

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

% Judgment Reserved on: September 09, 2014
Judgment Delivered on: September 18, 2014

+ **DEATH SENTENCE REF. 7/2013**

STATE Petitioner
Represented by: Mr. Varun Goswami, APP for State
with Inspector Satyavir Singh,
SHO/Bharat Nagar, Inspector
Sunder Singh, SHO/Palam
Village, HC Ramphool & HC
Pushap Raj, MHC(M), C.P.

versus

BHARAT KUMAR @ MANOJ @ MANNU Respondent
Represented by: Mr. K. Singhal, Advocate.

+ **CRL.A. 1662/2013**

BHARAT KUMAR @ MANOJ @ MANNU Appellant
Represented by: Mr. K. Singhal, Advocate.

versus

STATE Respondent
Represented by: Mr. Varun Goswami, APP for State
with Inspector Satyavir Singh,
SHO/Bharat Nagar, Inspector
Sunder Singh, SHO/Palam
Village, HC Ramphool & HC
Pushap Raj, MHC(M), C.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Karuna (name changed) aged just 6 years was too young to realise that on November 15, 2010 in the evening when she stepped out of the house she would never return to the loving arms of her mother and the comfort of her father.

2. The process of law was set into motion on November 15, 2010 by Bhupender Poddar PW-3 the father of Karuna who stated that he had gone to his night duty at 8.30 PM. Between 10.30 to 11.00 PM he received a phone call from his wife informing that their daughter Karuna was missing and was not traceable at home. Bhupender rushed back home. Both he and his wife frantically searched their missing daughter but could not find her. At 11.45 Bhupender made a PCR call from his mobile No. 9716811943. When the PCR and local Police visited his house he got recorded his statement Ex.PW-3/A informing that his daughter Karuna aged 6 years, height approximately 3 feet, fair complexion, round face, medium built wearing red-white flowered shirt, black coloured jeans pant, black colour string around the neck and yellow coloured chappal, playing outside the home at about 8.30 PM was not traceable. Thus he suspected that someone had enticed his daughter and kidnapped her and legal action be taken. On the statement FIR No. 230/2010 under Section 363 IPC was registered at PS Palam Village.

3. SI Chand Singh who was assigned the investigation searched Karuna by making inquiries from the local residents and neighbours. He met Ms. Rosy @ Kaka PW-1 residing in the neighbourhood of Bhupender who informed that she had seen the missing girl Karuna going towards main road

with another neighbour i.e. Bharat Kumar on November 15, 2010 at about 8.30 PM and the child was eating something. Statement of Rosy was recorded and enquiries were made from the parents of Bharat, however they could not give any definite answer. Moreover, Bharat Kumar could not be found at his residence on that day i.e. November 16, 2010. Further search of Karuna was made.

4. On November 18, 2010 at 11 O'clock an information was received vide DD No. 15A at PS Dwarka South informing that one 8-10 year old girl was lying dead near Petrol Pump near Ganga Apartment, Sector-6, Dwarka. ASI Dharampal was deputed to go to the spot. It appeared to him that the deceased was raped and murdered and the deceased being a little girl of around 8 years he was of the opinion that she must be of some neighbourhood area and thus he sent message to the Police Station and control room which was also received at PS Palam Village and recorded vide DD No. 16A at 1.45 PM.

5. On receipt of this information from the Control Room, SHO, PS Palam Village and other officials reached the spot. SI Chand Singh also reached the spot along with Bhupender. The dead body was identified to be that of Karuna. Her black colour jeans pant and her yellow sleepers were lying near her body. She was wearing one bangle, however the other bangle was lying broken near her body. There was a black thread around the neck of Karuna. One used packet of Kurkure was also lying, one big stone having blood and hair on it was also lying near the dead body. Blood was also lying on the grass and soil. Front tooth of Karuna was also broken. Articles were seized in the presence of Bhupender who signed the seizure memo Ex.PW-3/B. Dr.Rachna Pandey prepared the MLC of Karuna and

declared her brought dead and post-mortem was done by Dr.Yogesh Tyagi. Again Police and Bhupender went to the house of Bharat Kumar, however he was not available.

6. On the night of November 18th and 19th, 2010 Insp. Satbir Singh PW-30 who was assigned the investigation after the body was recovered received secret information that Bharat Kumar had been seen at the bus stand of Manglapuri. Accordingly Bharat Kumar was arrested vide memo Ex.PW-26/A. Pursuant to the disclosure statement Ex.PW-26/C made by Bharat Kumar his clothes i.e. jeans pants, shirt and underwear were recovered from the house of his maternal uncle in village Jhawli, district Alwar, Rajasthan. The underwear had been washed but however there were certain stains on the clothes and thus the same were seized. Bharat Kumar also pointed out the place from where he boarded a TSR with Karuna and the STD shop from where he had purchased the packet of Kurkure. Bharat Kumar also pointed out the place of incident. Vide Ex.PW-26/A Bharat Kumar was medically examined and his blood sample, semen samples, public hair sample were taken vide seizure memo Ex.PW-26/A.

7. During the course of trial the prosecution examined 30 witnesses when an application was filed by the learned APP under Section 311 Cr.P.C. for summoning Dr.Dhruw Sharma from FSL Rohini. When the matter was listed for final arguments learned APP pressed his application and pointed out that at the time of post-mortem on the body of deceased doctor had taken samples of vaginal swab and during the medical examination of Bharat Kumar, his blood, semen and pubic hair were taken which were sent to FSL for analysis, however due to inadvertence the I.O. did not request the FSL authorities to conduct DNA profile in respect of the exhibits, hence the

application be allowed.

8. Vide order dated November 16, 2012 the learned Trial Court observed that samples of deceased and accused were already there with the prosecution and thus directed that samples/exhibit No. 7 and 11 which were sent to the FSL authority be sent for further DNA profiling. On November 26, 2012 again the matter was taken up on an application filed by I.O. for breaking seal of exhibits and resealing the seal before the learned MM and giving the specimen seal so that the same can be deposited with the FSL Rohini. This was done and matter was fixed for November 30, 2012 when the investigating officer informed that the FSL authorities were contacted and they had advised that fresh blood samples of Bharat Kumar would be required for DNA analysis. Hence fresh blood samples were also taken and the same were sent for DNA profiling.

9. After the receipt of DNA report, 6 more witnesses were examined. Bharat Kumar also examined his father as DW-1. Pursuant to arguments the learned Trial Court on the basis of evidence on record convicted Bharat Kumar for offences punishable under Sections 363/376/302 IPC vide the impugned judgment dated November 11, 2013 and awarded the sentence of imprisonment for 3 years with fine of ₹3000/- for offence punishable under Section 363 IPC, imprisonment for life and a fine of ₹50,000/- for offence punishable under Section 376 IPC and sentence of death for offence punishable under Section 302 IPC with fine of ₹50,000/-. Thus in the Criminal Death Reference 7/2013 before this Court, the State seeks confirmation of the sentence of death to Bharat Kumar and by Criminal Appeal No. 1662/2013 Bharat Kumar challenges his conviction.

10. Since this is reference under Section 366 Cr.P.C. in terms of the

decision of Supreme Court in AIR 1957 SC 469 Jumman Vs. State of Punjab, and (1975) 3 SCC 39 Charan Singh and Ors. Vs. State of Punjab this Court is required to reappraise the entire evidence and relook at the facts and law.

11. The prosecution led the evidence of 36 witnesses to prove its case. Rosy @ Kaka PW-1 is a witness of last seen. She deposed that on November 15, 2010 she was cleaning the floor outside her house when she saw Bharat living in a house opposite her house in the same gali. On that day at about 7.30/8.00 PM she had seen Karuna aged about 5 years residing in the neighbourhood playing in the gali. Then she saw Bharat taking Karuna along with him towards main road. The evidence of this witness has been challenged on the ground that there was a previous enmity between the families and in the cross-examination this witness admitted that Bharat had assaulted her brother-in-law due to which her brother-in-law had sustained head injuries. This witness was recalled for examination on an application filed by Bharat Kumar under Section 311 Cr.P.C., however in further cross-examination she again denied that she was deposing falsely or that she had not seen Bharat Kumar while taking away Karuna.

12. Bhupender Poddar PW-3 father of Karuna deposed that on November 15, 2010 he had gone for his duty at 8.30 PM. At about 10.30 – 11.00 PM he received a phone call from his wife informing that Karuna was not traceable at home. He immediately came back home and searched his daughter, however he could not find her and thus he went to PS Palam where he informed SI Ranvir Singh regarding the missing of his daughter. He also made a call at 100 number at about 11.45 PM on that night. Thus the PCR and local Police reached his home and his statement was recorded

vide Ex.PW-3/A on the basis of which FIR No. 320/2010 was recorded under Section 363 IPC. He disclosed the steps taken by SI Chand Singh for searching his daughter. According to him SI Chand Singh accompanied him to Phase-I, Manglapuri where they searched for his daughter when Rosy informed that she had seen his daughter with Bharat Kumar on November 15, 2010 at about 8.30 P.M. Statement of Rosy was recorded. SI Chand Singh made inquiries from the parents of Bharat, however they did not give any definite answers and even Bharat Kumar could not be found on that day. On November 18, 2010 he was again joined in the operation to search when SI Chand Singh received a phone call at about 2 PM informing that the dead body of a girl child had been found at Sector-6, Dwarka. He along with SI Chand Singh went to the spot where SHO and other Police officials were already present. He saw his daughter lying in the park. He further deposed that the black colour jeans pant and yellow sleeper of his daughter were lying by the side, she had one bangle in her one hand and other bangle was broken, she was wearing black thread around her neck. He identified the dead body to be that of his daughter Karuna and according to him it appeared that somebody had killed her by brutally smashing her head against the stone. He also noticed partial dried blood lying at the spot near the dead body. He exhibited the various recoveries made in his presence. The suggestion given to Bhupender in his cross-examination was that Bharat Kumar had also accompanied Bhupender for searching his daughter on November 15 and 16, 2010 which fact was denied by Bhupender, however he admitted that father of Bharat Kumar was also searching his daughter in his community and further stated that he was not making the searches with them and appeared to be nervous.

13. Raghuwinder PW-7 is the witness who first saw the dead body of a girl child aged about 6/7 years lying in the park and made the PCR call. He deposed that in November 2010 he was working on a contract with DDA to clean the DDA parks by levelling and dressing the grounds. On November 18, 2010 at about 11 AM he along with his labour was present in the DDA park, Sector-6 behind Petrol Pump when they saw dead body of a girl child aged 6-7 years lying in the park. He immediately informed the PCR from his mobile number 9811667959. PCR reached in five minutes. This witness has not been cross-examined.

14. Dr.Yogesh Tyagi PW-18 conducted the post-mortem examination of Karuna and noticed the following external injuries:

(1) Fresh abrasions are present over (a) back of left hand, vertically placed 3x2 cms. (b) Right hypochondrial region 3x1 cms (c) Midline front of neck of size 2x1 cms, 1.0 cms above suprasternal notch.

(2) Fresh lacerated wounds over (a) right index finger distal phalanx 1x0.5x0.5 cms (b) Left great toe, 4th and 5th toes, and 1x0.5x0.5 cms each (c) Right small toe 0.5x0.5x0.5 cms (d) middle of forehead, vertically placed, 2.5x0.5xbone deep (e) left eyebrow, horizontally placed, 2.5x0.5x0.4 cms (f) Right forehead 5x3xbone deep, skin and soft tissue is missing (g) Left forehead 7x5xbone deep, skin and soft tissue is missing (h) Vertically placed over left upper lip and left side nose, 4x0.5xbone deep (i) right side of chin of size 3x2xcms bone deep, horizontally places with fracture of mandible. (j) Left chin 3x2cms x bone deep. (k) Tip of chin of size 1x1x0.5 cms.

(3) Fresh contusion of (a) right eye with hemorrhage of conjunctiva (b) Right angle of mandible 5x5 cms with fracture of right ramus of mandible with extravasations of blood.

15. Besides the above noted external injuries he also noticed a fresh tear

in the vaginal opening at 6 O'clock position of the size 1.5 x 0.5 x 1.0 cms, Multiple customs and multiple tears were present all around on vaginal walls and few maggots were present all around vaginal opening. Dr.Yogesh Tyagi exhibited the post-mortem report vide Ex.PW-18/A and opined the cause of death to be shock due to injuries to head and face produced by multiple blunt force impact. All injuries were ante-mortem in nature. Injuries over the head and face were individually and collectively sufficient to cause death in ordinary course of nature. Injuries present in vagina were suggestive of sexual intercourse. Time since death was 3-4 days. Dr.Yogesh Tyagi deposed that he had taken the samples of vaginal swab and blood of deceased and handed over the sealed parcels to the Police along with sample seals.

16. As noted above the investigation was handed over from SI Chand Singh PW-27 to Inspector Satbir Singh PW-30 after the recovery of the dead body. Inspector Satbir Singh deposed that on November 18, 2010 he was posted as SHO PS Palam Village and at 1.45 PM duty officer informed about recovery of the dead body of a female child in DDA park, Sector-6, Dwarka the description of which was similar to the missing girl in case FIR No. 230/2010. He went to the Police Station and made departure vide entry No.17A and directed I.O. of case FIR No. 230/2010 SI Chand Singh to reach the spot along with the complainant. When he reached the spot, PCR Van, Crime Team, SHO Dwarka South, ASI Dharampal of PS Dwarka South and other staff of PS Dwarka South were present along with senior officers. After some time SI Chand Singh reached with the complainant Bhupender who identified the dead body to be of his daughter. He also identified her clothes, Chappal, black colour thread around her neck and the description

tallied with the particulars in the hue and cry notices. Photographs of the dead body and scene of crime were taken and rough site plan was prepared. All exhibits were seized along with the blood stained pant, blood stained stone, blood stained earth and straws, chappal, one empty packet of Kurkure, one plastic broken bangle and earth control vide memo Ex.PW-3/A which was also signed by the complainant. He further deposed that since Bharat was suspected in this matter they tried to trace him. On the night intervening November 18/19th an information was received that Bharat Kumar was seen at the bus stand of Manglapuri and thus he was arrested vide memo Ex.PW-26/A. Bharat Kumar made a disclosure statement where after Inspector Satbir Singh accompanied by HC Surender Singh PW-26 and Ct.Om Prakash PW-22 went to Alwar with Bharat Kumar. In the village Bharat Kumar took them to the house of his maternal uncle Mangeram and from the house he took out one polythene containing one blue coloured jeans, blue colour underwear and one shirt which was seized vide memo Ex.PW-10/A. The exhibits were sent to FSL. This version of PW-30 is duly corroborated by Ct.Om Prakash PW-22 and HC Surender Singh PW-26. As per the FSL report Ex.PXY blood was detected on the pants of the deceased, cemented stone, blood stained earth, frock and T-shirt of the deceased, scalp hair of the deceased, jeans pant of Bharat Kumar, though the blood group of the deceased was found to be 'B' group, however the jeans pant though opined to be human blood but gave no reaction.

17. As noted above on the application of the prosecution under Section 311 Cr.P.C. the Court vide order dated November 16, 2012 directed the I.O. to make arrangements for sending the samples/ exhibits pertaining to the deceased and accused particularly sample No.7 and 11 to the FSL authority

which were the vaginal swab of the deceased and the semen sample of Bharat Kumar. The investigating agency sent 11 exhibits which included two fresh blood samples of Bharat Kumar which were taken after due permission of the Court vide order dated November 30, 2012 along with 9 other samples.

18. The prosecution examined Dr.Dhruw Sharma PW-31 who conducted the DNA finger printing and on comparison from vaginal swab of the deceased which was Ex.7 in the earlier report of the FSL and the blood gauze of the accused which was Ex.10 in the earlier report opined that male DNA profiles were generated in the vaginal swab of the prosecutrix and the blood stained gauze of Bharat Kumar and the STR analysis (DNA profiling data) is sufficient to conclude that allelic data of blood stained gauze of Bharat Kumar were found to be similar to the allelic data of vaginal swab of the prosecutrix.

19. The dispute is not with regard to the Karuna being kidnapped, raped and murdered but that the same was not done by Bharat Kumar and that he was falsely implicated. Learned counsel for the appellant Bharat Kumar assails the last seen evidence, recovery of blood stained clothes at his instance from the house of his maternal uncle at village Jhawli, Alwar and the DNA evidence.

20. Merely absence of Bharat from his house could not have aroused such a strong suspicion unless it was coupled by the statement of Rosy that he had been last seen with her, that immediately after recovery of the dead body all efforts were made by the investigating agency to arrest Bharat Kumar

21. As regards the last seen evidence of Rosy PW-1 it is contended that

her version is full of contradictions; though Rosy stated that her statement was recorded on November 16, 2010, however Bhupender in his cross-examination stated that he came to know on November 18, 2010 that his daughter had been seen with Bharat Kumar; Bhupender further stated that he had not met Rosy on November 16th or 17th; further Ct.Rakesh Kumar stated that efforts were made to locate the girl but no clue was found and he did not depose anything about the statement made by Bhupender or recorded by SI Chand Singh; HC Surender Singh stated that he made enquiries from Rosy on November 17, 2010 and SI Ranvir Singh did not state anything about last seen evidence.

22. In relation to the last seen evidence it may be noted that Rosy categorically stated that on the next day the Police came to her house, enquired from her and recorded her statement when she informed that she had seen Bharat taking Karuna towards the main road after 7.30/8.00 PM. This witness clarifies in her cross-examination that when she saw Karuna playing with her younger sister there was no one else in the gali at that time except Bharat and those children. She further stated that police had made general enquiries from her on November 16, 2010 when Karuna could not be found anywhere and till that time though she did not have any suspicion on the accused but only that he was missing from the gali. It is thus evident from the testimony of this witness that though she did not see Bharat taking away Karuna on November 15, 2010 but saw him present when Karuna and her sister were playing when no one else was present in the gali. This coupled with the fact that Bharat was missing from the house raised her suspicion on Bharat. Version of Rosy is corroborated by SI Chand Singh PW-27 who stated that he received the complaint Ex.PW31/A, PW-27/A on

which FIR was registered and flash and WT messages sent, took the photographs and made efforts to trace the girl. He further stated that on November 16, 2010 he searched the girl and recorded the statements. He made enquiries from the neighbours of the complainant i.e. Rosy, Rukmani and Chagan Lal during investigation of the case. He made enquiries from Rosy on November 17, 2010 for the first time and on the same day he recorded her statement who told her that she had seen Karuna in company of Bharat Kumar. He further stated that he had suspicion on Bharat when he was informed on November 18, 2010 at about 12 noon that he was missing since the night of November 15, 2010. Further Insp. Satbir Singh stated that after sending the dead body to mortuary for post-mortem he along with the father of deceased and relatives made enquiries in the locality and came to know that one Bharat was suspected in the matter and thus efforts were made to trace Bharat. It may be noted that the dead body was taken to the hospital at 6.00 PM and Bharat was arrested on the intervening night of November 18/19, 2010 at about 12.20 AM. It is thus apparent that the suspicion on Bharat was not formed immediately on receipt of the dead body but was based on multiple factors which included the statement of Rosy and the information that Bharat was absent from his house since the night of November 15, 2010 etc. Merely because there is a difference in the statement of Rosy and SI Chand Singh as to whether her statement was recorded on November 16, 2010 or November 17, 2010, version of Rosy cannot be belied.

23. Learned counsel for Bharat Kumar contends that with regard to recovery of blood stained clothes of Bharat at his instance from the house of maternal uncle, the arrest of Bharat Kumar itself is doubtful as he was

arrested hardly 200 meters away from his house, no public witness was joined and within 10 minutes of the arrest personal search, disclosure etc. statements were recorded and a taxi booked for leaving for outstation at 12.30 AM. Bharat Kumar was not medically examined immediately after arrest but at 4.00 PM on November 19, 2010. No log book, taxi booking, payment etc., have been proved. No outstation permission have been proved nor any arrival and departure entry from PS or corresponding entry at PS Alwar. Further, no local person was associated at village Jhawli. Moreover, the jeans pant allegedly seized at the instance of Bharat Kumar gave no reaction and hence was not connected with the offence.

24. As noticed above Inspector Satbir Singh has deposed about the arrest and recoveries made at Alwar. The version of Insp.Satbir Singh qua arrest is corroborated by HC Surender Singh who was a signatory to the arrest memo Ex.PW-26/A. HC Surender Singh PW-26 stated that in view of the fact that Bharat Kumar was missing from his house since day of incident and he was lastly seen with the girl when she was alive they tried to search Bharat Kumar. A secret information was received that Bharat Kumar had come at Manglapuri bus stand and hence he was apprehended from behind a stationed bus at the instance of a secret informer.

25. The raiding team to Alwar along with Insp. Satbir Singh was of HC Surender and Ct. Om Prakash i.e. PW-26 and PW-22. They had all gone in the private vehicle of Babloo PW-10. Babloo deposed that he was a taxi driver on taxi No. DL-1YC-1021. In November 2010 he was called to the Police station and his taxi was hired for going to Alwar. He took permission to go out of station from his employer. He along with IO, two Constables and Bharat went to Alwar in his taxi. Bharat Kumar took them to a house in

a gali and brought out a polythene bag having one blue colour blood stained jeans pant, one underwear and one striped T-shirt. He also identified his signatures at point 'A' on Ex.PW-10/A the seizure memo of the clothes. He also deposed that after reaching to Delhi Bharat Kumar took them to a shop in the area of Palam and then to the park at Sector-6, Dwarka. Nothing material has been elicited in the cross-examination of this witness. Further version of Insp. Satbir Singh is also corroborated by Ct. Om Prakash and HC Surender Singh who have deposed in sync with him. Thus, we have no reason to doubt the evidence of the witnesses regarding recovery of the jeans pant, stripped shirts and underwear of Bharat from the house of his maternal uncle at Alwar at the instance of Bharat Kumar. No doubt, as per the FSL report the blood grouping could not be given because of no reaction, however the jeans pant of Bharat Kumar was stained with blood of human origin as per the FSL report Ex.PXY.

26. Before further considering the evidence of Dr. Dhruv Sharma and the other witnesses i.e. Ct.Sushil Kumar PW-32 who took 11 sealed pullandas from MHCM on December 7, 2012 and deposited the same in FSL Rohini vide RC No. 142/22/12 and obtained an acknowledgement vide Ex.PW-32/B from the FSL; HC Nihal Singh PW-33 who took Bharat Kumar from the jail on December 5, 2012 to the DDU hospital and obtained the blood samples; PW-34 HC Ramphool MHCM of Palam village who received the various exhibits from Inspector Sunder Singh PW-35 the then SHO PS Palam village who produced the two sealed pullandas containing samples of prosecutrix before the learned Magistrate got them re-sealed and seized vide Ex.PW-34/A and took permission from the learned Sessions Judge for obtaining fresh blood samples and on his directions were deposited 11

sealed pullandas at FSL Rohini and Dr.Vinal Sharma PW-36 who deposed regarding the MLC of Bharat Kumar Ex.PW-35/A when his blood samples were taken; it would be appropriate at this stage to note the contention of the learned counsel for the appellant so that they can be dealt along with their testimonies as noted above.

27. The main ground on which learned counsel for Bharat Kumar has assailed the prosecution case is the non-proving of the link evidence resulting in the DNA report which thus vitiates the entire trial. According to him there is no material that the exhibits which were first sent to the FSL were kept in proper custody and no tampering of the same was done after fresh blood samples of Bharat Kumar were taken and manipulated resulting in the report of DNA. It is alleged that DNA report has been prepared at the instance of the investigating officer and manipulated to create false evidence against Bharat Kumar. Even otherwise the custody of the samples itself is broken and tainted and thus DNA result has no value in the eyes of law.

28. A perusal of the evidence on record shows that vide Ex.PW-3/B following articles were seized from the spot which were given parcel serial numbers 1 to 7 and sealed with the seal of 'SSK' by Insp. Satbir Singh in the presence of SI Chand Singh and Bhupender who witnessed the recoveries:

"1. One jeans pant, black coloured (sic), approximately 2 feet whereon stains of blood and fluid were found, in front there is the button of tongue and metal and a red coloured tailor label is there whereon TV web-jeans is written below on the right side. The same was placed into a plastic poly bag and a parcel was prepared with the help of white cloth and SL no.1 was given.

2. One plastic, used yellow coloured pair of chappal. The same was placed into a plastic polythene and a parcel was

prepared with the help of white clothes and SL No.2 was given.

3. One blood smeared stone whereon stains of blood and fluid are found and many hairs are stuck on the same stone. The same was placed in a plastic polythene and a parcel was prepared with the help of white clothes and SL No.3 was given.

4. Blood smeared soil, grass and straw was picked up from below the dead body from the place of occurrence and the same was placed into a plastic poly bag and was converted into a parcel with the help of white clothes and SL No.4 was given.

5. An empty kurkure (printed) packet was picked up from the place of occurrence and the same was placed into a plastic polythene and converted into a parcel with the help of white clothes and SL No.5 was given.

6. Earth Control was taken from the place of occurrence and the same was placed into a polythene bag and the same was converted into a parcel with the help of white clothes and SL No.6 was given.

7. One broken light red-yellow coloured plastic bangle was placed into a plastic polythene and converted into a parcel with the help of white clothes and the same was given SL No.7.

All the aforesaid parcels bearing SL No.1 to 7 were sealed with the seal of S.S.K. and were duly taken into the police possession as a piece of evidence and the seal was handed over to S.I. Chand Singh after its use.”

29. Further, after the post-mortem of Karuna, Dr.Yogesh Tyagi PW-18 handed over her (1) clothes (2) vaginal swabs (for microscopic examination to detect sperm, micro chemical test for semen, blood grouping and cross matching with accused) (3) blood on gauze; which were also seized and deposited in the malkhana. Pursuant to the arrest of Bharat Kumar his clothes i.e. jeans pant, underwear and T-shirt were seized at his instance from the house of his maternal uncle at Alwar. After medical examination

of Bharat Kumar 3 sealed parcels along with sample seals were handed over to Insp. Satbir Singh containing the blood sample, semen sample and pubic hair sample of Bharat Kumar all sealed with the seal of CMO DDU Hospital along with sample seal which were seized vide memo Ex.PW-26/E. PW-9 HC Mahender Singh the MHCM appeared in the witness box and deposed that on November 19, 2010 he was posted as Moharar Malkhana at PS Palam village and on that date Insp.Satbir Singh deposited 16 sealed parcels along with 7 sample seals and articles of personal search of accused. He deposited the same in Malkhana and exhibited the entry at serial number 876 in Register No.19 vide Ex.PW-9/A. The original register was seen and returned by the Court. He further deposed that on February 2, 2011 on the directions of the investigating officer he had sent 12 sealed parcels along with their respective sample seals to FSL Rohini through Ct.Anil Rana vide RC No. 57/21, copy of which he exhibited as Ex.PW-9/B. He also exhibited the copy of the acknowledgement issued by the FSL Rohini vide Ex.PW-9/C. He further deposed that so long as the exhibits remained in his custody the same were intact and nobody tampered with the same. This witness has not been cross-examined and thus his testimony has gone unchallenged.

30. The FSL report was prepared on July 20, 2011 and received by Ct.Anil who appeared as PW-23. PW-23 on February 2, 2011 deposited the sealed exhibits along with sample seal to FSL Rohini vide RC No.57/21 and handed over the acknowledgement to MHCM and deposed that as long as the exhibits remained in his custody they were intact and not tampered with. The FSL report PXY notes receipt of 12 sample parcels with seals intact. The description of the articles and the result of analysis are reproduced as under:

“Description of Articles Contained in parcel

- Parcel ‘1’ : One sealed cloth parcel sealed with the seal of “SSK” containing exhibit ‘1’.*
- Exhibit ‘1’ : One dirty baby pants described to be of deceased from scene of crime on which no hair could be found.*
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- Parcel ‘2’ : One sealed cloth parcel sealed with the seal of “SSK” containing exhibit ‘2’.*
- Exhibit ‘2’ : One cemented stone piece having darker stains and few strands of hair sticking.*
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- Parcel ‘3’ : One sealed cloth parcel sealed with the seal of “SSK” containing exhibit ‘3’, kept in a plastic dibba.*
- Exhibit ‘3’ : Earth with vegetative debris described as ‘Blood stained earth’.*
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- Parcel ‘4’ : One sealed polythene bag parcel sealed with the seal of “DFMT DDU Hospital” containing exhibits ‘4a’ and ‘4b’ described to be of deceased.*
- Exhibit ‘4a’ : One baby frock having darker stains and few strands of hair.*
- Exhibit ‘4b’ : One baby T-shirt having few strands of hair.*
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- Parcel ‘5’ : One sealed polythene bag parcel sealed with the seal of “DFMT DDU Hospital” containing exhibit ‘5’, kept in a plastic container.*
- Exhibit ‘5’ : Bunch of black hair described as ‘Scalp hair of deceased’.*
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- Parcel ‘6’ : One sealed polythene bag parcel sealed with the seal of “DFMT DDU Hospital” containing exhibit ‘6’, kept in a plastic container.*
- Exhibit ‘6’ : One strand of black hair described to be*

'from pubic area of deceased'

Parcel '7' : One sealed cloth parcel sealed with the seal of "DFMT DDU Hospital" containing exhibit '7', kept in a tube.

Exhibit '7' : Cotton wool swab on stick described as 'Vaginal swab kept in two tubes'.

Parcel '8' : One sealed paper envelope sealed with the seal of "DFMT DDU Hospital" containing exhibit '8'.

Exhibit '8' : Brown gauze cloth piece described as 'Blood in gauze of deceased'.

Parcel '9' : One sealed cloth parcel sealed with the seal of "SSK" containing exhibits '9a', '9b' and '9c' described as clothes of accused Bharat Kumar.

Exhibit '9a' : One jeans pants.

Exhibit '9b' : One underwear.

Exhibit '9c' : One T-shirt.

Parcel '10' : One sealed cloth parcel sealed with the seal of "CMO DDU Hospital" containing exhibit '10'.

Exhibit '10' : Gauze cloth piece having brown stains described as 'Blood sample of accused'.

Parcel '11' : One sealed cloth parcel sealed with the seal of "CMO DDU Hospital" containing exhibit '11', kept in a plastic container.

Exhibit '11' : Gauze cloth piece described as 'Semen sample of accused'.

Parcel '12' : One sealed cloth parcel sealed with the seal of "CMO DDU Hospital" containing exhibit '12', kept in a plastic container.

Exhibit '12' : Bunch of black hair described as 'Pubic

hair of accused’.

RESULT OF ANALYSIS.

1. Blood was detected on exhibits ‘1’, ‘2’, ‘3’, ‘4a’, ‘4b’, ‘5’, ‘8’, ‘9a’ & ‘10’.
2. Blood could not be detected on exhibits ‘9b’ and ‘9c’.
3. Human semen was detected on exhibits ‘7’ and ‘11’.
4. Semen could not be detected on exhibits ‘1’, ‘4a’, ‘4b’, ‘6’, ‘9a’ and ‘9c’.
5. On the basis of macroscopic and microscopic examination hairs in exhibits ‘2’, ‘4a’, ‘4b’, ‘5’, ‘6’ and ‘12’ were found to be human in origin. Hair in exhibits ‘2’, ‘4a’, ‘4b’ and ‘5’ were similar in most of their characteristics but found different to hair in exhibit ‘12’. Hair in exhibit ‘6’ could not be matched due to less number of hair (only one) in it.
6. Report of serological analysis in original is attached herewith.

NOTE: Remnants of the exhibits have been sealed with the seal of ‘DS FSL DELHI’.

31. As per the report of the serologist the findings are as under:

Exhibits	Species of origin	ABO Grouping/ Remarks
<u>Blood stains:-</u>		
‘1’ Baby pants	Human	No reaction
‘2’ Stone with hair	Human	No reaction
‘3’ Blood stained earth	Human	No reaction
‘4a’ Baby frock	Human	‘B’ Group
‘4b’ Baby T shirt	Human	‘B’ Group
‘5’ Scalp hair	Human	No reaction
‘8’ Blood stained gauze	Human	‘B’ Group
‘9a’ Jeans pants	Human	No reaction
‘10’ Gauze cloth piece	Human	‘B’ Group

<u>Semen stains:-</u>		
'7' Vaginal swab	-----	No reaction
'11' Gauze cloth piece	-----	'B' Group

32. As noted above, at the fag end of the trial, the prosecution realized that DNA analysis was not done and thus an application under Section 311 Cr.P.C. was filed. Vide order dated November 16, 2012 the learned Trial Court allowed the application under Section 311 Cr.P.C. and the Court directed the investigating officer to make arrangements for sending the samples/ exhibits pertaining to the deceased/ accused particularly sample No. 7 & 11 to the FSL authority for further profiling. An application was moved to seal the exhibits so that the same could be sent to reseal the exhibits by breaking the seal with the sample seal so that they could be sent to FSL Rohini. Further on an application by the investigating officer that FSL authorities have advised that fresh blood samples of the accused be also taken for DNA analysis, hence permission was taken to take the fresh blood samples for comparison which was also done. Thus Bharat Kumar was produced in DDU hospital wherein Dr.Vinal prepared the MLC and collected blood samples of Bharat Kumar.

33. Dr.Vinal Sharma PW-36 appeared in the witness box and deposed regarding the same. Thus out of the 12 samples sent earlier 9 samples plus 2 fresh blood samples of Bharat Kumar taken on December 5, 2012 and sealed with the seal of DDU were sent to FSL for DNA analysis. Ct.Sushil Kumar PW-32 appeared in the witness box and deposed regarding the taking of the 11 sealed pullandas with 3 sample seal from MHCM and depositing the same in FSL Rohini and exhibited vide RC No. 142/21/12 copy of which

was exhibited as Ex.PW-32/A. He also took the acknowledgement from the FSL which was handed over to MHCM photocopy of which was exhibited as Ex.PW-32/B. HC Ramphool who was posted as MHCM in PS Palam village deposed about handing over the pullandas on November 26, 2012 to be produced before the learned Magistrate to be resealed with the seal of the Court with sample seal and that on December 7, 2012 he handed over 11 sealed pullandas with 3 sample seals to Ct.Sushil Kumar to be deposited in the FSL Rohini and also exhibited the copy of the RC and the acknowledgement. He also deposed that on April 26, 2013 Ct.Balwan handed over the FSL result along with 11 sealed pullandas to him.

34. One of the grievance of the learned counsel for Bharat Kumar is that though in the first instance 12 samples were sent, however in the second time only 11 samples were sent to the FSL out of which two were of fresh blood samples. So it is not known which 3 samples were not sent.

35. Though none of the witnesses were cross-examined on this aspect and thus no challenge was made during trial on this count, however the same is amply clear by the second FSL report Ex.PW-31/A which also notes the earlier exhibits. The same is as under:

“DESCRIPTION OF PARCELS & CONDITION OF SEALS

Seals intact as per F.A. 's Letter

<i>Sealed yellow envelopes:</i>	<i>09</i>
<i>Sealed cloth parcels</i>	<i>: 02</i>

Total : 11 (Eleven)

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

- Parcel '1' : One sealed envelope sealed with the seal of "PS" containing exhibit '1' described in FSL 2011/B-524.*
- Parcel '2' : One sealed envelope sealed with the seal of "DS FSL DELHI" containing exhibit '4' described in FSL 2011/B-524.*
- Parcel '3' : One sealed envelope sealed with the seal of "DS FSL DELHI" containing exhibit '6' described in FSL 2011/B-524*
- Parcel '4' : One sealed envelope sealed with the seal of "DS FSL DELHI" containing exhibit '7' described in FSL 2011/B-524 now marked as exhibit '4'.*
- Exhibit '4' : Vaginal swab (02) on sticks kept in two tubes.*
- Parcel '5' : One sealed envelope sealed with the seal of "DS FSL DELHI" containing exhibit '8' described in FSL 2011/B-524.*
- Parcel '6' : One sealed envelope sealed with the seal of "PS" containing exhibits '9a', '9b' & '9c' described in FSL 2011/B-524.*
- Parcel '7' : One sealed envelope sealed with the seal of "DS FSL DELHI" containing exhibit '10' described in FSL 2011/B-524 now marked as exhibit '7'.*
- Exhibit '7' : Brownish gauze cloth piece described as blood in gauze of accused.*
- Parcel '8' : One sealed envelope sealed with the seal of "DS FSL DELHI" said to contain exhibit '11' described in FSL 2011/B-524.*

- Parcel '9' : One sealed envelope sealed with the seal of "DS FSL DELHI" said to contain exhibit '12' described in FSL 2011/B-524.*
- Parcel '10' : One sealed cloth parcel sealed with the seal of "CMO DDU Hospital" containing exhibit '10'.*
- Exhibit '10' : Dark brown liquid in a tube described as blood sample of accused.*
- Parcel '11' : One sealed cloth parcel sealed with the seal of "CMO DDU Hospital" containing exhibit '11'.*
- Exhibit '11' : Gauze cloth piece described as blood in gauze of accused.*

DNA EXAMINATION

Exhibit '4' (vaginal swab of prosecutrix), and exhibit '7' (Blood stained gauze of accused) were subjected to DNA isolation. DNA was isolated from exhibit '4' and '7'. Male DNA profiles were generated in exhibit '4' (vaginal swab of prosecutrix) & exhibit '7' (Blood stained gauze of accused). DNA was amplified using Identifier plus STR amplification kit and Gene Mapper IDx software was used for analysis.

RESULT OF ANALYSIS

Allelic data of exhibit '7' were found to be accounted in allelic data of exhibit '4'.

CONCLUSION

STR analysis (DNA profiling) data is sufficient to conclude that the allelic data of exhibit '7' (Blood stained gauze of accused) were found to be similar to allelic data of exhibit '4' (vaginal swab of prosecutrix).

NOTE: *Remnants of the exhibits have been sealed with the seal*

of “DS FSL DELHI”. ”

36. It is thus evident that from the earlier exhibits cemented stone earlier Ex.2, blood stained earth earlier Ex.3 and scalp hair of the deceased earlier Ex.5 were not sent and rightly so as the same were not relevant for the DNA examination.

37. It was next contended by the learned counsel for the appellant that though fresh blood samples were taken, however the analysis was done through the old samples which was not possible as they were not maintained at a temperature of 10 degree celcius. Dr.Dhruv Sharma PW-31 had appeared in the witness box and deposed that they had received 11 parcels on December 7, 2012 and he isolated the DNA from the vaginal swab of the prosecutrix and the blood sample of accused and found that allelic data in the DNA of blood sample of accused accounted for the allelic data in the DNA isolated from vaginal swab of the prosecutrix and thus he opined that the allelic data in both of these samples is similar. This witness was recalled for cross-examination and he stated that dried blood stained gauze, semen stained gauze does not require any preservation at all. He further deposed that these can give good result even if kept at room temperature and it is not essential that these samples should be kept at 20 degree centigrade temperature and these kind of exhibits give good result even if kept at 40 degree centigrade temperature for a long time and nor was it necessary that these exhibits should be kept in air tight container. According to him DNA can be isolated from such dried exhibits after a period of several years. He stated that he isolated the DNA from Ex.4 (vaginal swab) and Ex.7 (blood gauze of the accused) which he had earlier also examined in the year 2011.

He clarified that he did not isolate the DNA from Ex.10 and 11. Thus, the cross-examination of this witness clarifies that there was no tampering and the fresh blood samples even though taken were neither used for examination nor for tampering.

38. The request of the investigating officer for fresh blood samples have also been assailed by the learned counsel for the appellant that though the application was on the advice of FSL expert, however this was not the requirement of the FSL expert. Again Dr.Dhruw Sharma has been cross-examined and he did not deny that he had asked for fresh blood samples. He only stated that he did not remember whether any Police official had approached him for comparison of DNA profile in this case and that he had opined that DNA could not be isolated from the previous exhibits.

39. The custody of samples has been assailed on the ground that in Register No.19 Exhibit PW-9/A, though deposit entries have been made, their corresponding entries for the samples to be sent to FSL and receipt of the FSL report have not been made. Though we may note that PW-9 HC Mahender Singh MHCM who brought the Register and deposed about sending of the samples to FSL vide the Road Certificate Ex.PW-9/B and the acknowledgement of case acceptance vide Ex.PW-9/C has not been cross-examined, however to satisfy ourselves we called for the entire record and it was explained by the prosecution that on the start of every year the pending entries in which action is to be taken are carried forward in red ink in the fresh register and in the said carry forward register the entries with regard to sending of the samples to FSL and the receipt of the report are mentioned. The original carry forward register was produced for our perusal.

40. As noted above the prosecution has examined sufficient witnesses i.e.

HC Mahender Singh, Ct.Anil and HC Ramphool in this regard and they have exhibited the relevant copies of the relevant certificates, originals of which had been brought in the Court. Hence we find no merit in this contention of learned counsel for the appellant.

41. The defence of Bharat Kumar in his statement under Section 313 Cr.P.C. is of false implication and he examined his father Chagan Lal DW-1 who deposed that on November 15, 2010 he returned home at about 6.00 PM. His son Bharat was present at home at that time. He was having fever. Hence he brought two Crocin tablets from a nearby medical shop and administered the same to him. At about 6.45/7.00 PM they heard a commotion and saw many people gathered in the gali of their house. He also went there and came to know that minor girl Karuna daughter of Bhupender had gone missing. He along with two neighbours Sohan Lal and Roshan Lal set out to search the missing girl. They searched her in the entire colony till late night but they could not find her and thus they returned home. On November 18, 2010 Police officials came to their home and took him and his son to the Police Station. They were detained in the Police station. He was released after 6 days but his son was not released and is still in custody. As regards the version of Chagan Lal regarding searching of Karuna even PW-1 has deposed that father of Bharat Kumar tried to trace the girl. However, most importantly Chagan Lal does not depose that Bharat Kumar was at home from the night of November 15, 2010 to November 18, 2010. His testimony is absolutely silent on this aspect. As regards Chagan Lal also being detained in the Police Station along with his son for 6 days, it may be noted that in this regard Chagan Lal has lodged no complaint. It may be noted that SI Chand Singh is not a witness to the arrest

memo and arrest was made by Insp. Satbir Singh.

42. Considering the evidence on record we uphold the conviction of Bharat Kumar for offences punishable under Section 363/376/302 IPC.

43. The appellant Bharat Kumar has been awarded sentence of death for the offence of murder, subject to confirmation by this Court. In the decision reported as (2014) 4 SCC 292 Mahesh Dhanaji Shinde v. State of Maharashtra the Supreme Court noted the decision in (2013) 5 SCC 546 Shankar Kisanrao Khade Vs. State of Maharashtra wherein it was held that to award the death sentence, “crime test” has to be fully satisfied, that is, 100% and “criminal test” 0%, that is, no mitigating circumstances favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the “criminal test” may favour the accused to avoid the capital punishment.

44. In Khade case (supra) the Supreme Court analyzed the species of cases where the victim was raped and murdered. The analysis of the various decisions would demonstrate that the deadlock between a life sentence and a death sentence was resolved primarily by finding out whether the offence of rape and murder was a momentary lapse or was it premeditated and further whether the victim died as a consequence of rape and not because of any overt act by the accused.

45. In the decision of this Court State Vs. Ravi Kumar & Ors. Death Reference 1/2014 decided on August 26, 2014 we have already noted that the sexual offenders can be classified as Criminal Sexual Psychopaths who are least dangerous, Sexually dangerous persons and Dangerous and violent sexual predators and offenders who lack empathy and remorse. The first

category does not inflict any physical pain on the victim, the second category while perpetrating the crime cause grotesque suffering in the victim and the last category causes not only grotesque suffering in the victim but even defiles the victim after the crime. Bharat Kumar falls in the second category who not only perpetrated crime but caused grotesque suffering on the victim by raping a minor girl of tender age of 6 years and thereafter committing her murder by smashing her head with a stone. Thus, Bharat Kumar is Sexually dangerous person and not a Dangerous sexual predator and offender. Hence, the solution to the present case is not by removing Bharat Kumar from the earth but guarding the society against him so that he does not act dangerously to other innocent lives.

46. While awarding the punishment besides considering the aggravating and the mitigating factors it has also to be considered whether the question of reformation of the offender is foreclosed. In the decision reported as (2008) 13 SCC 767 Swamy Shraddhananda (2) Vs. State of Karnataka a three judge bench of the Supreme Court discussed the power of the Court to direct that an actual period of incarceration be undergone by the convict without remissions/commutations by the executive so that the convict serves out imprisonment for the remainder of the natural term of his life. This alternative was held to be a substitute for the death sentence and viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice. It was further held that formalization of a special category of sentence though for an extremely few number of cases shall have the great advantage of having the death penalty on the Statute book but to actually use it as little as possible really in the rarest of rare cases. This was held to be only a reassertion of the Constitution Bench decision in AIR

1982 SC 1325 Bachan Singh Vs. State of Punjab.

47. In our opinion, the ends of justice would be met by awarding a sentence of imprisonment for life to Bharat Kumar with the direction that no remission would be granted to him before completion of 25 years of actual imprisonment with a fine of ₹1 lakh and in default of payment of fine to undergo simple imprisonment of one year for the offence punishable under Section 302 IPC. Ordered accordingly. The fine, if recovered, will be paid to the parents of Karuna as compensation. The sentences as awarded by the learned Trial Court for offences punishable under Sections 363 IPC and 376 IPC are maintained.

48. The death sentence is answered in the negative. The appeal is disposed of accordingly.

49. T.C.R. be returned.

50. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 18, 2014
‘ga’