasons for awarding death penalty is to satisfy the requirement of law to award/uphold the death penalty. Because of irrevocable nature of the death penalty, this Court has to satisfy itself that manner of committing the crime is such that it pricks the judicial conscience of the Courts to such an extent that awarding death sentence would be an inescapable conclusion.

20. On behalf of all the convicts, it has been submitted that even after 16th December gang rape case and the amendment in Penal Law,

the crime rate against women has not decreased. Thus, awarding death penalty to the convicts may not have any deterrent effect on potential offenders.

21. In this regard, suffice it to note that it is the duty of the Court to impose appropriate sentence having regard to the nature of the crime and the pre-planned manner in which atrocities were committed on the hapless victim, having due regard not only the rights of criminal but also that of the victim. The cruel acts committed by the convicts are such that if appropriate sentence is not awarded, rage of the society would not be satisfied and our justicing system would be rendered suspect. This would be having devastating effect as common man will lose faith in the Courts. Any leniency shown in the matter would not only be misplaced but would give rise to a feeling of private revenge among the people leading to lawlessness in the society. The Court would not like such a situation to prevail. The victim has been subjected to such a cruelty which is extremely brutal, inhuman and unheard of. The convicts indulged in a deliberately planned crime and meticulous execution by alluring the victim and her friend (PW-1) in the bus pretending to be ferrying passengers to the destination. It may be noticed that except the young age of the convicts and dependence of their family on them, learned counsel for the convicts could not point out any other mitigating circumstance. On the contrary, the case discloses only aggravating circumstances which have been referred to above. Thus, irrespective of the fact whether the death sentence has deterrent effect or not, to award lesser

punishment to the convicts by letting them escape the death penalty would do more harm to the justice system.

22. Though commutation has also been prayed on the ground that all the convicts are young and have family to support, that itself is not sufficient to award life imprisonment. In the case of ***Dhananjoy Chatterjee vs. State of West Bengal (1994) 2 SCC 220***, death sentence was awarded to the Appellant who was a young married man of 27 years of age. The Supreme Court, finding it to be a case of rape and murder of a young girl of about 18 years, opined that a real and abiding concern for the dignity of human life is required to be kept in mind by Courts while considering the confirmation of the sentence of death. In para 14 of the report, while expressing concern about the rising graph of violent crime against women and society's cry for justice, the Supreme Court emphasized the need to impose sentence befitting the crime, observing :

> *'14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals gel very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and alter considering all those factors and taking an over-all view of the situation, impose*

sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

23. In ***Bantu vs. State of U.P. (2008) 11 SCC 113***, the death sentence was confirmed for the special reason of the depraved and heinous act of rape and murder of a 5 year old child, **which included the insertion of a wooden stick in her vagina to the extent of 33 cms, to masquerade the crime as an accident**. The Supreme Court held that the case at hand falls in the rarest of the rare category. **The depraved acts of the accused call for only one sentence, that is, death sentence**.

24. Nirbhaya and her friend had reposed complete confidence in the occupants of the contract bus while boarding the same to reach their destination. The four convicts and their associates must have been believed to be bonafide driver/conductor/cleaner/passengers. It was on account of such representation by the convicts leading to belief that they were being taken to their destination in the contract bus, they fell in the trap laid by the convicts. The convicts, misusing the confidence and faith of the victim and her friend, made them to board the bus so as to overpower them on the way and satisfy their lust. The crime was pre-planned and executed by resorting to diabolical method, exhibiting inhuman conduct in a ghastly manner, pricking the conscience of everyone in the society. When the innocent hapless young lady was subjected to such barbaric treatment by the convicts who were in position of trust, their culpability assumes the proportion of extreme depravity and arouses a sense of

revulsion in the mind of the common man. The motive of the convicts while alluring the victim and her friend to board the bus, motivation of the perpetrators, the vulnerability and the helplessness of the victim, the enormity of the crime, the barbaric and inhuman act of inserting rods and hand in her private part, taking out her internal organs, pulling her with hair, dragging her from rear portion of the bus to the front gate and throwing out of the bus alongwith her friend in nude condition on the road side, persuade us to hold that this is a case where not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes, death penalty needs to be confirmed.

25. It stands established beyond reasonable doubt that it is a case of gravest crime of extreme brutality by the convicts shocking the collective conscience of the society and clearly falls under the yardstick laid down by the Apex Court in various decisions referred to by my noble sister Reva Khetrpal, J. while confirming the death penalty awarded to the convicts.

26. In the light of aforesaid, I am of the considered opinion that with regard to all the four convicts, death penalty awarded to them has to be confirmed.

27. Thus, agreeing with the conclusion in the opinion of my venerated sister Reva Khetrapal, J., I endorse the directions confirming the death penalty to all the four convicts and dismissal of their appeals.

PRATIBHA RANI
JUDGE

March 13, 2014/'*st'*