Court No. - 46

Case :- CAPITAL CASES No. - 574 of 2013

Appellant :- Akhtar
Respondent :- State Of U.P.
Counsel for Appellant :- Ajatshatru Pandey,G.S. Chaturvedi
Counsel for Respondent :- Govt. Advocate

Hon'ble Amar Saran, J

Hon'ble Mrs. Vijay Lakshmi, J

(Delivered by Hon'ble Amar Saran, J)

This capital appeal arises from a judgement of the Additional Sessions Judge (Court no. 6), Budaun dated 31.1.2013 in S.T. No. 505 of 2012 whereby the appellant Akhtar has been awarded a sentence of death under Section 302 I.P.C together with a fine of Rs. 25,000/. The appellant Akhtar has also been sentenced to imprisonment for life under section 376 I.P.C and a fine of Rs. 25,000/, and under section 201 I.P.C, appellant Akhtar has been sentenced to 7 years RI and a fine of Rs. 7000/. A death reference has also been forwarded to this Court by the Sessions Judge for confirming the sentence of death awarded to the appellant Akhtar.

We have heard Sri G.S. Chaturvedi, Senior Advocate, assisted by Sri Ajatshatru Pandey for the appellant and Sri Akhilesh Singh, learned Government Advocate assisted by Sri R.K. Singh and Sri Anand Tiwari, learned A.G.As for the State. Written arguments along with case law have also been filed by the learned counsel for the parties.

Background and evidence

The first information report of this case was lodged by PW-1 Baise Ali, father of the deceased Noor-un Nisha on 4.4.2012 at 8.15 p.m at the police station Ujhani. This FIR alleges that Noor-un Nisha aged about 12 years had gone to graze her buffaloes in the afternoon in the direction of J.S. Talkies. When she did not return till 5.00 p.m then a search was made for her by the informant and other residents of the *Mohalla*. At about 6.00 P.M, when the informant, his brother Afzal and Mohalla neighbours Afzal and Islam were crossing the lane in front of the house of the appellant near Sapra Guest House, they saw the appellant throwing the body of Noor-un Nisha out side his house. The informant and other persons caught hold of the appellant Akhtar in Mohalla Gaddi Tola. Noor-un Nisha had died and there was a round mark on her neck and there were injuries on her body. With the help of Baise and Afzal , the appellant was brought to the police station where a report was lodged alleging that the appellant Akhtar had raped and murdered Noor-un Nisha on 4.4.2012. The case was registered at the police station at Crime No. 605 of 2012 under sections 375, 302, 201 I.P.C in the presence of the investigating officer Ashok Kumar Singh.

Inspector Ashok Kumar Singh, P.S. Ujhani commenced the investigation of the case. He arrived at the spot along with SI Raj Bahadur and female constable Parul Yadav and others. He directed SI Raj Bahadur to take steps for getting the inquest done on the body of the deceased and he recorded the statement of the informant. He prepared the recovery memos (Ext. Ka 11) of some black and Henna coloured hair which were found between the fingers of both the hands of the deceased Noor-un Nisha. He placed the hair on a white paper and then placed the same in a plastic box and sealed

them after wrapping the packet with a piece of cloth. He inspected the spot and got photographs taken of the body and the spot. Thereafter, he sent the dead body for post-mortem. He also collected the tiffin box, steel plate, grass and grass leaves tied with a string. The said items were wrapped in a *Dupatta* which were lying near the body. He also took out the appellant Akhtar from the police lockup, who is said to have confessed to his crime. The appellant also agreed to take the police to the place, where he had strangulated the deceased. The I.O thereafter brought the appellant Akhtar to the spot along with SI Raj Bahadur Rastogi and SI Nareshpal Singh. The appellant took the keys of his house from his neighbour Dr. Netrapal. He opened the lock of his shop and climbed up the stairs and opened the lock of the room. He then pointed out the bed in the room, where he admitted to have committed the crime. Then the room and bedding were examined. On the bedding, some broken pieces of red coloured bangles and long hair were found. The recovery memos of the hair and bangles were made.

The post-mortem on the dead body was conducted by Dr. Amit Kumar on 4.5.2012 at 2.25 p.m along with Dr. Harpal Singh. The age of the deceased was about 12 years. Time since death was ¾ days. It was an average built body. Rigor mortis was present on all the four limbs. Postmortem staining was present on the dependent parts. The mouth and eyes were half open. Eyes, face and neck were congested.

Ante-mortem injuries:

1. Multiple abrasions over front of neck in an area 9 cm x 4 cm. Varying from maximum 3 c x 2 cm to minimum 1 x 1 cm.

2. Multiple abrasions over back of neck maximum 1.5 x 1 cm, minimum 1 x 0.5 cm in an area of 7 x 3 cm. On dissection of neck. Internal tissue were echymosed.

Trachea was found congested, hyoid bone found fractured.

3. Lacerated wound on tip of lower finger of left hand 0.5 x 0.5 cm.
4. Multiple abrasions on back of abdomen maximum 3 cm x 2 cm to minimum 1 cm x 0.5 cm.
5. Contusion on left side of face 2 x 2 cm.
6. Abrasion just below right knee 2 x 1 cm.
7. On internal examination of genitalia, the hymen was found lacerated, lacerated wound 2 x 0.5 cm on right labia minora. Clotting of blood found in vaginal canal.

Note: Vaginal smear slide was prepared for pathological examination (including D.N.A. Examination) and hair of scalp was also preserved for forensic examination.

On internal examination, the brain was found congested. Right and left lungs were congested. In the opinion of the doctor, the cause of death was asphyxia as a result of ante-mortem throttling. The death could have taken place on 4.4.2012 at about 6.00 p.m.

To the court question, whether there was any injury of teeth bite on the cheek, the doctor replied that there was a contused mark on the cheek which could be possible because of a teeth bite. To another court question whether rape could have possibly been committed on the deceased, he answered in the affirmative.

The appellant Akhtar was also sent for medical examination. The doctor examining the appellant prepared a slide and took a blood sample and sample of hair of the head and beard of the appellant and forwarded them to the police station.

The hair of the appellant which was collected from between the fingers of the deceased Noor-un Nisha and the

hair of the head and beard of the appellant which were cut by the doctor and the hair which were found from the spot and the hair of the deceased which were cut by Dr. Amit Kumar PW-3 when he was conducting post-mortem for forensic and possible DNA examination, the vaginal smear slide which was prepared at the time of post-mortem, the sample of blood of appellant Akhtar and the appellant's underwear (i.e. a total 8 items) were sent for analysis to the Forensic Laboratory, Agra.

PW-5 Ashok Kumar Singh, I.O also prepared the site plan (Ex. Ka-16) of the place of incident i.e. the first floor of the house of the appellant Akhtar, where the dead body was found. After recording the statements of the witnesses and collecting documents and other material i.e. recovery memos , site plan of the place of incident, inquest, post-mortem report, the I.O submitted a charge sheet (Ext. Ka-18) under sections 376, 302 and 201 I.P.C on 2.5.2012.

The report of the Forensic Laboratory Agra dated 11.7.2012 disclosed that no blood was found on the hair collected from between the fingers of the deceased (item 1), the hair cut from the accused-appellant (item 2), the hair collected from the room (item 4), from the cut hair of the deceased (item 5), from the slide made at the time of post mortem (item 6), and broken slide collected from the appellant (item 7) and underwear of appellant (item 8) and Kurta of the deceased (item 10). The hair collected from between the fingers of the deceased(item.1) and the hair cut from the accused appellant (item 2) were found to be of human origin but on their comparison, no affirmative opinion could be given. However, the hair which were found in the room (item 4) and the hair of the deceased which were cut by the doctor at the time of autopsy (item 5) were also found to be of human origin and on comparison and analysis, they appeared to be similar. No semen was found on the slide

collected from the deceased (item 6) and the broken slide collected from the appellant (item 7) and on the underwear of the deceased (item 8), *Salwar* of the deceased (item 9) and *Kurta* of the deceased (item 10).

Charges were framed against the appellant under sections 302 , 376 I.P.C and 201 I.P.C on 29.20.2012 for having committed rape and murder of the 12 year old deceased Noorunnisha and for trying to conceal the evidence regarding the murder by removing the dead body from the room to save himself from punishment.

Apart from the three formal witnesses PW-3 Dr. Amit Kumar, PW-4 Constable Parul Yadav and PW-5 Inspector Ashok Kumar Singh, whose roles have been mentioned above, two witnesses of fact PW-1 Baise Ali, father of deceased Noor-un Nisha and informant of this case and PW-2 Afzal have been examined in this case.

PW-1 Baise Ali has deposed that as usual on the date of incident, the deceased Noor-un Nisha had gone for grazing buffaloes at about 8.00 a.m. in the vacant plot near their house. She would normally return by 4 or 5 P.M, but when she did not return till 5.00 p.m on the date of incident, then PW-1 Baise Ali accompanied by PW-2 Afzal, Islam,Najruddin and Baisan went in the direction of Sapra Guest House to search for the deceased. When they reached near the house of appellant Akhtar, they found him throwing the dead body out side. They apprehended the appellant Akhtar and they took him to the police station. The informant dictated the report to Rashid out side the police station (ext. Ka 1) to which he appended his thumb impression.

PW-2 Afzal deposed that the daughter of Baise Ali had disappeared about 8-9 months prior to the deposition. In the morning she had gone to graze her buffaloes but when she did not return in the evening, even though the buffaloes had

returned then this witness along with four others went to search for Noor-un Nisha. When they were returning after searching near the Sapra Guest House, they saw the appellant Akhtar catching hold of the deceased by her hair and pulling her out from his house. Then an alarm was raised and the appellant was apprehended. Noor-un Nisha was found dead. The persons apprehending Akhtar took him to the police station. At the police station, the appellant is said to have admitted to his guilt for committing rape and murder of the deceased in the presence of 4-5 persons, who were present at the police station. He claims to have been overcome by a spirit (*jinn)* which caused him to commit the crime.

Defence of the appellant

In his 313 Cr.P.C statement the appellant took the plea that the witnesses had falsely deposed against him and that a false document had been prepared and he had been falsely implicated by the public. He further stated that the place of incident was near his shop and house. He was sitting at his shop as was his daily routine. His family members had gone home. In the evening as per his usual practice, he had gone for prayers at the nearby *Barey Wali* mosque and had returned to his shop. In the mosque, an announcement was also made on the loudspeaker that a girl had gone missing and the people had collected and there was a jam on the Budaun bye-pass. The dead body was found near the house of this appellant. The police wrongly apprehended him because of which the appellant was locked up and falsely implicated by the informant in this case. The appellant has also examined five witnesses in his defence.

DW-1 Mohammad Sharif, is a Junior Engineer of the Power Division Buduan. He stated that there was no light on the date of incident until 9.00 p.m.

DW-2 Hazi Rahmat Husain, has deposed that the appellant had offered evening prayers at the *Bare Wali Masjid*, where he kept a stall.

DW-3 Hafiz S. Ahmad, who had also given the same evidence of the appellant offering evening prayers at the mosque.

DW-4 is Netrpal who states that the appellant had a shop, where auto mobile parts were sold. His house was adjoining the shop. The appellant had a good character and used to offer prayers. The deceased had left her house and she was found at 9.00 p.m in the plot behind the house of the appellant. The police had picked him up from his shop in the presence of this witness.

DW-5 Mujahid Husain. has also deposed that the appellant used to offer prayers in *Barey Wali Masjid*. On the date of incident, he had returned after offering prayers at 6.30 p.m to his shop and parked his cycle at his shop, and after evening prayers he left with this cycle.

Defence and steps taken by this Court for DNA analysis of samples of hair collected from the deceased, accused and spot

When the bench consisting of one of us (Amar Saran J) and Mrs. Sunita Agarwal, J were hearing this appeal on 23.10.13 on a perusal of the forensic laboratory report and post-mortem report, we found that even though the doctor who conducted the post-mortem examination had collected the sample of hair from the head of the deceased and some hair were found in the room of incident which was said to have been pointed out by the appellant, the two sets of hair are said to have been shown to be similar as per physical and microscopic examination. But no DNA test was conducted on

the two sets of hair. Also as no affirmative evidence of their similarity could be given by the Forensic Laboratory report on comparison of the hair found between the fingers of the deceased, and the hair cut from the head of the appellant, hence we decided to have a look at the condition of the material and called for the said material which may have been deposited in the *Malkhana* or elsewhere, through the CJM Budaun on the next date of listing, i.e. 29.10.2013.

On 29.10.2013, Constable Santosh Kumar Singh produced two bundles containing material exhibits which were brought from the *Malkhana*. The said bundles were opened in presence of learned counsel for the appellant and the learned A.G.A and the seal was found intact. In one bundle, the material exhibit was kept in a plastic box which contained hair which was found between the fingers of the deceased Noor-un Nisha (item 1 of the Forensic laboratory report), which was re-sealed and marked HC 3. The second material exhibit was the hair found at the spot pointed out by the appellant (item 4 of the Forensic laboratory report), which was re-sealed and marked HC 2. The third material exhibit kept in a brown envelope wrapped in a white paper contained the hair of the deceased taken by the doctor who conducted the post mortem which was earlier described as item 5 in the Forensic laboratory report which was re-sealed and marked as HC 1. These three material exhibits were kept in separate bundles which were assigned fresh HC numbers by us as mentioned above. We also examined material exhibits (mentioned at item nos. 2 and 3) in the Forensic Laboratory report which were the hair and blood of accused Akhtar which were collected by Dr. R.K. Singh. However, as the said samples were not found in a good condition and further the said doctor was also not examined to prove the said sample, we directed that a fresh sample of the hair of the appellant be got cut by the Jail Doctor in presence of the Jail Authorities and Judicial

Officers which were directed to be produced before this Court on 14.11.2013. We also directed that the evidence of the Jail Doctor and Jail authorities in whose presence the hair of the appellant was cut as also the judicial Magistrate in whose presence the samples were taken be recorded and their affidavits under section 296 Cr.P.C be also taken and forwarded to this court.

Pursuant to our order dated 29.10.2013, samples of hair of the appellant were received from District Jail Budaun which we directed to be kept in a separate envelop which was marked as HC-4.

We then passed an order on 14.11.13 directing that the cut hair of the appellant kept in a sealed bundle (HC 4), be forwarded to the Director, Centre for DNA Fingerprinting and Diagnostics (CDFD) Hyderabad along with the hair found between the fingers of the deceased (HC-3) for DNA comparison. We also directed that the hair of the deceased which was collected by PW-3 Dr. Amit Kumar who conducted the autopsy (HC 1) and the hair purportedly of the deceased found at the place of incident, (HC-2) be also forwarded for DNA comparison to CDFD, Hyderabad. The affidavit and reports of Jagdish Prasad Deputy Jailer, Budaun, Umesh Singh, Jail Superintendent and Dr. A.K. Gupta were filed and taken on record to be treated as part of the evidence under section 296 Cr.P.C. We had sought a report from CDFD within three weeks.

Pursuant to our order dated 14.11.2013, letter of CDFD dated 21.11.2013 and report of CDFD Hyderabad dated 3.12.2013 were placed before us on 10.12.2013. On 12.12.2013, we directed that Expert Dr. Devinder Kumar, who had prepared the DNA report be present in Court on 27.1.2014. We also directed the CJM Budaun to ensure the presence of accused Akhtar who was detained in District Jail

Budaun on the said date so that the evidence of Expert Dr. Devindra Kumar could be put to the accused and Dr. Devinder Kumar could be examined in the presence of the accused.

As in his earlier examination under section 313 Cr.P.C the entire evidence was compositely put to the accused, and his attention was not specifically drawn to the circumstances against him we also directed the learned Government Advocate to prepare a draft of questions in Hindi for the benefit of the Court which were to to be put to the accused under section 313 Cr.P.C and which were also to be shared with the counsel for the accused. We may point out here that such a course has been permitted under the newly introduced section 313 (5) Cr.P.C, which is in force from 31.1.2009 vide Act No. 5 of 2009.

The case was thereafter, directed to be listed on 27.1.2014.

Evidence of Technical Examiner on DNA report and re-examination of appellant in this case

On that date, the Technical Examiner Dr. Devinder Kumar and the accused appellant Akhtar were present. The material exhibits and documents relating to the case were put to the Technical Examiner Dr. Devinder Kumar, who gave his evidence in court in presence of the accused and his counsel Sri G.S. Chaturvedi, who also cross-examined the expert.

We also examined Ashok Kumar, who carried the material exhibit as C.W.1. We then examined the accused under section 313 Cr.P.C on the additional evidence with regard to the D.N.A test carried out by Dr. Devinder Kumar and also put to him the detailed circumstances which appeared in the evidence against him, for preparation of which we had taken the assistance of the G.A., as mentioned

above, and which had also been furnished to the counsel for the accused for seeking his objections or clarifications.

It may be noted that learned counsel for the appellant has not objected to the putting of detailed questions to the accused-appellant, under section 313 Cr.P.C on 27.1.2014 However learned counsel for the appellant has objected to some questions in the cross-examination and under section 313 Cr.P.C which refer to admissions made by the appellant before the police, such as the admission that he had committed the rape because he had lost control of his senses and was overcome by a "*jinn*" and we may clarify here that we have eschewed consideration of those admissions for reaching a decision on the merits of this case.

The report of the D.N.A expert and the evidence of Dr. Devinder Kumar disclosed that the source of Exhibit E (hair marked as HC-3 by the High Court labeled as HC X which was taken from the palm of the deceased) yielded DNA profile of male origin and was matching with the DNA profile of the source of exhibit A (a bunch of cut hair from the scalp of accused Akhtar) which was marked as HC-4 by the High Court. The source of exhibit C (hair cut from the deceased labeled as HC-1 by the High Court in the packet labeled as HC-X) and exhibit D (hair said to be found on the crime scene) which was marked as HC-2 in the packet labeled as HC X. The examiner deposed that he had been allotted 60 D.N.A. cases, of which, he had submitted reports in around 30 cases. The conclusion in his report was also based on some additional data, which he was carrying in CDFD file No. 2768, which contained genotyping results in the form of Electropherogram. As learned counsel for the appellant wanted the entire additional data to be placed on the record, we directed accordingly, and the expert Devinder Kumar produced the same, which were taken on record. It may be noted that no criticism has been

raised by the learned Senior counsel regarding the quality of the DNA examination by Dr. Devinder Kumar of the CDFD.

Arguments of counsel for defence

The contentions of Sri G.S. Chaturvedi as mentioned in his arguments and in his written submissions were that the basic evidence in this case was only that the accused had been caught disposing of the body near his house at about 6.00 p.m. This evidence appeared to be false because PW-1 Baise Ali had given conflicting evidence at different points in his examination and cross examination. He had further stated that he searched for his daughter the whole night and even a loudspeaker announcement was made regarding the disappearance of the daughter which would render false the evidence of the accused having been apprehended when he was throwing the dead body at 6.00 p.m. It was suggested that actually the body was recovered at about 9 or 9.30 p.m near the house of the appellant and he was implicated by the police, only to show the case as solved because of the outcry raised by the general public and politicians. The alleged recovery of hair from the fingers of the deceased was false and baseless as it was a recovery from an open place in the presence of 100-200 persons who may have touched the body, so it was highly improbable that the scalp hair of the appellant were recovered from the fingers of the deceased.

It was further argued that the investigation and recovery was unreliable and doubtful as only two relation eye witnesses PW-1 Baise Ali and PW-2 Afzal had been examined and no other independent eye witness has supported the prosecution version and only to complete the chain of evidence, the I.O had taken the hair of the appellant at the police station and the same was shown to have been recovered from the fingers of the deceased Noor-un Nisha and from the bed of the

appellant. There were contradictions inasmuch as according to the FIR, and the 161 Cr.P.C statements, it was mentioned that the deceased had left her house with cattle in the afternoon, but during the trial PW-1 and PW-2 stated that the deceased had left her home in the morning. It was further argued that the FIR was lodged at 8.15 p.m i.e. after a delay of 2 hours of the recovery of the dead body and from the statement of PW-1 and PW-2 it could be inferred that the FIR was lodged prior to the recovery of the dead body which was impossible. A doubt was raised regarding the reliability of the DNA report as it was contended that recovery of the hair from the fingers and palm of the deceased by the I.O was doubtful, hence their correspondence with the hair taken from the appellant whilst he was in jail after the order of this Court could not improve the case of the prosecution. It was further submitted that the FIR and statements of witnesses under section 161 Cr.P.C and other documents including the D.N.A report reveal that after sending the dead body for autopsy, all other formalities were completed which shows the false implication of the appellant in this offence.

Arguments for Prosecution

Learned Government Advocate on the other hand filed written arguments and submitted that there were sufficient circumstances for connecting the appellant with this incident which conclusively established that the appellant and none other had committed the crime. The deceased had left her house in the noon of 4.4.2012 and when she did not return back as per her daily routine, a search was made by PW-1 and PW-2 and others and at about 6.00 p.m. they caught the appellant red handed near his house whilst throwing out the dead body of the deceased Noor-un Nisha. The FIR was subsequently lodged by PW-1 Baise Ali. The appellant was

handed over to the police by the informant at the time of lodging of the FIR. Even at the time of inquest, some hair were found on the palm and between the fingers of the deceased which were collected and duly sealed by the I.O. During the course of investigation, pursuant to the disclosure statement of the appellant, the I.O also recovered some hair from the place of incident, i.e. the bed (*Diwan*) inside the room of house of the appellant. PW-3 Dr. Amit Kumar, who conducted the postmortem on the body of the deceased had also cut and preserved the sample of hair of the deceased which tallied with the hair found on the bed and in the room whose keys were in the custody of the appellant and who had led the police and witnesses to the room, which was the scene of the crime. The prosecution case could be established by PW-1 and PW-2 in Court, who had absolutely no motive for falsely implicating the appellant. No suggestion was even given regarding any enmity of these witnesses with the appellant. The witnesses did not even know the parentage of this accused prior to the incident. The contradictions pointed out by learned counsel for the appellant were minor in nature on the basis of which, the entire prosecution case could not be discarded. So far as the contention regrading variation in the time in the statement of PW-1 as pointed by learned counsel for the appellant was concerned, it was stated that this whole argument has been built on a sentence appearing in the deposition of PW-1 that at about 8 or 9 p.m on the date of incident the persons of the locality had blocked the road due to non recovery of the victim. In the present case, the FIR was lodged at 8.15 p.m and even the inquest started at 9.00 p.m. The time of inquest as stated by PW-5 SI A.K. Singh I.O has not been challenged by the appellant. The appellant was handed over to the police at the time of lodging of the FIR. PW-4 Parul Yadav who was a member of the police team at the time of inquest proceedings has proved the inquest proceedings.

Since the time of inquest on the cadaver has not been disputed by the appellant as such, it was apparent from the evidence on record that the time given by the PW-1 was due to an inadvertent mistake. PW-1 was an illiterate rustic, who may have been confused about the time. The observations of the trial judge in this connection that variations of time could not be accepted at its face value because it was a result of a slip of tongue, was in order. Even if there were any deficiencies in the investigation, it was contended, that could not be a ground for discarding the prosecution evidence which was authentic, credible and cogent. So far as the argument of learned counsel for the appellant regarding ante-timing of the FIR was concerned, it is submitted that no suggestions regarding it was given to the I.O that the FIR was ante-timed as the I.O immediately proceeded to the spot and even started the inquest proceedings at 9.00 p.m. The medical evidence corroborates the allegation of throttling and rape of the victim. The forensic report of the Agra Forensic Science Laboratory indicated that the hair of deceased preserved by the doctor at the time of postmortem were found similar in length, thickness and on the basis of microscopic composition to the hair collected from the scene of the crime. This fact has been further confirmed by the DNA report of CDFD Hyderabad which was proved by CW-1 Dr. Devinder Kumar before this Court. The D.N.A report of CDFD, Hyderabad further indicated that the hair found between the fingers of the deceased and the sample of the head hair of the appellant, collected by the jail authorities, on this Court's order were from the same individual. The contents and conclusion of this report cannot be doubted and have to be accepted as scientifically accurate and based on an exact science.

Regarding the appellant having been caught red handed while disposing of the dead body of the deceased near his house it was argued by learned GA that it has not been

explained by the appellant as to how the dead body came in his possession either by way of a suggestion in the cross examination or in his statement recorded under section 313 Cr.P.C. Also pursuant to the disclosure statement of the appellant, the hair of the deceased were found at the place of incident i.e. the room with a bed (*divan)* on the upper floor of the house of the appellant on his pointing out. No explanation has been given by the appellant as to how the said hair were lying in his house. This fact was only within his special knowledge, and the onus under section 106 of the Evidence Act fell on the appellant to explain how the hair of the deceased were present on the divan and room of his house of which he had custody. Regarding the fact that the hair found at the place of incident and the sample of the hair of the deceased having been found similar in the Agra forensic test and also as per the D.N.A report by the CDFD, Hyderabad, the hair found between the fingers of the deceased and the sample of the hair taken from the appellant in jail pursuant to our order being of the same individual, the appellant could give no explanation except by making a suggestion in an answer in his re-examination under section 313 Cr.P.C before this Court, that the hair between the fingers of the deceased had been planted by the police, but no suggestion in this regard was even given to the I.O. Considering the gravity of the crime of rape and murder of a minor child, learned Government Advocate submits that there was no immediate extreme mental or emotional disturbance or provocation to the appellant for committing the crime and the case falls within the purview of the rarest of rare cases calling for the death penalty.

Both the counsel for the parties have cited case law which would be considered at the appropriate stage.

Analysis of contentions of learned counsel for the parties and evidence.

The basic contention of the learned counsel for the appellant was that the claim of the witnesses that the appellant had been caught hold of at about 6.00 p.m when he was throwing the dead body of the deceased Noor-un Nisha outside his house was unreliable. In fact the dead body had been found lying on the spot and only to show the case as solved because of public and political out cry, the police had falsely implicated the appellant in this case. Learned counsel for the appellant tried to support this argument by contending that PW-1 Baise Ali in his cross examination has stated that when the deceased Noor-un Nisha did not return till 5 or 6 pm in the evening, a search was made for her, by which time it became late and lights were lit in the houses. A rickshaw with a loudspeaker made an announcement that Baise Ali's daughter had not returned and that she be searched. It was argued that in this background the apprehension of the appellant when he was throwing the corpse outside his house was unlikely.

Even if it is accepted for the sake of arguments that the defence has succeeded in raising a small doubt, as to whether the appellant could indeed have been arrested at the very moment when he was throwing the dead body, and that the appellant might have been linked with this crime after the corpse was found lying outside his house. But there are other significant features in this case, which dispel any suspicion in our mind that anyone other than the appellant was responsible for the crime.

There appears to be substance in the learned AGA's submission that the description of time of apprehension of the appellant as about 6 pm when he was throwing the cadaver appears to be an error on part of the rustic witness, who may

not have had a clear idea about the time.

Furthermore If the appellant was not arrested when he was throwing the cadaver, the police could not have recovered the broken bangles and hair of the deceased from the room in that house, (which showed the room to be the place of incident), when the police were taken there by the appellant after he was handed over at the police station by PWs 1 and 2, Baise Ali and Afzal. The appellant's house could not have been identified as the house where the crime had taken place, as there were a large number of houses near point 'A' on the site plan (Ext. Ka 16), where the cadaver was found. Thus the plots of Shakil, the house of Ashok Pasi, Sapera Guest house, and the houses of Negcha and Dhichu and also the appellant Akhtar have been shown in the site plan as being near the point 'A.' Furthermore in his cross-examination PW 1 Baise Ali admits that there were 500 to 600 houses between his house and Sapera Guest house.

No doubt only PW 5, A.K. Singh, inspector, and PW 4, female constable Parul Yadav have been produced in Court to prove the discoveries of the broken bangle pieces and hair from the *Divan* and *“bistar”* (bedding) and the floor to the South of the *“divan”* where they were taken by the appellant, which were collected and sealed and shown as Ext. Ka 14 in the recovery memo. The prosecution has even failed to examine the two witnesses of recovery, Nathu and Sayyar Ali, (who signed the recovery memo along with the appellant). but the I.O., PW 5 A.K. Singh has proved the discovery of the room at the instance of the appellant where the broken bangles and hair of the deceased were lying. The recovery memo also bears the signatures of the I.O., PW 5 A.K. Singh and the appellant (along with the two non-produced witnesses).

We also think that it would be wrong not to place reliance on the testimony of the the Police witnesses PW 5 AK Singh, or

PW 4 Constable Parul Yadav, who have proved the inquest report and the recoveries only because the independent prosecution witnesses of recovery have not been examined. Though no doubt it would have been better, if the trial Court had made efforts for examining the independent recovery witnesses, Nathu and Sayyar, but merely in view of their non-examination, the testimony of the police witnesses who have proved the recovery ought not to be discarded. The Court may presume that official and judicial acts have been regularly performed in view of section 114 (e) of the Evidence Act, although the requirement in law is only that statements of police witnesses need to be scrutinized carefully before the Court can act upon them and in appropriate cases corroboration in material particulars may be sought. Certainly there is no rule that police testimony must invariably be discarded as they were interested in proving the prosecution case.

The law on this point has thus been reiterated recently in *Gian Chand v. State of Haryana, (2013) 14 SCC 420*, in paragraph 32 at page 432 as follows *:*

"32. *In Rohtash Kumar v. State of Haryana, (2013) 14 SCC 434 this Court considered the issue at length and after placing reliance upon its earlier judgments came to the conclusion that where all witnesses are from the Police Department, their depositions must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars should be sought. The Court held as under:*

> *"Thus, a witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said*

witness has cause, to bear such enmity against the accused, so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon."

(See also Paras Ram v. State of Haryana, (1992) 4 SCC 662, Balbir Singh v. State, (1996) 11 SCC 139, Akmal Ahmad v. State of Delhi, (1999) 3 SCC 1315, M. Prabhulal v. Directorate of Revenue Intelligence, (2003) 8

SCC 449 and Ravindran v. Supt. of Customs, (2007) 6 SCC 410)

It is also noteworthy here that after Devinder Kumar, the CDFD DNA expert was examined on 27.1.2014 and the fresh 313 Cr.P.C statement of the appellant was recorded, an application was moved by the learned defence counsel on 28.1.14, purportedly under section 233 Cr.P.C, to summon some witnesses of the recovery of the hair from between the fingers of the deceased, or from the room in custody of the appellant, who were signatories of the recovery memos. On the said application an order was passed for summoning Ible Hasan, Mukhtiyar, Natthu and Siffar as defence witnesses. On 10.2.14 one witness Ible Hasan appeared along with the I.O. But learned defence counsel made an endorsement on the application and order sheet on 10.2.14 that he did not want to examine Ible Hasan. We also found that the defence counsel had not taken steps for obtaining processes for production of the defence witnesses. We were therefore of the view that the disposal of the appeal would be unnecessarily held up, hence we discharged the I.O. PW 5, Ashok Kumar Singh who was present and issued no further production warrant for the other witnesses. This order has not been challenged by the defence. From the failure of the defence to examine Ible Hasan when he appeared on 10.2.14 as a defence witness, this Court could reasonably presume in view of section 114(g) of the Evidence

Act, that the evidence of Ible Hasan if examined, would have been unfavourable to the defence, and that even though Ible Hasan who was a signatory of the recovery memo (Ext. Ka 6) of the hair found between the fingers of the deceased, had not appeared as a witness, but it is apparent that Ible Hasan does not appear to be prepared to give evidence favouring the defence. In any case the defence can make no capital of the fact that the prosecution has not examined the witnesses of recovery, who may not have been interested in getting embroiled in the matter, even though they had signed the recovery memos, but who do not appear to be interested in supporting the case of the defence either. Police witnesses as mentioned *(supra)* have given evidence of the recoveries and there is no good reason to discard their testimony.

The witness Baise Ali, PW-1 has specifically denied that he was given information regarding the recovery of the corpse of the deceased. He was also denied the suggestion that in the late evening in order to get the public demonstration ended, he was compelled to lodge the FIR as dictated by his relation.

Likewise PW-2 Afzal has also denied the defence suggestion that at 1.00 a.m in the night when the cadaver was found in the jungle, then the *Jaam* (blockade) was ended and after that the police got the report lodged. Also we are of the view that if the cadaver had been found in the jungle as was suggested by this question in cross-examination it was not explained by the defence as to how the broken bangles and the hair of the deceased etc. would have been recovered from the appellant's room and how would the room, which was the scene of the crime, been located, as the room in question could only have been pointed out by the appellant.

Another circumstance which contradicts this suggestion is the fact that inquest on the dead body itself commenced at

9.00 p.m and was concluded at 10.15 p.m. No suggestion was given to the I.O PW-5 Ashok Kumar Singh or to PW-4 Constable Parul Yadav that the inquest had not been carried out at the time alleged.

There was some cross examination of PW-2 Afzal on the point that in the statement under section 161 Cr.P.C to the police, he had stated that the appellant had carried the deceased on both his hands but in his evidence in court, he stated that the appellant had carried the deceased by her neck and hair. Also we are not prepared to accept the contention that the FIR was ante-timed, as even though the accused having been apprehended by the witnesses and public at 6.00 p.m, there was no good reason for the report having been lodged after two hours 15 minutes at 8.15 p.m and the said report was therefore written at the instance of police

In *Sandeep v. State of U.P., (2012) 6 SCC 107,* in paragraph 57 it has been held that minor variations in the time of registration of the FIR cannot be considered a serious infirmity because of some variations in the time mentioned`by different witnesses, or even for some reasons suggesting alteration of the time, if there was no reason to doubt the registration of the FIR by the informant, or for holding that there was any deliberate attempt to ante-date or ante-time the FIR by the prosecution. In paragraph 61 it was rightly observed in the aforesaid law report: *“We have already held that the accused miserably failed to substantiate the stand that he was not present at the spot of occurrence whereas he was really apprehended on the spot by the prosecution witnesses and was brought .to the police station from whom other recoveries were made. The submission by referring to certain insignificant facts relating to the delay in the alteration of crime cannot be held to be so very fatal to the case of the*

prosecution.”

However, even if something may be said in favour of the accused on the basis of these suggestions and arguments, there are certain important and compelling facts in this case which unerringly indicate the involvement of the appellant alone in this offence and none else.

These irrefutable circumstances are as follows. If the informant had only picked up the appellant on ground of suspicion, there was no question of the appellant having taken the informant and the police to the room, the keys of which room were with his neighbour. After the room was got opened, hair was found lying on the bed and on the floor of that room which was collected by the I.O. This hair as per the Agra forensic laboratory report and the D.N.A report by CDFD, Hyderabad clearly demonstrated that the said hair was the hair of the deceased, as it matched with the hair that PW 3 Dr. Amit Kumar had collected at the time of autopsy. If the appellant had not committed the crime in question, there was no possibility of the hair of the deceased being present in the room of his house, and to a specific question being put to the accused in his detailed 313 Cr.P.C examination on 27.1.2014 before this Court as to how the long hair of the deceased and pieces of her red bangles were found in the room and on the bed therein, he simply denied that he was arrested by the police. He maintained that the police and the photographer had gone upstairs, but he has offered no explanation as to how the hair, and broken pieces of bangles of the deceased were found in the upstairs room of his house.

Most important the complicity of the appellant in this offence is established from the DNA matching of the hair which was collected from between the fingers of the deceased Noor-un Nisha with the hair of the appellant which had been cut and its sample taken on the basis of the earlier bench's

order dated 29.10.13. Notably the presence of hair in between the fingers of the deceased was noticed even in the inquest report, which establishes that it was taken in possession by the police at that stage. The recovery memo of the said hair was prepared which was marked as Exhibit Ka-11 and which describes the said hair as black and henna coloured which were collected in a white paper *puriya*. The said hair were produced before us on 29.10.13 along with some other samples which were collected. As the previous sample of the hair and blood which were taken from the appellant by Dr. R.K. Singh (who has not been examined), and the hair found from the fingers of the deceased could not be determined to be of the same person, and the High Court bench had also found the bottle and seal on the sample of the hair and blood collected from the appellant to be in a damaged condition, the bench had directed that a fresh sample of the appellant's hair be collected from him at the jail where he was lodged by the order dated 29.10.13. This was done and the fresh sample of the appellant's hair and sample of other materials earlier collected were sent to the CDFD, for a DNA analysis by the order dated 14.11.2013.

It may also be noted that initially the suggestion of the defence to the I.O was that no hair were recovered from between the fingers of the deceased. However there is a somersault from this suggestion when the appellant in his 313 Cr.P.C statement before this Court on 27.1.2014, in answer to question no.13, suggests that his hair were taken by the police at the hospital and the police station, and at this stage a contention has been raised by learned Counsel for the appellant, that the hair was planted by the police between the fingers of the deceased. This belated suggestion and contention that the police after apprehending the appellant on his being handed over by the informant and other witnesses, would go to the length of getting his hair immediately cut, and

then put it between the fingers of the deceased before 9 p.m. when the inquest started, is too far-fetched a suggestion, which deserves to be summarily rejected.

Also again the appellant somersaults from his answer to question no. 13, when in response to question no.33, he states that the hair which were found between the fingers of the deceased were not his hair. As per the D.N.A report given by the CDFD Hyderabad laboratory however it was clear that on DNA matching the hair found between the fingers of the deceased and the hair taken from the head of the appellant on the High Court's order were of the same person. As held in *Santosh Kumar Singh v. State, (2010) 9 SCC 474,* that the conclusions of the DNA report cannot be doubted and must be accepted as scientifically accurate as DNA finger printing is an exact science. In *Santosh* the trial Court had not relied on the DNA report and held that the vaginal swabs and slides and the blood sample of the accused had been tampered with, and had relied on some text books for this purpose. The High Court and the Supreme Court however held that there was no reliable evidence for suggesting that the sample had been tampered with, and even criticized the trial Court for relying on text books which were not put to the expert.

Recently the same position regarding the value of the DNA profiling has been reiterated in *Dharam Deo Yadav v. State of U.P.,(2014) 5 SCC 509,* wherein, modern forensic techniques for criminal investigations such as DNA profiling have been lauded, because of reliable witnesses failing to give testimony, or turning hostile due to intimidation, though it is conceded that the DNA testing may in a particular case not be cent percent accurate, as that would depend on the quality of the analysis and whether the sample collected was kept free from contamination. Thus the law report observes in paragraph 30:

"30. *The criminal justice system in this country is at crossroads. Many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. The investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness, etc. whereas .forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasising the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence."*

In the aforesaid law report where the skeleton of the deceased a female from New Zealand was exhumed from the house of the appellant after a year of its burial there on the pointing out of the appellant and all the skin had even disappeared by then, it was observed that as the humerus and

femur bones corresponded biologically with the blood sample of her father, it was held sufficient for establishing the identity of the deceased, looking to the specialized skill of the DNA analysts and the laboratory (CDFD, Hyderabad), which had carried out the DNA analysis in that case. In the present case also the DNA analysis was carried out by the same CDFD, Hyderabad on our orders, and no reasons were suggested by the learned counsel for the appellant for showing why the report could not be relied upon.

With this DNA affirmation that the hair of the appellant was the same as the hair found between the fingers of the deceased, this identify cannot be explained on the contradictory stances on this aspect in the defence suggestions to witnesses and in his answers given to the questions put under section 313 Cr.P.C. statements before the lower Court and this Court.

The other factor which is also unexplained by the defence is as to how the hair of the deceased would have been present in the appellant's top floor room whose keys were provided by the appellant to the police. It would again be too far-fetched to suggest that the police might have cut the hair of the deceased and placed it in the room and on the bed (*divan).* Cumulatively these two circumstances, i.e. the presence of the hair and the broken red bangles of the deceased in the appellant's room and on the bed therein, which was got opened by the appellant, and the presence of the hair of the deceased between the fingers of the deceased, which indicate a possible struggle by the deceased who may have pulled his hair to save herself are overwhelming in nature which establish the involvement of the appellant in this offence in a clinching manner.

We should also keep in mind that when the incident took place, the appellant was not even known to the informant PW-

1 and the other witness Afzal and the informant states that he did not even know his name from before, nor even his father's name. Hence clearly the appellant had not been picked up on account of any enmity. In fact there was no reason for the false implication of the appellant. These are all reasons for concluding that the recovery of the hair of the deceased and her broken bangles from the appellant's upstairs room, and also the appellant's hair from between the fingers of the deceased were genuine recoveries, and which in conjunction with the CFL and DNA examinations, regarding which the appellant could offer no satisfactory explanation, clearly establish the complicity of the appellant in this crime, and are sufficient for dispelling any iota of doubt, which have been raised on the bases of the basis of some minor contradictions and suggestions given by the deceased that the FIR was lodged belatedly at 8.15 p.m., when the appellant after being arrested was handed over to the police at about 6 p.m., and thus was a product of police advice, or some suggestions about a loudspeaker information having been circulated about the deceased girl having gone missing in the evening or about the road block by the agitating public, which continued till late at night. It has been rightly observed in *State of U.P. v. Krishna Master and others, (2010) 12 SCC 324* and *State of U.P. v. Anil Singh, 1988 Supp SCC 686* that if the evidence read as a whole has a ring of truth, then discrepancies, inconsistencies, infirmities or deficiencies of a minor nature not touching the core of the case cannot be a ground for rejecting the evidence. The contentions of the defence can therefore not displace the inferences that are to be drawn from the strong material incriminating circumstances that have been elicited in this case for connecting the appellant with the crime.

We are therefore left without a scintilla of doubt regarding the complicity of the appellant in this offence and

that the appellant and the appellant alone could have committed this crime, on all the criteria for judging a case on the basis of circumstantial evidence.

Question of Appropriate sentence and imposition of life imprisonment to run for the appellant's whole natural life in place of death sentence

The final question for consideration in this case is whether it would be appropriate to confirm the sentence of death awarded to the appellant or whether a sentence of life imprisonment would be more appropriate in the circumstances.

The Constitutional bench decision, *Bachan Singh vs. State of Punjab, (1980) 2 SCC 684* which was even cited by the trial judge, the Apex Court has enjoined giving importance to the antecedents of the prisoner, apart from the gravity of the crime, for reaching the conclusion whether only a death sentence was appropriate. One important mitigating circumstance to be taken into account was whether the accused had a previous criminal history, or whether there was any material to suggest that his reform was wholly improbable and that he was likely to commit such crimes in the future. However except referring to the sensational and dastardly nature of the crime, the trial judge does not appear to have considered these factors.

In somewhat similar circumstances, in *Amit v State of U.P., (2012) 4 SCC 107,* where a 3 year old girl had been murdered by a 28 year old man, the Court converted a sentence of death to a sentence of life imprisonment, to run for the whole life of the prisoner, as he had no criminal antecedents, and it was not likely that the accused would repeat the offence. Thus it was mentioned in the decision in

para 22:

> *"In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."*

In *Raju v State of Haryana, (2001) 9 SCC 50,* the appellant had committed the rape and murder of the 11 year old deceased after enticing her with toffees. On his arrest, his shirt and and pant had bloodstains and his underwear had blood and seminal stains. The accused gave no explanation of the blood stains. The Supreme Court held that the as the appellant appeared to have acted without premeditation in giving two brick blows to the deceased after she threatened to expose him, and had no criminal antecedents, and it could not be concluded that he would be a danger to society, the sentence of death awarded by the Courts below be commuted to a sentence of imprisonment for life.

In *Amrit Singh* v. *State of Punjab*, (2006) 12 SCC 79, where a 6 or 7 year old child was raped and murdered by the 31 year old accused, the Apex Court had converted the sentence of death to life imprisonment holding that this was not the rarest of rare case and the crime may have been committed because of a momentary lapse, on part of the the

accused on the seeing the girl at a secluded place, and the deceased may have been gagged inadvertently, without any intention to kill her. Paragraphs 21 and 22 of the law report read:

> *"21. The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr. Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr Reshamchand Singh, PW 1 did not state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant.*
>
> *22. Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare cases."*

In *Rameshbhai Chandubhai Rathod (2)* v. *State of Gujarat, (2011) 2 SCC 764* there was a difference of opinion of the two Judges who had heard the case on the sentence to be awarded. Accordingly the matter was referred to a larger Bench which observed that as the accused was about 27

years of age who had raped and killed a child studying in a school in Class IV, but as there was no finding regarding the possible reformation and rehabilitation of the appellant and the possibility of his becoming a useful member of society on being given the opportunity, hence the proper course in the case would be to substitute the sentence of death with a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. Paragraphs 9 and 10 of the law report at SCC page 767, read as follows:

"9. Both the Hon'ble Judges have relied extensively on Dhananjoy Chatterjee case,(1994) 2 SCC 220 . In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.

10. We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant."
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In *Akhtar* v. *State of U.P., (1999) 6 SCC 60,* for the rape and murder by gagging of a young girl, who the appellant came across at a lonely place, the sentence of death awarded to the accused was converted to one of life imprisonment and it was observed in paragraph 3 at SCC pp. 62-63:

"3. … But in the case in hand on examining the evidence of the three witnesses it appears to us that the appellant-accused has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the appellant-accused found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death."

In *Mohd. Chaman* v. *State (NCT of Delhi) (2001) 2 SCC 28*, where the 30 year old accused had raped and killed a one-and-a-half year old child, even after describing the crime as heinous, and that the appellant had no control over his carnal desires, the Apex Court had converted the death penalty to one of imprisonment for life holding that a humanist approach needed to be followed and it could not be held that the appellant was such a dangerous person who would endanger the community. It was held at page 40 of SCC para 25:

"25. Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: whether the case can be classified as of a 'rarest of rare' category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, (1980) 2 SCC 684, Machhi Singh, (1983) 3 SCC 470 and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the 'rarest of rare cases' deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."

In *Surendra Pal Shivbalakpal* v. *State of Gujarat*, *(2005) 3 SCC 127* which was a case where an impecunious 36 year old U.P. migrant labourer had raped a young girl after being rebuffed by her mother for demanding sexual favours, in which the death penalty awarded to the accused was converted to life imprisonment as there was no material for showing that the appellant was involved in any other case or that he would be a menace to society. In para 13 it was held (SCC p. 131):

"13. The next question that arises for consideration is whether this is a 'rarest of rare case'; we do not think that this is a 'rarest of rare case' in which death penalty should

be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case."

Learned G.A. on the other hand in his written arguments placed reliance on *Mohd. Mannan v State of Bihar, (2011) 5 SCC 317, Rajendra Prahladrao Vasnik v. State of Maharashtra, (2012) 4* SCC 37, and *Bantu v. State of U.P., (2008) 11 SCC 113,* where the Apex Court has held that on balancing the aggravating with the mitigating circumstances, the only punishment that would suffice in those cases looking to the brutality of the crimes, was a sentence of death.

In *Mohd. Mannan,* a 7 year old girl had been done to death by a 43 year old mason who was working in the house. He had sent the victim child to buy betel to a shop after winning her trust. He thereafter followed her to the shop, and took her away on a bicycle to a lonely spot, where he murdered her after causing various injuries to her for satisfying his lust. None suspected his evil designs, as the victim was a thin unattractive girl barely four feet in height. The Apex Court noticed the brutality of the crime and considered the appellant a menace incapable of reform.

In *Rajendra Prahladrao Vasnik* a 3 year old girl had been lured away on the pretext of buying her biscuits away by a 31 year old man with a false identity who had and won the trust of a poor family. Thereafter the girl had been brutally raped, and there were bleeding injures on her nose and mouth, and on her private parts. There were even bite marks on her chest. The deceased was then left in a naked condition in an open

field.

Bantu was a case where the appellant had taken away the 5 year old deceased Vaishali with him on the pretext of getting her a balloon. He had later been caught in a naked condition inserting a stem/ stick 33 cms into the fragile vagina of the dead body for masquerading the case as one of an accident. Looking to the abominable nature of of the crime the bench had confirmed the sentence of death awarded to Bantu.

It is apparent that the facts and circumstances of each of these cases is quite different. In these cases evidence was led that after winning the trust of the victim or her family a minor girl had been lured, raped and then done to death by a wily assailant after some cold blooded planning. In the present case it it possible that the appellant came upon the victim girl all of a sudden, and probably after losing control over his senses, he may have committed the dastardly crime. After which he tried to hurriedly conceal the offence by trying to get rid of the body from his house, in which endeavour he was unsuccessful.

In a recent decision of the Apex Court, *Shankar Kisanrao Khade v State of Maharashtra, (2013) 5 SCC 546,* its earlier decision in *Sangeet* v. *State of Haryana, (2013) 2 SCC 452*, was reiterated and it was observed that the appropriateness of the “balancing test” of balancing the aggravating and mitigating circumstances, the aggravating circumstances being the circumstances of the crime, and the mitigating circumstances being the circumstances of the criminal needed to be reconsidered, as these distinct and unrelated factors could not be put on the same scale. Hon'ble K.S.P. Radhakrishnan J in his opinion in *Shankar Kisanrao Khade* noted that even where the aggravating circumstances were extremely grave, only if the mitigating circumstances relating to the accused were zero percent, i.e. there was complete absence of any circumstance favourable to the accused

personally with regard to his antecedents, could the case be considered one where the death penalty might be justified. Even then it needed to be considered whether it was the rarest of rare case where only a death penalty was appropriate. In *Shankar Kisanrao,* the 52 year old appellant had enticed a 12 year old moderately intellectually challenged girl living with her grandmother, and then repeatedly sodomized and raped her before strangulating her. However as the appellant had only been earlier implicated for the murder of his wife and also in a case under section 380/ 457 IPC, but was not convicted in those cases, hence the Apex Court considered the High Court allegation against the appellant of having criminal antecedents not to have been established, and the case in hand was therefore not considered the rarest of rare cases for award of the death penalty. Justice Radhakrishnan in paragraphs 37,38 and 39 of the law report specifically faulted the judgements in *Mohd. Mannan, Rajendra Prahladrao Vasnik* and *Bantu* for applying the “balancing test.”

In his separate opinion Justice Madan B. Lokur has observed in paragraph 123 of the law report, that the possibility of reform or rehabilitation of the appellant was not ruled out by any expert evidence in *Mohd. Mannan,* unlike some other cases the conviction being based only on circumstantial evidence was not held to be a mitigating factor.

In the aforesaid background we are of the opinion that this is not the rarest of rare cases, where the special reasons exist for only awarding the death penalty and where the other option of awarding a sentence of imprisonment for life is unquestionably foreclosed.

In *Shankar Kisanrao Khade* the Apex Court had directed that the life sentence (after commutation of the death penalty) for murder and the life sentence for rape and the sentences under other provisions run consecutively and not

concurrently. However, we see some difficulties in making the sentences run consecutively and not concurrently, as under section 386(b)(iii) Cr.P.C. it is clarified that whereas in an appeal from conviction, the nature and extent of the sentence may be altered, “but not so as to enhance the same.”

In another similar case of rape and murder of an eighteen year old girl, by a young painter working in the house, who was suddenly overwhelmed by a sense of lust, and who after committing the murder tried to conceal the corpse in a trunk in the house, this Court in *Sanjay Kumar v State of U.P., (2012) 77 ACC 65* after relying on the decisions in *Ramraj v State of Chattisgarh, (2010) 1 SCC 573, Mulla v State of U.P, (2010) 3 SCC 508,* and *Rameshbhai Chandubhai Rathod (2) v State of Gujarat (2011) 2 SCC 764,* had commuted the sentence of death, to a sentence of imprisonment for life for the remainder of the appellant's life subject to the clemency powers of the President or Governor under Articles 72 or 161 or the State's powers of remission under the relevant statute. In an appeal preferred against the said judgment in *State of U.P. v Sanjay Kumar,* reported in *(2012) 8 ACC 537,* the Apex Court after reviewing the case law on the point, had regarded this approach of the High Court as finding an appropriate *via media,* for situations where the Court may be loath to impose a sentence of death for any extenuating circumstances, and yet may feel that the routine sentence for life which in practice works out to a sentence of 14 years or 20 years in view of guidelines framed by the State was grossly inadequate or disproportionately small. For such offences, the sentencing or the Appellate Court for proportionate sentencing whilst doing away with the death sentence in a particular case, could impose a sentence even extending for the prisoner's entire remaining natural life, or for a fixed term over and above the mandatory 14 years actual jail term under section 433 A Cr.P.C, subject to the

State retaining its powers of exercise of clemency or for granting remission, in a *bona fide* and non-arbitrary and objective manner.

That a minimum sentence for the prisoner's whole life or for a fixed number of years over and above the statutory minimum of 14 years can be prescribed by the Court before the accused is entitled to the benefit of the powers of remission to be exercised by the government and the concerned authorities under the appropriate statutory provisions, has been held to be valid by the three judge decision in *Swamy Shraddananda v. State of Karnataka, (2008) 13 SCC 767.* Recently *Sahib Hussain v. State of Rajasthan, (2013) 9 SCC 778* has held the view of the two judge decision in *Sangeet v. State of Haryana (2013) 2 SCC 452* to be *per incuriam* on the point where it had adversely commented on the view of the larger bench in *Swamy Shraddananda (2),* regarding the permissibility of prescribing a minimum sentence in life imprisonment matters without referring the case to the Chief Justice for constituting a larger bench. This view in *Sahib Hussain* is in accord with the view expressed in the Constitutional bench decision in *Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673* on the inappropriateness of a smaller bench doubting the correctness of a larger bench decision without referring the matter to the Chief Justice for constituting a bench larger than the bench which has expressed the opinion which was being doubted.

On these considerations we are of the view that the judgement of the trial judge convicting the appellant as above be upheld. However the death sentence awarded to the appellant under section 302 IPC is commuted to a sentence of imprisonment for life, which is to run for the remainder of the appellant's natural life, subject to a *bona fide* exercise of the clemency powers of the President or Governor or the powers

of remission of the State under the appropriate statutory provisions. The remaining sentences awarded by the trial Court are upheld.

Adverse comments on manner of investigation and trial

Before parting however we must express our unease with the casual manner in which the investigation and trial in this case has been conducted.

No doubt this Court relying on the observations in *Zahira Habibullah Sheikh (5) v. State of Gujarat, (*2006) *3 SCC 374,* recommending to Courts not to act as mute spectators and mere recording machines, this Court had in the interest of of justice for the accused, victim and society acted proactively and called for and examined the samples of hair of the deceased and appellant and other materials collected in this case on 29.10.13 which were thereafter sent to the C.D.F.D., Hyderabad for DNA analysis. As mentioned above, according to the DNA report the hair of the deceased, which was cut by the doctor conducting the post mortem examination, was of the same person whose hair was found in the room and bed in possession of the appellant Also the hair, which was taken from between the fingers of the deceased matched with the hair of the appellant, which has been cut in jail on the orders of this Court. The said material as we have shown above has gone a long way for establishing the complicity of the appellant in this offence. However, we find gross negligence in the I.O. and ineptitude on part of the the trial Court in not themselves sending the hair samples, which were collected at the place of occurrence and from the deceased, for D.N.A. examination which were crucial for establishing the complicity of the appellant in this offence. We also see negligence on part of the the I.O. in not examining Dr. R.K. Singh, who had

initially taken the hair samples and blood sample of the appellant and also in not keeping the sample in a proper condition causing us to find that the seal and bottle of the sample were damaged. We had therefore directed that fresh sample of hair of the appellants be cut and collected in the jail where he was lodged by the order dated 29.10.13. It is also a source of anxiety to us that in a case of such gravity as the present case, the Investigating Officer has only examined two witnesses of fact viz. P.W. 1 Baise Ali and P.W. 2 Afzal and only three other witnesses P.W. 3 Dr. Amit Kumar, P.W. 4 Constable Parul Yadav and himself PW 5 S.I. Ashok Kumar Singh.

We must state categorically that this is not the manner to prove a charge of rape and murder of a 12 year old girl, and actually if we had not ourselves sent the samples of hair of the deceased and the hair found at the place of incident which had been collected and got a fresh sample of the hair of the appellant cut and got the same sent for DNA matching to th the CDFD, Hyderabad, the order of conviction may have suffered from some infirmities in view of the improbabilities alluded to by the learned counsel for the appellant, and there was a risk that such a grave case of rape and murder a 12 year old girl may have resulted in undeserved acquittal, eroding the confidence of the victim and the public in our system of justice.

It may be noted that this Court has earlier also adversely commented against negligent investigations in cases of rape and murder of minor girls, viz. Criminal Capital Appeal (Jail) No. 2531 of 2010], Bhairo vs. State of U.P. and Chhotu @ Ajay vs. State of U.P., Capital Case No. 863 of 2011 which had ended in unwarranted acquittals because D.N.A. samples were not collected or the accused not subjected to medical examination or where witnesses did not appear or support the

accused after being won over, and other grave lacunae were inadvertently or designedly left by inept or dishonest investigations. This Court had issued directions in those cases to the Director General of Police, U.P. to improve the process of investigations, especially in cases of rape and murder of minor girls. which have been reiterated in the on-going Criminal Writ Petition – Public interest Litigation No. 1797 of 2011, Qasim Vs. State of U.P., where this Court has been taking steps and issuing directions for improving the techniques and procedure for investigations in the State of U.P.

We may mention that in the case of *Dayal Singh vs. State of Uttaranchal, 2012 (8) SCC, 263*, where the deceased and injured were said to have been assaulted with lathies, but it appeared that the doctor conducting the post mortem examination and the Investigating Officer had colluded with the accused and no blunt object injury had been shown on the deceased in the postmortem report. Also although the viscera of the deceased was preserved for sending to the Forensic Science Laboratory, it deliberately appeared not to have been sent. The Apex Court noted with approval that the trial Court and High Court relying on the evidence of the eyewitnesses in preference to the medical report had held the accused guilty. The trial Court had even recommended action against the doctor and the police officer to the Director General (Health) and DGP. The Apex Court even initiated contempt proceedings against the Director General Health Services of U.P. / Uttarakhand and Director General of Police, U.P./ Uttarakhand under the provisions of the Contempt of Court Act for not complying with the directions of the trial Court and in failing to take action against the errant Medical Officer and Investigating Officer for dereliction of their duties and also directed that disciplinary proceedings be initiated against them. It was further clarified that in case the I.O. and the

Medical officer had retired, action could be taken against them even by withdrawal of their pensions. It was further observed in *Dayal Singh (supra)* that *" if primacy is given to such designed or negligent investigations, omission and lapse by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the enforcement agency, but also in the administration of justice."*

We are also disturbed by the manner, in which the trial Judge has recorded the 313 Cr. P. C. statement, which only consisted of six questions compositely putting the case, the witnesses and documents to the accused and simply questioning him as to why he was prosecuted and whether he had anything else to say or defence to lead, instead of seeking the explanation of the accused on each of the incriminating circumstances which appeared against him in the evidence on record, which is the requirement of law.

We were therefore constrained to re-frame detailed questions against the accused with the assistance of the learned G.A. on all the existing incriminating circumstances on the record, in addition to the further specific questions which were framed regarding the DNA analysis and other co-related material when the accused was re-examined under section 313 Cr.P.C by this Court on 27.1.14.

Direction issued to concerned authorities for improving investigations and trials in rape and murder cases

We therefore find it imperative to issue the following directions:-

(1) That in cases of rape and murder of minor girls, which are based on circumstantial evidence, as far as

possible, material which is collected from the deceased or the accused for example hair or blood of the victim or the accused, which is found on the persons or clothes of the victim or the accused or or at the spot, seminal stains of the accused on the clothes or body of the victim, Seminal swabs which may be collected from the vaginal or other orifices of the victim and the blood and other materials extracted from the accused which constitutes the control sample should be sent for D.N.A. Analysis, for ensuring that forensic evidence for establishing the participation of the accused in the crime, is available.

(2) We also direct the Director General Medical Health U.P., Principal Secretary Health, U.P., and D.G.P., U.P. to mandate sending the accused for medical examination in each case for ascertaining whether he has any injuries caused by the resisting victim, or when he attempts to cause harm to her as is provided under section 53 A of the Code of Criminal Procedure Code, which was introduced by Act 25 of 2005, (w.e.f 23.6.2006). In particular if the rape suspect is apprehended at an early date after the crime, it should be made compulsory to take both dry and wet swabs from the penis, urinary tract, skin of scrotum or other hidden or visible regions, after thorough examination for ascertaining the presence of vaginal epithelia or other female discharges which are also a good source for isolating the victim's DNA and necessary specialized trainings be imparted to the examining forensic medical practitioners for this purpose.

(3) We direct the Principal Secretary (Health), U.P., Director General (Health and Medical Services) U.P. to prohibit conducting the finger insertion test on rape survivors, and to employ modern gadget based or other

techniques for ascertaining whether the victim has been subjected to forcible or normal intercourse. These finger insertion tests in female orifices without the victim's consent have been held to be degrading, violative of her mental and physical integrity and dignity and right to privacy and are re-traumatizing for the rape victim. Relying on the International Covenant on Economic, Social, and Cultural Rights, 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 it was further held in *Lillu v. State of Haryana, (2013) 14 SCC 643* that no presumption of consent could be drawn *ipso facto* on the strength of an affirmative report based on the unwarranted two fingers test.

(4) We find that there is absence of an adequately equipped D.N.A. Laboratory in U.P. which has advanced mitochondrial DNA analysis facilities, comparable to the CDFD, Hyderabad, (from where we were able to obtain positive results in this case, after unsuccessful DNA matching in an earlier case [Criminal Capital Appeal (Jail) No. 2531 of 2010], Bhairo vs. State of U.P.(decided on 6.9.11) where this Court had sent the sample of vaginal smear slides and swabs and appellant's underwear to the U.P. DNA laboratory, viz. Forensic Science Laboratory, Agra), and we direct that such a DNA centre comparable to the CDFD be established in the State of U.P. at the earliest so that Courts and investigating agencies are not compelled to send DNA samples at high costs to the specialized facility of the CDFD at Hyderabad.

(5) The Director General of Prosecution, U.P., the Director General of Police U.P. and Director General Medical Health should ensure that blind cases of rape

and murder of minor girls or other complicated cases are thoroughly investigated by efficient Investigating Officers. Effective steps should be taken for forensic investigations by collecting and promptly sending for DNA analysis all possible incriminating material collected from the deceased, victim, accused, and at the scene of the crime etc. which may give information about the identity of the accused and his involvement in the crime, after taking precautions for preventing the contamination of the material. This is necessary to prevent Courts being rendered helpless because the prosecution and investigating agency are lax in producing witnesses or because witnesses have been won over or are reluctant to depose in Court. Steps should also be taken for preventing witnesses from turning hostile, by prosecuting such witnesses, and even by cancelling bails of accused where they have secured bails where it is apparent that efforts are being made to win over witnesses and by providing witnesses with protection where ever necessary so that they can give evidence in Court without fear or pressure. In case there is reason to think that the Investigating Officers or medical officers or others have colluded with the accused, strict action be initiated against the colluding officials as was recommended in the case of *Dayal Singh vs. State of Uttaranchal (supra)*. It is necessary that policies and protocols be developed by the DGP, U.P., Principal Secretary Health, Director Medical Health U.P., Director of Prosecutions, U.P., for the aforesaid purposes.

(6) The JTRI, Lucknow must ensure that proper training is given to Judicial Officers on framing proper questions for 313 Cr. P. C. examination, so that the entire circumstances of the case are put to the accused and they cannot claim the benefit of being inadequately

questioned about the incriminating circumstances of the case

Copies of this order should also be placed on the record in the case of *Qasim v. State of U.P.*, Criminal Writ Petition – Public interest Litigation No. 1797 of 2011 We also direct the Registry to forthwith forward this order to the respondents above mentioned who are to submit a compliance report of these directions in the on-going PIL, *Qasim (supra)* within 4 weeks.

Subject to the aforesaid observations modifying the sentence and issuing directions as above this Appeal stands dismissed.

The Reference for confirming the death sentence is also rejected.

The Registry is directed to circulate copies of this judgement to all District Judges for ensuring compliance of the direction herein above.

Date: 28.8.2014

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