

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

+ CRL.A. 576/2018

Reserved on: 10.01.2019

Date of decision: 22.01.2019

IN THE MATTER OF:

ARSHAD ALI @ MUNNA KHAN

..... Appellant

Through: Mr. B. Badrinath, Advocate
(DHLSC)

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Aasha Tiwari, APP for the State
with Inspector Krishan Kumar, I/C Lock-up
with SI Omveer, PS Nand Nagari.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

HIMA KOHLI, J.

1. The appellant is aggrieved by the judgment dated 28.2.2018 passed by the learned Addl. Session Judge (Fast Track Court), Shahdara Karkardooma Court, Delhi, in S.C. No. 54/2014, arising out of FIR No.366/2014, P.S. Nand Nagari whereunder he has been held guilty and convicted under Sections 302/506 IPC for a double murder, one of his daughter-in-law, Nagma and the other of her 22 days old daughter, Sofia. However, the appellant and his son, accused No.2, Ibne Ali, were acquitted for the offence under Sections 498-A/34 IPC. Vide order on sentence dated 09.03.2018, the appellant has been sentenced to undergo

life imprisonment with a caveat that he would not be released on remission before undergoing a sentence for a period of 28 years under Section 302 IPC and shall pay a fine of Rs.10,000/-. In default of payment of fine, he has been directed to undergo simple imprisonment for a period of six months. For the offence under Section 506 IPC, the appellant has been sentenced to undergo rigorous imprisonment for a period of 2 years. Further, compensation has been directed to be awarded to the legal heirs of both the deceased under Section 357-A Cr.P.C.

2. The process of criminal law was set into motion when at around 3.50 AM on 08.4.2014, DD No. 7A (Ex.PW14/A) was recorded at PS Nand Nagari, Delhi. The Control Room was intimated through a telephonic call received by the PCR Van that a lady was murdered in K-Block, House No. 285, Street No. 5, Sundar Nagri, Delhi. On the duty officer intimating PW-24, SI Gaurav Kumar about DD No. 7A, he along with PW-14, SI Ashok Trikey and PW-19, Ct. Charan Pal reached the first floor of the aforesaid house where the dead bodies of Nagma and the baby girl, Sofia were found. There was blood on the floor and in the nostrils of Nagma. Ligation marks were found on the necks of both the deceased. The Crime team was called, who inspected the site and took photographs. The "Scene of Crime Visit Report" (Ex.PW7/A) recorded in column 6 that the *modus operandi* was strangulation and noted in column 9 that the weapon/tool suspected to have been used for strangulation, appeared to be a rope. In column 14, the exhibits advised to be collected from the spot included the jute rope.

3. On inquiries made by PW-24, SI Gaurav Kumar, it was revealed that the appellant is the father-in-law of the deceased, Nagma and the grandfather of baby Sofia and that he and his son, Abid Ali @ Nihal aged about 8 years were sleeping outside the room of the deceased; Dildar Ali @ Dillu, husband of Nagma was in Tihar Jail at that time and the appellant's wife, Bilkish @ Ujma had left his company 3-4 months ago. There was no sign of breaking open of the door of the room where the dead bodies were found. The dead body of the woman was identified as that of Nagma, w/o Dildar @ Dillu, aged about 22-23 years and that of the baby girl was identified as Sofia, daughter of Nagma, about 20-22 days old. Based on the aforesaid information, the IO prepared a rukka and got the FIR registered. Later on, the investigation was entrusted to PW-29, Inspector Kishan Kumar.

4. The site plan was prepared with the assistance of PW-24, SI Gaurav Kumar (Ex.PW29/A). The exhibits lifted from the scene of crime that included blood samples, blood stained earth, sample earth control, broken *mala*, one ear ring, small blanket and *dari*, were seized vide seizure memo Ex.PW19/B. On reaching the ground floor of the house, the IO (PW-29) had met the appellant and his neighbour, Nisar Ahmed (PW-10) and Anwar Ali (PW-11). He had also met the minor son of the appellant namely, Abid Ali (PW-5), who is the sole eye witness and his wife, Bilkish @ Ujma (PW-6). Besides recording the statements of PW-10 and PW-11, the statement of PW-5 was also recorded. Abid Ali (PW-5) stated that his father, the appellant had murdered his *bhabhi*, Nagma and baby Sofia by strangulating them with the help of a rope. The appellant was arrested and on the basis of his disclosure statement

(Ex.PW6/B), the blood stained rope with which he had strangled both the deceased, recovered from beneath the cot where the dead bodies were lying, was seized vide pointing out seizure memo, Ex.PW6/A. The blood stained clothes worn by the appellant at the time of the incident were also seized vide seizure memo, Ex.PW20/C. Another piece of rope found near the stairs on the ground floor was sealed and seized vide seizure memo, Ex.PW19/A. The appellant stated to the IO that his son namely, Kismat Ali had murdered Nagma and Sofia with the help of his friends and had tied his hands and legs with the said piece of rope.

5. On 11.04.2014, upon being informed by the police, the parents of the deceased Nagma, namely, PW-2 Asabuddin (father) and PW-3 Mursida (mother) travelled from Bihar to Delhi and their statements were got recorded by the SDM wherein they leveled allegations against the appellant and the accused No.2, Ibne Ali (one of the four sons of the appellant) of murdering Nagma and her baby daughter.

6. An application moved by the IO for recording the statement of the child witness, Abid Ali @ Nihal under Section 164 Cr.P.C. was allowed by the learned ACMM (PW-26) on 11.4.2014, but after putting him general questions and noticing that he was not in a fit mental state to make a statement, the said application was disposed of with liberty to the IO to move a fresh application when the witness was in a position to depose properly. Subsequently, a fresh application was moved by the IO and allowed by the learned ACMM on 15.4.2014. Abid Ali had stated this time that he had seen the appellant/his father, who he addressed as '*Chacha*', strangulating his *bhabhi*, Nagma with a rope. He further stated

that his father had killed baby Sofia too and had threatened him to keep quiet and not inform anybody, failing which he would kill him.

7. On completion of the investigation, a charge sheet was filed before the Court and charges were framed against the appellant under Section 302/506 IPC and against both the accused i.e., the appellant and the accused No.2, Ibne Ali under Sections 498-A/34 IPC. Both the accused had pleaded not guilty and claimed trial.

8. The prosecution has examined 29 witnesses to prove its case. The material ocular evidence includes that of Asabuddin (PW-2), Murshida (PW-3), Arshad Ali (PW-4), Abid Ali @ Nihal (PW-5), Bilkish @ Ujma (PW-6, wife of the accused), Nisar Ahmed (PW-10), Anwar Ali (PW-11) and Mohd. Yaseen (PW-12). The star witness is PW-5, Abid Ali, minor son of the appellant, who is the sole eye witness of the incident.

9. PW-2, Asabuddin (father of the deceased Nagma) and PW-3, Mursida (mother of the deceased Nagma) had deposed that a day before her murder, their daughter, Nagma had telephonically informed them that her father-in-law, the appellant herein, was having evil eye on her and had asked her not to lock the door of the room from inside. PW-4, Arshad Ali, brother of the deceased had also deposed about receiving a telephonic call from his sister, Nagma one day before the crime and had stated that he and his parents had spoken to her. On the next day, they had come to know about his sister having expired. PW-4 had identified the dead body of Nagma vide Ex.PW4/A.

10. PW-6, Bilkish @ Ujma, wife of the appellant had deposed that before marrying Nagma, her son Dildar @ Dillu was married to one Yasmeen and a *talaq* had taken place between them due to allegations of molestations leveled by Yasmeen against the appellant. She stated that because the appellant used to tease Nagma, she had left his home and moved to her parental home; that Nagma used to wear a *burka* and she had telephonically informed Bilkish that the appellant had forced her to remove the *parda*; that the appellant was not of good character and their son, Dildar was lodged in jail before the date of the incident; that as long as she was living in the house, Nagma used to close the door of the room where she was residing, from inside. Later on, Nagma had told PW-6 on the telephone that the appellant used to force her to keep the room open. She further deposed that after Nagma had got married to Dildar, she was informed about the loose character of the appellant and was warned to be cautious. She stated that on 04.8.2014, she had visited the house of PW-11, Anwar Ali, who lived in the neighbourhood with a view to take Nagma back with her as her husband was in jail, but when PW-11 went to the house of the appellant to call Nagma, he did not allow her to leave the house. PW-6 had also deposed about witnessing the disclosure statement of the appellant, Ex.PW6/B and the pointing out memo of the recovery of the rope lying under the cot where the dead bodies were lying at the instance of the appellant, Ex.PW6/A.

11. The medical and forensic witnesses produced by the prosecution includes PW-9, Dr. Neha Gupta, who had conducted the postmortem on the bodies of Nagma and baby Sofia and had proved the postmortem reports as Ex.PW9/A and Ex.PW9/B, respectively. She had deposed that

the time since the death had occurred was about five days and the cause of death was asphyxia as a result of ante-mortem strangulation by a ligature and that injury No.1 on the body of the deceased, Nagma was sufficient to cause death in the ordinary course of nature. Similarly, the cause of death of baby Sofia was also stated to have been caused by asphyxia as a result of ante-mortem strangulation by a ligature.

12. The record reveals that during her cross examination, PW-9 had stated that she had not been shown the ligature material for obtaining an opinion. At that stage, the State moved an application before the Court asking for permission to obtain an opinion in respect of rope seized vide pointing memo, Ex.PW6/A, which was allowed and a second opinion dated 24.7.2016 was given by PW-9 vide Ex.PW9/B, opining *inter alia* that injury No.1 mentioned in the postmortem reports of both the deceased were possible by the rope furnished for examination.

13. PW-17, Dr. Adesh Kumar, Sr. Scientific Officer, Chemistry, FSL Rohini, Delhi had deposed about the contents of a wooden box received from the I.O. and examined by him. He had proved his detailed report, marked as Ex.PW17/A.

14. PW-25, Ms. Shashi Bala Pahuja, Sr. Scientific Officer (Biology), FSL, Rohini, Delhi, proved the detailed report, Ex.PW25/A wherein she had opined that the DNA profiling revealed that the blood stains found on the rope, Ex.-7 matched with the blood stains on the *kurta* of the accused, Ex.-8(a) and the blood stained gauze of the deceased, Nagma, Ex.-12.

15. PW-10 Nisar Ahmed, a neighbour of the appellant had stated that at about 3.00 AM on the relevant date, he had heard cries and on coming out of his house, he had seen the appellant lying on a slab outside his house with a rope tied on his knees and both his hands tied at the knees, inside the rope. On enquiring as to what had happened, the appellant had told PW-10 that his sons, Kismat Ali and Dildaar @ Dillu had beaten him up and tied him with a rope. On being asked by the appellant to go upstairs and see what had happened, PW-10 had untied him but did not notice any injury on his body. He had then called a lady living in the neighbourhood, namely Lambo, who went upstairs, came down and stated that Nagma and her daughter had died. PW-10 then called the PCR at No.100. However, on going through the PCR form, it transpires that the mobile number mentioned therein is not that of PW-10. The said witness went on to state that the appellant was a flirtatious man and there were complaints against him of eve teasing due to which his wife had left him.

16. PW-11, Anwar Ali, another neighbour of the appellant had deposed that he had old relations with the family of the accused; that two months before the incident had taken place on 08.4.2014, PW-6, Bilkish (wife of the appellant) had left her matrimonial home and at that time, Nagma's husband, Dildar was lodged in Tihar Jail and Nagma and her baby daughter were residing on the first floor of the house. He had deposed that the appellant was also residing on the first floor alongwith his minor son, Abid Ali @ Nihal and they used to sleep there; that on 08.4.2014 at 3.15AM, on hearing the noise of someone crying, he had come out of his house and had seen that the appellant's hands were tied

with a rope near his knees. The appellant had told PW-11 that he was thrown from the stairs and was beaten by someone and his cash and mobile phone were robbed; that on his wife Mobina asking about Nagma, the appellant had stated that she was on the first floor. They had then gone to the first floor of the appellant's house and found that both the deceased were dead and ligature marks visible on Nagma's neck. PW-11 then called 100 Number and informed the police about the murder. It is relevant to note that it is the mobile number of PW-11 that has been recorded in the PCR form. PW-11 further deposed that one day prior to the incident, the appellant had asked him to call up his wife, Bilkish. At his request, he had called up Bilkish and asked her to come to his house, which she did late in the night. On the instructions of Bilkish, PW-11 had gone to his house to bring Nagma with him as Bilkish wanted to take her, but the appellant had refused to allow Nagma to go with Bilkish. PW-11 also tried to persuade the appellant but he refused to allow Nagma to accompany Bilkish. As a result, Bilkish had left his house. PW-11 deposed that the appellant is a person of bad character. In his cross examination, he stated that he had heard of incidents of eve teasing by the appellant. He volunteered that the earlier daughter-in-law of Arshad Ali had also complained about eve teasing by him and when he had asked Nagma a day before to accompany him to meet Bilkish, she had refused to do so stating that if she did so, she would be killed by Arshad.

17. PW-12, Mohd. Yaseen, residing as a tenant in the appellant's house for a year and a half prior to the incident, had deposed that the appellant is a bad character and that 15 days before the incident, his wife had left him after a quarrel. On the day when a quarrel had taken place

between the appellant and his wife, PW-12 had tried to pacify them and bring about a compromise by asking the appellant to bring Bilkish back to his house, but he had refused to do so. PW-12 stated that the appellant had tried to allure his wife, Shabana by offering her money to establish a sexual relation with him and a scuffle had taken place between him and the appellant. But due to the intervention of neighbourers, the matter was closed.

18. PW-29, Inspector Kishan Kumar had deposed about reaching the spot of crime at 5.00 AM on 08.4.2014, where he discovered the dead bodies of Nagma and baby Sofia; of preparing site plan, calling the Crime Team, who had inspected place and taken photograph of the place of occurrence; of collecting the case properties and recording the statement of the family members of the appellant, the public witness including Abid Ali (PW-5), Bilkish (PW-6), Nishar Ahmed (PW-10) and Anwar Ali (PW-11). PW-29 stated as to how, based on the disclosure statement of the appellant made in the morning of 09.4.2014, one piece of blood stained rope was recovered beneath a cot where the dead bodies were found lying in the house and the same was seized vide seizure memo (Ex.PW6/A) along with the blood stained *Kurta* and *Tehmat* (Lungi) worn by the appellant. The IO also deposed about the inquest proceedings, recording of the statement of the child witness, PW-5 before the ACMM, receiving of the postmortem reports and the FSL report.

19. We may note that in his statement recorded under Section 313 Cr.P.C. the appellant claimed that he has been falsely implicated in the case; that it was his son Kismat Ali, his wife, Bilkish and one Shahid

Kabari with whom he claimed Bilkish had an affair and one Murad, who had murdered Nagma and Sofia and they had tied his hands and put clothes over him. Though liberty was granted to both the accused to lead defence evidence, they did not do so.

20. Relying on the testimony of the child witness, Abid Ali @ Nihal (PW-5) and holding that his deposition was reliable and trustworthy, particularly in the light of the corroborative testimony of independent witnesses, i.e., the neighbours and tenants including Nisar Ahmed (PW-10), Mohd. Yaseen (PW-12), Saleem Javed (PW-18) and the appellant's wife, Bilkish @ Ujma (PW-6), the learned ASJ held that the prosecution had successfully proved that the appellant was not of good moral character and he had harboured bad intention towards his daughter-in-law, Nagma that he did not allow her to bolt the door of her room from inside and one day prior to the incident, he did not allow his wife, Bilkish to take Nagma with her. The trial court also relied on the forensic evidence which established that a piece of blood stained rope seized on the basis of the disclosure statement of the appellant was the one that had been used by him to strangle Nagma and baby Sofia, as the blood appearing on his *Kurta* had matched with the blood stains on the rope as also on the shawl in which baby Sofia was found wrapped.

21. Referring to the circumstances that had occurred a day prior to the fateful day, when Bilkish (PW-6) had tried to take Nagma with her, which was resisted by the appellant and connecting the same with the testimony of the parents and brother of Nagma, who had deposed that one day before her murder, she had telephonically informed them about

the appellant threatening her and warning her not to latch the door of the room from inside, the trial court held that the prosecution was successful in establishing the motive for the murder attributable to the appellant. The defence version that the appellant had been falsely implicated due to a property dispute between him and his wife Bilkish, was turned down.

22. The trial court had also commented on the false statement made by the appellant under Section 313 Cr.P.C., wherein he had pointed a finger of suspicion at his son, Kismat Ali, besides his wife and two others for committing the murder of the deceased. Referring to the deposition of Nisar Ahmed (PW-10), who had deposed that the appellant had informed him that his sons, Kismat Ali and Dildar @ Dillu had beaten him up and had tied him up with a rope, the learned ASJ rejected the said version outright in the light of the fact that at that point in time, Dildar @ Dillu (husband of Nagma) was admittedly in judicial custody. It was held that the appellant was trying to wriggle out of the situation by taking shifting stands at different points in time.

23. Mr. Badrinath, learned counsel for the appellant has sought to fault the impugned judgment on three counts, firstly, that there is no scientific evidence to connect the appellant with the murder of the deceased, Nagma and baby Sofia on the ground that the rope originally sent by the police to the FSL for obtaining a report, does not match with the rope that was subsequently sent to Dr. Neha Gupta (PW-9), who had submitted a second opinion on the ligature material. The second plea is that the trial court has erred in relying on the tutored statement of the child witness (PW-5), which is full of contradictions and ought to have

been discarded and lastly, that the character of the appellant has been wrongly maligned and the evidence referred to in relation to his character, was mostly hearsay and therefore no motive could have been attributed to him for committing the murder of Nagma and baby Sofia. In support of the said submission, learned counsel cited Ram Lakhan Singh & Others vs. State of Uttar Pradesh reported as (1977) 3 SCC 268, Munna vs. State of U.P. reported as (1985) 11 ALR 619 and Ranganayaki vs. State By Inspector of Police reported as (2004) 12 SCC 521.

24. The aforesaid arguments were sought to be rebutted by Ms. Ashaa Tiwari, learned APP, who stated that there was ample evidence on the record to link the jute rope bearing the blood stains and discovered on the basis of the disclosure statement made by the appellant, to the rope in respect whereof PW-9, Dr. Neha Gupta had given a second opinion. She urged that there was no scope of planting the rope or substituting it and nor was any tampering done by the prosecution to indict the appellant, as alleged. Coming to the testimony of the child witness (PW-5), learned APP vehemently denied the submission made on behalf of the appellant that the child had been tutored by the prosecution or that all the witnesses had deposed at the instance of Bilkish (PW-6), who had a property dispute with the appellant. She asserted that the loose character of the appellant came out clearly from the deposition of PW-6, PW-10, PW-11 and PW-12 and the final nail in the coffin was driven by the medical and forensic reports that leave no manner of doubt that the blood stains on the rope and on the appellant's *kurta* matched with the DNA of Nagma. In support of her submissions, learned APP relied on State of U.P. vs. Babu

Ram reported as **AIR 2000 SC 1735**; Hema vs. State through Inspector of Police, Madras reported as **AIR 2013 SC 1000** and Mahavir Singh vs. State of Haryana reported as **(2014) 6 SCC 716**.

25. The first plea taken by learned counsel for the appellant is that the prosecution has failed to prove that the rope recovered on the basis of the disclosure statement made by the appellant, is the very same rope that was used for the crime and that there is a reasonable doubt about its authenticity in the light of the second opinion dated 27.4.2016, given by PW-9/Dr. Neha Gupta regarding the ligature material, which describes the jute rope as *“having three intertwined limbs with one fixed knot at one end and other knot was cut separating the three limbs of the rope”*. The said report (Ex.PW9/B) also states that the total length of the rope is 69 cms., circumference 3 cms., width 0.8 cms. with a white sticker of FSL present near the end.

26. To test the aforesaid submission, we have meticulously gone through the relevant evidence on the record that reveals that the rope in question was seized vide seizure memo (Ex.PW6/A), from under the cot where the dead bodies were found lying on the first floor of the appellant's house, on the basis of his disclosure statement (Ex.PW6/B), duly witnessed by two police witnesses, namely, PW-20, HC Faiyaz Ahmad and PW-21, Ct. Amritraj and one public witness, PW-6, Bilkish @ Ujma.

27. A doubt has also been raised by learned counsel for the appellant on the credibility of PW-6, Biklish on the ground that she had deposed that the said rope was found on the second floor of the house whereas the

crime had taken place on the first floor. We are inclined to accept the explanation offered by the learned APP that there could have been a genuine confusion in the mind of the said witness in describing the floor as ordinarily, many a times, the ground floor is described in hindi, as the first floor, i.e., “*pehli manzil*” and the first floor as the second floor, i.e., “*doosri manzil*”. The scope of confusion on this count, cannot be ruled out. In any event, PW-6 has clarified that the police had seized the rope vide memo Ex.PW6/A, which bears her thumb marks at point ‘A’. She had also asserted that the rope had been recovered at the instance of the appellant. She had correctly identified the rope when it was produced from a parcel sealed by the FSL. So, not much would turn on the above discrepancy.

28. The sequence of events show that once the rope was seized, it was sealed and deposited in the store room by PW-29, Inspector Kishan Kumar. The Store Room Register (Ex.PW16/A) records at Sl. Nos. 4716, 4717 and 4720 that the rope along with other case property was deposited by PW-29, Inspector Kishan Kumar in the Malkhana. Subsequently, the same was sent for examination in a sealed parcel to the Director, FSL, Rohini along with other case material on 02.05.2014. It is the very same piece of rope that has been mentioned as Ex.-7 in the FSL report dated 22.04.2016 (Ex.PW25/A), which states that the same matched with the blood stained gauze of the deceased, Nagma (Ex.12) and the blood found on the *Kurta* of the appellant [Ex.-8(a)].

29. On 26.04.2016, all the 17 parcels were received back from the FSL, Rohini and re-deposited in the Malkhana. The extracts of the Store Room Register, Ex.PW16/A and Ex.PW16/B have been proved to show

that one sealed pullanda with the seal of 'FSL SBP Delhi' containing the rope was sent to the Head of the Department, Forensic GTB Hospital on 27.04.2016 for a subsequent opinion. The rope was sent through a Road Certificate No.73/21/16 (Ex.PW23/A) on 27.04.2016. PW-9, Dr.Neha Gupta deposed that on 27.04.2016, she had received a yellow envelope bearing seal of 'SBP, FSL, Delhi', which was intact. On opening the parcel, a jute rope was examined and a 'subsequent opinion' (Ex.PW9/B) was given by her. The testimony of PW-16, Ct. Hari Mohan, Malkhana Mohrar, PS Nand Nagari and PW-23, ASI Prem Kumar, have corroborated the movement of the rope along with other case property, through the entries made in the Store Room Register. Both the said witnesses have affirmed that as long as the case property had remained in their possession, they had remained intact and untampered. PW-15, Ct. Ankit proved deposit of the sealed pullanda with PW-9, Dr. Neha Gupta vide Road Certificate (Mark PW15/A). The said Road Certificate was proved by PW-23, ASI Prem Kumar as Ex.PW23/A. The rope, after examination for subsequent opinion, was deposited back in the Store Room on 06.05.2016.

30. It is also noteworthy that during her cross-examination, PW-25, Ms. Shashi Bala Pahuja, Senior Scientific Officer (Biology), FSL, Rohini, Delhi, had clearly stated that 17 parcels containing the case material were found to be intact. At that stage, the defence did not put any question to her about the condition of the rope. Merely because the dimension of the rope was not mentioned in the FSL Report by referring to its length and circumference, as was described in the second opinion given by PW-9, is not enough to call in question, its authenticity. Learned

APP has correctly placed reliance on the observations made by the Supreme Court in Mahavir Singh (supra) to fortify her stand that in case a question was not put to the witness during the cross examination, who could have furnished an explanation on a particular issue, then the correctness and legality of the said issue cannot be raised later on. [Also refer : Atluri Brahmennandam vs. Anne Sai Bapuji reported (2010) 14 SCC 466 and Laxmibai vs. Bhagwantbuva reported as (2013) 4 SCC 97].

31. In view of the above evidence, it cannot be disputed that the rope in question was not the ligature material used to strangle the deceased more so, when forensic evidence reveals that the blood stains found on the said rope, matched with the DNA of the deceased and the blood stains on the *kurta* of the appellant. Learned APP has been able to satisfactorily demonstrate from the evidence on record that no tampering had taken place in respect of the said rope and nor was it planted or substituted, as claimed by the defence counsel. We therefore do not find any substance in the plea taken by learned counsel for the appellant for harbouring a suspicion as to the authenticity of the rope used as the ligature material.

32. Coming to the second plea taken on behalf of the appellant to the effect that the statement of the child witness, PW-5 Abid Ali @ Nihal ought to have been discarded by the trial court as he was tutored by his mother, PW-6, Bilkish and it was full of contradictions, there is no doubt that while evaluating the evidence of a child witness, the courts ought to be cautious and circumspect. It must be ensured that the possibility of any tutoring is ruled out. It is judicious for the courts to tread cautiously

and not act hastily on the said uncorroborated evidence. It is equally true that there is no impediment in accepting the uncorroborated testimony of a child witness. It is not as if children of tender years are incapable of recapitulating the sequence of facts or an incident that may have occurred in their presence. The judicial dicta is that the deposition of a child witness requires greater scrutiny before it is accepted or rejected. As long as the statement of the child witness is found to be credible and it rings true, there is no reason to reject it. [Refer: Rameshwar vs. State of Rajasthan; **AIR 1952 SC 54**, Mangoo vs. State of M.P.; **AIR 1995 SC 959**, Panchhi and Ors. vs. State of U.P.; **AIR 1998 SC 2726**, Gagan Kanojia and Anr. vs. State of Punjab; **(2006) 13 SCC 516**, Nivrutti Pandurang Kakote and Ors. vs. State of Maharashtra; **AIR 2008 SC 1460**, State of Madhya Pradesh vs. Ramesh; **(2011) 4 SCC 786** and Raj Kumar vs. State of Madhya Pradesh **(2014) 5 SCC 353**]

33. In the instant case, the statement of the child witness, PW-5, Abid Ali @ Nihal under Section 164 Cr.P.C. was first sought to be recorded on an application moved by the IO within three days of the crime, i.e., on 11.04.2014. But when the learned ACMM (PW-26) had put some general questions to the child witness to check his state of mind and found that he was not in a fit state of mind to give a statement, he had declined to record the same. Instead, liberty was granted to the IO to move a fresh application when the child witness was in a position to depose properly. A second application was moved by the IO within four days from 11.4.2014, on 15.4.2014 with the same request. This time the statement

of PW-5 was recorded by PW-28, learned M.M. and he stated as follows:-

“Mein uprokt pate par ammi ke saath rehta hun. Mere chacha, Arshad Ali ne meri bhabhi ko rassi se gala ghont kar mar diya. Chacha ne munni ko kuch daba kar maar diya. Munni Nagma bhabhi ki beti thi. Chacha ne mujhko bola chup kar so ja aur bola kisi ko mat batana verna tumko bhi aise hi maar dunga. Mujhko aur kuch nahi kehna hai.”

It is relevant to note that in the aforesaid statement, PW-5 has referred to the appellant, Arshad Ali as his ‘chacha’ which fact he had clarified to the trial court in his deposition recorded on 06.08.2015.

34. The contention of the learned defence counsel that PW-5 had made contradictory statements in his deposition, is found to be devoid of substance. On the contrary, PW-5 has been consistent in all the material facts relating to the incident and in his testimony, he has mostly repeated what was recorded earlier under Section 164 Cr.PC. PW-5 reiterated the fact that on the fateful day, he was sleeping and when he got up, he saw the appellant putting a rope around the neck of his sister-in-law, Nagma, pulling it and killing her; that this had taken place at about 3.00 AM and thereafter, the appellant had told him to go to sleep, and not tell anyone about the incident, failing which he would kill him. PW-5 has also deposed that his sister-in-law, Nagma had a small daughter, Sofia and his father had trampled on her head and killed her. It is the latter part of his testimony that learned counsel for the appellant states is contradictory as in his statement recorded earlier under Section 164

Cr.P.C., the child witness had stated that the appellant had killed the baby girl by pressing her.

35. We are of the opinion that such a minor variation in the deposition and that too of a child all of eight years at the time of the crime and nine years on the date of his deposition, is inconsequential. It must be kept in mind that PW-5, the child had witnessed a gruesome sight, where he saw his own father strangulating his sister-in-law and her baby. It is apparent from his deposition that PW-5 was able to discern between right and wrong. He also appears to have understood the implications of what he was saying. All the precautions were taken by PW-26 and PW-28 in recording his statement under Section 164 Cr.P.C. The defence could not bring out anything to indicate otherwise. During his deposition, he firmly stood by his statement as recorded under Section 164 Cr.P.C. and minced no words in explaining the events of the crime committed by his own father, without any improvement or embellishment. There is no reason to believe that he was tutored by his mother. No motive can be attributed to a child of such a tender age and that too in a case where he could not have had any malice against his own father. PW-5 was a natural witness. The time of the offence was nighttime. The child was naturally present at his home at that point of time. Not a single suggestion was put to the said witness that he was not present within the house in the intervening night of 07/08.04.2014. We are therefore of the opinion that the trial court was justified in relying on the deposition of the child witness and rejecting the plea of the defence lawyer that he had been tutored by his mother to depose against the appellant. In any event, it is not as if the testimony of the child witness in respect of the factum of the crime is uncorroborated.

It has been duly corroborated by medical and forensic evidence that has come on record and the same when read collectively, clearly inculcates the appellant.

36. Coming to the third limb of the arguments addressed by learned counsel for the appellant to the effect that the prosecution has not been able to establish any motive *qua* the appellant and nor was any evidence brought on record in relation to his loose character, there cannot be any quarrel with the view expressed by the Supreme Court in the case of Ranganayaki (supra), cited by learned counsel for the appellant that the motive of doing a criminal act is generally a difficult area for the prosecution and many a murder is committed without any known or prominent motive. However, in the very same case, the Supreme Court has expressed a view that some times, it may appear that the motive established is a weak one but that itself would be insufficient to lead to an inference adverse to the prosecution.

37. In the instant case, the deposition of two public witnesses i.e., PW-10, Nisar Ahmed and PW-11, Anwar Ali clearly bring out the lecherous character of the appellant. Similarly, PW-12, Mohd. Yaseen and PW-18, Saleem Javed, both living as tenants in the appellant's house have spoken of his loose character. They deposed that the appellant did not allow the deceased, Nagma to bolt the door from inside her room. PW-12 went to the extent of stating that the appellant had tried to allure his wife for sexual favours by offering her money. The deposition of PW-6, Bilkish, wife of the appellant is equally damaging to his character. She had stated that the divorce between her son, Dildar @ Dillu (husband of the

deceased, Nagma) and his first wife, Yasmeen had taken place due to the appellant molesting her. PW-6 had stated that though Nagma used to wear a *burka*, it was at the appellant's insistence that she had to remove the same. When PW-6 left the appellant's house, the deceased Nagma had informed her on telephone that he had forced her to keep the door of her room open. Both PW-6 and PW-11 narrated how a day before the crime, the appellant had strongly resisted attempts made by PW-6 to take Nagma back with her.

38. Even if we overlook the statements of Nagma's parents, PW-2 (father), PW-3 (mother) and her brother, PW-4 on the ground taken by the defence counsel that no material evidence was brought on record by the prosecution through CDRs to prove that the calls allegedly received by them from Nagma were made from the mobile phone of PW-6, Bilkish as no efforts were made by the I.O. to collect the CDRs of the mobile phones of PW-2, PW-4 and PW-6, yet the loose character of the appellant has been amply proved through the deposition of independent witnesses, i.e., the neighbours and tenants of the appellant. The appellant comes out as a licentious character, who lusted for his own daughter-in-law and desired to establish a physical relationship with her. This was apparently resisted by the young hapless girl aged 22/23 years, who had delivered a girl child barely 20/22 days before the incident, while her husband was still in jail. This had apparently enraged the appellant to the point that he strangled Nagma within the four walls of her matrimonial home. The appellant did not even spare the tiny baby, Sofia and strangled her too in a cold blooded manner.

39. In the light of the aforesaid facts and circumstances, there is no manner of doubt that the appellant had sufficient motive to commit the crime which has been amply proved by the prosecution on the basis of the testimonies of independent witnesses and the circumstantial evidence brought on record. Simply because there was no eye witness to the lustful overtures made by the appellant towards his daughter-in-law is not reason enough for this Court to disbelieve the said evidence, which when taken together, clearly establishes that the appellant had resented Nagma for not submitting to his sexual desire which had provoked him to commit such a heinous offence. The prosecution has thus succeeded in proving the motive behind the twin murders committed by the appellant.

40. It is also noteworthy that the appellant has been shifting his stand about the sequence of events that had occurred on the date of the crime as was narrated by him to his neighbours, PW-10 and PW-11, who had reached the spot after hearing his cries and had deposed about what he had told them immediately after the incident. PW-10 had deposed that when he asked the appellant as to what had happened, he stated that his two sons, Kismat Ali and Dillu (husband of the deceased, Nagma) had given him beatings and had left him after tying him with a rope. The falsity of this version is borne out by the fact that on the date of the incident, Dildar Ali @ Dillu was in judicial custody and could not have been present at the scene of crime. As for PW-11, he had deposed that the appellant had told him that he was thrown from the stairs and beaten by someone and his mobile phone alongwith cash was robbed. Both the witnesses had deposed that they did not notice any injury on the body of

the appellant. In his statement made before the court under Section 313 Cr.PC, the appellant offered yet another version of the incident by claiming that it was his son, Kismat Ali, his wife Bilkish, one Shahid Kabari and Murad, who had committed the murder of Nagma and baby Sofia and had tied his hands and put clothes over him.

41. Given the aforesaid contradictory versions of the same incident offered by the appellant at different points in time, each one more implausible than the other, we do not find any error in the findings returned in the impugned judgment that the appellant's defence did not ring true and the same is unbelievable. We therefore uphold the conviction of the appellant under Sections 302/506 IPC.

42. Coming lastly to the order on sentence dated 09.03.2018, we find that the trial court has sentenced the appellant to life imprisonment with a caveat that he would not be released on remission before actual 28 years of incarceration. Learned counsel for the appellant has faulted the sentence by citing the landmark decision of the Constitution Bench of the Supreme Court in the case of Union of India vs. V. Sriharan alias Murugan and Ors. reported as **(2016) 7 SCC 1**, where, amongst others, the following two issues had come up for consideration:-

“(i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?”

“(ii) Whether a special category of sentence instead of death for term exceeding 14 years can be made by putting that category beyond grant of remission?”

43. In the captioned case, the Supreme Court observed that imprisonment for life in terms of Section 53 read with Section 45 of the IPC only means imprisonment for the rest of the life of the convict. However, it was clarified that the right to claim remission, commutation, reprieve etc. as provided for under Article 72 or Article 161 of the Constitution will always be available, being Constitutional remedies, untouchable by the Court. Referring to the principles laid down in its earlier decision in the case of Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka reported as **(2008) 13 SCC 767**, the Supreme Court held that after the initial finding of guilt, in cases where death penalty or life imprisonment is the punishment imposed by the trial court, and the convict files an appeal before a Division Bench of the High Court, it is only the said Court that derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life, or for any specific period exceeding 14 years, say, 20 or 30 years, depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed. Further, in the event of an appeal to the Supreme Court, such powers can be exercised by the said Court. But in no circumstances, can such a power be exercised by an inferior court.

44. In other words, it has been clarified by the Supreme Court that it is not permissible for the Sessions Court to impose or modify a punishment provided for in the Indian Penal Code for such specified offences by directing any specific term of incarceration or till the end of the convict's

life, as an alternate to death penalty. Such a power can only be exercised by the superior courts, i.e., the High Court and Supreme Court.

45. In the light of the above legal position, we are of the opinion that in the present appeal, the trial court was not empowered to qualify the sentence of life imprisonment imposed on the appellant by directing that he would not be released on remission before actual incarceration for a period of 28 years. Limited to the said extent, the impugned order of sentence dated 09.03.2018, is unsustainable and is accordingly set aside. At the same time, while hearing the appeal preferred by the accused against the impugned judgment of conviction and order of sentence, as notice above, this Court is empowered to impose a condition on the sentence by directing a minimum term of imprisonment, which may be in excess of fourteen years of imprisonment, thereby depriving the convict of the benefit of remission till the expiry of such period.

46. Imposition of fixed term sentence has been justified by the Supreme Court in the case of Vikas Yadav vs. State of Uttar Pradesh reported as (2016) 9 SCC 541, where the following passage from Gopal Singh vs. State of Uttarakhand reported as (2013) 7 SCC 545 was quoted:-

“18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by

certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect – propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in conceptual essence of just punishment.”

47. In a recent judgment of the Supreme Court in Jitendra @ Kalla vs. State of Govt. of NCT of Delhi reported as **AIR 2018 SC 5253**, where it was called upon to examine whether the appellant therein, who had been sentenced to rigorous imprisonment for life with a direction that he shall not be considered for grant of remission till he undergoes the actual

sentence of 30 years plus fine of Rs.3 lacs and in default of fine, simple imprisonment for a period of three years and in appeal, the High Court had concluded that the punishments awarded to the appellant were excessive in nature and had modified the same by removing the cap of 30 years and sentenced him to the period already undergone, i.e., 16 years 10 months, the Supreme Court has reiterated the decision of the Constitution Bench in V. Sriharan alias Murugan (supra) on the aspect of the types of remissions earned by a convict in the case of life imprisonment and held thus:-

“62. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant rules based on his/her good behaviour or such other stipulations prescribed therein. The other remission is the grant of it by the appropriate Government in exercise of its power under Section 432 of the Criminal Procedure Code. Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka, (2008) 13 SCC 767.

63. With that when we come to the second part of the first question which pertains to the special category of sentence to be considered in substitute of death penalty by imposing a life sentence i.e. the entirety of the life or a term of imprisonment which can be less than full life term but more than 14 years and put that category beyond application of

remission which has been propounded in paras 91 and 92 of Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka, (2008) 13 SCC 767 and has come to stay as on this date.”

48. Keeping in mind the law laid down as above, we revert back to the facts and circumstances of the instant case. The appellant herein has been convicted for committing a double murder. It has been successfully established by the prosecution that he was disreputable and had an evil eye on his own daughter-in-law, a young girl of 22-23 years. Prior to the date of the incident, the appellant had made sexual overtures towards her. All this had happened within the four walls of the appellant's own home and that too in the absence of his son, Dildar Ali @ Dillu (husband of Nagma), who was incarcerated at that time. Thus the onus was on the appellant, who had special knowledge as to what had transpired that night in his own house, which he miserably failed to discharge. When the deceased, Nagma resisted the depraved acts of the appellant, he had strangled her and did not stop at that. He also proceeded to strangle his 22 days' old granddaughter, baby Sofia (Nagma's daughter), without any remorse. The appellant had also threatened his eight year old son, PW-5 and had warned him that he would kill him if he disclosed to anyone, the incident that he had witnessed. Thereafter, the appellant offered contradictory versions of the incident and kept on shifting his stand about the occurrence on the fateful day by initially seeking to blame his two sons including the husband of the deceased, Nagma and later on, his wife and two others.

49. Given the aforesaid facts and circumstances, the appellant is sentenced to undergo rigorous imprisonment for life with a direction that he shall not be released before completing 25 years of incarceration under Section 302 IPC alongwith a fine of Rs.10,000/-. In default of payment of fine, the appellant shall undergo simple imprisonment for a period of six months. The sentence imposed on the appellant by the trial court for the offence punishable under Section 506 IPC, is maintained. Both the sentences shall run concurrently. The impugned order on sentence dated 09.03.2018, is modified on the above terms.

50. The appeal is partly allowed and disposed of. Trial court record be released and a copy of this order forwarded to the appellant through the Superintendent Jail.

(HIMA KOHLI)
JUDGE

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 22, 2019
ap/rkb