

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: March 19, 2019

MRC No.2 of 2016

State of Haryana

.....Appellant

Versus

Padam @ Parmod and others

....Respondents

CRA-D-90-DB of 2016 (O&M)

Sunil @ Mada

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-91-DB of 2016 (O&M)

Sunil @ Sheela

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-99-DB of 2016 (O&M)

Sarvar @ Billu and another

.....Appellants

Versus

State of Haryana

....Respondent

CRA-D-107-DB of 2016 (O&M)

Padam @ Parmod

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-108-DB of 2016 (O&M)

Manbir @ Manni

.....Appellant

Versus

State of Haryana

....Respondent

CRA-D-187-DB of 2016 (O&M)

Rajesh @ Ghochru

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI
HON'BLE MR. JUSTICE SURINDER GUPTA**

Present: Mr. Deepak Sabharwal, Addl. AG, Haryana.

Mr. Vinod Ghai, Senior Advocate with
Ms. Kanika Ahuja, Advocate for the convict-Sunil @ Mada.

Mr. N. S. Shekhawat, Advocate for convict-Sarwar @ Billu.

Mr. Rajiv Vij, Legal Aid Counsel
for convict-Rajesh @ Ghochru.

Mr. Pradeep Virk, Advocate
for the convicts-Padam @ Parmod and Manbir @ Manni.

Mr. Arun Sharma, Advocate for convict-Sunil @ Sheela.

A.B. CHAUDHARI, J

By this common judgment and order, above said all the appeals/MRC are being disposed of.

2. Being aggrieved by the judgment/order dated 18.12.2015/21.12.2015, in Sessions Case No.61/2015, passed by the learned Additional Sessions Judge, Rohtak, by which the appellants/accused persons, namely Padam @ Parmod, Pawan, Sarwar @ Billu, Manbir @ Manni, Rajesh @ Ghochru, Sunil @ Mada and Sunil @ Sheela were convicted for commission of offence punishable under Sections 302, 376-D, 366, 201 read with Section 120-B of the Indian Penal Code, 1860 (for short 'IPC') and sentenced, the present appeals were filed by the appellants/accused persons. They have been sentenced as under:-

“I. The convicts Rajesh @ Ghouchru, Pawan, Sunil @ Mada, Padam @ Parmod, Sarwar @ Billu, Manbir @ manni and

Sunil @ Sheela are sentenced to death for offence punishable under section 302 read with Section 120-B of Indian Penal Code. Accordingly the convicts be hanged by neck till they are dead. Fine of ₹50,000/- to each of the convict is also imposed and in default of payment of fine such convict shall undergo imprisonment for a period of two months.

- II. Life imprisonment which shall mean imprisonment for the remainder of their natural life for the offence under section 376-D read with Section 120-B of Indian Penal Code and fine of ₹50,000/- each. In default of payment of fine simple imprisonment for a period of two months.*
- III. Ten years rigorous imprisonment for offence under section 366 read with Section 120-B of Indian Penal Code and fine of ₹20,000/- each. In default of payment of fine, simple imprisonment for a period of two months.*
- IV. Seven years rigorous imprisonment for offence under section 201 read with Section 120-B of Indian Penal Code and fine of ₹20,000/- each. In default of payment of fine, simple imprisonment for a period of two months.*
- V. Life imprisonment for offence under section 377 of Indian Penal Code and fine of ₹50,000/- to convict-Rajesh @ Ghochru. In default of payment of fine, simple imprisonment for a period of two months.”*

The sentence of death having been awarded, reference has been made to this Court registered as MRC No.2 of 2016. Hence, both, the appeals and MRC are taken together for disposal.

FACTS

3. Briefly stated, the prosecution case is that PW1-Surat Singh noticed a dead body lying in the field under his cultivation and some dogs

were gnawing upon it and was also partially eaten. PW41-ASI Baje Singh along with PW17 HC Satish No.73 reached the spot and carried out initial formalities and also recorded the statement of PW1-Surat Singh leading to registration of FIR No.57 dated 04.02.2015, for offence punishable under Sections 302 and 201 of IPC, at Police Station Sadar Rohtak. They recovered blood stained earth, strands of hair, pieces of blood stained stones, one Salwar and one Sweater of black and white strips. Thereafter, they removed the dead body and kept in the mortuary where PW2-Amar along with PW5-Janki saw the dead body and they identified it as that of their sister (later referred to as 'M') who went missing since 01.02.2015. PW5-Janki had filed a report registered as FIR No.22 dated 01.02.2015, under Section 346, at Police Station PGIMS, Rohtak with the description of the deceased as height 4'9" and aged about 27/28 years. PW2-Amar and PW5-Janki disclosed that the deceased was mentally ill and was brought from Nepal to Rohtak and was residing at the house of PW5-Janki, her sister.

Next day, postmortem was conducted by the Board of doctors of PGIMS, Rohtak which noticed several injuries on the person of the deceased including an injury of 9x7 cm over the top of head. They also removed one piece of stone from the anal canal of deceased and another piece of stone from the abdominal cavity besides one condom. The Board recorded the cause of death as cranio-cerebral damage along with utero-vaginal rupture & rupture of large gut, rectum & anus ante-mortem in nature and the death was homicidal. Consequently, offences under

Sections 376 and 377 of IPC were also added. Two FIRs were consolidated into one by cancelling FIR No.57 dated 01.02.2015 and by adding offences under Sections 364 and 302 of IPC.

4. Thereafter, the investigation was undertaken and first arrest made was of Padam @ Parmod on 09.02.2015. On the same day, accused Somvir committed suicide at Delhi obviously because he must have come to know about the police in action. During investigation, police arrested other accused who confessed their guilt before PW30-Gulab Singh, Naib Tehsildar, the executive Magistrate and other public witnesses while they were in custody of police. Pursuant to the disclosures, recoveries were made in respect of several articles having material evidentiary value. As stated earlier, the victim's family is Nepali so also one accused Santosh @ Nepali who was declared juvenile.

5. The case was committed to the Sessions Court for trial as per the procedure. Charges were framed against the accused persons for various offences. Prosecution examined 57 witnesses in all and thereafter, closed its case. The trial Court recorded the statement of all the accused persons under Section 313 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') by putting incriminating evidence against them. Thereafter, the trial Court heard the arguments and decided the trial convicting the accused persons and sentencing them as stated earlier. The trial Court discussed the evidence of each and every witness separately which we have seen carefully. In order that we do not burden the judgment with finer details, we would discuss about the material evidence in the present

case hereinafter.

ARGUMENTS

6. Learned counsel for the respective appellants in these appeals as well as in reference made the following submissions:

- (i) The reliance placed by the trial Judge as well as the prosecution on the disclosure, allegedly made by the appellants in the immediate presence of the executive Magistrate PW-30 Gulab Singh is wholly misplaced and unwarranted as Section 26 of the Evidence Act, 1872 (for short 'Evidence Act') read with scheme of Sections 24, 25 & 27 of the Evidence Act creates an embargo on the proof of such confession by the accused persons who are in the police custody. Section 26 of the Evidence Act uses the expression 'Magistrate' in whose immediate presence the confession was allegedly recorded in the present case. According to the learned counsel for the appellants the Full Bench of Gauhati High Court in the case of ***Shri Ajay Chakraborty Vs. State of Assam***, in Criminal Appeal No.7 of 2008 decided on 26.10.2017, has in terms held confirming the view of the Division Bench of that Court in the case of ***Kalam @ Abdul Kalam Vs. The Inspector of Police, 2007 Criminal Law Journal, 3179***, that the expression 'Magistrate' occurring in Section 26 of the Evidence Act, would only mean the Judicial Magistrate and not the Executive Magistrate. In addition to the reasons stated in the said Full Bench judgment, the learned counsel for the appellants submitted that it would be dangerous to rely on the confession made in the presence of an Executive Magistrate as he is a part of the Executive and not the judiciary. The counsel for the appellants then contended that in the present case the confession of all the accused persons so recorded have been relied upon which is wholly

illegal which could not have been proved;

- (ii) The learned counsel for the appellants then contended that the first arrest of accused-Padam @ Parmod was made on 09.02.2015 and his disclosure statement was also recorded as Exhibit P-136 wherein he had disclosed about the places of crime which were ultimately demarcated. Thereafter there was no question of any new discovery or recoveries of the articles on the spots as contemplated by 26 of the Evidence Act, on 12.02.2015. The prosecution story about discovery and recovery so also the disclosures made by all the accused, is clearly sham and is liable to be rejected;
- (iii) The learned counsel for the appellants also submitted that as held by the Full Bench in the case of **Kartik Chakraborty (supra)**, that the mandatory procedure under Section 164 Cr.P.C., which was applicable for Judicial Magistrate for recording confession therein, is not to be found in Section 26 of the Evidence Act and therefore, admissibility and proof of such confession would lead to an unfair trial;
- (iv) The learned counsel for the appellants then submitted that forensic team as well as the police party had surveillance on the spots demarcated by the police and therefore the story about recovery of the articles from the various spots, not in one go but on different dates, clearly appears to be after thought and will have to be rejected. There is no explanation as to why on the very first visit by the police and the FSL team, all the alleged incriminating articles were not recovered;
- (v) As to the burnt jumper (lady shirt), the learned counsel for the appellants submitted that nothing was proved in that context since the police has collected only the ash which was also not sent for any test and therefore, that was no circumstance against the appellants Sunil @ Mada and Sunil @ Sheela;

- (vi) It was submitted that the proof in the nature of soil found from the spot of murder in the shoes of the accused persons, could not be utilized as evidence as the soil being of the same nature everywhere in the area, the same could not be an incriminating circumstance;
- (vii) It was then submitted that the reliance on the recoveries of the mobile phones, pursuant to the alleged disclosures, and of motorcycle, was of no avail. The prosecution brought PW-36 SI Surinder, Incharge of Cyber Cell, to prove the locations of the mobile phones at the relevant time, but then he was not authorized to issue any certificate as per Section 65 (B) of the Evidence Act, nor did he issued any certificate. Therefore his evidence was in contravention of Section 65 (B) of the Evidence Act and could not have been relied upon;
- (viii) It was then contended that the prosecution has in common relied on the evidence in the form of semen on the appellants own underwears after about 7/8 days of the alleged offence. In the first place, such type of evdience is improbable and does not have any incriminating value as the semen was not found to have matched with any articles recovered from the spots or otherwise. It was, therefore, of no use to rely on the presence of semen on the underwear of the accused persons in the DNA test. The reliance placed by the prosecution in this behalf on the own clothes of the accused persons i.e. track pants, t-shirt and woolen sweater, again is no incriminating evidence;
- (ix) It is then submitted by learned counsel for the appellants that though the accused persons did not explain the incriminating circumstances against them as contended by the prosecution, it cannot be said that the prosecution proved its case. Accused is required to keep silent and did not give any explanation as alleged by the proseuciton, as the prosecution itself faild to discharge its initial burden of proof. Finally the learned

counsel for the appellants submitted that the entire impugned judgment and order of the conviction of the appellants is illegal and will have to be set aside. The learned counsel for the appellants vehemently argued that there was nothing like rarest of the rare case as argued by the prosecution to award them the death sentence. It was further argued that in a case where there is circumstantial evidence and no direct evidence, and there is a doubt in the mind of the Court about the veracity of the prosecution case, it would be unsafe to award death sentence in such cases. According to the learned counsel for the appellants, the appellants are young persons and there are various mitigating circumstances on record which have not been considered by the trial court. The counsel for the appellants also submitted that the comparison by the State counsel with the case of “Nirbhaya” is misplaced as the facts in that case were totally different;

- (x) Thus the learned counsel for the appellants prayed for acquittal and in the alternative to remove the death sentence;
- (xi) *Per contra*, learned counsel for the State Mr. Deepak Sabharwal, Additional Advocate General, Haryana, vehemently opposed the arguments raised by the learned counsel for the appellants. He submitted that the prosecution has proved its case beyond any reasonable doubt and the investigation machinery has collected each and every type of minute details and evidence and proved the same before the trial court. According to him in the circumstances like finding of the semen in the condom and matching thereof with one of the accused in the DNA test and number of circumstances which have been pointed out from the evidence, the prosecution proved its case to the hilt. It was, therefore, submitted that the conviction recorded by the trial court is legal, correct and proper and no interference is required to be

made. As to the death sentence the learned counsel for the State vehemently argued that the facts of each case are bound to be different. But then, major facts and the nature of offences committed by the appellants in the present case, are almost similar like the case of Nirbhaya and there is no reason why any other view, except death sentence, can be taken by this court. He therefore, submitted that applying the ratio in respect of the award of death sentence in the case of Nirbhaya, the trial Court is right in awarding the death sentence to all the appellants. He, therefore, prayed for dismissal of the appeals.

CONSIDERATION

7. Upon hearing the learned counsel for the rival parties at length for a few days and upon perusal of entire evidence oral as well as documentary, we proceed to record our findings on evidence as under:-

- (a) PW1-Surat Singh, farmer, deposed that he saw the dead body in question in the field on 04.02.2015 partially eaten by dogs and one hand of the dead body was also missing. He made a phone call to number 100 and the police arrived;
- (b) PW2-Amar is the brother of the deceased, a native of Nepal and the deceased was elder to him. She was suffering from mental illness since June 2014 and was brought to Rohtak by his eldest sister PW5-Janki for being looked after. His family received intimation on 04.02.2015 about recovery of a dead body from the village Bahu Akbarpur and therefore, entire family proceeded to PGIMS, Rohtak and saw the dead body of the deceased 'M'. They identified the dead body by means of clothes shown to them by the police making sure identification with one high-neck sweater of black colour having white strips and zipper and one suit and salwar. He also deposed that the deceased was being treated at Sai Hospital at Haldwani Town,

District Nanital where she was being taken for treatment because one of his brother-in-law works at Haldwani. The deceased 'M' was thus, residing with PW5-Janki, but from 01.02.2015, she went missing and while in Nepal she had also gone missing once or twice;

- (c) PW3-Dr. Vijay Pal Khanagwal, Professor Department of Forensic Medicine, PGIMS, Rohtak deposed about the constitution of Board for conduct of postmortem which the Board conducted after going through the inquest papers. Thereafter on 11.02.2015, one left hand of the deceased was produced before him for postmortem on which he gave his report. After going through the FSL reports Exhibit P12 to P22, he opined that vaginal and anal intercourse had been committed with the deceased 'M'. He then deposed that a sealed parcel having seal of FSL was opened from which two stone pieces (one piece broken into two parts) were seen and Exhibit P23 and P24 were taken out from the body of the deceased at the time of her postmortem. He also deposed about Exhibit P25 to P28 and one condom Exhibit P29 also being tested by FSL and stated that condom Exhibit P29 was removed from the abdominal cavity of the deceased. He deposed about the cause of death namely cranio-cerebral damage along with utero-vaginal rupture & rupture of large gut, rectum & anus; ante-mortem in nature and homicidal in manner which could cause death immediately. After pursuing the FSL reports, he opined that the deceased was subjected to vaginal and anal intercourse;
- (d) PW4-Rajesh son of Raj Kumar deposed that he was Senior Vice-Presiding of Haryana Pradesh Vypar Mandal, Rohtak and a candle march procession was taken out. On 12.02.2015, he along with PW9-Gulshan Nijhawan, Ajay Kumar and Tushar Anehja had gone to the Police Station CIA Staff,

Rohtak and were allowed to remain present by SHO M.I. Khan who was along with Gulab Singh, Naib Tehsildar, Rohtak and some other police officers. He and his colleagues offered assistance to the police when they were asked to sit outside. After ten minutes, accused Pawan was called from inside. He remained present along with SHO M.I. Khan Naib Tehsildar Gulab Singh, P/SI Rakesh Kumar and Head Constable Sonu who brought him from inside the room. He along with his colleagues remained present there. In their presence, interrogation of accused Pawan commenced by SHO M.I. Khan and one police officer started reducing it in writing. Accused Pawan in disclosure statement Exhibit P30 stated that on the date of incident, i.e. about 7:00/7:30 P.M., he took liquor in the vacant shop by the side of the shop of Sunil @ Sheela accompanied by Sunil @ Mada, Manvir and Rajesh @ Ghochru. After some time, Sunil @ Sheela came to them and said that one lady in bare foot was going towards the village Bahu Akbarpur. They started chasing her in order to entice her. He then disclosed that in the meantime, Padam @ Parmod, Sarwar and Sombir came from opposite side on a motor cycle driven by Sombir and they were stopped by him. Then Sombir caught hand of that lady and started talking with her. Sarwar caught hold of that lady from her shoulders and made her to sit on the motorcycle driven by Padam. Sombir sat behind the lady on the said motorcycle. Sunil asked them to take her to the *Kotha* of *Johri* and they were also coming there. He took his motorcycle and Sunil @ Mada took motorcycle of his friend and consumed liquor and reached *Kotha* of *Johri*. After recahing there, Sunil, Sombir, Rajesh @ Ghochru and two others made her to fell down on the ground. They forcibly took up her *Salwar* and first of all, Sombir committed rape upon her and thereafter, Manbir committed

rape upon her. Santosh @ Nepali also arrived at the spot. At that time, one police Gipsy vehicle passed through that place and all of them got afraid. Therefore, Sunil put a blanket on that woman and took her to one *Kotha* of Ram Niwas and from there, Sombir sent Manvir to bring condom from outside. At that place, a blanket was laid down and upon it first of all, he committed rape upon that woman and thereafter, one by one all of them committed rape upon her. In the meanwhile, Manbir reached back after fetching condoms along with some liquor, eatables and glasses. All of them consumed liquor and thereafter, Sunil @ Sheela committed rape with the use of a condom. The condition of the woman started deteriorating and then all of them planned to kill the woman with the fear otherwise they will be exposed. Thereafter, Rajesh @ Ghochru made that girl to board the motorcycle and two others sat behind her and took her towards the canal by the side of the village. As there was no water in the canal, the woman was pushed down in the fields and they started hitting her with the bricks lying there. At that time, Rajesh stopped them and said he wanted to have intercourse once again. After that Rajesh committed rape upon her. She was hit with bricks and on his asking, Rajesh @ Ghochru placed a cement sheet on her anus and thrust it inside by hitting it with a brick due to which she breathed her last. Thereafter, all of them returned back and went to a plot by the side of the village and burnt there the Jumper (lady shirt) of the woman and all of them went to their respective houses. The disclosure statement Exhibit P30 that was recorded as stated above was read over to the accused-Pawan in the presence of all and the accused-Pawan after admitting it to be true put his signatures in the token of its correctness. Thereafter, PW30-Gulab Singh, Naib Tehsildar, P/SI Rakesh and Head Constable Sonu also attested

the disclosure statement. Thereafter, one by one all other accused persons who were arrested were brought inside the office. SHO M.I. Khan interrogated one by one and according, their disclosure statements were recorded, which were duly exhibited in the trial Court. The disclosure statements were in the similar manner as stated above;

After completion of the aforesaid part at 10:00 A.M., all of the accused persons and the police party started for the place of occurrence in 3-4 vehicles. After reaching at the place, they found FSL team with In-charge, one Madam Dahiya and Janki, the sister of the deceased. Accused-Padam first led them and pointed out one *Kotha* at a distance of about 1 killa from the road disclosing it to be of *Johri wala Kotha* where firstly, rape was committed on the woman. Accordingly, Exhibit P32-memo of demarcation was prepared duly signed by the accused and attested by the witnesses as aforesaid. The FSL team lifted from the spot, one hair band, a small bunch of hair and some disposable glasses vide recovery memo Exhibit P33. Padam lead the police party to a distance of about 300 meters where he pointed out towards another *Kotha* which was known as *Kotha* of Ram Niwas and prepared demarcation Exhibit P34 again signed by all the witnesses. From this spot, police lifted one blanket, small pieces of hair, one broken silver chain, one underwear of red colour, some empty bottles, glasses and used, unused condoms outside the *Kotha*. All articles were sealed vide Exhibit P35 signed by the witnesses. Thereafter, all of them came to the road and went to the plot in the village vide demarcation Exhibit P36, where it was disclosed that Jumpher was burnt. Some ash was lifted by the police from that spot. Thereafter, the accused lead them to the police from where the deceased woman was forcibly made to sit on the motorcycle and that place was demarcated as

Exhibits P37 and P38 signed by the witnesses. The accused, thereafter, led the party to the place where the dead body was lying. At that place, bricks and brick bats were lying which were used to kill her with some blood. Demarcation memos Exhibit P39 and P40 were prepared duly signed thereafter. From this spot, police lifted three full bricks and one half which were stained with blood and some blood stained earth and converted them into a separate parcel sealed with seal 'SN' and memo Exhibit P41 was prepared duly signed by the witnesses. Accused-Pawan thereafter, led them to his home in the village Gaddi Kheri and he got recovered one shirt, one gray vest, one mobile and one lower of coffee colour and a motorcycle parked by the side of stairs which were taken into possession and converted into sealed parcel Exhibit P42 duly signed;

Accused Sunil @ Mada also led the entire party to his home in village Gaddi Kheri and got recovered one jean pant of blue colour, one red shirt and one coffee colour vest and one Micromax mobile of black colour which were converted into separate sealed parcels with seal of 'SN' and made Exhibit P43;

PW9-Gulshan Nijawan, member of Haryana Pradesh Vypar Mandal, Rohtak along with PW4-Rajesh Vice President of Haryana Pradesh Vypar Mandal, Rohtak, PW19-Ajay Kumar son of Shadi Lal, the persons associated with Vypar Mandal and PW24-Tushar son of Krishan Lal were also examined by the prosecution who deposed in the same manner as PW4-Rajesh. All these public witnesses PW4-Rajesh, PW9-Gulshan Nijawan, PW19-Ajay Kumar and PW24-Tushar, were present throughout from 6:30 A.M. when the interrogation/disclosures were made in their presence, and recoveries were made; and their evidence has practically gone

un-shattered.

PW4-Rajesh, Senior Vice-President of Haryana Pradesh Vypar Mandal, Rohtak then in his evidence proved the articles, namely strands of hair Exhibit P44, chain Exhibit P45 and hair band Exhibit P46, one underwear-Exhibit P47, blanket-Exhibit P48, two used condoms Exhibits P49 & P50, three full bricks Exhibits P51 to P53 and half brick Exhibit P54, one blue colour jean Exhibit P55, one shirt of coffee colour-Exhibit P56, vest of green colour-Exhibit P57 belonging to accused Sunil @ Mada, one lower of chocolate colour Exhibit P58, one vest of gray blackish colour Exhibit P59 and one shirt of white colour Exhibit P60, pair of white shoes Exhibit P61, ash Exhibit P62, all recovered at the instance of Sunil @ Mada and Sunil @ Sheela from the spot where Jumpher (lady's shirt) was burnt. Thus, all the recoveries made were duly proved by substantive evidence by the independent witness PW4-Rajesh;

- (e) These witnesses cannot be said to have enmity or reason to depose in respect of above pieces of evidence tendered by the prosecution before the trial Court;

The submissions that all these recoveries from the spots and from the accused are untrustworthy will have to be rejected as misconceived. As many as four independent witnesses have consistently, honestly deposed about the disclosures, recoveries, demarcation etc. We have absolutely no hesitation in accepting the said evidence. It was contended that, though, the appellants were arrested on 09.02.2015, the disclosures were recorded on 12.02.2015 and hence, the same were manipulated. PW30-Gulab Singh did not inform the appellants that the disclosures could be used against them. In fact, PW30-Gulab Singh volunteered that he did inform accordingly. This argument was based on modalities under

Section 164 Cr. P.C. But then Section 26 of the Evidence Act does not say so and in the absence of challenge to its validity on that ground, we cannot accept such an argument. There is no cross-examination as to disclosures on 12.02.2015 when arrest of one Pawan was made on 09.02.2015;

- (f) PW5-Janki, a Nepali woman deposed that her sister, the deceased 'M' was residing with her for the last two months at Rohtak and had gone missing. She was mentally ill and was receiving treatment from the Hospital at Haldwani. At the time when she went missing, PW5-Janki and her husband had gone for their work whereas the children had gone for tuition and her sister, deceased 'M' was alone in the house. Vide Exhibit P63 on 01.02.2015, she reported about the missing of her sister. On 04.02.2015, her family received intimation about the dead body and accordingly, they went to see it along with PW2-Amar and they identified the dead body. On 07.02.2015, she disclosed to the police that her sister was wearing artificial silver chain and a nose pin. She identified the sweater black and white colour with zipper and was taken to the spot, namely one *Kotha* where one hair-band belonging to her sister was recovered and alongwith other articles likes empty bottles, glasses and used, unused condoms at the *Kotha*. From another *Kotha* at the distance of 3 to 4 killas, piece of artificial chain and underwear were recovered and she identified both belonging to her sister 'M' which she had worn. Identification memo Exhibit P64 was prepared. Chain Exhibit P45, hair band Exhibit P46 and underwear Exhibit P47 all were identified by her along with sweater of black and white colour Exhibit P65, Salwar of sky blue colour (firozi) Exhibit P66 worn by her sister on the day when she went missing;
- (g) PW6-Raj Kumar was examined to show that he had sold packet of condom. This witness did not support the

prosecution;

- (h) PW7-Dr. Saroj Dahiya, In-charge FSL, Rohtak deposed that she reached the spot and found a dead body of a naked woman partially eaten by rodents. Photographs Exhibits P68 to P75 were taken on her direction and also collected evidence available there and she handed over her report of the spot inspection to the I.O. on 05.02.2015. She then inspected *Johri Wala Kotha* and lifted the evidence from there. Thereafter, she inspected *Kotha* of Ram Niwas and collected evidence from that place also and also took photographs Exhibits P76 to P83. She also inspected the spot from where ash was collected;
- (i) PW9-Gulshan Nijawan, an independent witness with Rajesh alias Teenu, Tushar and Ajay of Vyapari Sangh deposed that in their presence and in the presence of Naib Tehsildar and some other police officials, Sunil alias Sheela and Santosh @ Nepali were interrogated. Sunil @ Sheela suffered disclosure statement Exhibit P87 whereby he offered to demarcate the place of occurrence and got his clothes recovered from his house which he was wearing at the time of commission of rape and murder of victim 'M'. His disclosure statement was duly signed by the witnesses and Naib Tehsildar-Gulab Singh so also that of Santosh alias Nepali Exhibit P88;

In the similar manner as stated above, disclosure statement Exhibit P86 of accused Sunil alias Sheela and demarcation Exhibit P89 were duly proved. In his presence, police lifted one hair band, strands of hair and some disposable glasses vide Exhibit P33. He led the police party to *Kotha* of Ram Niwas and accordingly, demarcation memo Exhibit P90 was prepared. Thereafter, accused Santosh alias Nepali also did same vide Exhibits P91 and P92. Accused Sunil alias Sheela led the party to the place of murder of deceased 'M' vide demarcation Exhibit P93. Accused Santosh

alias Nepali demarcated the place vide Exhibit P94. Sunil alias Sheela demarcated the place where Jumpher was burnt vide Exhibit P96;

- (j) PW10-Inspector/SHO Gajender Singh was the first police officer who went to the spot and he deposed that the Special Investigating Team was formed on 08.02.2015 of which he was also the member;

It was contended that if the spots were under the surveillance of police, the show of recoveries on two-three occasions is a farce as the police must have found all the articles on the very first inspection. Hence, according to the learned counsel, the recoveries were planted. We are unable to agree. In the first place, there is no cross-examination on this line. Secondly, the incriminating articles might not have been noticed at the first blush by the F.S.L. team or by police. The supplementary statements of PW5-Janki revealed about the articles on the person of the deceased and then again, searches were carried out and some more articles were found. There is nothing abnormal about it. That PW33-Ram Niwas, owner of *Kotha* did not find anything on 08.02.2015 cannot help the accused as he might not have been able to see it.

At any rate when all the accused were together and in conspiracy right from lifting the woman and killing her and thereafter, the confessions made by all of them under Section 26 of the Evidence Act, are clearly corroborated by this piece of evidence also.

- (k) PW11-Constable Pardeep, PW12-Dinesh Kumar, Halka Patwari accompanied the I.O. for preparing site-plans. PW14-Head Constable Somvir Singh deposed about visit to the spot from where one severed left hand below the wrist was recovered at the place from village Bahu Akbarpur near one water works which was under construction. He recovered the

same and deposited;

- (l) PW15-ESI Phool Kumar deposed about the case property he being *Malkhana Mohrir* of the Police Station, PGIMS, Rohtak;
- (m) PW17-Head Constable Satish deposed that he had gone to the spot on 04.02.2015 itself along with ASI Baje Singh to see the naked dead body lying in partially eaten condition where one sweater having black and white strips and one Ghiya (gourd) colour Salwar were found along with blood stained stones, blood stained earth and strand of hair which were lifted and sealed;
- (n) PW18-Head Constable Sandeep is the very important witness who is expert posted in Cyer Cell of the Police Department. He proved call details of mobile phones seized by the police and the working of the phone in A & B location of same tower;
- (o) PW20-SI Subhash deposed that on 09.02.2015, on the basis of secret information he and his team arrested Padam alias Parmod from village Gaddi Kheri and thereafter, arrested Manbir and Rajesh @ Ghochru so also Sunil alias Sheela and Santosh alias Nepali. Pawan and Sarwar @ Billu, Sunil alias Mada were also arrested. He thus, deposed about the arrest of all the accused persons;
- (p) PW21-Dr. Rajesh Raj Kumar Rajpoot deposed about Somvir (one of the accused) having committed suicide by consuming poison;
- (q) PW23-Mahavir Singh Rohilla, S.D.E. BSNL proved the certificate Exhibit P145 that was required under Section 65-B of the Evidence Act. He also proved about the call details in his evidence. His evidence is equally important to prove the call details and there is no manner of doubt that he has successfully proved the call details between the accused

persons;

- (r) PW30-Gulab Singh, Tehsildar, Rohtak, the star witness of the prosecution deposed that on 12.02.2015, when he was Naib Tehsildar he had gone to CIA Staff, Rohtak on the directions of the District Magistrate, Rohtak at about 6:15 A.M. He found there some public persons had also arrived. In the presence of all, at about 6:30 A.M., S.I. M.I. Khan started interrogation of the accused persons. Firstly, accused-Pawan was interrogated and thereafter, about all others he deposed in all minor details in his evidence stating that he also attested all the statements and documents were prepared accordingly, which he signed along with the witnesses. He deposed about disclosures of accused persons, recoveries etc. In his cross-examination, he also stated that he was authorised and directed by the District Magistrate to go to the CIA Staff and remain present in his capacity as Magistrate and accordingly, he was present at 6:15 A.M.;
- (s) PW33-Ram Niwas son of Ujala was examined to prove the existence of *Kotha* in his fields so also PW32-Rampal son of Hardwari was examined to prove the existence of *Kotha* constructed in the fields known as *Johri Wala Kotha*;
- (t) PW36-SI Surender, In-charge of Cyber Cell proved the study made by him in respect of call details of mobile phones of Padam son of Ranbir, Sunil @ Sheela. He deposed that on 06.09.2015, he being posted as In-charge in Cyber Cell, S.P. Office, Rohtak, on the asking of P/SI/SHO Kuldeep Singh, had studied the call details of phone no.9812503390 of Padam son of Ranbir, phone no.9996366066 of Sunil @ Sheela, phone no.9467222012 of Sarwar @ Billu, phone no.9466548307 of Manbir son of Dharambir, phone no.9996693350, phone no.9728470821 of Sunil @ Mada, phone no.9729161888 of Pawan son of Ranbir, phone

no.9728044409 of Sombir son of Shilak Ram and ascertained their location on 01.02.2015 from 6.00 P.M. to 12.00 (mid-night) inconsonance with the respective C.D.Rs. Accordingly, he located the positions of above noted mobile phones of the place where deceased was raped, the place where her dead body was found and the tea-vend and in respect of those places, he prepared site plan Ex.P211 along with locations of above said mobile phones. The cell I.D. of the Idea Tower for the place of rape is 7316, that of Airtel is 34451 and that of Vodafone is 21523. The cell I.D. of Idea Tower for the place where the dead body was found is 7318, for Airtel 34453 and Vodafone 21171.

Mobile phone no.9812503390 (of accused Padam) & 9466548307 (of accused Manvir) were present at the places of rape and where the dead body was found and same were in use from 6.00 P.M. to 9.37 P.M. and thereafter, it was not in use. Mobile no.9466548307 (of accused Manvir) was at the location of Hissar Road, Industrial Area under the Cell I.D. 7501 at 7.21 P.M.

Mobile phone no.9728044409 (of accused Somvir, the deceased) was also present at the places of rape and where the dead body was found and it was in use from 6.00 P.M. to 9.27 P.M. and thereafter, it was not in use.

Mobile phone no.9729161888 (of accused Pawan) was also present at the places of rape and where the dead body was found and it was in use from 6.00 P.M. to 9.16 P.M. and thereafter, it was not in use.

Mobile phone no.9996693350 & 9728470821 (of accused Sunil @ Mada) were also present at the places of rape and where the dead body was found. Mobile phone no.9996693350 was in use from 6.00 P.M. to 10.10 P.M. (it is relevant to mention here that at this stage of testimony of

PW36, his further evidence was deferred).

In his further evidence, it is further deposed by PW36 that after verifying the fact from record, he found that on 01.02.2015, mobile number 9728470821 was not in use and was switched off. Further, mobile no.9728044409 pertaining to Sombir son of Shilak Ram and mobile no.9729161888 pertaining to Pawan son of Ranbir was working and both were present at the place of rape as well as at the place where the dead body was found. Mobile phone of Sombir was working till 21:27 hours on 01.02.2015 and mobile phone of Pawan was working till 21:16 hours on 01.02.2015. Most of these mobile numbers were in touch with each other on the date of occurrence as well as prior to that date. He had also gone to the spot and checked from the towers located at those places and from there, he verified and confirmed about the presence of the above said mobile phones at the place of rape as well as at the place where dead body was found.

The evidence of this witness PW36-S.I. Surinder was severely criticized by the counsel for the appellants. It has been contended that he is not a competent witness to prove as stated in Section 65-B of the Evidence Act. He claimed to have proved the tower locations at the place of rape and murder. There is no certificate by him under Section 65-B of the Evidence Act.

At the outset, we find that PW36-S.I. Surinder is an expert in Cyber-Cell of police with requisite training. He collected the call details from the concerned mobile companies and as per their information also made demarcation/location map (Exhibit P211). Why this part of his evidence should be disbelieved? There is no reason. Apart from that PW37-Manish Bindra from Bharti Airtel, PW39 Deepak Kumar, Idea, have proved Exhibit P212, Exhibit P257 certificates as

per Section 65-B of the Evidence Act;

- (u) PW37-Munish Bindra, Nodal Officer, Bharti Airtel Limited deposed that on 29.04.2015, on the asking of HC Sarajudeen, he handed over certificate Exhibit P212 under Section 65-B of the Indian Evidence Act and the covering letter Exhibit P212/A along with attested copy of customer application form Exhibit P213 of Manish son of Jai Bhagwan resident of village Gaddi Kheri to whom mobile no.9996693350 was issued as well as copy of I.D. proof in the shape of vote I.D. card Exhibit P214 and the call details from 31.01.2015 to 09.02.2015 having 15 pages Exhibit P215. He also handed over attested copy of customer application form Exhibit P216 of Ramesh son of Ram Kishan resident of village Gaddi Kheri to whom mobile no.9996366066 was issued as well as copy of I.D. proof in the shape of ration card Exhibit P217 and the call details from 31.01.2015 to 09.02.2015 having 9 pages Exhibit P218. Further, he also handed over attested copy of customer application form Exhibit P219 of Pawan Kumar son of Ranbir resident of village Gaddi Kheri to whom mobile no.9279161888 was issued as well as copy of I.D. proof in the shape of driving licence Exhibit P220 and the call details said number from 31.01.2015 to 09.02.2015 having 6 pages Exhibit P221. He further handed over attested copy of customer application form Exhibit P222 of Balraj son of Dhupan resident of Village Gaddi Kheri to whom mobile no.9466548307 was issued as well as copy of I.D. proof in the shape of ration card Exhibit P223 and the call details of said number from 31.01.2015 to 09.02.2015 having 8 pages Exhibit P224. Said documents were taken into possession by HC Sarajudeen vide memo Exhibit P225 against his attestation and that of Sumant Vasahisht, Assistant Nodal Officer. His statement was also recorded;

- (v) PW38-Dr. Sandeep, the Deputy Medical Officer, PGIMS, Rohtak deposed about medical examination of the accused persons;
- (w) PW39-Deepak Kumar, Nodal Officer, Idea Cellular Limited, Ambala deposed that on 29.04.2015, on the asking of HC Sarajudeen, he handed over to him certificate Ex.P257 under Section 65-B of the Indian Evidence Act along with photo copy of customer application form Exhibit P258 of Parmod son of Ranbir resident of village Gaddi Kheri to whom mobile no.9812503390 was issued as well as copy of I.D. proof in the shape of registration certificate Exhibit P259 and PAN card Exhibit P260 and the call details of said number from 31.01.2015 to 09.02.2015 having 4 pages Exhibit P261. He also handed over photo copy of customer application form Exhibit P262 of Somvir son of Shilak Ram resident of Village Gaddi Kheri to whom mobile no.9728044409 was issued as well as copy of I.D. Proof in the shape of voter card Exhibit P263 and the call details of said number from 31.02.2015 to 09.02.2015 having 2 pages Exhibit P264. He also handed over attested copy of location chart Exhibit P265 of both mobile numbers i.e. 9812503390 and 9728044409. And above said documents were taken into possession by HC Sarajudeen vide memo Exhibit P26 against his attestation. His statement was also recorded;
- (x) PW40-Head Constable Jasbir Singh stated that on 01.02.2015 he received application Exhibit P63 from PW5-Janki about missing of her sister 'M' and accordingly, he received it;
- (y) PW41-ASI Baje Singh deposed about information he received on telephone about one dead body lying near canal and accordingly, he informed the FSL team and he also proceeded to the spot;
- (z) PW44-Inspector Dharambir deposed that he recorded the

statement of PW5-Janki and Jagat Singh and added offence under Sections 302, 364, 376, 377 of IPC. He was the participant in the investigation that started from 09.02.2015 after the arrest of the accused-Pawan;

- (aa) PW46-Dr. Mahesh Chander Sharma, Neuro Surgeon, Sai Hospital, Haldwani (Nanital) deposed that the deceased 'M' was brought to his hospital on 08.01.2014 with two years history of seizures and abnormal behaviour and was also admitted in his hospital for two days. She was discharged on 10.01.2014 with further advise and treatment Exhibit P280. His evidence is practically gone unchallenged;
- (ab) PW48-P/SI Rakesh Kumar participated on 09.02.2015 to go along with police party for arresting accused persons and first one being arrested was Padam @ Parmod and others were also arrested. He also deposed about disclosure statements as well as recoveries made by the accused persons;
- (ac) PW50-ASI Rohtas had taken Swarupa Sunar, mother of the deceased 'M' to FSL Laboratory, Madhuban where her blood sample was taken by DNA Branch for comparison with DNA of the deceased 'M';
- (ad) PW52-SI Mohammad Ilyas is the star Investigating Officer. He deposed about the entire prosecution case right after he was given investigation w.e.f. 06.02.2015 and he swung into action immediately thereafter. He deposed about the entire evidence that we have already discussed above and the steps he had taken to collect the evidence.

The trial Court in details stated about his evidence about which we have also stated in earlier part of the judgment;

- (ae) PW53-Gaytri Sen, Senior Scientific Officer (Physics) FSL (H), Madhuban deposed that she had examined two pieces of greyish colour sheet Exhibits P272 & P273 described as stone pieces; three broken pieces of greyish colour sheet (two pieces

of them were belonging to one part which might have been broken during transit) described as stone piece Exhibit P23 & P24. She examined those articles and prepared her report. She also examined soil Exhibit 18 and the soil collected from the shoes Exhibit 21-A, Exhibit 26-A and Exhibit 27-A by means of stereo zoom microscope and in respect of density gradient distribution particles. She found that the same were similar with the soil on the shoes and the soil collected from the spot;

(af) PW54-Dr. Surjeet Kumar, Senior Scientific Assistant (Serology) FSL (H), Madhuban deposed about examination of Exhibit 1-A (Salwar), Exhibit 1-B (Sweater) i.e. Exhibit P66 & Exhibit P65 in the Court. He also took out brownish stains Exhibit P272 & Exhibit P273. From parcel no. III, he took out Exhibit 3 (bunch of hair), i.e. Exhibit P274 in the Court. From parcel no.V, he took out Exhibit 5 (stone pieces stained with brownish stains), i.e. Exhibit P23 and Exhibit P24 in the Court. From parcel no.X, he took out Exhibit 10 (damp lump of each approximately 15 grams described as blood stained earth), i.e. Exhibit P271 in the Court. He stated that except blood stained earth (material disintegrated), all the blood so detected was of human origin and accordingly, his reports are Exhibits P14 and P15. He also stated that three and a half pucca bricks stained with few brownish stains) and (one pair of gray white shoes along with socks stained with few small brownish stains) indicated existence of human blood and his report is Exhibit P20;

(ag) PW56-Dr. Monika Dhankar, Senior Scientific Officer (Biology), FSL (H), Madhuban deposed that she carried out laboratory examinations to detect the presence of semen/blood/hair on the exhibits by performing chemical test and microscopy. Based upon above said examinations, she detected human semen on Ex.1A (Salwar) marked as Ex.P66

in the court, Ex.1B (sweater) marked as Ex.P65 in the court, Ex.5 (stone pieces) marked as Ex.P23 and Ex.P24 (broken into two pieces) in the court and Ex.6 (condom) marked as Ex.P29 in the court. She further proved two slides Ex.7A marked as Ex.P323 & Ex.324 in the court and Ex.7B one anal swab marked as Ex.P325 after bringing out them from a sealed parcel having seal of FSL deposing that those exhibits are same which were also examined by her and human semen was also detected upon those articles. She also proved four slides Ex.8A marked as Ex.P326 to Ex.P329 in the court and Ex.8B and two vaginal swabs marked as Ex.P330 & Ex.P331 in the Court after bringing out them from another sealed parcel having seal of FSL which were also examined by her and human semen was detected upon them.

Further, based upon above said examination, she had detected blood on Ex.1A (Salwar) marked as Ex.P66 in the Court, Ex.1B (Sweater) marked as Ex.P65 in the Court, Ex.P3 (hair) marked as Ex.P274 in the Court, Ex.5 (stone pieces) marked as Ex.P23 and Ex.P24 (broken into two pieces) in the Court, Ex.P6 (condom) marked as Ex.P29 in the Court.

Further, blood was also detected on slides Ex.7A marked as Ex.P323 and Ex.P324 in the Court and Ex.7B anal swab marked as Ex.P325 in the Court, slides Ex.8A marked as Ex.P326 to Ex.P329 in the Court and the Ex.8B vaginal swabs marked as Ex. P330 & Ex.P331 in the Court are same which were also examined by her. Further, hair Ex.P3 marked as Ex.P274 in the Court was found to be rooted and human in nature. In regard to above conducted examination, Ex.P12 is her report which bears her signatures.

It is further deposed that on 16.02.2015, she received 28 parcels vide R.C. No.9 dated 16.02.2015 through EASI Phool Kumar No.258. Thereafter, laboratory examinations were

carried out to detect the presence of semen/blood/saliva/hair/bone/fiber on the exhibits shown in her report (the contents of those parcels). While examining bone Ex.1 marked as Ex.P103 in the court, it was cut into two pieces for the examination. She had examined the exhibits by performing chemical Tests and microscopy and based upon her examinations, human semen was detected on Ex.3A (underwear stated to be of Sunil), marked as Ex.P229 in the court, Ex.4 (underwear stated to be of Manvir) marked as Ex.P233 in the court, Ex.5A (underwear in parcel stated to be of Santosh), Ex.6A (underwear stated to be of Parmod) marked as Ex.P240 in the court, Ex.7A (underwear stated to be of Sarwar) marked as Ex.P244 in the court, Ex.8A (underwear stated to be of Pawan) marked as Ex.P248 in the court, Ex.9A (underwear stated to be of Rajesh) marked as Ex.P252 in the court, Ex.10A (underwear stated to be of Sunil son of Suraj Bhan) marked as Ex.P256 in the court, Ex.12A & Ex.12B (condoms) marked as Ex.P49 & Ex.P50 in the court, Ex.16 (lady' underwear stated to be recovered from the spot) marked as Ex.P47 in the court, Ex.20 (blanket stated to be recovered from the spot) marked as Ex.P48 in the court, Ex.21D (sweater stated to be of Rajesh) marked as Ex.P162 in the court, Ex.22A & Ex.22C (jacket and T-shirt in separate sealed parcels stated to be of Santosh @ Nepali), Ex.23A & Ex.23B (Track pant and T-shirt stated to be of Pawan) marked as Ex.P99 & Ex.P100 in the court, Ex.24A & Ex.24B (Track pant and shirt stated to be of Sarwar) marked as Ex.P128 & Ex.P127 in the court and Ex.25A (pant stated to be of Manvir) marked as Ex.P133 in the court.

Further, blood was detected on Ex.9A (underwear stated to be of Rajesh) marked as Ex.P252 in the court, Ex.20 (blanket stated to be recovered from the spot) marked as

Ex.P48 in the court, Ex.21A & Ex.21D (pair of shoes & socks and sweater stated to be of Rajesh) marked as Ex.P165, Ex.P166 & Ex.P164 in the court.

Further, traces of blood were detected on Ex.5B (pubic hair stated to be of Santosh @ Nepali), Ex.16 (lady' underwear stated to be recovered from the spot) marked as Ex.P47 in the court, Ex.22A (jacket stated to be of Santosh @ Nepali).

Further, saliva was detected on Ex.11E(3) and 11E(14) biri but) marked as Ex.P317 in the court and traces of saliva on Ex.11E(8) (biri but) marked as Ex.P316. Hair Ex.15 marked as Ex.312 in the court and Ex.20 (hair recovered from blanket) marked as Ex.P48 in the court was found to be rooted and human in origin. Bone Ex.1 marked as Ex.P103 in the court was found to be human in origin. After examination, she prepared her report Ex.P17 which bears her signatures

(ah) PW57-Sidharth Kaushik, Senior Scientific Officer (Serology) DNA Division, FSL (H), Madhuban deposed that eight accused persons in the case were produced before me and he caused taking of their blood samples. Further, on 03.03.2015, he also received 17 parcels from Biology Division, FSL (H), Madhuban. DNA was extracted from items no.1A, 1B, 2, 3, 4, 5A, 5B, 6A, 6B, 7, 8, 9, 10, 11A, 11B, 11C, 12A, 12B, 13 to 25 as mentioned in his report Ex.P22 and he subjected it to autosomal and Y STR analysis by using identifier and Y- filler kit.

The allelic pattern of items no.1A, 3, 10, 15 and 17 matched with the allelic pattern of item no.23. The allelic pattern of item no.1A matched with allelic pattern of item no.20. The allelic pattern of item no.4 matched with allelic pattern of item no.24. The allelic pattern of item no.16 matched allelic pattern of item no.22. The allelic pattern of item no.7 matched with allelic pattern of item no.3, 5A, 6A

and 14.

After examining all the exhibits, he concluded that autosomal STR analysis indicates that DNA profile of seminal stains on source of item no.1A (salwar) marked as Ex.P66 in the court, source of item no.3 (stone pieces) marked as Ex.P23 & Ex.P24 in the court, source of item no.10 (underwear stated to be of Rajesh) marked as Ex.P252 in the court, source of item no.15 (blanket) marked as Ex.P48 in the court, source of item no.17 (jacket stated to be of Santosh @ Nepali) matched with DNA profile of Santosh (source of item no.23). DNA profile of source of item no.4 (condom) marked as Ex.P29 in the court matched with DNA profile of Pawan (source of item no.24). DNA profile of source of item no.16 (woolen sweater) marked as Ex.P164 in the court matched with DNA profile of Rajesh @ Ghochru (source of item no.22).

DNA profile of source of item no.7 (bone) marked as Ex.P103 in the court matched with DNA profile of blood stains present on source of item no.3 (stone pieces) marked as Ex.P23 & Ex.P24 in the court, source of item no.5A (glass slides) marked as Ex.P323 & Ex.P324 in the court, source of item no.6A (glass slides) marked as Ex.P326 to Ex.P329 in the court, source of item no.14 (lady' underwear stated to be recovered from the spot) marked as Ex.P47 in the court and conclusively proves that they all are of same biological origin.

The Y-STR analysis indicates that DNA profile of seminal stains on source of item no.1A (salwar), source of blanket is inadvertently mentioned as item no.16 whereas the blanket in the report is mentioned as item no.15 matched with the DNA profile of Santosh (source of item no.23). DNA profile source of item no.1A (salwar) also matched with DNA profile of Manvir @ Mani, source of item no.20. DNA profile source of item no.16 (woolen sweater) also matched with

DNA profile of Rajesh @ Ghochru, source of item no.22 and conclusively proves that all are of same biological origin.

He took blood sample of Swarupa Sunar, the mother of deceased 'M' and conducted DNA test. His evidence shows that there was matching of DNA profile of the mother and the deceased 'M'. Thus, the prosecution squarely proved that it was 'M' who was the victim, the daughter of Swarupa Sunar;

- (ai) The defence examined its witnesses DW1-Kapoor Singh, DW2-Jai Bhagwan and DW3-Yogender Sagar in support of their case;
- (aj) DW1-Kapoor Singh deposed that soil of the land owner owned by him near the canal is similar throughout the village from Canal. His evidence is of no significance;
- (ak) DW2-Jai Bhagwan, Kanungo, Rohtak deposed for corroborating the version of DW1-Kapoor Singh that Kapoor Singh really owned the land. His evidence is also not of no significance;
- (al) DW3-Yogender Sagar, Press Correspondent of News Paper, Dainik Bhaskar, Rohtak deposed that he had gone to the spot when he came to know about the dead body being fetched out in the fields and taken photographs. At that time, according to him, on the spot, police officers were inspecting the site in an around area of 100 meters and one shirt was recovered from the spot and some broken pieces of cemented sheets were lying there. According to him, on 08.02.2015, again he had gone to the spot and he saw police making search in the area. In the cross-examination, he admitted that he did not have any personal knowledge about the incident or the facts and circumstances of the case nor he was called for joining investigation. His evidence is of no use to the defence;

8. Having thus, briefly taken stock of the evidence that has come

before the Court from the prosecution witnesses, we proceed to record our further reasons.

9. PW2-Amar and PW5-Janki, the brother and sister of the deceased 'M' respectively and the DNA sample test of her mother clearly proved that the victim was 'M', the real sister of PW5-Janki. PW46-Dr. Mahesh Chandra Sharma, Neuro Surgeon, Sai Hospital, Haldwani (Nanital) clearly proved that the victim 'M' was brought to him for treatment and he had prescribed certain treatment for her mental illness. Thus, it is proved that the victim was mentally ill woman. That the articles seized by the police from the spots particularly the sweater of the victim 'M' was identified by PW2-Amar stating that it was he who had gifted it to her sister 'M' and was one of her favourite sweater. It is also deposed that she was wearing that sweater when she went missing on 09.02.2015. PW5-Janki deposed that the articles seized from the spot, namely one artificial chain, hair band and lady's underwear were purchased by PW5 from the market for her sister 'M' and all those articles along with underwear were worn by her that is the victim 'M' on the day when she went missing. It is thus, proved by the prosecution beyond any doubt that the dead body was of victim 'M', the sister of PW5-Janki and it was found in the field at village Bahu Akbarpur.

10. At this stage, it would be appropriate to reproduce the finding of the Board which conducted the postmortem vide report Exhibit P6 as to the external examination as under:-

“- *The length of the body was 147 cm.*

- *Mark of ligature on neck & dissection-Gnawing effects present over the neck are described below in detail.*
- *The dead body was of a female individual found to be wrapped in a white & yellowish plastic palli.*
- *The whole body was lying naked and was soiled at places.*
- *The scalp was missing from all over the vault of the skull except right fronto-temporal region and lateral half of parietal region which showed gnawing effects.*
- *The available scalp had 45 to 50 cm long, black hair which could be pulled out on moderate traction.*
- *The vault of skull was lying exposed in the region-whole of left half, medial half of the right parietal region & entire occipital region.*
- *The gnawing effects were also present over the face-whole of left side & lateral half of right side in the maxillary & mandibular regions as a result of which underlying facial bones were lying exposed.*
- *The teeth were also lying exposed on the left side.*
- *The gnawing effects were also present over the neck all around.*
- *All the soft tissues including skin & subcutaneous tissues were missing except laryngo-tracheal structures, cricoid & thyroid cartilages.*
- *Gnawing effects were also present over the upper half of the chest wall on the front & entire back in the thoracic region along with both the lateral aspects.*
- *Soft tissues (skin, subcutaneous tissues and muscles) were missing including the gnawing effects were present in the form of fractures (nibbling of the lateral half of both the clavicles, all ribs on their anterior ends along with the vertebrae).*
- *Both the upper extremities with the scapula were missing.*
- *Right lobe of the liver was lying exposed through the defect produced by gnawing of chest wall on the right side.*
- *The whole of the contents of the thoracic cavity were found missing except trachea & oesophagus.*
- *Right eye was closed. Left eyelids were missing with gnawing effects around the left eye.*
- *The body was emitting mild foul smell.*
- *Rigor mortis was in passing off phase.*
- *Greenish discolouration of skin was present all over the abdominal wall.*
- *In the anal canal, **a rectangular shaped piece of stone (appeared to be asbestos sheet) was found to be forcibly thrust into the anus, with 3 cm length lying outside the anal verge. On removal of it from the anus, it measured 16x6.5x0.5 cm with irregular margins (13 cm length of this strip was lying in the anus & 3 cm was lying outside the anal verge). The inserted portion of the stone was smudged with***

blood all over it at places.

The Board also noticed the following injuries over the body:-

- (1) Diffuse peri-cranial infiltration of blood over an area of 9x7 cm over the top of head. On dissection of the skull, diffuse subdural hemorrhage was present confined to both the parietal hemispheres over an area of 3x3 cm on either side of midline.
- (2) Diffuse reddish contusion of size 8.5x7 cm over the right parietal region of the scalp just below the parietal eminence. On dissection, the underlying tissues were ecchymosed including the peri-cranial infiltration of blood. On further dissection of the skull, diffuse subdural hemorrhage was present over the parieto-temporal region on the right side.
- (3) Reddish abraded contusion of size 8x3 cm over the right side of front of abdominal wall, situated 3 cm from midline & 17 cm from the right anterior superior iliac spine. On dissection, the underlying tissues were ecchymosed.
- (4) Reddish contusion of size 5x2 cm over the right iliac region situated 5 cm above the right anterior superior iliac spine. On dissection, the underlying tissues were ecchymosed.
- (5) Reddish contusion of size 3x2 cm over the right anterior superior iliac spine. On dissection, the underlying tissues were ecchymosed.
- (6) Three reddish abraded contusions with size 7x1.5 cm, 6x2 cm & 8x2.5 cm over an area of 26x8 cm on the anterolateral aspect of right thigh, situated 30 cm from the right knee joint. On dissection, the underlying tissues were ecchymosed.
- (7) Reddish contusion of size 13x6 cm over the posterior aspect of the right thigh, situated 25 cm from the posterior superior iliac spine. On dissection, the underlying tissues were ecchymosed.
- (8) A reddish contusion of size 8x5 cm over the antero-medial aspect of the left thigh, situated 25 cm from the left knee joint. On dissection, the underlying tissues were ecchymosed.
- (9) Pubic hairs were 1.5x2.0 cm long, black in colour. There was diffuse reddish contusion present over the perineum. Hymen was torn at 7, 6 & 5 O'clock positions with the margins irregularly torn & reddish in colour. The posterior vaginal wall was lacerated along with laceration of the cervix & the posterior & upper portion of the uterus. All the tears were reddish in colour fresh

along with the collection of about 250 cc of blood along with blood clots.

(10) The anal region showed diffuse reddish contusion along with tear of the anal canal at 12&6 O'clock positions (vertically) with tearing of the anal verge, whole of the anal canal, rectum & sigmoid colon. The margins of the tears of these structures were reddish in colour."

11. PW3-Dr. Vijay Pal Khanagwal also deposed that after opening of abdominal wall of the deceased 'M', an irregular shaped piece of stone (appeared to be part of asbestos sheet) was visible in the pelvic cavity between the loops of gut. On further examination, exploration, the mesentery & all other soft tissues in the vicinity along with the loops of gut were found contused. The terminal portion of large gut was found to be torn irregularly by above described piece of stone, the shape of which (piece of stone) was like "Kalam" shaped.

The piece of stone was soiled with blood and faecal matter. In the vicinity of terminal portion of large gut, posterior surface of the urinary bladder was contused (diffusely). The pelvic cavity contained about 200-250 cc of blood admixed with faecal matter.

The ends of long bones of lower extremities were fused. Medial end of clavicles were fused. Body of sternum was fused, xiphisternum & manubrium were not fused. Cranial sutures were not obliterated. All the permanent teeth except both left sided 3rd molar & right upper 3rd molar had erupted which showed mild to moderate grinding. Right lower 2nd molar was carious while the left lower 1st molar was missing with its socket absorbed.

12. Detailed findings were also given by the Board in relation to

the injuries and the cause of death which we reproduce hereunder:-

- “- The meninges (membranes of brain) and hyoid bone were intact.
- Gnawing effects were seen over larynx and trachea.
 - Pleurae, lungs, pericardium & heart were missing.
 - Large vessels were empty.
 - Pharynx, oesophagus, liver & spleen were softened.
 - Kidneys were missing with gnawing effects seen over both lumbar regions.
 - Stomach contained approximately 150 cc of yellowish semi-digested food material.
 - Small intestines contained digested food material and gases.

And after conducting the autopsy, it was opined that the cause of death in this case was cranio-cerebral damage along with utero-vaginal rupture & rupture of large gut, rectum & anus which were ante-mortem in nature, homicidal in manner & these could cause death immediately. Viscera were also preserved for chemical analysis for detection of any poisonous substance including stupefying agent/intoxicant

.....

Accordingly, multiple injuries were observed by the Board of doctors upon that body and in view of their own specific findings read with FSL reports Ex.P12 to Ex.P22, PW3 Dr. Vijay Pal Khanagwal has stated that vaginal as well as anal intercourse had been committed with the deceased and that as per the opinion of Board, the cause of death in this case was cranio-cerebral damage (head injury) along with utero-vaginal rupture & rupture of large gut, rectum & anus which were ante-mortem in nature, homicidal in manner & these could cause death immediately. Further, the doctor has also proved stone pieces (asbestos sheet) Ex.P23 and Ex.P24 out of which one was removed from the anal canal which was 16x6.5x0.5 cm with irregular margins (13 cm length of that strip was lying inside the anus and 3 cm was lying outside the anal verge) whereas another was found in the abdominal cavity and one condom Ex.P29 which was also removed from the abdominal cavity of deceased. Further, PW3 opined that the deceased was subjected to vaginal and anal intercourse.”;

13. We are shocked and aghast to see the above number of injuries and nature of injuries caused to the victim 'M' with the brutal and

predatory acts of perpetrators of the barbaric crime.

14. The submission made by the learned counsel for the appellants/accused persons that PW5-Janki disclosed most of the material evidence only in the supplementary statement recorded at a later point of time and therefore, her evidence ought to be rejected, is misconceived. We reject the said submission. After all, PW5-Janki was working woman for earning her livelihood by cleaning utensils at various houses and was hardly having any education. That apart, when her first statement was recorded, she must have been in deep shock particularly looking to the manner in which her younger sister was raped and done to death.

15. After the investigation was handed-over to the S.I.T., the police swung into action and acting on secret information caught hold of Padam alias Parmod, resident of village Gaddi Kheri who, on interrogation, obviously disclosed the names of all other accused persons who had committed crime along with him. We have already made a reference to the disclosures made by accused Padam alias Parmod who was first apprehended by the police.

16. As to the scheme of Sections 24, 25, 26 and 27 of the Evidence Act, and in particular regarding the recording of confessions of the accused person in the immediate presence of Naib Tehsildar, the Executive Magistrate-PW30-Gopal Singh, vehement arguments have been made before us. Learned counsel for the appellants also pressed into service Full Bench judgment of **Gauhati High Court** in the case of **Shri Ajay Chakraborty Vs. State of Assam**, in Criminal Appeal No.7 of

2008, decided on 26.10.2017, in which it is held that the word 'Magistrate' in Section 26 of the Evidence Act would only mean Judicial Magistrate and not the Executive Magistrate like PW30-Gopal Singh. We proceed to decide the question.

17. It is not in dispute and rather an admitted fact that the incident that took place was looked upon by the residents of Rohtak as blatant shame and the people were chagrined, riled and were also under trepidation. PW4-Rajesh son of Raj Kumar was a Senior Vice President of Haryana Pradesh Vyapar Mandal, Rohtak. They had taken out a candle march immediately after the incident came to the light, demanding arrest of the guilty. They were so disturbed that on 12.02.2015 PW4-Rajesh along with PW-9 Gulshan Nijhawan, PW-19 Ajay Nijhawan and PW-24 Tushar Aneja had visited the Police Station to know about the progress of the investigation but they were initially stopped at the gate but called in later. Thereafter, interrogation of the accused-Pawan was made by SHO M.I. Khan in the presence of PW-4 Rajesh and the persons accompanying him. PW-30 Naib Tehsildar Gulab Singh, Executive Magistrate and other police officers were present in civil cloths at that time and the interrogation of the accused-Pawan was made. SHO M. I. Khan in the presence of PW-4 Rajesh and others and obviously in the immediate presence of PW-30 Gulab Singh, recorded the disclosures made by each accused and pursuant recovery thereto which has also been deposed by PW-4 Rajesh, PW-9 Gulshan Nijhawan, Ajay Nijhawan and PW-24 Tushar Aneja. We have already made a mention about the nature of

disclosure and the recoveries made by all the accused persons and therefore, there is no need to repeat it. PW-30 Gulab Singh also deposed in the same manner. In the cross-examination, he stated:

“xxx...xxx... Interrogation was started at about 6.30 A.M. Besides SI/SHO M.I. Khan, two more police officials in civil uniform were present there. I did not serve with accused any notice that they were not bound to make a disclosure. Volunteered in my presence, that fact was made clear by SI/SHO M.I. Khan to them at the time of their respective interrogation. I did not issue any certificate that the accused had suffered disclosure statement voluntarily.”

18. The above cross-examination was made in the light of the procedure stated in Section 164 Cr. P.C.

19. With the above preface regarding the evidence tendered by the prosecution through these witnesses, we now proceed to deal with the legal question that has been hotly contested before us.

20. Mr. Vinod Ghai, learned Senior Advocate for the appellants and other learned Advocates submitted that the word 'Magistrate' occurring in Section 26 of the Evidence Act, 1872, does not mean a person like Gulab Singh PW-30, who was merely an Executive Magistrate and not a Judicial Magistrate. Section 26 of the Evidence Act contemplates Magistrate means Judicial Magistrate. Therefore, the confession contemplated by Section 26 of the Evidence Act made in the immediate presence of Magistrate, while accused is in police custody, must be held to be before the Judicial Magistrate. Relying on Section 164 of the Cr.P.C. regarding recording of confession before Judicial

Magistrate, he submitted that Section 164 Cr.P.C. provides for modalities for recording confession. The said provision provides for safeguard for the fairness and to ensure that there is no prejudice or persecution of the accused. Referring to the methodology, with which a confession under Section 164 Cr.P.C. is recorded, he submitted that except for the bare word of PW-30 Gulab Singh, there is no contemporaneous record prepared by him, as is required by Section 164 Cr.P.C. According to him assuming but not admitting that PW-30 Gulab Singh could be the Magistrate under Section 26 of the Evidence Act, the confession recorded under Section 26 as claimed by the prosecution, will have to be treated as the one prohibited by law. He however conceded that in accordance with the settled legal position qua Section 27 of the Evidence Act, the recoveries made pursuant to the disclosure statements would be admissible in evidence. But then he also submitted that the recoveries made, cannot be believed as more than one number of accused at the same time, are said to have made disclosures and recoveries one by one. Such a mode of making recovery is unknown to law according to Mr. Ghai. We have ourselves found one more judgment of the Division Bench of the Bombay High Court in the case of **Dagdu Dharmaji Shindore Vs. State of Maharashtra** reported in **2005 ALL MR (Cri) 1450**. The learned counsel for the parties before us submitted that there is no judgment of the Supreme Court or of this Court on this legal question.

21. *Per contra*, learned counsel for the respondents vehemently opposed the submissions on the above legal question and submitted that

word 'Magistrate' in Section 26 of the Evidence Act includes Executive Magistrate.

Section 26 of the Evidence Act, 1973 reads thus:-

“26. Confession by accused while in custody of police not to be proved against him-*No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.*

[Explanation- In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George

*[***] or else where, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).”*

22. Then Section 3 of the Code of Criminal Procedure, 1973, reads thus:

“3. Construction of references.-

(1) In this Code, -

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires, -

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall, -

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area,

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed “before” the commencement of this Code, -

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the function exercisable by a Magistrate relate to matters-

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.”

23. The question of law that arises for consideration is framed thus:-

Whether the expression ‘Magistrate’ appearing in Section 26 of the Evidence Act would only mean Judicial Magistrate or would include Executive Magistrate?

24. Examining the case of **Dagadu Dharmaji Shindore Versus State of Maharashtra**, 2005 ALL MR(Cri) 1450, we find that in the facts of that case that accused committed murder of his wife, daughter and son by cutting their throats by means of razor blade. He thereafter tried to kill himself by the same razor blade but the neighbours caught hold of him and was taken to the hospital. Exhibit 15, his dying declaration, was recorded by PW-1 Shalini Phansalkar, JMFC after certification by Doctor. PW-11 Special Executive Magistrate, Mr. Kamalakar Adhav recorded confession of the accused on 17.05.1991 produced at Exhibits 45 and 46,

which were rejected by the trial court itself since they were not recorded after following the procedure contemplated by Section 164 Cr.P.C. Exhibit 15 recorded by PW-1 Ms. Shalini Phansalkar, JMFC, merely became statement under Section 164 Cr.P.C. as the accused survived after treatment. The Bombay High Court however made the following observations in paras 12 and 16 of its judgment, the relevant portion of which reads thus:

“12. xxx... Section 26 of the Evidence Act bars admissibility of the confession made by a person in the custody of the police officer unless it was made in the immediate presence of a Magistrate which could be proved against him. In our view, the presence of Magistrate contemplated under Section 26 of the Evidence Act cannot be other than the Magistrate following the mandatory provisions of Section 164 of Cr. P.C. ...xxx...

xxx... xxx... xxx...

16. From the aforesaid cases, it is clear that presence of police near the accused where his statement was recorded would make such statement inadmissible by virtue of Section 26 of the Evidence Act. In this case Dr. Paralikar having admitted that he was examining and questioning the patient (accused) and the patient had made the inculpatory statement in the presence of the two police constables, the inculpatory statement recorded by Dr. Paralikar cannot be used as extra judicial confession being inadmissible by virtue of Section 26 of the Evidence Act.”

25. Now examining the case of **Velu Versus State**, 2009 (11)

RCR (Criminal) 17, in the facts of that case; the accused was produced

before PW-7 Tahsildar Thangavel on 10.06.2003 who recorded confession statement Exhibit P-11 given by the accused. In para 18 of the judgment the Division Bench relied on Rules 72 and 73 of the Criminal Rules of Practice and Circular Orders, 1958 and stated that Rule 73 clearly stated about recording of confession before a salaried Magistrate First or Second Class. Thus the Madras High Court relied on Rule 73 cited supra. The said decision is of no relevance as no such rule exists here.

26. The Full Bench decision of the Gauhati High Court in the case of **Kartik Chakraborty and others Versus State of Assam**, decided on 26.10.2017, is the decision directly on the point. The referral Bench which made reference to the Full Bench had made the following observations in its referral order:-

“15. The scheme of the Code of Criminal Procedure does not envisage participation of a Judicial Magistrate along with the police in the course of investigation. The role of the Magistrate during the course of investigation is specifically defined. Firstly, he has to receive the FIR submitted and make a note of the date and time of submission of the FIR. Secondly, the accused after arrest have to be produced before a Magistrate within 24 hours and the Magistrate has to deal with the accused so produced either by giving police remand or judicial custody or bail. Thirdly, the Magistrate has to deal with the extension of the period of judicial remand under Section 167 Cr.PC. Further, in case of summons trials, if investigation is not completed within a period of six months, the Magistrate can direct stoppage of the investigation. Fourthly, the Magistrate can record the confessional statement of the accused under Section 164 and statement of

any witness under Section 164(5). After completion of investigation, when final report is filed, judicial trial has to take place.

16. The role of an Executive Magistrate in the Code of Criminal Procedure is also envisaged under Sections 174 and 176. In a case of suicide or unnatural death, the Executive Magistrate can conduct inquest and in specific cases, inquest have to be conducted mandatorily by the Executive Magistrate. An Executive Magistrate, under Section 174, can enquire into the cases of death under such circumstances as envisaged in the proviso. The Magistrate shall also have to conduct exhumation proceedings.

17. In the scheme of the Code of Criminal Procedure, an Executive Magistrate do co-ordinate with the police effectively in conducting investigation. However, the Judicial Magistrates only pass judicial orders like remand, bail, recording confession under Section 164 but, while doing so, they would not associate with the police in any manner in the course of investigation. While recording confessional statement under Section 164, the Magistrate has to take precaution to keep away the presence of police. In the context of said legal settings, the expression Magistrate used in Section 26 of the Evidence Act cannot be construed and understood as a Judicial Magistrate because Judicial Magistrate can never co-ordinate with the police in the course of interrogation or investigation for collecting evidence.

18. The Explanation in Section 26 helps in a way to understand the expression Magistrate appearing in Section 26. In the Explanation, there is a reference to village Head discharging Magisterial functions in the Presidency town or village Headman exercising powers of Magistrate under the Code of Criminal Procedure, 1882, is not deemed a

Magistrate within the meaning of Section 26. Be that as it may, the Code of Criminal Procedure, 1882, is repealed. The Explanation part of Section 26 has become obsolete and irrelevant. Nonetheless, the intention of the legislature could be gathered from the said Explanation to mean that the expression Magistrate would mean an Executive Magistrate and not a Judicial Magistrate.”

27. The Full Bench of the Gauhati High Court made a survey of the provisions of Code of Criminal Procedure 1861 and Indian Evidence Act, 1872 stating that Evidence Act was passed 11 years after the Code of Criminal Procedure. It has been stated that Section 148 of the old Cr.P.C. of 1861, was equivalent to Section 25; Section 149 Cr.P.C. finds place in Section 26 of the Evidence Act and Section 150 Cr.P.C. finds expression in Section 27 of the Evidence Act with certain modification of language. Section 148, 149 and 150 of the Cr.P.C. 1861 having been incorporated in Evidence Act, these provisions do not find place in the Criminal Procedure Code of 1973 as they have been engrafted in Sections 25, 26 and 27 of the Evidence Act. The Full Bench then observed that in the year 1872 when the Evidence Act was enacted, there was no concept of separation of powers between judiciary and executive or was in a nebulous state. The Full Bench then stated thus in paragraphs 26 and 27 of its judgment that 1973 Code was enacted 23 years after the adoption of the Constitution when separation of judicial powers from the executive was achieved:

“26. Section 26 appears in the Evidence Act immediately after Section 25. Section 25 is specific. It says that no

confession made to a police officer shall be proved as against a person accused of any offence. Section 26 appears to be in continuation of Section 25 with an exception carved out, the exception being that confession made by a person while in the custody of a police officer may be proved against him if it is made in the immediate presence of a Magistrate. Therefore, a conjoint reading of Sections 25 and 26 of the Evidence Act would go to show that no confession made by a person to a police officer while in custody shall be proved against him unless it is made in the immediate presence of a Magistrate. We have already discussed that when this provision was initially provided in the Code of Criminal Procedure, 1861 and thereafter incorporated in the Evidence Act, 1872, the concept of separation of powers between the executive and the judiciary was either non-existent or was in a nebulous state. Therefore, it is quite but natural that the reference in Section 26 of the Evidence Act is only to a Magistrate.

27. Now, we may look at the Code of Criminal Procedure, 1973, which was enacted 23 years after adoption of the Constitution and by which time separation of judicial powers from the executive was achieved in the country barring a few hill states or some other tribal areas. In this context, Section 3 of the Code of Criminal Procedure, 1973 clearly mentions that any reference in the said Code to a Magistrate without any qualifying words would mean a Judicial Magistrate in relation to an area outside a metropolitan area or to a Metropolitan Magistrate in relation to a metropolitan area.”

28. With due respect we are unable to agree with the aforesaid line of reasoning. There is no manner of doubt that the Code of 1973 comprehensively replaced the Code of 1861 and the Parliament was fully aware about the existence of Evidence Act 1872 and the various

expressions in the said Code of 1861 including 'Magistrate' in Section 26 of the Evidence Act, coupled with the fact that many expressions in the Evidence Act 1872, were intermixed with expressions in 1973 Code. For the first time the Executive Magistrates (Section 20) and the Special Executive Magistrates (Section 21), were inserted in the Code of 1973, having been fully aware about the expression 'Magistrate' in Section 26 Evidence Act. That is further highlighted upon perusal of the following opening words in sub-Section (4) of Section 3 of the Cr.P.C. 1973.

“(4) Where, under any law, other than this code, xxx....”

29. This would mean Evidence Act, 1872, which is the law other than the Code. But in para 27 (supra), there is reference made to Section 3 of the Code, and to be precise sub-Section (1) which has no relevance because sub-Section (1), (2) and (3) relate to references “In this Code” and sub-Section (4) to “any other law”. Similar misreading was made by Division Bench (affirmed by Full Bench) in para 26, without considering that it was only sub-Section (4) which was relevant, vide **State of Assam vs. Anupam Das**, 2007 (3) GLT 697. Not only that the Parliament was fully aware that after the adoption of the Constitution; there was a separation of judicial power from the Executive. It was aware that Section 26 of the Evidence Act uses the word 'Magistrate'. The Parliament was further fully aware about the provision of Section 164 of the Code of 1973 for recording of confession by Judicial Magistrate and the procedure that is required to be followed for recording any such confession. To express in other words, Section 26 of the Evidence Act makes deliberate use of the

expression ‘Magistrate’ and not the ‘Judicial Magistrate’. The Parliament was also aware that Section 3(4) of the Code of Criminal Procedure was incorporated with full knowledge about the said expression in Section 26 of the Evidence Act, 1872.

30. In para 29 of its judgment the Full Bench while agreeing with the view of the Division Bench in the case of **Anupam Das (supra)**, made the following observations in the case of **Kartik Chakraborty (supra)**:

“29. xxx... xxx... After a detailed analysis, Division Bench expressed the view in unequivocal terms that it would be a strange logic if a statement recorded by a Judicial Magistrate under Section 164 Cr.P.C. would be vitiated for non-compliance of the conditions mentioned therein rendering it inadmissible in evidence but on the other hand to hold that the expression “Magistrate” contemplated under Section 26 of the Evidence Act need not even be a Judicial Magistrate and therefore under no obligation to comply with the requirements of Section 164 Cr.P.C. and yet such confession would be admissible in evidence.”

31. In our humble opinion, the above reasoning would indirectly mean omission by the legislature in not understanding the logic expressed above. We cannot agree.

32. After discussing the various provisions of Cr.P.C. in paragraphs 24, 25 and 26, the Full Bench also referred to the Supreme Court’s judgment in the case of **Bheru Singh Versus State of Rajasthan**, (1994) 2 SCC 467 by quoting para 16. A careful reading of paragraph 16 itself shows the following sentence from the Supreme Court’s judgment:

“Section 26 of the Evidence Act deals with partial ban to the

admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case.

33. Thus the Supreme Court was not concerned with the interpretation of Section 26 of the Evidence Act and therefore, the aforesaid sentence in the case of **Bheru Singh (supra)** was of no assistance.

34. The Full Bench thereafter stated thus, in paras 28 and 31 of its judgment:

“28. The Legislature was obviously of the view that any kind of confession by an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of mankind. However, the Legislature recognized an exception to the rule contained under Sec 26, i. e. a confession made by an accused, who is in the custody of the police, to some person other than a police officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a police officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods.

Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of Article 20 Sub Article 3 of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties u/s 164 (2) Cr.PC on the Judicial Magistrate recording statement u/s 164 Cr.PC. It would be strange logic that while a statement recorded by a Judicial Magistrate u/s 164 Cr.PC would be vitiated for non-compliance of the conditions stipulated u/s 164 (2) and (4) of the Cr.PC and cannot, therefore, be used against the maker of the statement, but the Magistrate contemplated u/s 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, is under no obligation to comply with the requirements of Sec 164 (2) and (4) of the Cr.PC, but the confession recorded by such a Magistrate can be proved against the accused for establishing his guilt.

29. xxx... xxx... xxx...

30. xxx... xxx... xxx...

31. xxx... A plain and simple reading of paragraph 28 would go to show that the previous Division Bench had observed that it would be a strange logic if a statement

recorded by a Judicial Magistrate under Section 164 Cr.PC would not be admissible in evidence if the conditions stipulated therein are not complied with whereas a statement made before an Executive Magistrate under Section 26 of the Evidence Act where there is no procedural safeguards as provided under Section 164 of the Code of Criminal Procedure, 1973, would be admissible in evidence. Following such analysis, conclusion was reached in paragraph 29 that the expression “Magistrate” appearing in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate.”

35. We have carefully gone through the reasons adopted by the Full Bench in para 28. Having given our careful thought, with respect, we are of the opinion that the reasons given by the Division Bench in the case of **Anupam Dass (supra)** followed by the Full Bench in the aforesaid para 28 amount to deciding the validity of Section 26 of the Evidence Act qua the expression 'Magistrate' and declare the same 'ultra-vires'. In the absence of any articulated challenge to the validity of Section 26 of the Evidence Act, there was no occasion for the Division Bench in **Anupam Dass (Supra)** and the Full Bench to indirectly declare Section 26 as invalid or ultra vires Article 20 (3) of the Constitution of India or for the alleged logic described as strange logic. In our humble opinion, that will amount to questioning the wisdom of the Parliament in the absence of specific legal challenge to the provision of Section 26 of the Evidence Act in appropriate proceedings, inter alia, on the touchstone of comparison with Section 164 Cr.P.C. We are unable to agree that such a course could

be adopted by indirectly replacing the word ‘Magistrate’ with the word ‘Judicial Magistrate’ in Section 26 of the Evidence Act against the will of the Parliament.

36. According to us even with the best of intention, if there is no statutory expression of the intention, the court cannot supply words for the sake of achieving the alleged intention of the law maker. It is entirely within the realm of the law maker to express clearly what they intend. No doubt, there is a limited extent to which the court can interpret a provision so as to achieve the legislative intent. That is in a situation where such an interpretation is permissible, otherwise feasible, when it is absolutely necessary, and where the intention is clear but the words used are either inadequate or ambiguous. That is not the situation here. The Full Bench replaced the authority and jurisdiction of the “Magistrate” by “Judicial Magistrate” which is a major change which could be made only by the Legislature. The court, in the process of interpretation, cannot lay down what is desirable in its own opinion, if from the words used, the legislative intention is otherwise discernible. As we have already noted above, the duty of the court is not to lay down what is desirable in its own opinion. Its duty is to state what is discernible from the expressions used in the statute. The court can also traverse to an extent to see what is decipherable but not to the extent of laying down something desirable according to the court if the legislative intent is otherwise not discernible. What is desirable is the jurisdiction of the law-maker and only what is discernible is that of the court.

37. In the case of ***Shri Ram Krishna Dalmia & others Versus Shri Justice S. R. Tendolkar and others***, AIR 1958 SC 538, the Apex Court observed thus in (c) and (d):

“(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds:

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.”

38. In the case of ***Pinner Versus Everett***, (1969) 3 All ER 257, Lord Reid with majority opinion observed thus:

“In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.”

39. Justice Bushrod Washington of the United States, Supreme Court said “It is but a decent respect due to the wisdom, the integrity and the patriotism of the Legislative body, by which any law is passed, to presume in favour of its validity until its violation of the Constitution is proved beyond a reasonable doubt.”

40. To repeat, sub-Section (4) of Section 3 of the Criminal Procedure Code 1973 opens with words 'where, under any law, other than this Code', obviously refers to the Evidence Act. Thereafter clause (a) of sub-Section (4) of Section 3 of Criminal Procedure Code, 1973 in clear terms speaks about the function to be performed by the Judicial Magistrate. Thus as per Clause (a) the Executive Magistrate is neither involved at the stage of Section 26 of the Evidence Act in the matter of appreciation or sifting of evidence or formulation of any decision nor would expose any person to any punishment or penalty or detention in custody and also with no effect of sending such person for trial in Court. To repeat, under the scheme of the Code of 1973 sending for trial in the Court is the job of the committal Court or punishing any person or detaining in the custody is the function of a Judicial Magistrate and not of the Executive Magistrate. Therefore, it is Clause (b) of sub-Section (4) of Section 3, which would be relevant in respect of Executive Magistrate. The list stated in that clause is illustrative which would mean that recording of statement of the accused under Section 26 of the Evidence Act in his immediate presence would also fall in the Clause (b). The function to take any decision, whether to withdraw for a prosecution or sanction a prosecution, is always subject to the decision by the judicial courts. We, therefore, find that the Parliament has, in clear terms, inserted sub-Section (4) defining function of 'Magistrate' in Clause (b). The function to be performed by a 'Magistrate' (Executive Magistrate) as per Section 26 of the Evidence Act would not be of the nature specified in

Clause (a) but would be as specified in Clause (b). Had there been any intention to confer the power only on the Judicial Magistrate, the Parliament would not have forgotten to insert the word 'Judicial' before the word 'Magistrate' in Section 26 Evidence Act. It is in the light of the above discussion, therefore, we are of the opinion that the reasons given by the referral Court as quoted earlier in paras 15 to 18, are in consonance with the scheme of the Criminal Procedure Code and the Evidence Act and therefore, we come to the conclusion that the expression 'Magistrate' (in Section 26 of the Evidence Act includes) 'Executive Magistrate' and not only the 'Judicial Magistrate'.

41. Having held that Executive Magistrate is a Magistrate for the purposes of Section 26 of the Evidence Act, we are bound to clarify in the light of the settled legal principles regarding confession, that the proof or admissibility of such confession cannot 'be all and end all' of the matter. To repeat, admissible evidence of confession as per Section 26 of the Evidence Act as discussed above is one of the pieces of evidence and may require corroboration in the given circumstances. We need not quote the said settled legal position herein.

42. With the above preface now we proceed to marshall the other evidence in addition to the proved confession recorded under Section 26 of the Evidence Act to find out whether the prosecution case could be believed and whether the same is trustworthy.

43. We have already stated about the evidence that has come on record and in particular in relation to the recoveries made from the spots

and from the accused persons. We would like to quote the evidence that has been culled out against each accused person by the trial Court (from Page No.223 to 234 of impugned judgment) as under:-

- “1) *Rajesh @ Ghuchru*
- a) *DNA matched*
 - b) *Blood on shoes, socks and wearing apparel of the accused i.e. his underwear and sweater*
 - c) *Semen on underwear, and wearing apparel of the accused.*
 - d) *Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks and stones and stone pieces/sheets recovered from the abdominal and anal cavity of deceased from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate as well as stone pieces/sheets recovered from the abdominal and anal cavity of deceased thrust by him.*
 - e) *Statement of accused Ex P151 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.*
 - f) *Statement of accused of Padam @ Parmod Ex.P136 vide which he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused were arrested.*
 - g) *Soil on the shoes matched with the soil of place of murder.*
- 2) *Sarwar @ Billu:*
- a) *Semen on the underwear and wearing apparel i.e. track pant and shirt of the accused.*
 - b) *Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks and stones from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate.*
 - c) *Statement of accused of Padam @ Parmod Ex.P136 vide he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.*
 - d) *Statement of accused Ex.P116 wherein he admitted his involvement in the crime in the immediate presence of a*

Magistrate.

e) Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone and sim card.

3) Pawan:

a) DNA matched

b) Semen on underwear and wearing apparel i.e. track pant and T shirt of the accused

c) Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks and stones from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate as well as recovered condom from the abdominal cavity of deceased having his source.

d) Statement of accused of Padam @ Parmod Ex.P136 vide he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.

e) Statement of accused Ex P30 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.

f) Soil on the shoes matched the soil of place of murder.

g) Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 and the fact also corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone.

h) admits in statement U/S 313 Cr.P.C. that he lead the police to places for demarcation and his shoes were taken into possession by the police.

4) Sunil @ Mada:

a) Semen on underwear

b) Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate.

- c) *Statement of accused of Padam @ Parmod Ex P136 vide he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.*
- d) *Statement of accused Ex P31 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.*
- e) *Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 and the fact also corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone and two sim cards.*
- f) *Admits in statement U/S 313 Cr.P.C. that he along with Sunil @ Sheela took the police where the Jumpher was burnt and ash was lifted by the police.*
- 5) *Manbir @ Manni:*
 - a) *DNA matched*
 - b) *Semen on underwear and wearing apparel i.e. track pant and shirt of the accused*
 - c) *Recovery of artificial silver chain, hair-band, semen and blood stained lady's underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks and stones from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate.*
 - d) *Statement of accused of Padam @ Parmod Ex.P136 vide he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.*
 - e) *Statement of accused Ex P117 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.*
 - f) *Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 and the fact also corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone and sim card.*
 - g) *Location of his mobile phone on Hisar Road at 7.21 pm on 01.02.2015 where the chemist shop is situated from where condoms were purchased.*
- 6) *Padam @ Parmod:*
 - a) *Semen on underwear*

b) Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, semen stained blanket, blood stained bricks and stones from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate.

c) Statement of accused Ex.P136 vide which he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.

d) Statement of accused Ex P152 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.

e) Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 and the fact also corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone and sim card.

f) Soil on the shoes matched with the soil of place of murder.

7) Sunil @ Sheela:-

a) Semen on underwear

b) Semen and blood on his blanket recovered from the spot

c) Recovery of artificial silver chain, hair-band, semen and blood stained ladies underwear of deceased, strands of hair, disposable glasses, used condoms, his semen and blood stained blanket, blood stained bricks and stones from the places of rape and murder which were in his exclusive knowledge and demarcated by him along with his co-accused in the presence of Executive Magistrate.

d) Statement of accused of Padam @ Parmod Ex.P136 vide he implicated himself and on the basis of which the conspiracy hatched by him and co-accused was revealed and co-accused was arrested.

e) Statement of accused Ex P152 wherein he admitted his involvement in the crime in the immediate presence of a Magistrate.

f) Call details and location of the mobile phone of accused at the places where rape was committed and murder of the deceased at relevant time on 01.02.2015 and he remained in contact with other co-accused from 01.02.2015 to 09.02.2015 and the fact also corroborated by admission in statement U/S 313 Cr.P.C. wherein admits use and possession of the recovered mobile phone and sim card.

g) *Admits in statement U/S 313 Cr.P.C. also that ash i.e. of burnt Jumpher was lifted by the police in his presence of the plot."*

44. We have already reproduced the nature of evidence available against each individual accused. Considering the arguments advanced by the learned counsel for the appellants, we proceed to deal with the evidence on record in the first place collectively. Following evidence in respect of all the accused can be summarised which has application to all the accused persons:-

- (i) **Statement of the accused in the immediate presence of the Executive Magistrate wherein, he admitted his involvement in the crime in question by describing the same from the beginning till the end:**

Such statement of each of the accused were recorded and were exhibited accordingly, by the trial Court, namely Rajesh @ Ghochru (Exhibit P151), Sarwar @ Billu (Exhibit P116), Pawan (Exhibit P30), Sunil @ Mada (Exhibit P31), Manbir @ Manni (Exhibit P117), Padam @ Parmod (Exhibit P152), and Sunil @ Sheela (Exhibit P87);

- (ii) **Recovery of artificial Silver Chain, Hair band, Semen and human blood stained lady's underwear of the deceased, strands of hair, disposable glasses, used condoms, semen strand blanket, human blood stained bricks, stones and stone pieces/sheets recovered from the abdominal and anal cavity of the deceased from the places of rape and murder, which were in their exclusive knowledge and were demarcated by all the accused separately along with co-accused in the presence of Executive Magistrate as well as public witnesses:**

The recovery of the aforesaid incriminating articles was in the exclusive knowledge of the accused persons and they lead the police party, the public witnesses as well as the Executive Magistrate (PW30), Gulab Singh, Naib Tehsildar to the various spots from where the recoveries were made. This is

the evidence which is common for all the accused persons. In the connection, the submission was made that the first accused who was arrested on 09.02.2015 had lead the police party to the spots and therefore, these spots and recovered articles were within the knowledge of the police. Therefore, the demarcation of reports and showing recovery from the same spots from the remaining accused persons was merely a farce and since the places were already known to the police from the first accused and therefore, such demarcation as well as recoveries made from the spots by others cannot be said to be the evidence showing any evidentiary value. It is true that the first accused had lead the police to all the spots and some recoveries were made, but then recoveries were not made and the spots were not demarcated till the time one by one all the accused lead to the demarcation of the places and also to the recoveries. When number of accused have committed one crime, such a course of action is bound to occur but then the submission that the entire discovery should be rejected is not acceptable to us;

(iii) Semen on underwear of each of the accused:

Learned counsel for the appellants vehemently argued that the finding of semen on underwear of each of the accused after a few days would be no evidence at all and the same cannot be incriminating circumstance. We, however, find that coupled with the other evidences finding of semen on underwear of the accused persons would assume importance and would become a circumstance which can be taken into consideration particularly because none of these accused persons stated, even a word, in answer to the questions put to them on these material aspects. The accused persons did not give any explanation/answer in respect of the blood stained and semen connecting with the deceased, which would be discussed

individually hereinafter. In so far as non-explanation in Section 313 of Cr. P.C. is concerned, in the case of **Sunil Clifford Daniel versus State of Punjab**, (2012) 11 SCC 205, the Supreme Court stated thus, in Paras 50 and 51 of the said decision:-

“50. It is obligatory on the part of the accused while being examined under Section 313 CrPC to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not, the chain of circumstances is complete. The aforesaid judgment has been approved and followed in Musheer Khan v. State of M.P. (See also Transport Commr. v. S. Sardar Ali.)

51. This Court in State of Maharashtra v. Suresh held that, when the attention of the accused is drawn to such circumstances that inculcate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision, only to highlight the fact that the accused has not given any explanation whatsoever, as regards the incriminating circumstances put to him under Section 313 CrPC.”

We think the said ratio is apt in application to the present case;

- (iv) **Call details and location of the mobile phones of the accused persons at the places where rape and murder was committed at the relevant time on 01.02.2015 and the accused remained in contact with each other from 01.02.2015 till 09.02.2015**

45. It is significant to note that in response to the question on these aspect, the accused persons have admitted in statement under Section 313 of Cr. P.C. about use and possession of mobile phones

recovered from them along with Sim Card. In this behalf, learned counsel for the appellants submitted that and it is true that except, Rajesh @ Ghochru, all other accused persons had used mobile phones and thus, mobile phones were recovered by the police. We agree with the learned counsel for the appellants that the evidence regarding mobile phone cannot be used against Rajesh @ Ghochru because no mobile phone was recovered from him. However, recovery of mobile phones having been made from other accused persons, the same evidence would be relevant.

46. Now we turn to the individual evidence against the accused persons as under:-

- (i) **Rajesh @ Ghochru**
 - (a) **DNA matched:**

Learned counsel for the appellant was right in arguing that the matching of DNA of Rajesh @ Ghochru with the stains on his underwear and therefore, about the crime in question, the said evidence does not carry any weight. But in our opinion, fact, however, remains that he was under obligation to explain about presence of semen on his underwear. The submission that no accused would wear the same underwear for some days was a matter for explanation by the accused persons. But in this case, there is no explanation at all. It is a different matter that the explanation could be accepted by the Court;

- (b) **Blood on the shoes, socks and apparel wearing by the accused, i.e. underwear and sweater:**

Human semen was found on his sweater and the DNA profile thereof matched with him. Most significantly, blood was detected on his underwear, sweater and shoes.

This is a most significant circumstance and rather the

clinging evidence against this accused. He has not explained in his statement under Section 313 of Cr. P.C. as to how the blood on the shoes, socks and apparel, i.e. underwear and sweater was found. We, therefore, accept the said circumstance as conclusive;

(c) **Soil on the shoes matched with the soil of places rape and murder:**

Learned counsel for the appellants argued that mere finding of soil on the shoes would not make a circumstance. The defence has also brought the evidence that the soil in the area was of the same nature. We do not agree with the submission. In the first place, it was for the appellant-Rajesh @ Ghochru to explain as to how the soil was there on his shoes and where from the soil got inserted in the shoes. On the contrary, the prosecution has proved that the soil was of the same place where the murder took place. This was an unusual circumstance which ought to have explained by this accused but he did not. We, therefore, hold that the said circumstance is equally significant and conclusive;

(ii) **Sarwar @ Billu**

(a) **Semen on the wear apparel, i.e. track pant and shirt of the accused:**

Admittedly, the appellant-Sarwar @ Billu did not explain a word as to how there was semen on the track pant and shirt and the finding of semen on the track pant and shirt is unusual and definitely required explanation from him. But he did not explain. The finding of semen on his track pant and shirt would again constitute a significant circumstance against the accused;

(b) **Call details and location of mobile phones of the accused at the places where rape and murder was committed and the accused remain in contact with other co-accused from 01.02.2015 to 09.02.2015 and there was admission in the statement under Section 313 Cr. P.C.**

about use and possession of recovered mobile phones and Sim Cards:

The submission is made by the learned counsel for the appellants that the finding regarding call details and location is totally inadmissible in the wake of Section 65-B of the Evidence Act and that mere communication between accused persons would not be a circumstance. We do not agree. We are concerned with the call details from the time the accused persons initiated the offence and till the end of it and thereafter, till 09.02.2015. The accused persons ought to have explained as to why they had several exchange of calls between them particularly at the relevant time before and after the rape and murder committed and what was the conversation between them. It is a different matter that the explanation could or could not have been found satisfactory. But the absence of explanation itself would mean that the prosecution proved the circumstance that right from the initiation of the crime till 09.02.2015, all the accused persons were in contact with each other. At this stage, we must state that all the accused persons made disclosure statement in the form of confession before the immediate presence of Executive Magistrate. In those statements, all the accused persons referred to the phone calls between them right from the beginning of the crime. We, therefore, find that the call details and the contact of the accused with each other fully corroborates the confessional statement under Section 26 of the Evidence Act;

(iii) **Pawan**

(a) **DNA matched:**

There was semen that was found in the condom (item No.4) that was recovered from the body of the deceased. That semen found in the condom matched with the item No.24,

blood sample of Pawan, in the DNA test. This is a very strong circumstance against him;

(b) Semen on underwear, shirt pant and t-shirt of the accused:

This is also a strong circumstance against the accused-Pawan because it is most unusual that the semen would be found on track pant and t-shirt of the accused persons except in the case of gang rape. Pawan did not explain a word about the same in his statement under Section 313 of Cr. P.C. and the prosecution proved it beyond any doubt about the presence of semen. This circumstance is therefore, a strong circumstance;

(c) Soil on the shoes matched with the soil on the place of murder:

The accused did not explain in his statement under Section 313 Cr. P.C. as to how and where from the soil was found in his shoes and the prosecution proved that the soil was from the same place by examining the expert;

(d) Call details:-

For the same reasons which we have given above, it was obligatory on the part of the accused to explain as to why they were in contact with each other from the beginning of the crime till the end and what they were taking over the mobile phones;

He admitted in his statement under Section 313 Cr. P.C. about demarcation and recovery of his shoes.

(iv) Sunil @ Mada

(a) Semen on underwear:

This accused did not explain in his statement under Section 313 Cr. P.C. as to how there was semen on his underwear, though, the said circumstance may not be conclusive but is definitely corroborative in the absence of any explanation by him in his statement under Section 313 Cr. P.C.

(b) **Phone Call:**

Learned counsel for the appellant-Sunil @ Mada contended that as to the call details, there was only one call that was said to have been proved. Even if that its true, it was for him to explain that on the relevant time, the call was made for what purpose, though, the circumstance was put to him. We, therefore, do not attach any importance whether one call or several calls were made;

(c) The statement of Sunil @ Mada in the immediate presence of Executive Magistrate which is confession under Section 26 of the Evidence Act is corroborated by the call details and demarcation of places coupled with the fact that he took police party along with Sunil @ Sheela to the places where jumper was burnt which was in the exclusive knowledge of this accused persons. We are convinced that the common circumstances and the present individual circumstances are good enough to hold the complicity of these accused;

(v) **Manbir @ Manni**

(a) **Exhibit P22 (Page 269) DNA profile source of *salwar* of the deceased:**

This is a very strong circumstance against the accused since DNA test revealed matching with *salwar* of the deceased and is a clinching circumstance;

(b) **Semen was found on his underwear and track pant and shirt:**

This is another strong circumstance since it is most unusual that the track pant and shirt of the accused would have semen stains. Surprisingly, Manbir @ Manni did not prefer to explain these circumstances against him.

Learned counsel for the appellant submitted that the chemist shop owner did not support the prosecution from whom this accused is said to have purchased condom.

Nevertheless, the location of his mobile phone at Hisar Road at 7:25 A.M. on 01.02.2015, i.e. the date of incident, has not been explained by him. We, therefore, accept the said circumstance as corroborative.

(vi) **Padam @ Parmod**

(a) **Semen on underwear:**

Apart from the common circumstances described by us for all the accused persons, semen was found on his underwear. He did not explain the same in his statement under Section 313 Cr. P.C. His confession in the immediate presence of Executive Magistrate is admissible, in addition to common circumstances about recovery and demarcation. He has not tendered any explanation regarding call details from 01.02.2015 to 09.02.2015 and he has not uttered a word about it.

(b) **Soil was found on his shoes and that was matched with the soil of the places of occurrence:**

This is again a clinching circumstance against him and we accept the same as corroborative evidence.

(vii) **Sunil @ Sheela**

(a) **Semen on underwear:**

He has not explained in his statement under Section 313 Cr. P.C. about it.

(b) **Semen and blood on blanket recovered from the spot:**

This is a very strong circumstance against the accused Sunil @ Sheela. The blanket was used during the course of rape and the incident when the deceased was shifted to second place. Semen and blood was found on the blanket that was recovered from the spot. Semen of Sunil @ Sheela was found on the blanket. The blanket had blood stains. In our opinion, this is a very strong circumstance apart from the common circumstance.

Learned counsel for the appellant argued that the

appellant-Sunil @ Sheela did not make a single call. The said circumstance even if ignored, fact remains that that semen and human blood on the blanket recovered from the spot is very strong and conclusive circumstance. Sunil @ Sheela and Sunil @ Mada both were involved in burning the jumper which they admitted while leading the police party to the places of occurrence. But then for all these circumstances, no explanation was given by them.

47. The above is the crux of circumstantial evidence that in our opinion is quite conclusive against each of the accused and according to us, thus, the prosecution has proved its case beyond any doubt much less reasonable doubt. In addition, the findings recorded by the medical board which conducted post mortem of the dead body in minute details clearly corroborate the confessions of all the accused persons recorded in the immediate presence of the Executive Magistrate. We accept the evidence tendered by the prosecution and find no merit in the appeals filed by all the appellants/accused persons.

48. The appellants/accused persons have been awarded by the trial Court death sentence.

49. Learned counsel for the appellants contended that there is nothing rarest of rare in the case that the trial Court should have endeavoured to award death sentence.

50. A mentally ill woman, who came out of her sister's house situated on the outskirts of the town Rohtak, started walking towards unpopulated open area, was ensnared and waylaid by these appellants/accused by forcibly making her sit on their motorcycle. She

was taken to two places where she was raped by all the appellants/accused one by one. The appellants/accused had consumed alcohol. They changed the spot due to fear as a police jeep had passed. They pushed her down in the field and started hitting her with the bricks. Rajesh @ Ghochru again raped her and she was again hit with bricks. She was still alive. What must be the excruciating pain to almost half dead young woman! Then the 'animalism', torment, highest order of cruelty rather “tsunami” of cruelty made thereafter is bound to petrify one and all. Rajesh @ Ghochru placed a cement sheet on her anus and thrust it inside by hitting it inside with brick. She shrieked for the last time and breathed her last.

Now we ask the question to ourselves; what else is required to hold this case to be the rarest of rare!

51. We have seen the decisions on the point which we find were also also considered by the trial Court with all details in the impugned judgment/order. The law is well settled in this behalf.

52. Learned State counsel vehemently argued that the present case is akin to the case of **Nirbhaya** in which the Apex Court upheld the death sentence to the accused persons in that case. Though, the facts are slightly different, we are inclined to agree with the submission made by the learned State counsel having gone through the decisions in the case of **Nirbhaya** and having carefully applying our mind to the manner in which the rape and murder was committed. We would not burden the said aspect of the matter by quoting references, but we would quote the following portion which is apt in its application:-

“A large number of murders is undoubtedly of the common type. But some atleast are diabolical in conception and cruel in execution. In some others where the victim is a person of

high standing in the country society is liable to be rocked to its very foundation. Such murders cannot simply be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society". "The instruments used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the mentally ill victim, and the like, steel the heart of the law for a sterner sentence."

53. We are therefore, fully convinced with careful and conscious consideration of the entire matter that the death sentence awarded by the trial Court to all the accused persons was the only sentence that could be awarded.

54. At the hearing of these matters, we specifically put the counsel for the appellants/accused on notice as to why fine or compensation should not be increased and granted. Mr. Ghai, learned Senior counsel for convict-Sunil @ Mada (present in the Court) submitted that the imposition of fine or grant of compensation is a matter within the realm of the Court and the same would depend on the settled principles which the Court may follow. We have thus, heard the learned counsel on this aspect of the matter. The second aspect as to whether in the absence of any appeal by the State, the order imposing fine made by the trial Court on the appellants can be varied.

We would like to answer the second question first in that even, though, there is no appeal preferred by the State, this Court as an

Appellate Court does have a power under Section 386(b)(iii) and (e) Cr. P.C. after giving the opportunity of showing cause. Since the substantive sentence of death has already been awarded, there is obviously no occasion for us to make enhancement. However, we have heard the learned counsel as already stated on the question of enhancement of fine, which we think we would be able to vary in terms of the above provisions. Apart from that we think the power under Section 482 Cr. P.C. which is exclusively available to this Court to secure the ends of justice can also be utilized.

We then find that despite stern penal laws in places, deterrence in the matter of sentences including the death sentence is not satisfactory. We think imposition of heavy fine which, if recovered by sale of the properties of the guilty, would prove additional deterrence. Not only that the victim or the concerned relatives of the victim would also find atleast some solace to their sufferance, if they are compensated by selling the property of the guilty. In the present case, having regard to the entire factual matrix discussed above, we think fine in the sum of ₹50 lakhs would be appropriate which should be recovered from the appellants/accused by attaching/selling their respective immovable properties like plot, house, agricultural land etc. It is quite possible that one or more of the convict does not own or possess any immovable property. But then all these appellants/accused have been found, by us, to have committed the ghastly crime with a conspiracy jointly and individually. If they had come together to commit the crime jointly and

individually and not one of them resisted any of the other, we think the liability to pay fine in the sum of ₹50 lakhs under the peculiar facts and circumstances must be made joint and several. Having thus, come to this conclusion, out of the total sale proceeds, if any recovered, half of the sale proceeds ought to go to the State of Haryana and the remaining half to PW5-Janki.

We applaud the splendid hard work and the professionalism with which Investigating Officer SI, Mohammad Ilias conducted the investigation in such a hard case. Now it is for the Government how to reward him.

55. The upshot of the above discussion is that the following order is inevitable:-

ORDER

- (i) **MRC No.2 of 2016** is decided in the affirmative and the judgment and order of conviction of all the respondents-Sunil @ Mada, Sunil @ Sheela, Sarvar @ Billu, Pawan, Padam @ Parmod, Manbir @ Manni and Rajesh @ Ghochru, for the offences for which they have been convicted and death sentence has been awarded to all of them, is upheld;
- (ii) Criminal appeals **CRA-D-90-DB of 2016** filed by Sunil @ Mada; **CRA-D-91-DB of 2016** filed by Sunil @ Sheela; **CRA-D-99-DB of 2016** filed by Sarvar @ Billu and Pawan; **CRA-D-107-DB of 2016** filed by Padam @ Parmod; **CRA-D-108-DB of 2016** filed by Manbir @ Manni and **CRA-D-187-DB of 2016** filed by Rajesh @ Ghochru, are dismissed and the impugned judgment of conviction and order of sentence of death penalty imposed by the trial court against the appellants-Sunil @ Mada, Sunil @ Sheela, Sarvar @ Billu, Pawan, Padam @ Parmod, Manbir @ Manni and Rajesh @ Ghochru, is upheld and affirmed;
- (iii) The sentence of fine imposed by the trial Court is substituted as under:-
 - (a) The appellants/accused, namely Padam @ Parmod,

Pawan, Sarwar @ Billu, Manbir @ Manni, Rajesh @ Ghochru, Sunil @ Mada and Sunil @ Sheela shall pay total fine in the sum of ₹50 lakhs (Rs. Fifty Lacs only), jointly and severally, out of which an amount of ₹25 lakhs (Rs. Twenty Five Lacs only) shall be paid to the State of Haryana; and the balance ₹25 lakhs (Rs. Twenty Five Lacs only) to PW5-Janki;

- (b) The Deputy Commissioner, Rohtak is directed to identify the immovable properties of all the appellants/accused, namely Padam @ Parmod, Pawan, Sarwar @ Billu, Manbir @ Manni, Rajesh @ Ghochru, Sunil @ Mada and Sunil @ Sheela, attach them within one month from today. He is further directed to sell the attached properties within two months from the date of attachment and report compliance to this Court on or before 04.07.2019;
- (c) List on 05.07.2019 for reporting compliance.

(A.B. CHAUDHARI)
JUDGE

(SURINDER GUPTA)
JUDGE

March 19, 2019
mahavir/raj

Whether speaking/ reasoned: Yes

Whether Reportable: Yes