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

+ CRL.A. 1075/2017

MAHESH RAI

..... Appellant

Through: Mr.C.L.Gupta, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State with
SI Sandeep Shrivastava, PS Bharat
Nagar.

WITH

+ CRL.A. 31/2018

HORI LAL

..... Appellant

Through: Mr. Ajay Kumar Pipaniya, Advocate
with Ms. Mahima Chaudhary, Advocate.

versus

THE STATE GOVT. OF NCT OF DELHI & ANR.

..... Respondents

Through: Ms. Aashaa Tiwari, APP for State.
Mr. C.L.Gupta, Advocate for R-2.

AND

+ CRL.A. 292/2018

STATE (NCT OF DELHI)

..... Appellant

Through: Ms. Aashaa Tiwari, APP for State

versus

MAHESH RAI

..... Respondent

Through: Mr.C.L.Gupta, Advocate.

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Date of Decision: 13th May, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. While CrI.A.No.1075/2017 has been filed by the appellant-accused challenging the judgment dated 29th November, 2016 convicting him under Sections 452 and 302 IPC as also the order on sentence dated 26th September, 2017 by which the appellant-accused had been directed to undergo R.I. for three years for offence committed under Section 452 IPC along with a fine of Rs.10,000/- and to undergo R.I. for offence under Section 302 IPC along with a fine of Rs.5,00,000/-, CrI.A.No.292/2018 and CrI.A.No.31/2018 have been filed by the State as well as by the father of the deceased-victim respectively seeking enhancement of the sentence.

FINDINGS OF THE TRIAL COURT

2. The relevant findings in the impugned judgment are reproduced hereinbelow:-

“13. Admission of Shivani in the hospital and preparation of her MLC:-

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(c) The matter written in MLC Ex. PW10/A does not exhibit any word or sentence having been incorporated therein subsequently. No question about subsequent addition of last line in the history of injuries in MLC Ex. PW10/A was put either to PW-2 Leelawati or PW-10 Dr. Ajay Kumar. When there is no interpolation manifest in the document, the content, the contention raised by way of an after thought has to be repelled.

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(d) The related contention of Ld. Defence counsel that the name of accused was not disclosed when the incident was informed to Police Control Room reflects that PW-2 Leelawati, who claimed to

have informed at no.100 from hospital was not aware of the assailant and had subsequently got the name of the accused added in the MLC. It is true that PW-2 Leelawati had stated that she had informed the Police at No.100 from the hospital in her examination-in-chief. She had however corrected herself when related questions were put to her in cross-examination and stated that she had not reported the matter to the Police. The call at no.100 was made by her husband in her presence. Even otherwise, the SOS call to Police Control Room are made by people in distress calling for immediate help / assistance. The information is generally short, may be one or two liner so that precious time is not lost in detailing the entire events, which can be appropriately collected by the local Police subsequently. The PCR call of the incident was, thus, meant for alerting the Police and triggering necessary proceedings. Non-mention of name of accused therein, even if, the caller PW-4 Hori Lal may have been informed of his involvement by his wife, PW-2 Leelawati, is inconsequential.

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15. **Non-recording of statement of deceased by Magistrate:-**

(a) It has vehemently been argued by Sh. Gupta that despite the availability and opportunity, IO did not call the Sub-Divisional / Executive Magistrate for recording statement of injured. The statement Ex. PW2/A now being projected as dying declaration of deceased Shivani, cannot be taken into consideration for want of adequate explanation. It has been stressed that the lapse is also in breach of the instructions circulated by Commissioner of Police to all investigation agencies, prosecution under him vide no.2251-2350/Record Branch/PHQ, dated 19.04.2011. Reliance in this behalf has been placed on the ratio in **Jagdish Lal Malhotra V. State, 1984 (1), RCR 332**, that dying declaration recorded by I though he had time and facility to fetch the Magistrate, as the victim survived for 24 days, should be excluded from evidence. In '**State (Delhi Administration) V. Laxman Kumar, 1986 (1) RCR 184 SC**', it was held that dying declaration recorded by the IO without explaining the non-availability of magistrate and doctor and further the declaration not recorded in question –

answer from nor signed by the deponent was held unacceptable. Further reliance on the same lines is placed on '**Kaushalya V. State, 1988 (1) RCR, 475** Where dying declaration of deceased with 80% burn injuries was recorded by the IO in hospital. Pathedin injection had been given to the patient. It was held that dying declaration recorded four hours thereafter cannot be relied upon as the patient would not have normal alertness. The additional reason for excluding the dying declaration from consideration was that the IO had not even contacted the Magistrate for recording the statement and he himself had not recorded it in question-answer form, in violation of rules of caution applicable in Delhi. Further it was held in '**Surender Singh Vs. State, 1990 (1) RCR 318**', it was held by referring to Rules and Orders of Punjab High Court that dying declaration recorded by a doctor but not got attested by any other persons though another doctor, nurse attendant were on duty. It was held that the statement having not been recorded in accordance with Rule 7 is not reliable.

(b) Ld. Addl. PP has replied that Shivani was admitted in Sunder Lal Jain Hospital on 06.05.2010 and she had succumbed to the injuries on 31.05.2010. The IO remained under an impression that Shivani being a spinster, there was no legal requirement to get her statement recorded by a Magistrate. He also clarified that since he did not anticipate her death, he did not approach the Magistrate. Reliance in this behalf has been placed by Sh. Pipaniya on '**Kansraj V. State of Punjab, AIR 2000, SC 2324**', that Section 32 of **Evidence Act** does not require that the statement sought to be admitted in evidence should have been made in imminent expectation of death. Further he has cited '**Ramwati Devi V. State of Bihar, AIR 1983 SC 164**', to stress that dying declaration recorded before Police Officer is admissible and can be relied upon for conviction. It need not be recorded before a Magistrate.

(c) Undoubtedly IO would have done better by associating SDM / Executive Magistrate in recording the statement of deceased Shivani in the hospital. But on assessment of MLC Ex. PW10/A, response to the Medical treatment and personal observation, he did not anticipate the death of Shivani till

10.05.2010, till when the investigation was with him and thereby the urgency to call the magistrate. His response in cross-examination also reflects that he had remained under an impression that Shivani being unmarried, it was not compulsory for him to get her statement recorded by the Magistrate. Although, questions have been put to PW-4 Hori Lal and IO/SI Saran Chand in cross-examination that the statement Ex.PW2/1 actually pertains to Hori Lal on behalf of his daughter in order to falsely implicate the accused. It was obviously denied by both the witnesses. It was surmised that the original FIR bears the signatures of PW-4 at the place where signatures of complainant / informant were to be obtained. Duty Officer HC Mukesh Kumar had produced the original FIR register on 20.10.2011 but the signatures of PW-4 Hori Lal were not found appended there. PW-4 had also denied the suggestion that he had forged the signatures of his daughter in collusion with Police. The witness was not shown any document bearing the signatures of deceased Shivani to relate the same to the said question. In fact, right thumb impression of Shivani had been obtained on the documents be it the MLC Ex.PW10/A or statement Ex. PW2/1. A close perusal of the contents of statement Ex. PW2/A shows that it could not have been described by one who was not himself present at the spot at the relevant time. In **Laxman V. State of Maharashtra, AIR 2002 SC 2973**, it was held that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such a statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

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(h) The Investigating Officer has furnished plausible explanation for not associating Magistrate for recording statement of the deceased. Statement Ex.PW2/A categorically meets the second requirements of Circular No.20/2011 of the Commissioner of Police, Delhi as the statement of deceased was attested by her

mother / PW-2 Leelawati, who was present at that time. No material or circumstances has been put to doubt the authenticity of statement Ex. PW2/A of the deceased.

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(j) It has been a matter of experience that even when the statement of a dying men is recorded in question-answer form, multiple points of resentments are raised on behalf of defence about the formation of questions at times alleging that the recording authority resorted to roving / fishy inquiry from the declarant. The Circular No.20/2011 relied upon by the defence prescribes that the statement of declarant should be in the form of simple narrated in the language of declarant and if any, occasion arises for putting questions to the dying man, it should be recorded in question-answer form. The actual words of declarant should be taken down and not merely their substance. In the case in hand, the IO appears to have performed the job in this behalf ethically and since he did not feel any ambiguity in the narration of deceased, no question was needed to be put to her.

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19. (g). The main bone of contention of the timing of IO of recording the statement of deceased getting faux-pushed with his presence at the spot was rectified by him in his examination-in-chief by clarifying that the sequence of getting the spot inspected and photographed by Crime Team and recording of statement of Shivani are wrongly mentioned in rukka Ex.PW 19/A. That puts curtain on most of the related objections of defence. Minor contradictions in the testimonies of other witnesses do not create trough in the prosecution case.

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20. Motive:-

(a) Without spreading an edifice or spilling the background, a suggestion was given to PW-2 Leelawati in cross-examination that accused had physical relationship with Shivani. Such suggestion was not given to father of the deceased. Only to disgrace the deceased in public estimation, could have been the thought process of accused behind such suggestion.

(b) PW-2 Leelawati, mother of the deceased was also suggested that Shivani had committed suicide. There is no basis of the new ground suddenly taken by the defence. It did not make any effort to stick to it after giving said suggestion abruptly.

(c) Apart from referring to the bad behaviour of accused earlier with elder sister of deceased and after sufficient gap of time with her and that too some months prior to the incident, prosecution has not imputed any motive to the accused to commit murder of the deceased but that aspect is not fatal to the case in hand. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Sometimes, motive is surrounded in the mystery and it is very difficult to prove. If, however, the evidence of the eye witness is credit worthy and can be believed, the question whether there is any motive or not becomes wholly irrelevant. Reliance in this behalf is placed on Raj Kumar @ Rajesh Pandit V. State, Crl. Appeal No. 433/2011 decided by Hon'ble High Court of Delhi on 17.02.2012. Although the accused has spoken about some grudge against the deceased yet the theory was not canvassed by the prosecution.

(c) In 'Ravinder Kumar V. State of Punjab (2001) 7 SCC, 690', it was held that it is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases would point to is the possible mental element which could have been the cause for murder in this connection, we deem it useful to refer to the observation of this court in State of Himachal Pradesh V. Jeet Singh, (1999) 4 SCC 370 "no doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed, if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record, the manner in which, such ire would have swelled up in

the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost a impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.

21. Conclusion:-

From the above discussion and analysis of evidence, the prosecution has been able to prove beyond reasonable doubt that with the gradual normalization of relations with accused Mahesh, a cement contractor, was called by PW-2 Leelawati to her house on the fateful day for repair of AC window that required cement masonry work. The accused however had other plans. Since he used to stare at Shivani for some period of time and was apparently aware of her timings. He had come prepared with a plastic bag containing cane of Sulphuric Acid, which otherwise was not required for the work for which his services were requisitioned. On finding the deceased to be an easy target who was lying on bed being unwell, the accused diverted the mother of deceased for bringing water for himself and immediately poured acid from cane into a plastic box and poured the same over the deceased. The concentrated acid, which was detected in skin and hair of deceased, preserved after 26 days of the incident, reflected his absolute intention to finish his target. He very well knew that his such act was sure and certain to cause slow painful death of Shivani that he intended to achieve. Prosecution having been able to squarely prove the charges, the accused is hereby held guilty for the commission of offence under Section 452/302 IPC.

Let he be heard on the point of sentence on 06.12.2016.”

ARGUMENTS ON BEHALF OF THE APPELLANT-ACCUSED

3. Mr. C.L.Gupta, learned counsel for the appellant-accused contends that initially the assailant was mentioned as unknown and the name of the appellant-accused had been added subsequently by PW-2 (the mother of the deceased-victim), as she wanted to settle personal scores. He points out that

in the DD Entry No. 34B, Ex. PW-14/A it had been recorded that an unknown person had thrown acid on PW-2's daughter. He states that in the initial history given in MLC, the assailant was not named. He alleges that few sentences while recording the history of the case in the MLC had been added subsequently. He points out that when the Investigating Officer after meeting the victim had reached the crime spot—which was being inspected by the crime team—the Investigating Officer had informed the crime officials that an unknown person had thrown acid on a girl. He states that PW-3 Prem Lata had deposed that she had been told that the appellant-accused had been called for repair of air conditioner, which fact she stated to the attending doctor, inasmuch as, the MLC recorded that some boy had thrown some liquid used for AC repairs.

4. According to learned counsel for the appellant-accused, there was a dispute between the families of appellant-accused and the deceased-victim as the appellant-accused had been in a relationship with the elder sister of the deceased-victim and they wanted to marry, but her parents did not agree.

5. Mr.Gupta further states that the claim of PW-2, mother of the deceased, that the appellant-accused had been called by her for repair of AC window does not stand to reason as the families of the deceased and the appellant-accused were not on speaking terms and further the appellant-accused was not a mason by profession, but a dealer in building materials. Thus, according to him, the name of the appellant-accused was added subsequently, at the instance of the mother of the deceased, with intent to falsely implicate him in the present case.

6. Learned counsel for the appellant-accused submits that a learned Single Judge of this Court in *Smt.Deepa Bajwa Vs. State & Ors.*, 115

(2004) **DLT 202** has held that the first version as disclosed in the complaint is always important in adjudicating as to whether an accused has committed an offence or not. He also submits that another learned Single Judge of this Court in the case of **Sunil Bansal Vs. State of Delhi, 2007 (2) JCC 1415** has held as under:-

“.....Therefore, the attempt at improving the case at each stage, in my opinion injects suspicion as to their veracity. Without any further comment it could be said that they do amount to bringing in two version, which can be considered by the Court. In such an event the Court would be within its rights in concluding that the version supporting the discharge of the petitioner is to be preferred.”

7. Learned counsel for the appellant-accused states that the scientific evidence available in the form of footprints on the staircase, by which truth could have been easily detected, was deliberately not lifted by the police in connivance with the parents of the deceased. He emphasises that this piece of evidence could have easily and definitely proven whether the appellant-accused was a culprit or not. He points out that before the trial court, the State claimed they were the footprints of the deceased-victim, but the MLC did not show any burn injury on the feet of the deceased. He states that the State had admitted that the footprints were not of the appellant-accused. He emphasises that the appellant-accused had been medically examined and there were no burn injuries on his feet either. Thus he reiterates that the assailant was unknown and the appellant-accused was not present at the time of the incident.

8. Mr. Gupta also submits that the statement given by the deceased-victim on 6th May, 2010 was not a dying declaration as the Investigating

Officer had not taken any steps to get her statement recorded before the Magistrate. He further submits that the dying declaration is not admissible in law as it was neither in question-answer form nor it had been attested by a doctor. He emphasises that the doctor who had declared the victim fit for statement had not been examined and he was not a regular doctor. Thus, according to him, the alleged dying declaration is untenable in law.

9. Learned counsel for appellant-accused states that recording of the statement of the deceased-victim is doubtful because as per endorsement on *rukka*, the Investigating Officer had collected the MLC and recorded the statement of the victim on his first visit to the hospital which was at 03.45 p.m. and thereafter he had come back to the crime spot at 04.00 p.m. He states that the Investigating Officer to improve the case had testified before the Court subsequently that he had collected the MLC on his first visit and recorded the statement of deceased-victim on his second visit at 07.30 p.m.

10. He points out that PW-18 Ct. Dev Narain had deposed that the Investigating Officer after coming back to the hospital remained with him at the crime spot till 08.30 p.m. Thus, according to him, the Investigating Officer's testimony that he had visited the hospital twice was false.

11. Learned counsel for the appellant-accused lastly emphasises that at the time the alleged recovery was made in pursuance to the disclosure statement of the appellant-accused, there was no public witness. He also points out that recovery had been made from an open and accessible place. He submits that in the absence of public witness, the State could not rely upon the alleged recovery and/or the disclosure statement.

ARGUMENTS ON BEHALF OF THE STATE

12. Per contra, Ms. Ashaa Tiwari, learned additional public prosecutor states that PCR call had been made for alerting the police and triggering the necessary proceedings only. She points out that on the right hand side of the PCR form, the name of the appellant-accused had been mentioned almost contemporaneously.

13. She states that in the MLC Ex. PW-10/A, the mother of the deceased had identified the appellant-accused as the boy who had run away. She emphasises that involvement of the appellant-accused was not in doubt as the deceased-victim had told PW-3 Prem Lata, while she was being taken to the hospital, “*Mahesh (appellant) had sprinkled tezab over her (deceased-victim)*”

14. Learned APP specifically denies the allegation that any word or sentence had been subsequently incorporated in the MLC Ex. PW-10/A.

15. Learned APP states that the footprints/footmarks on the stairs of the house were of the deceased-victim as she was brought down the stairs by PW-2 and PW-3 for being taken to the hospital. She emphasises that the feet of the deceased-victim were wet with acidic material when she was being taken to the hospital. She points out that both in FIR Ex. PW-5/A and statement of PW-2, it had been recorded that the deceased-victim had been immediately taken to the bathroom and lot of water had been poured over her body. In support of her contention she refers to the mobile crime team report Ex. PW-6/A.

16. Learned APP vehemently denies that the statement of the deceased-victim had been recorded at 03.45 p.m. She points out that as per MLC Ex.

PW-10/A the deceased-victim was unfit for statement at 05.15 p.m. and was declared fit for statement at 07.30 p.m. by Dr. Inderdeep Singh and only thereafter her statement was recorded by IO PW-19.

17. She points out that PW-18 in his examination-in-chief had stated that the Investigating Officer after completion of proceedings by the crime team had again gone back to Sunder Lal Jain Hospital. She states that PW-18 had testified that at about 08.20 p.m. the Investigating Officer had handed over *rukka* to him after endorsement with direction to get the FIR registered. She also states that the Investigating Officer had clarified that the sequence of events were wrongly mentioned in the *rukka/tehrir* PW-19/A.

18. Learned APP lastly submits that there is no requirement in law that the dying declaration must necessarily be made before a Magistrate and/or it should be in question-answer form. She points out that the Investigating Officer in his testimony had stated that he had not recorded the deceased's statement before a Magistrate, as at that time, he never thought that the victim would not survive. In support of her submission, she relies upon the following judgments :-

A) ***Pradeep Bisoi @ Ranjit Bisoi Vs. State of Odisha, 2018 LawSuit (SC) 1027*** wherein it has been held as under:-

“16. We have noticed that this Court has laid down that statement under Section 161 Cr.P.C, which is covered under Section 32(1) is relevant and admissible. Thus, we do not find any error in the judgment of the trial court as well as of the High Court in relying on the statement of the injured recorded by the I.O on 05.12.1990 It is also relevant to notice that I.O in his cross-examination has stated that he went on the night of 30.11.1990 to the Medical College to record the statement but as his condition was serious, he was not examined. Thus, reliance on the statement made on 05.12.1990 to the I.O does not lead to

any suspicious circumstances so as to discard the value of such statement. The statement, which was made by the victim on 05.12.1990 was to the following effect:-

“My name is Bhaskar Sahu, S/o. Kaibalya Sahu, present/permanent Resident of Village - Lungal Dei, P.S Digapahandi Dist. Gangnam, Today, i.e on 05.12.1990, being at the Medical College ward I hereby give my verbal statement that, I was going to Belapada from our Village Lungal Del on 28.11.1990 at about 6:30 to 7:00 O'clock on my bi-cycle. On my way near the bridge of Belapada Village, inhabitant of our village namely Pradeep Bisoi, S/o. Madhab Bisoi and some of his friends were waiting to kill me. They had come by a Scooter. I don't know others. Near the Belapada Bridge, all of a sudden Pradeep Bisoi threw a Bomb towards me which was defused after hitting my right leg for which I fell down on the road. When I started running, trying to save my life, at that time Pradeep Bisoi came running after me and dealt a kati blow on my right shoulder, for which I fell down bloodstained. Thereafter from a bottle carried by him, he poured acid on my head, face, chest and also on my entire body To save my life. I threw away my black color vest from my body. Looking at my critical condition, Pradeep Bisoi and his friends left that place. After that, the son of Khalia Pati of our village saw me, and while taking me by the help of a cycle, my brother Surendar Sahu got that news and Tarini Sahu, and Kishnath Bisoi and Bidhyadhara Babu of our village reached to me and my brother immediately admitted me in the Berhampur Medical Collage. Otherwise I would have died on the spot. Because of our previous enmity, Pradeep Bisoi was trying to kill me. But I was just saved. There is no chance of my survival.”

B) *Laltu Ghosh Vs. State of West Bengal, 2019 SCC OnLine SC 236*

“17. The courts cannot expect a victim like the deceased herein to state in exact words as to what happened during the course of the crime, inasmuch as it would be very difficult for such a victim, who has suffered multiple grievous injuries, to state all the details of the incident meticulously and that too in a parrot-

like manner. The Trial Court assumed that the Investigation Officer in collusion with the doctor wilfully fabricated the dying declaration. It is needless to state that the Investigation Officer and the doctor are independent public servants and are not related either to the accused or the deceased. It is not open for the Trial Court to cast aspersions on the said public officers in relation to the dying declaration, more particularly when there is no supporting evidence to show such fabrication.

18. It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. A dying declaration, if found reliable, and if it is not an attempt by the deceased to cover the truth or to falsely implicate the accused, can be safely relied upon by the courts and can form the basis of conviction. More so, where the version given by the deceased as the dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration. The doctor PW-18, who recorded the statement of the deceased which was ultimately treated as his dying declaration, has fully supported the case of the prosecution by deposing about recording the dying declaration. He also deposed that the victim was in a fit state of mind while making the said declaration. We also do not find any material to show that the victim was tutored or prompted by anybody so as to create suspicion in the mind of the Court. Moreover, in this case the evidence of the eyewitnesses, which is fully reliable, is corroborated by the dying declaration in all material particulars. The High Court, on reappreciation of the entire evidence before it, has come to an independent and just conclusion by setting aside the judgment of acquittal passed by the Trial Court. The High Court has found that there are substantial and compelling reasons to differ from the finding of acquittal recorded by the Trial Court. The High Court having found that the view taken by the Trial Court was not plausible in view of the facts and circumstances of the case, has on independent evaluation and by assigning reasons set aside the judgment of acquittal passed by the Trial Court. We concur with the judgment of the High Court, for the reasons mentioned supra.”

ARGUMENTS ON BEHALF OF THE FATHER OF THE DECEASED-VICTIM

19. Mr. Ajay Kumar Pipaniya, learned counsel for the appellant/Hori Lal, father of the deceased-victim contends that the sentence imposed by the trial court is grossly inadequate inasmuch as it failed to consider the aggravating circumstances of the case and the conduct of the appellant-accused. He states that the sentencing order passed by the trial court needed to be enhanced as the act of the accused was gruesome and it was a pre-planned murder of a young innocent and helpless girl. He points out that the Supreme Court in ***Sevaka Perumal and another Vs. State of Tamil Nadu, (1991) 2 SCC 471*** after referring to the decision in ***Mahesh Vs. State of M.P., (1987) 3 SCC 80*** has held as under:-

“10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.:”

REJOINDER

20. In rejoinder, learned counsel for the appellant-accused contends that the present case does not merit any enhancement of sentence as the mitigating circumstances pointed out by the Apex Court in ***Chhannu Lal Verma Vs. The State of Chhattisgarh, Crl. A. No(s) 1482-1483/2018*** dated **28th November, 2018** were attracted to the present case.

COURT'S REASONING

THIS COURT FINDS THAT PW-2, MOTHER OF THE DECEASED-VICTIM – AN EYE WITNESS – HAS NARRATED THE ENTIRE INCIDENT WITH SUFFICIENT PARTICULARS. NOT ONLY HER STATEMENT IS TRUSTWORTHY AND INSPIRES CONFIDENCE, BUT IT IS ALSO CORROBORATED BY THE VICTIM'S DYING DECLARATION AS WELL AS PW-3 (NEIGHBOUR) PREM LATA'S TESTIMONY AND APPELLANT-ACCUSED'S DISCLOSURE STATEMENT WHICH LED TO RECOVERY OF THE CANE AND PLASTIC SACK READ WITH THE FSL REPORT

21. Having heard learned counsel for the parties, this Court finds that PW-2, mother of the deceased-victim – an eye witness – has narrated the entire incident with sufficient particulars and has categorically stated that the appellant-accused had caused death of the deceased-victim. The relevant portion of the PW-2's testimony (mother of the deceased-victim) is reproduced hereinbelow:-

(Cross-examination on 18.4.2011)

".....About 2-3 days before 06-05-2010, I called accused Mahesh for the repair of AC window. On 06-05-2010 at about 3 pm, accused Mahesh came at my house with a plastic bag. At that time, I and my daughter Shivani were at home. I showed the window to the accused. My daughter Shivani was sleeping on the bed. Accused asked me for drinking water. When I went to the kitchen to bring water, I heard the shouts of "bachao-bachao" from Shivani. I rushed back to the room and saw that accused was pouring some liquid which was perhaps tejab on my daughter Shivani with a white colour plastic box. As a result, the clothes of Shivani, cushions, pillows, and bedsheets started burning. The burn marks on the body of Shivani were also visible. There was smoke in the room because of sprinkling of tejab. Accused then fled away with the plastic bag and the box. I took my daughter to the bathroom and poured lot of water on her body and thereafter rushed her to Sunder Lal Jain Hospital with my neighbor Prem Lata for treatment. I informed the police at 100 number from the hospital....."

(Cross-examination on 20.10.2011)

.....We had asked Mahesh for the repair of AC window as it required cement masonry work. Despite the fact that accused had misbehaved with my daughters, we requested him for AC repair work because it was a small work and accused was cement contractor. My husband did not know that I had called accused for window repair. My husband or son did not specifically told me to get the repair done through accused Mahesh. My younger daughter did not know that I had called Mahesh for window repair.”

(emphasis supplied)

22. Not only the statement of PW-2 is trustworthy and inspires confidence, but it is also corroborated by the victim's dying declaration as well as PW-3 (neighbour) Prem Lata's testimony and appellant-accused's disclosure statement which led to recovery of the cane and plastic sack. The relevant portion of PW-3's testimony is reproduced hereinbelow:-

“.....On hearing the noise from the second floor flat of Hori Lal, I rushed there and found that Shivani, daughter of Hori Lal, was draped in a curtain. Her clothes had got burnt and the face had got burnt. There were white burn marks on the face. On asking, the mother of Shivani told that accused Mahesh, now present in court (correctly identified) had come at their house for the repair of the AC. Shivani told that Mahesh had sprinkled tejab over her. I and the mother of Shivani namely Leela brought Shivani downstairs and rushed her to Sunder Lal Jain Hospital in a TSR where she was admitted. Accused Mahesh was not present at the house when I reached there. Shivani informed me that accused Mahesh had run away after pouring tejab at her.

(emphasis supplied)

23. It is pertinent to mention that the appellant-accused's disclosure statement led to recovery of a cane, which the FSL report confirmed containing 'sulphuric acid'. The relevant portion of the English translation of the disclosure statement, which led to recovery as well as FSL report are reproduced hereinbelow:-

“.....And I threw the sack and cane along with the screw driver into the drain towards the wall of Mata Jai Kaur School inside Picnic Hut Park..... I can point out the place where I had thrown the cane along with the screw driver and the plastic sack inside the Picnic Hut Park and cane get them recovered.”

(emphasis supplied)

24. Relevant portion of the FSL report is reproduced hereinbelow:-

Form No. FSL/DELHI/FM/03/23/24.12.2007 **207**



Forensic Science Laboratory
 Govt. of NCT of Delhi
 Sector 14, Rohini, Delhi-110085.
 Tel: 011-27588011, Fax: 011-27558600



Accredited by the National Accreditation Board for Testing and Calibration Laboratories (NABL)
REPORT No. FSL-2010/C-2616 **Dated 21/10/2010**

Please quote the Report (Opinion) No. & Date in all future correspondence & Summons.

To
 The Station House Officer,
 P.S. Bharat Nagar
 Delhi

Your letter No. 4054/S/O/Bharat Nagar Dated 18.08.10 regarding fifteen parcels in connection with case FIR No. 115/10 dated 06.05.10 U/S 307/452 IPC P.S. Bharat Nagar duly received in this office on 18.08.10 through Ct. Sher Singh, No. 1727/NW.

DESCRIPTION OF PARCEL(S)	
Sealed plastic bags	: 04 (four)
Sealed plastic jar	: 02 (two)
Sealed cloth parcel	: 09 (nine)
Total	: 15 (fifteen)

Fifteen sealed parcels marked as '1', '2', '3', '4', '5', '6', '7', '8', '9', '10', '11', '12', '13', '14' & '15'. Seals were intact and tallied with the specimen seals as per forwarding letter (FSL FORM).

DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL(S)/EXHIBIT(S)

xxx

xxx

xxx

Exhibit-‘15’ Some light brown colour liquid stated to be acid like substances kept in a plastic cane wrapped in a polythene.

RESULTS OF EXAMINATION

On Chemical & Ion-Chromatography examination, (i) Exhibits ‘1’, ‘2’, ‘3’, ‘4’, ‘5’, ‘6’, ‘7’, ‘8’, ‘9’, ‘10’, ‘11’, ‘12’, ‘13’ & ‘15’ were found to contain ‘Sulphuric Acid’.”

(emphasis supplied)

APPELLANT-ACCUSED'S SUBMISSION THAT THE SEIZURE FROM A PUBLIC PLACE IN THE ABSENCE OF AN INDEPENDENT WITNESS COULD NOT BE RELIED UPON IS UNTENABLE IN LAW.

25. The appellant-accused's submission that the seizure from a public place in the absence of an independent witness could not be relied upon is untenable in law. The Supreme Court in the case of ***State, Govt. of NCT of Delhi Vs. Sunil & Anr, (2001) 1 SCC 652*** has held as under:-

“19. In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person and signed by such witnesses. It must be remembered that search is made to find out a thing or document which the searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference

between the two processes in the Transport Commissioner, Andhra Pradesh, Hyderabad vs. S. Sardar Ali. Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition:

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

20. Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the

presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

22. In this case, the mere absence of independent witness when PW17 recorded the statement of A2-Ramesh and the nickers were recovered pursuant to the said statement, is not a sufficient ground to discard the evidence under Section 27 of the Evidence Act.”

(emphasis supplied)

26. Consequently, in view of Section 27 of the Evidence Act, the portion of the statement of the appellant-accused that led to the recovery of the cane and plastic sack is admissible in law and the same further corroborates the testimony of PW-2 – eye witness.

THE APPELLANT-ACCUSED HAD BEEN IDENTIFIED AS THE ASSAILANT AT THE EARLIEST IN THE CONTEMPORANEOUS RECORDS

27. The argument that the appellant-accused had not been named as an assailant in the initial DD Entry made by the parents of the deceased-victim

is contrary to the facts as on the right hand side of the PCR form, the name of the appellant-accused had been mentioned almost contemporaneously. The relevant portion of DD Entry is reproduced hereinbelow:-

**“DELHI POLICE CONTROL ROOM
Form-I**

DELHI POLICE (PART I) Date <u>06-May-2010</u> Time: <u>15:11:04</u> R.D.D. No. <u>06May101130749</u> Extn No. <u>113</u> Informant's @ <u>Name SHASI</u> (Male)	PART-II STAFF FILLED IN BY WIRELESS															
i) Phone No. <u>92128119..</u> ii) Address <u>20/28 WEST PATEL NAGAR NEW DELHINDL</u> Contact Name _____ Complaint <u>OTHERS</u>	<table style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 33%;">Van Selected Time</th> <th style="width: 33%;">Msg transmitted to Van No.</th> <th style="width: 33%;">At</th> </tr> <tr> <td style="border-top: 1px solid black;">Time When Van reached spot</td> <td style="border-top: 1px solid black;">Van Report Time</td> <td style="border-top: 1px solid black;">Van Free Time</td> </tr> <tr> <td style="border-top: 1px solid black;">06-May-2010 15:11:56</td> <td style="border-top: 1px solid black;">CMD-06</td> <td style="border-top: 1px solid black;">06-May-2010 15:11:56</td> </tr> <tr> <td style="border-top: 1px solid black;">06-May-2010 15:19:34</td> <td style="border-top: 1px solid black;">06-May-2010 15:26:56</td> <td style="border-top: 1px solid black;">06-May-2010 16:01:51</td> </tr> <tr> <td style="border-top: 1px solid black;">06-May-2010 15:11:59</td> <td style="border-top: 1px solid black;">TGR-53</td> <td style="border-top: 1px solid black;">06-May-2010 15:12:00</td> </tr> </table>	Van Selected Time	Msg transmitted to Van No.	At	Time When Van reached spot	Van Report Time	Van Free Time	06-May-2010 15:11:56	CMD-06	06-May-2010 15:11:56	06-May-2010 15:19:34	06-May-2010 15:26:56	06-May-2010 16:01:51	06-May-2010 15:11:59	TGR-53	06-May-2010 15:12:00
Van Selected Time	Msg transmitted to Van No.	At														
Time When Van reached spot	Van Report Time	Van Free Time														
06-May-2010 15:11:56	CMD-06	06-May-2010 15:11:56														
06-May-2010 15:19:34	06-May-2010 15:26:56	06-May-2010 16:01:51														
06-May-2010 15:11:59	TGR-53	06-May-2010 15:12:00														
Accident Addr. <u>JANTA FLAT ASHOK VIHAR ME MERI LADKI PAR KISI NE TEJAB DAL DIYA HAI.</u>	Accident Info. <u>MEIN BETI KO SUNDER LAL JAIN HOSPITAL ME LE AAYA HU. YANHI PCR BEHJEIN.</u>															
DCR No. Received <u>37</u> Report Received from VAN <u>CDR-2 FOR INF. SHO/ACP 06/05/2010 15:39:19 FROM BASE CALL IS TRUE SHIVANI D/O HORI LAL AGE 17 R/O 19C JANTA FLAT KRISHNA ENCLAVE ASHOK VIHAR KO PADOSI LADKA MAHESH S/O BUA LAL AGE 28/29 R/O 19 A JANTA FLAT ASHOK VIHAR NE GHAR PAR AAKAR LADKI PAR TEJAB DALKAR BHAG GAYA LADKI 50% JALI HUI HAI JO ABOVE HOSP. MAI ADIT HAI HOSH MAI TREATMENT CHAL RAHA HAI GHAR WALE MOKA PAR HAI KARAN NAA MALUM AREA PS BHARAT NAGAR KA HAI (Q/ROOM INFO.)</u>																
XXXXX	XXXXX	XXXXX	XXXXX	XXXXX	XXXXX”											

28. In the MLC recorded few minutes after the incidence, the appellant-accused is mentioned as the assailant. The MLC is reproduced hereinbelow:-

29. Also the appellant-accused had been identified as the assailant by the deceased-victim in her dying declaration recorded on the date of the incident itself. Consequently, the appellant-accused had been identified as the assailant at the earliest in the contemporaneous records.

AS FAR AS THE ALLEGATION OF NON-LIFTING OF FOOTPRINTS FROM THE STAIRCASE IS CONCERNED, THIS COURT IS IN AGREEMENT WITH THE REASONING GIVEN BY THE TRIAL COURT IN THE IMPUGNED JUDGEMENT.

30. As far as the allegation of non-lifting of footprints from the staircase is concerned, this Court is in agreement with the reasoning given by the trial court in the impugned judgement. The relevant portion of the said judgment is reproduced hereinbelow:-

“(c) It is not the case of prosecution that the accused had come to the house of deceased barefooted or that he had left his shoes / slippers at the gate. The footmarks belonging to the accused has neither been set up by the prosecution nor fits in the facts and events. The footmarks can only pertain to the victim Shivani and reflect that her right leg / foot was wet with acidic material when she was taken to the hospital. As per the FIR, Ex.PW5/A and statement of PW-2, Shivani was immediately taken to the bathroom, after sprinkling of Tejab on her, and a lot of water was poured over her body. She was then wrapped in a curtain cloth for being taken to the hospital. The photographs of right footmark indicate that despite being diluted with water, the concentration of acidic material flowing from such foot of Shivani was strong enough to react with surface of stair as to leave its clear sign. The footmarks and related events, thus, indicate that the assailant had brought highly concentrated corrosive liquid with the intention not to leave anything to chance”.

31. The aforesaid finding is corroborated by the report of the Mobile Crime Team prepared on the date of the incident. The relevant portion of

the said report reads as under:-

“Its round area was wet due to which no chance print detected despite painful efforts. Also blood type thick fluid lying near the bed on floor and Right foot marks of injured girl ridden with tejab (acid) are marked on stairs from his floor down to ground floor.”

(emphasis supplied)

THE DYING DECLARATION OF THE DECEASED-VICTIM IS TRUSTWORTHY AND INSPIRES CONFIDENCE.

32. This Court is further of the view that the dying declaration of the deceased-victim is trustworthy and inspires confidence. English translation of the dying declaration reads as under:-

“.....At about 3 PM, I heard Mahesh, who resides in my neighbourhood, talking with my mother regarding A/C. Mahesh asked my mother to bring drinking water. My mother went to bring water. At the same time, I felt something wet on my body and felt sharp burning sensation on the body. I started screaming loudly and found Mahesh pouring some water like liquid from a plastic container on me. On hearing my screaming, my mother ran and came to me. Meanwhile, Mahesh immediately ran downwards while carrying the plastic bag and plastic container in his hand. My mother took me to the bathroom and poured water on my body. And thereafter, my mother and Prem Lata Auntie brought me to Sunder Lal Jain Hospital. I am getting treatment here. Mahesh has poured some acid like liquid on me with the intention of killing me. Mahesh had misbehaved with me while I was returning from school 8-9 months ago, on which my father had complained about Mahesh at his home. Thereafter, Mahesh did not say anything to me verbally. But, he would stare at me while passing. Legal action has been initiated against him.”

I have heard the statement and the same is correct.

R.T.I. Shivani

'A'

Sd/- Lella

(In Hindi)

Smt. Leela W/o Sh. Hori Lal

(Mother)

Attested

Sd/- (illegible)

(In English)

Saran Chand

P.S. Bharat Nagar, Delhi"

(emphasis supplied)

THE ARGUMENT THAT THE DECEASED-VICTIM'S STATEMENT WAS RECORDED PRIOR TO HER BEING DECLARED FIT BY DR.INDERDEEP SINGH AT 7.30 P.M. IS INCORRECT. THE DYING DECLARATION FINDS CORROBORATION IN THE TESTIMONIES OF OTHER WITNESSES i.e. PW-2, PW-3, PW-10, PW-18, PW-19, PW-20 AS WELL AS MLC.

33. The argument that the deceased-victim's statement was recorded prior to her being declared fit by Dr. Inderdeep Singh at 7.30 p.m. or the implied suggestion by learned counsel for appellant-accused that the statement of PW-2 had been recorded as a dying declaration are incorrect. In fact, Dr. Ajay Kumar, PW-10 has proved the MLC and in his testimony has stated as under:-

"..... one injured namely Shivani, female 17 years was brought to the hospital by Mrs. Prem Lata, the neighbor of the injured, with alleged history of burn caused by some liquid being used for air conditioner repair by some boy who ran away as stated by the mother. The victim when asked, she said that "I was sleeping in the room with my mother". The mother named the boy as Mahesh who ran away and there was smoke everywhere.

On examination, the injured was found very sick, blurred vision and restless. On local examination the burn was found on face front portion of chest, front of both hands, front of abdomen, front of both lower limbs. She was having 45% to 55% burn over the body. She was admitted in the Burn ICU and Burn & Plastic and Eye Surgeon were informed. She was given treatment.

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As per MLC, on 06.05.2010 at about 7.30 pm the injured Shivani was fit for statement and was found conscious oriented and relived from pain and she was responding to all verbal commands. This observation was given by the Sr. Resident of Surgery.

(emphasis supplied)

34. It is pertinent to mention that no question pertaining to subsequent addition or interpolation in the MLC had been put either to PW-2 Leela Wati or PW-10 Dr. Ajay Kumar.

35. Further, Dr. Dilip Kumar, PW-20 had identified the signature and handwriting of Dr. Inderdeep Singh, who had declared the deceased-victim fit for statement. The relevant portion of PW-20, Dr. Dilip Kumar's testimony is reproduced hereinbelow:-

"..... I have seen the MLC of Shivani bearing No.7353 available on judicial file already Ex.PW10/A and as per the said MLC, on 06.05.2010 at about 05.15 pm Dr.Richi Gupta had declared the patient unfit for staemnet and thereafter at 07.30 pm Dr.Inder Deep Singh declared the patient conscious oriented, relieved from pain, responding to all verbal commands and fit for statement. Noting of Dr. Inder Deep Singh is encircled at point X and it bears his signature at point Y on the MLC already Ex.PW10/A. Dr. Inder Deep has left the hospital in the year 2012 and his present whereabouts are not available with the Hospital. I can identify the signatures and handwriting of Dr. Inder Singh as I have seen him writing and signing in the course of official duties."

(emphasis supplied)

36. The statements of Investigating Officer, PW-19 and Head Constable Dev Narain, PW-18 corroborate the testimonies of the doctors i.e. PW-10 and PW-20. The relevant portion of the PW-19, Investigating Officer and PW-18, Head Constable Dev Narain are reproduced hereinbelow:-

A) Testimony of Investigating Officer/PW-19:-

“.....I left Ct. Dev Narain at the spot and I reached Sunder Lal Jain Hospital at about 03.45 pm there I collected the MLC bearing No.7353 pertaining to injured Shivani. Shivani was in the ICU with burn injuries and she was unfit for statement at that time. From the hospital, I telephonically requested duty officer, PS Bharat Nagar to sent Crime Team at the spot and thereafter, I left the hospital and came back at the spot. At about 04.15 pm, Crime Team arrived at the spot. In-Charge Crime Team SI Devender Singh inspected the spot, prepared his report and handed over the same to me. Photographer Ct. Subhash took the photographs of the spot. I recorded their statements. Thereafter, they both left the spot. Thereafter, I again reached Sunder Lal Jain Hospital at about 05.15 pm and at about 7.30 pm, Shivani was declared fit for statement by the Doctor. Thereafter, I recorded the statement/complaint of injured Shivani in the presence of her mother already Ex.PW2/A bearing RTI of Shivani at point A and signatures of Smt. Leela at point B and attested by me at point X.

xxx

xxx

xxx

.....It is incorrect to suggest that first I recorded the statement of Shivani and then I reached at the spot and got the spot inspected and photographed by the photographer of the Crime Team and In-Charge Crime Team. Vol. The sequence is wrongly mentioned in the rukka/tehrir Ex.PW19/A.”

B) Testimony of Head Constable Dev Narain/PW-19:-

“.....After sometime, IO returned on the spot and got the spot inspected through crime team officials. After completion of the proceeding by the crime team, IO again left for Sunder Lal Jain Hospital. At about 8.20 pm, IO handed over me the rukka after

endorsement with direction to get the FIR registered. I went to P.S. and handed over the rukka to the Duty Officer HC Mukesh Kumar at about 8.30 pm. After registration of FIR, DO handed me the copy of FIR and original rukka. I returned to the spot, handed back the copy of FIR and original rukka to the IO.”

(emphasis supplied)

37. Consequently, the dying declaration in the present case finds corroboration in the testimonies of other witnesses i.e. PW-2, PW-3, PW-10, PW-18, PW-19, PW-20 as well as MLC.

38. Further, none of the police officers can be attributed with any kind of ill-feeling against the appellant-accused in the present case.

THE ARGUMENT THAT THE DYING DECLARATION IS UNTENABLE IN LAW AS IT HAD NEITHER BEEN MADE BEFORE A MAGISTRATE NOR ATTESTED BY ANY DOCTOR OR RECORDED IN A QUESTION-ANSWER FORM IS INCORRECT.

39. Also the submission of learned counsel for the appellant-accused that the dying declaration is untenable in law as it had neither been made before a magistrate nor attested by any doctor or recorded in a question-answer form are incorrect. The Supreme Court in **Laxman Vs. State of Maharashtra, AIR 2002 SC 2973** has held as under:-

“3..... A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying

declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.....”

(emphasis supplied)

40. Further a Division Bench of this Court in ***Kamla Prasad Vs. State (NCT of Delhi), 2013 LawSuit (Del) 3725*** has held as under:-

“6. Counsel further submits that the entire case of the prosecution is based upon the dying declaration, which is highly doubtful in nature, as the circumstances in which it was recorded are shrouded in mystery and there is no independent corroboration regarding the contents of the dying declaration, there was no attestation got done by the I.O. on the said statement from the attending doctors. It is also submitted that the dying declaration was not in question answer form, nor Smt. Savitri Devi was conscious and thus the dying declaration Ex.PW-10/A is not trustworthy. Counsel further submits that the appellant has been falsely implicated in the matter at the instance of the Police who wanted to solve the case at his expense.

xxxx

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15. In the cross-examination PW-10 testified that he had recorded the statement of the deceased within 10-15 minutes of her having been declared fit by the Doctor. He has also testified that no relative or family member was present near the bed of Savitri. He denied the suggestion that the hands of the patients were bandaged and he further denied that she was unable to give the thumb impression.

xxxx

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17. It has been repeatedly held by the Supreme Court that it is not mandatory that a dying declaration should be recorded in a

question-answer form, or that it requires corroboration if it is trustworthy and inspires confidence. In view of the law laid down by the Supreme Court, which has been extracted above, the submissions made by learned counsel for the appellant are without any force and the same are rejected.

(emphasis supplied)

THE DEFENCES IN THE PRESENT APPEAL THAT APPELLANT-ACCUSED HAD A RELATIONSHIP WITH ELDER SISTER OF THE DECEASED-VICTIM AND THAT THE ASSAILANT WAS UNKNOWN WERE NEVER PUT TO THE EYE WITNESS. CONSEQUENTLY, THE APPEAL OF THE APPELLANT-ACCUSED IS BEREFT OF MERITS.

41. The defences in the present appeal that appellant-accused had a relationship with elder sister of the deceased-victim and that the assailant was unknown were never put to the eye witness. In fact, the defences put forward in the cross-examination of PW-2 by the appellant-accused were that the deceased-victim had committed suicide and the deceased-victim had physical relationship with the appellant-accused and that he had teased deceased-victim's elder sister. The relevant portion of cross-examination of PW-2 is reproduced hereinbelow:-

"Shivani had told me that accused had misbehaved with her about 8/9 months before the occurrence. She did not tell me if she was physically assaulted or molested by him. Accused had not molested or assaulted my daughter before putting tejab on the day of incident. The call at 100 number was made by my husband and I was also present with him at that time. It is incorrect to suggest that accused was having physical relationship with Shivani. I had seen accused Mahesh pouring tejab on my daughter when I rushed back on hearing the shouts of my daughter. Shivani was shouting after the tejab was being put on her. It is incorrect to suggest that I am not in a position to identify the plastic can and had wrongly identified the same in the court. Despite smoke, the plastic can was visible. There was smoke when I reached the room from the kitchen. Accused took

away the plastic can and the plastic bag with him. I have inverter at my house. We do not purchase acid for the battery of inverter and do not purchase acid for cleaning the toilet. My husband came straight at the hospital and not at home. My husband accompanied the police at my house in the night. I do not use mobile phone. Mobile phone No.9212811961 belongs to my husband. It is correct that on the day of incident my husband was having this mobile phone. It is incorrect to suggest that I have deposed falsely against accused Mahesh. It is incorrect to suggest that I had not witnessed the occurrence. It is incorrect to suggest that Shivani committed suicide. It is incorrect to suggest that I have got the accused falsely implicated because he had teased my elder daughter.”

(emphasis supplied)

42. In fact, the post-mortem report of the deceased-victim confirmed that her hymen was intact.

43. Consequently, this Court is of the view that the appeal of the appellant-accused is bereft of merits.

IN THE APPEALS FILED BY THE STATE AND THE FATHER OF THE DECEASED-VICTIM, THE ACCUSED’S PUNISHMENT NEEDS TO BE MODIFIED AS A CLEAR MESSAGE NEEDS TO BE SENT TO THE SOCIETY THAT THOSE WHO INDULGE IN ACID ATTACK SHALL BE SEVERELY DEALT WITH.

44. As far as the appeals filed by the State and the father of the deceased-victim are concerned, this Court is of the view that sentencing is a difficult task and often vexes the mind of the court.

45. Under the Indian Penal Code, most of the heinous crimes are punishable by death or life imprisonment. While awarding of life imprisonment is a rule, death penalty is an exception. The term “rarest of rare” cases, which is consistent determinative rule declared by the

Constitutional Courts for death penalty itself suggests that it has to be an exceptional case. The Supreme Court in ***Ramnaresh and Others v. State of Chhattisgarh: (2012) 4 SCC 257***, re-stated the principles with regard to the sentencing policy and, in particular, the death penalty. The relevant paras of the said judgment are reproduced hereinbelow:-

“76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in Machhi Singh [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] . The aforesaid judgments, primarily dissect these principles into two different compartments—one being the “aggravating circumstances” while the other being the “mitigating circumstances”. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and

the punishment is the principle of “just deserts” that serves as the foundation of every criminal sentence that is justifiable. In other words, the “doctrine of proportionality” has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly bring the case within the ambit of “rarest of rare” cases and the court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to the “rarest of rare” cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence.”

(emphasis supplied)

46. Subsequently, the Supreme Court in ***Duryodhan Rout vs. State of Orissa, (2015) 2 SCC 783*** has held that life means the sentence for entire life of an accused. The relevant portion of the said judgment is reproduced hereinbelow:-

“18. The word “imprisonment” has not been defined either in the Code of Criminal Procedure or in the Penal Code. As per the General Clauses Act, 1897 under Section 3(27) “imprisonment” shall mean imprisonment of either description as defined in the Penal Code. The definition of imprisonment under the General Clauses Act would, therefore, in case of life imprisonment mean imprisonment for life/imprisonment for the remainder of the convict's life. We are not in agreement with submission made on

behalf of the State that imprisonment for life has not been included in the definition of the term “imprisonment” under Section 3(27) of the General Clauses Act, 1897.

19. Imprisonment for life is not confined to 14 years of imprisonment. A reading of Section 55 IPC and Sections 433 and 433-A CrPC would indicate that only the appropriate Government can commute the sentence of imprisonment for life for a term not exceeding fourteen years or accedes to the release of such person unless he has served at least fourteen years' of imprisonment.

20. Section 57 of the Penal Code merely relates to calculating fractions of terms of punishment by providing a numerical value of 20 years to life imprisonment. Section 53 of the Penal Code lists the punishments to which offenders are liable under the Code which reads as follows:

“First.—Death;

Secondly.—Imprisonment for life;

Fourthly.—Imprisonment, which is of two descriptions, namely—

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine.”

Therefore, a person sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted by the appropriate Government in terms of Sections 55, 433 and 433-A of the Code of Criminal Procedure.

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28. From the aforesaid decisions rendered by this Court, it is clear that a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the

whole or a part of the sentence under the provisions of the Criminal Procedure Code.

(emphasis supplied)

47. The Supreme Court in **Swamy Shraddhananda (2) alias Murali Manohar Mishra vs. State of Karnataka, (2008) 13 SCC 767** also pointed out that the Court's option is not limited to two punishments only, one a sentence of imprisonment for fourteen years and the other death. The relevant portion of the said judgment reads as under:-

“92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. *Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.*

94. *In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.*

(emphasis supplied)

48. In ***Raj Kumar vs. State of Madhya Pradesh, (2014) 5 SCC 353***, in a case of rape and murder of a 14 year old girl, the Supreme Court directed the appellant therein to serve a minimum sentence of 35 years in jail (without remission).

49. In the present case as the deceased-victim was a defenceless young girl aged about 16 years, who had given no provocation or intimidation and the appellant-accused had decided to eliminate the deceased-victim in a ghastly pre-planned manner, this Court is of the view that the accused's punishment needs to be modified as a clear message needs to be sent to the society that those who indulge in acid attack shall not be let off lightly.

CONCLUSION

50. Accordingly, the judgment of the Trial Court convicting the appellant-accused for the offences committed under Sections 452 and 302 IPC, is confirmed. However, the sentence is modified. The appellant is hereby

directed to undergo imprisonment for life i.e. for remainder of his life. It is also directed that the appellant-accused's case for remission shall not be considered till he undergoes imprisonment for twenty-five years. The sentence already undergone by the appellant-accused shall be set off. The appeals filed by the State as well as the victim's father stand disposed of in the above terms.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MAY 13, 2019
KA/js/rn



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