

AFR

Reserved on: 23.04.2019**Delivered on: 22.10.2019****Court No. - 34****Reference No. 06 of 2011**

With

Case :- CAPITAL CASES No. - 2330 of 2011**Appellant :- Santosh @ Tidke****Respondent :- State Of U.P.****Counsel for Appellant :- From Jail, S.P. Sharma****Counsel for Respondent :- A. G. A.**

With

Case :- CAPITAL CASES No. - 4173 of 2011**Appellant :- Santosh @ Tidkey****Respondent :- State Of U.P.****Counsel for Appellant :- S.P. Sharma****Counsel for Respondent :- Govt. Advocate****Hon'ble Sudhir Agarwal, J.****Hon'ble Rajendra Kumar-IV, J.***(Delivered by Hon'ble Sudhir Agarwal, J.)*

1. Present Reference under Section 366 Cr.P.C. and Capital Case under Section 374(2) Cr.P.C. have arisen from judgment and order dated 14.03.2011 passed by Sri Vigyan Ram Mishra, Additional Sessions Judge, Court No. 1, Jhansi.
2. Capital Case Appeal No.4173 of 2011 has been filed by accused-appellant Santosh @ Tidkey through Sri S.P. Sharma, Advocate and Capital Case Appeal No.2330 of 2011 has been filed by same accused-appellant through Senior Superintendent, District Jail, Jhansi.
3. By the impugned judgment and order, accused-appellant has been convicted in Session Trial No.144 of 2009, (Case Crime No.665 of 2009), under Sections 376, 302 and 201 IPC, Police Station Chirgaon, District Jhansi. Considering the case to be rarest of rare, he has been sentenced under Section 376 IPC for life imprisonment; under Section 302 IPC, he has been sentenced to death. He has been directed to be hanged till he

dies. Under Section 201 IPC, he has been sentenced to two years Rigorous Imprisonment (hereinafter referred to “R.I.”).

4. For confirmation of death sentence, Reference No.06 of 2011 has been made to this Court by Trial Court vide letter dated 14.03.2011.

5. Factual matrix of the case arising from the written report Ex.Ka-1, as well as evidence brought on record is as follows:-

6. On 05.05.2009, a written report was presented before Police Station Chirgaon, District Jhansi by Informant, PW-1, Mehtab Singh, alleging that on previous evening of 04.05.2009 at about 05:00 PM, Informant's wife Usha was present in the house and their daughter Jyoti was playing in front of door. In the meantime, accused-appellant Santosh @ Tidkey, aged about eighteen years, came over there and told the child Jyoti to go with him to get mehadi applied on her hand, whereupon Jyoti went with him. When she did not return till night, Informant made search for her but could not trace. Buddh Singh, son of Hemraj, and Lakhan son of Gokal Rajpoot of the village told that they had seen Santosh getting Jyoti drunk water at the hand-pump in front of house of Amar Singh Rajpoot. They had seen him taking away the girl. When Informant and others made search for Santosh @ Tidkey, he could not be traced. Santosh is a mischievous boy and they are sure that he has murdered her and caused dead body of Jyoti disappeared has absconded.

7. On the basis of written report Ex.Ka-1, First Information Report (hereinafter referred to as “FIR”) was lodged by PW-3, Constable, Brijesh Mohan Rawat, as Case Crime no.665 of 2009, under Sections 302 and 201 IPC on 05.05.2009 at 02:00 PM at Police Station Chirgaon, District Jhansi. He prepared Chick FIR Ex.Ka-6 and made relevant corresponding entry in General Diary (hereinafter referred to as “GD”), a copy whereof is Ex.Ka-7 on record.

8. After registration of case, investigation was entrusted to PW-5, Sub Inspector (hereinafter referred to as “SI”) Sri Girwar Giri. He obtained a

copy of FIR and after recording statement of Head Moharrier as well as Informant, PW-1, proceeded to the place of occurrence along with S.I. Sri Ram and other Police personnel. He searched for accused and recorded statement of mother of the deceased (Jyoti). He prepared site plan Ex.Ka-9 of the place where-from accused-appellant had taken prosecutrix / deceased. In the meantime, on getting information about location of accused, Police went to Temple of Kuchwadiya and arrested accused-appellant, who admitted that he had taken Jyoti on the pretext of applying Mehndi and got her drunk water and then took her to *Bera*, where he inserted finger in her vagina as a result whereof blood stained oozing; then she cried. Accused put her frock and suppressed her mouth and committed rape upon her on a stone slab (Patiya). Thereafter he covered her with the stone slab and fled away. On the pointing of accused-appellant, dead body of Jyoti was recovered by Police. A recovery memo, Paper no. 11, was prepared by Investigating Officer (hereinafter referred to as "IO"). He also prepared inquest Ex.Ka-10 before the Panches. He prepared necessary documents along with inquest, Ex.Ka-11 to 15, and thereafter sent dead body along with Constable, Mustaque Ahmad, and Head Constable, Prati Pal Singh, to District Hospital for postmortem. He took in possession simple as well as blood stained pieces of stone slab (patiya). IO also took in possession a blank wrapper, a tube of mehndi cone and necklace made of red and white beads from the spot and prepared recovery memo Ex.Ka-4. He also took in possession undergarments of deceased which contained blood stains and prepared recovery memo Ex.Ka-6.

9. Autopsy on the dead body of deceased was conducted by PW-4, Dr. A.K. Tripathi. According to him, deceased girl was aged about 3½ years. On external examination, Doctor found that deceased was of average body built; rigor mortis passed off from neck and upper extremities and present on both lower extremities, no sign of decomposition was seen; face was congested; both eyes were closed; fresh blood was coming out

from both nostrils; bleeding from vagina was present; dried blood was present over perineal region and both thighs; hymen was ruptured and lacerated; bleeding from vagina was present. He found following ante mortem injuries:-

1. Contusion abraded 1.5cm x 1.5cm on right side of neck just behind mastoid process.

2. Abraded contusion two in number, one below other on left side of neck, 1 cm below and behind left mastoid process on side of neck, underlying tissue and muscle of neck are contused.

10. On internal examination, Doctor found both the pleura, larynx, trachea and both the lungs congested; about 50 gm of pasty semi digested food in stomach; large intestine contained faecal matter and gases; liver was congested; gall bladder was half full, weighed 450 gm; spleen and both kidneys were congested; urinary bladder was empty and blood clots present on the vagina. According to doctor, duration of death was about one day at the time of postmortem. In the opinion of PW-4, Dr.A.K. Tripathi, girl died due to asphyxia as a result of ante mortem throttling.

11. Doctor prepared slides of vaginal smear and vaginal swab and preserved for pathological examination which were sealed and handed over to Constables along-with clothes of the deceased.

12. PW-6, Dr. Mohini Saxena, the then Senior Consultant Pathologist in Women Hospital, Jhansi had examined three slides of vaginal smear and swab sent by PW-4 Dr. A.K. Tripathi. She found that slides did not contain spermatozoa but RCBS was found in them. She prepared report Ex.Ka-22.

13. On 06.05.2009. I.O. got accused-appellant medically examined. He sent recovered articles relating to incident for Forensic Science Laboratory (hereinafter referred to as "FSL"), Agra.

14. After conclusion of investigation, IO, PW-5, Girwar Giri, submitted charge sheet Ex.Ka.-16 in Court under Sections 376, 302 and 201 IPC

against accused-appellant.

15. Cognizance of the offences was taken by Chief Judicial Magistrate (hereinafter referred to as "CJM"), Jhansi on 20.05.2009. Since the case was exclusively triable by Court of Sessions, CJM committed the case to Sessions Court on 09.07.2009, where it was registered as Session Trial No.144 of 2009, under Sections 376, 302 and 201 IPC, Case Crime No.665 of 2009, Police Station Chirgaon, District Jhansi. Learned Sessions Judge transferred the case to the Court of Additional Sessions Judge, Court No.1, Jhansi who framed charges against the accused-appellant under Sections 302, 376 and 201 IPC. The charge read as under:-

"मैं विज्ञानराम मिश्रा, अपर सत्र न्यायाधीश, कक्ष सं०-1, झॉसी आप सन्तोष उर्फ तिड़के पर निम्न लिखित आरोप विरचित करता हूँ-

प्रथम यह कि दिनांक 4.5.09 को स्थान-पेश दरवाजा वादी ग्राम बरल थाना चिरगाँव जिला झॉसी में अपने वादी मेहताबसिंह की पुत्री कु० ज्योति आयु साढ़े तीन वर्ष की हत्या कर दी। इस प्रकार आपने ऐसा अपराध किया जो भा०द०सं० की धारा-302 के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

द्वितीय यह कि दिनांक उक्त दिनांक, समय व स्थान पर आपने वादी की पुत्री कु० ज्योति उम्र साढ़े तीन साल के साथ ग्राम बरल थाना चिरगाँव जिला झॉसी में स्थित बुद्धसिंह के मकान के खण्डहर में बलात्कार किया और इस प्रकार आपने ऐसा अपराध किया, जो भा०द०सं० की धारा-376 के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

तृतीय यह कि दिनांक 5.5.09 को आपने ग्राम-बरल वहद थाना चिरगाँव जिला झॉसी स्थित बुद्धसिंह के मकान खण्डहर में कमरे के उत्तरी पश्चिमी कोने से पत्थर के पटिया के नीचे से मृतका कु० ज्योति की लाश को बरामद कराया जिसे आपने अपराध की साक्ष्य विलोपन हेतु छिपाया था और इस प्रकार आपने ऐसा अपराध किया, जो भा०द०सं० की धारा-201 के अन्तर्गत दण्डनीय है और ऐसा इस न्यायालय के प्रसंज्ञान में है।

और एतद् द्वारा निर्देश देता हूँ कि आपका परीक्षण उपरोक्त धाराओं के अन्तर्गत इस न्यायालय द्वारा किया जायेगा।"

"I Vigyan Ram Mishra, Additional Sessions Judge, Court No.1, Jhansi charge you Santosh @ Tidkey as under:-

Firstly that on 04.05.2009 at the door of informant in Village Baral, Police Station Chirgaon, District Jhansi you committed murder of Km. Jyoti daughter of Mehtab Singh aged about 3½ years. Thereby you have committed offence which is punishable under Section 302 IPC and is within the cognizance of this Court.

Secondly that on the aforesaid date, place and time you committed rape on Km. Jyoti aged about 3½ years in the ruins of the house of Budh Singh within Village Baral, Police Station Chirgaon, District Jhansi and thereby you have committed an offence punishable under Section 376 IPC and within cognizance of this Court.

Thirdly that on 05.05.2009 you got recovered the dead body of deceased Km. Jyoti from beneath the stone slab kept in the south west corner of the ruins in the ruins of house of Budh Singh situated within Village Baral under Police Station Chirgaon, District Jhansi where you had concealed the dead body with the intention of disappearing the evidence and thereby you committed offence which is punishable under Section 201 IPC and within cognizance of this Court.

I hereby direct that you be tried by this Court for the aforesaid judgement.” (English Translation by Court)

16. Accused-appellant pleaded not guilty and asked for trial.
17. In support of its case, prosecution examined, in all, six witnesses, out of whom **PW-1** Mehtab Singh is father of victim (deceased Km. Jyoti), **PW-2** Budh Singh is witness who had last seen the deceased Jyoti with accused-appellant while he was getting her drink water. He is also a witness of arrest of accused-appellant as well as recovery of blood stained under-wear of accused-appellant.
18. PWs 1 and 2 both are witnesses of fact and rest are formal witnesses of Police and Health Department.
19. **PW-3** Constable Moharrir Brij Mohan Rawat had registered FIR at case crime no.665 of 2009, under Sections 302 and 201 IPC and has proved Chick report Ex.Ka-6 and a copy of GD Ex.Ka-7. **PW-4** Dr. A.K.

Tripathi had conducted autopsy on the dead body of Km. Jyoti and has proved injury report Ex.Ka-8 referred above. **PW-5** Girwar Giri is the IO and has proved site plan Ex.Ka-9, inquest Ex.Ka-10, documents relating to sending of dead body of victim / deceased to the District Hospital Ex.Ka-11 to 15, recovery memo Ex.Ka-3 in respect of blood stained pieces of stone slab, recovery memo Ex.Ka-4 in respect of Mehndi Cone and necklace of beads, recovery memo Ex. Ka-6 pertaining to blood stained underwear of the appellant; charge sheet Ex.Ka-16 and site plan Ex.Ka-17 in respect of place of occurrence where-from dead body of Jyoti was recovered. IO has also proved FSL report Ex.Ka-19, 20 and 21. **PW-6** Dr. Smt. Mohini Saxena has proved pathological report, Ex.Ka-22, in respect of examination of three slides of vaginal smear and swab.

20. Three reports of FSL of Agra were received; **first report**, dated 26.10.2009 received from Joint Director, FSL, Agra is Ex.Ka-21, according to which spermatozoa were found on the frock of the deceased. However, no spermatozoa was found on underwear of Kalawa.

21. **Second report**, of the Joint Director of FSL, Agra is dated 29.10.2009, Ex.Ka-20, and findings are as under:-

- (i) Blood stains were found on the pieces of stones, underwear of accused-appellant Santosh, frock of deceased and Kalawa (bracelet) in large area.
- (ii) Largest blood stains on stone measured about 5 cm.
- (iii) For examination of blood spectrum test was applied.
- (iv) On **pieces of stones, underwear of accused-appellant and frock of Jyoti, human blood was found.**
- (v) On Kalawa (bracelet) blood stains were found disintegrated, therefore, determination could not be made. No definite conclusion could be drawn from the classification of blood stains on pieces of stone and

underwear of accused Santosh.

(vi) Blood stains on the frock of Km. Jyoti were not fit for classification.

22. **Third FSL report** Ex.Ka-19 dated 16.01.2010 is with respect to sample of blood stained and simple pieces of stones slab. On physical microscopic inspection both the pieces of blood stained stone and pieces of simple stone (material EX-1) appeared to be similar in terms of colour, nature and density.

23. Accused-appellant was examined under Section 313 Cr.P.C. on 24.02.2011, he stated that prosecution story is false; he had not taken Jyoti with him from house of Informant; allegation that he had made Km. Jyoti drunk water is false and concocted; witness Budh Singh in connivance with Lakhan Singh had got FIR registered to implicate him falsely; he did not commit rape or murder and has falsely been implicated; all the documents are false and incorrect; he pleaded ignorance about the postmortem on deceased; site plan had been prepared at the instigation of Informant in order to implicate him; police had arrested him from the *chabutra* situated out side his house; he did not make any statement to Police and Police has recorded false statement; he did not get any dead body recovered; he pleaded ignorance about blood stains on stone slab; he denied of any underwear belong to him taken by Police; he was not aware as to whose underwear had been recovered; on the instigation of Informant and witnesses, he has been implicated under Section 376 IPC; he also pleaded ignorance about sending articles to FSL for examination; Informant and witnesses are relatives and friends and want to usurp his property after throwing him out of village.

24. On 03.03.2011, accused-appellant was again examined by Court under Section 313 Cr.P.C. wherein he was confronted with the reports regarding sample of smear in three slides. He said that the same are wrong and he has no knowledge about those reports.

25. On appreciation of evidence available on record and after hearing both the parties, Trial Judge recorded capital punishment against the accused-appellant under Section 302 IPC; life imprisonment under Section 376 IPC and two years' RI under Section 201 IPC as stated above.

26. Trial Court has given verdict of conviction, broadly, recording its finding on the following aspects :-

(i) Dead body of victim (Km. Jyoti) was discovered on the pointing by accused on 05.05.2009.

(ii) Accused has taken victim with him and Informant PW-1 was an eye witness to this fact and also proved the pretext on which accused allured victim to accompany him.

(iii) PW-2 Budh Singh verified the fact that he has seen accused along with victim while he was helping victim to drink water at the hand-pump in front of the house of Bhanwar Singh.

(iv) Possibility of rape could not be ruled out by PW-4 Dr. A.K. Tripathi due to ruptured hymen.

(v) Cause of death of victim due to asphyxia as a result of throttling was proved by PW-4 who proved post mortem report.

(vi) Blood stains were found on the underwear of accused as per forensic report dated 29.10.2009 (Ex.Ka-20) and remained unexplained by accused.

(vii) There was no delay in lodging F.I.R. inasmuch as victim had gone with accused at around 5:00 PM in the evening in front of PW-1 and when she did not return up to 7:00 PM, PW-1 and other family members searched for her. PW-2 Budh Singh during search met Informant and told that he has seen accused along with victim getting her to drink

water at the hand-pump in front of the house of Bhanwar Singh and thereafter went together and on this information further search continued and when none could be traced out thereafter report was lodged at 2:00 AM in the Police Station.

(vii) Accused was arrested at 5:00 AM on 05.05.2009 and on his pointing out dead body of the victim was recovered.

(viii) Post mortem was conducted on 05.05.2009 at 3:30 PM and as per statement of PW-4 death might have been occurred about 24 hours earlier and / or in the night of 4/5.05.2009.

(ix) Victim was last seen with accused and thereafter her dead body was recovered. The time lapse between the last seen and recovery of dead body is closer ruling out any possibility of the victim having gone with anybody else in the meantime.

(x) Accused pleaded enmity with Informant stating that he wanted to grab his property but neither any evidence was adduced to prove this nor any such suggestion was made to PW-1 and PW-2 in cross-examination.

(xi) Though defence was taken that PW-1 and PW-2 are relatives but this fact could not be proved adducing any evidence.

(xii) No evidence was brought to show that there was previous enmity with the witnesses of fact and more particularly, the Informant and accused. Accused also did not adduce any evidence to show that he had any personal property in the village.

(xiii) Site plan Ex.Ka-9 was proved by I.O., PW-5, S.I. Girwar Giri, showing that the houses of accused and Informant i.e. father of victim are opposite to each other.

(xiv) The place where accused stated to have committed rape upon victim as also the place where her dead body was concealed were clearly mentioned in site plan and I.O. also proved G.D. (Ex.Ka-18) wherein the fact of taking statement of accused explaining the manner in which he committed crime, is mentioned.

(xv) The stone slab on which rape was committed measured 2' 10" by 1' 8" and had blood stains in large amount.

(xvi) The stone slab, underwear of accused and deceased frock were found to have human blood of same nature.

(xvii) Though underwear of accused and underwear and frock of deceased, as per the report (Ex.Ka-2) of PW-6, did not contain spermatozoa but as per forensic report, spermatozoa was found on deceased's frock.

(xviii) In the panchayatnama, swelling in vagina was mentioned and as per post mortem report also hymen was found ruptured which supports that rape was committed upon the victim.

(xix) The defence that accused was juvenile was not found correct and as per record, it was found that accused was 19-1/2 years at the time of incident.

27. Trial Court, therefore, found accused guilty of committing offences under Sections 376, 302 and 201 I.P.C. and has convicted and sentenced him in the manner as stated above.

28. Against conviction and sentence Capital Case Appeal No.4173 of 2011 has been filed by accused-appellant Santosh @ Tidkey through Sri S.P. Sharma, Advocate, Capital Case Appeal No.2330 of 2011 has been filed by same accused-appellant through Senior Superintendent District Jail, Jhansi and Reference No. 06 of 2011 has been made by Trial Court

for confirmation of Capital punishment.

29. We have heard Sri S.P. Sharma, learned Counsel for the appellant and Sri M.C. Joshi, learned AGA for State at length and have gone through record carefully with the valuable assistance of learned Counsel for parties.

30. Learned counsel for the accused-appellant contended that there is no eye witness of the incident; there was no motive for accused to commit the crime for which he has been charged; chain of events is not complete so as to draw a conclusion that it is only the accused appellant who could have committed crime and none else; the dead body of the victim was found by Police on its own and accused has been implicated falsely; as per vaginal smear test, no spermatozoa was found and the charge of rape is not proved; prosecution has failed to prove its case beyond reasonable doubt; and, lastly that since evidence adduced by prosecution is not sufficient to point out with due reasonableness that it is only the appellant who has committed crime for which he has been charge, accused is entitled to benefit of doubt. On the question of sentence, it is contended that accused at the time of committing crime was a young man of 19-1/2 years with no criminal history and there was no aggravating factors so as to justify death sentence hence Court below in awarding capital punishment has committed manifest error.

31. Per contra Sri M.C. Joshi, learned AGA for the State contended that admittedly, it is not a case of ocular evidence but there are two reliable and unimpeachable witnesses who have proved the fact that the accused had taken the girl with him and she was last seen with him where-after her dead body was recovered and that too, on pointing out by accused-appellant, hence, chain of circumstances was complete; the short time within which incident had taken place and other relevant factors of presence of blood stains on the underwear, stone slab and frock of deceased of same nature support the inference that it is only the accused who had committed crime and none else; and accused has not offered any

explanation as to how blood stains were found on his underwear. So far as the sentence is concerned, it is contended that a minor girl aged about 3 and 1/2 years has been dishonoured and murdered in a very cruel manner and accused-appellant, not only committed rape and murder, but even hide her dead body and showed no repentance, hence, Trial Court has rightly treated it as case of rarest of rare nature and awarded capital punishment which warrants no interference and Reference made by Trial Court deserves to be confirmed.

32. Before coming to the merits of the matter we find it appropriate to place on record that during pendency of appeals, accused-appellant moved an application under Section 7-A of Juvenile Justice Board (Care and Protection) Act, 2000 (hereinafter referred to as the Act, 2000) with prayer that accused-appellant be declared juvenile and the matter should be decided in accordance with provisions of Act, 2000. This plea was raised by accused before Trial Court also. The matter was examined and thereafter Trial Court passed order dated 07.07.2010 rejecting application of accused for declaring him juvenile offender in Trial relating to Case Crime No. 66 of 2009 under Sections 302 and 201 I.P.C., P.S.Chirgaon. The matter was taken in Criminal Revision No. 4154 of 2010 by accused-appellant Santosh @ Tidkey wherein order dated 07.07.2010 passed by Additional Sessions Judge, Court No. 1, Jhansi was challenged. This Court confirmed findings of Trial Court after considering material on record and dismissed revision vide judgement dated 18.1.2017. It is not in dispute that aforesaid judgement of Revisional Court has attained finality therefore, counsel of appellant did not press issue of juvenility before this Court at the time of final hearing of these appeals and Reference and has addressed this Court on merits.

33. Now we proceed to consider the merits of the matter.

34. In the light of rival submissions, two questions have arisen requiring adjudication by this Court :-

- (i) Whether prosecution has adduced enough evidence to prove beyond reasonable doubt that accused appellant has committed crime for which he was charged.
- (ii) Whether facts of this case bring it within the parameters of 'rarest of rare', so as to justify Capital punishment, i.e. death sentence.

35. Before examining above questions, we find it appropriate to have re-look of entire evidence on record which was brought by prosecution before Court below and thereafter we shall proceed to examine “whether evidence is sufficient to bring home the findings of guilt / conviction against the accused appellant”.

36. Documentary evidence placed by prosecution includes written report dated 05.05.2009 (Ex.Ka-1); F.I.R. dated 05.05.2009 (Ex.Ka-6); recovery memo of blood stained stone dated 05.05.2009 (Ex.Ka-3); and recovery memo of wrapper *Chka-Chak*; and red-yellow Mala, dated 05.05.2009 (Ex.Ka-4); recovery memo of dead body of Km. Jyoti dated 05.05.2009 (Ex.Ka-5); recovery memo of blood stained Chaddhi (underwear) dated 05.05.2009 (Ex.Ka-6); vaginal semen report dated 08.05.2009 (Ex.Ka-22); post mortem report dated 05.05.2009 (Ex.Ka-8); and Forensic Laboratory Reports dated 16.01.2010 (Ex.Ka-19), dated 29.10.2010 (Ex.Ka-20) and dated 26.10.2010 (Ex.Ka-21).

37. Oral evidence examined by prosecution comprised of six witnesses whereof Mehtab Singh PW-1 is the Informant and father of victim / deceased; PW-1 and Budh Singh PW-2 are the witnesses of fact having seen victim along with accused-appellant in the evening of 04.05.2009; Constable, Brijmohan, prepared Chick No. 77 of 2009 (Ex.Ka-6) and G.D. No. 3 at 2:00 AM dated 05.05.2009 (Ex.Ka-7) and these documents were proved by him; Doctor A.K. Tripathi, Senior Consultant, District Hospital, Jhansi, PW-4, had conducted post mortem and proved post mortem report (Ex.Ka-8); Investigating Officer, S.I., Girwar Giri, PW-5

proved site plan (Ex.Ka-9) and also the fact of arrest of accused and discovery of dead body of Km. Jyoti on the pointing out of accused-appellant; recovery memo of dead body and Panchayatnma; collection of blood sample of stone; recovery of underwear of accused-appellant and forensic reports received as (Ex.Ka-19, Ka-20 and Ka-21) and lastly, Dr. Smt. Mohini Saxena, PW-6 who examined three slides of vaginal smear received from Dr. A.K. Tripathi and proved the report (Ex.Ka-22).

38. The Informant PW-1 and Budh Singh PW-2 are witnesses of fact and rest are formal witnesses.

39. PW-1, Mehtab Singh, father of deceased in examination in chief stated that he is well acquainted with accused Santosh @ Tidkey who was residing in front of his house; his daughter Km. Jyoti aged about 3 and 1/2 years at around 5:00 PM on 05.05.2009 was playing in front of door of the house and PW-1 and his wife were present in the house; Accused-appellant on the pretext of getting Mehadi applie on the hand of Km. Jyoti, took her with him in front of Informant and his wife and thereafter Km. Jyoti did not return; they tried to find out but failed. Lakhan Lal and Budh Singh, two persons residing in the village, during search, met Informant and told that they had seen accused Santosh @ Tidkey in front of the house of Bhanwar Singh where he was getting Km. Jyoti to drink water and had seen both of them going together; Santosh @ Tidkey is a mischievous person which led Informant to believe that he (accused) had murdered Km. Jyoti and hide her dead body somewhere; thereafter he lodged report in Police Station i.e. Ex.Ka-1. On 05.05.2009, Police arrested Santosh @ Tidkey at the temple of Kuchbadiya Baba where he was hiding; Santosh @ Tidkey in front of all told that he had killed Km. Jyoti and hide her dead body in the ruins of the house of Hemraj and also that he can get her dead body discovered; thereafter, he got body discovered from the ruin of the house of Hemraj. I.O. prepared panchayatnama of dead body of Km. Jyoti on the spot in front of villagers as well as Informant and PW-2. PW-1 Informant and other villagers

signed panchayatnama; at the time of preparing panchayatnama, private part of deceased Km. Jyoti had blood stains and it appeared that after committing rape upon her she was murdered; PW-1 proved his signature on panchayatnama which is marked as Ex.Ka-2. I.O. also collected stone slab having blood stains, it was cut with an Axe and blood stained stone piece was taken in custody and Fard (memo) was prepared which was also signed by Informant and another witness Sudama and it was marked as Ex.Ka-3; from the spot, one Mala, a blank wrapper of '*Chka chak*' and Mehadi was recovered for which also Fard (memo) was prepared and signed by Informant as well as Sudama which was marked as Ex.Ka-4. Dead body of girl was sent for post mortem; Four stone pieces kept in a sealed bundle were opened in Court and during examination in chief, Informant saw those pieces and verified that the same were those which were collected by I.O. from the place where dead body was found and where, as per information given by accused, he committed rape and murder of Km. Jyoti and these articles were marked as material Exhibits-1 to 4; out of four stone pieces, one was without any blood stain. In cross examination PW-1 said that they are three brothers, Parvat Singh, Mehtab Singh and Ram Prakash; Parvat Singh is residing outside; Hemraj Singh belongs to his family and in relation is grandfather (Baba) aged about 72 to 75 years; Hemraj has three sons, Budh Singh, Mithlesh and Bahadur Singh; Lakhan Lal belongs to the same caste as that of Informant and his father's name is Gokul; House of Lakhan Lal is at a quite distance from the house of Informant. Lakhan Lal has two houses in the village; one house is after about 8-9 houses from the house of Informant; house of accused was in front of Informant's house and in between there is a five feet passage; there is no Chabutara in front of house of Informant and Informant's house has four rooms; accused Santosh @ Tidkey are two brothers and since childhood he has been residing in the same house; accused is not undergoing education and PW-1 is not aware as upto which class accused has studied; he is not aware as to whether accused was

facing any other criminal case; accused is unemployed and just wanders hither and thither; accused was born in front of Informant and there were some complaints of theft committed by accused, made by villagers, but they were all settled; he was not aware as to whose goods were stolen by accused; Informant had four daughters and Km. Jyoti was playing in front of door of his house where he was sitting, Santosh came out from his house and in the presence of Informant took her with him; Informant did not raise objection when accused was taking Km. Jyoti though he asked as to why he was taking her, whereupon he said that he is taking Km. Jyoti for putting Mehadi on her hand; this happened at around 5:00 PM; at that time other neighbours were not present; he did not stop Santosh @ Tidkey from taking Km. Jyoti as he was not aware that Santosh @ Tidkey would murder her; when she did not return up to 7:00 PM, search was made but she could not be found and then Informant was let to believe that Santosh had taken her and might have murdered her, hence he lodged F.I.R.; during search when the girl was not found, two village people Budh Singh and Lakhn Singh told Informant that they had seen Km. Jyoti accompanying Santosh @ Tidkey and she was drinking water from the hand pump in front of the house of Bhanwar Singh Rajpoot and those two persons had seen Km Jyoti going with Santosh @ Tidkey; these persons met Informant around 7.15 PM, where-after, search continued up to 11:30 PM and then report was lodged at 2:00 AM on 05.05.2009; first of all search was made at the house of Santosh @ Tidkey where his mother was present but Santosh @ Tidkey and Km. Jyoti was not present; both were searched in the entire area; nobody except Budh Singh and Lakhan Singh told that Santosh and Km. Jyoti were going together; Informant came back to his house around 3:00 AM after lodging report and by that time, accused Santosh @ Tidkey could not be found; Informant and others were sitting in the house in the night; body of Km. Jyoti was found in the ruins of house of Hemraj, who was not brother of Informant but belongs to the family; Informant has no relation with Hemraj and was not aware with the

name of his father; about 15 houses away is the house of Hemraj; dead body of Km. Jyoti was recovered by Police; Informant had reached the site and Hemraj had also come; dead body was discovered in front of Hemraj, Informant and Ram Prakash; Hemraj and Ram Prakash did not sign documents i.e. recovery memo; Police arrested Santosh @ Tidkey at around 5:00 AM or 5:30 AM in the morning when a lot of people had gathered; after arrest of Santosh @ Tidkey, Informant did not visit Police Station; Informant's statement was recorded by I.O. and Informant told him about the place where-from Santosh @ Tidkey had taken Km. Jyoti; the place where dead body was discovered is around 70 to 80 paces from the house of Informant; he did not visit the entire village with I.O. and Police did not arrest any member of family of Santosh @ Tidkey and only Santosh @ Tidkey was arrested; Informant had no dispute regarding property or house with Santosh @ Tidkey.

40. PW-1 therefore, is not a witness of crime as such, but he has proved that Santosh @ Tidkey had taken Informant's minor daughter, aged about 3-1/2 years, in the evening of 04.05.2009 and when she did not come back by 7:00 PM, search started and during that process. Informant met Budh Singh also told that Santosh @ Tidkey and Km. Jyoti were going together. PW-1 is also a witness of recovery of dead body of victim in the ruins of house of Hemraj and condition of dead body is mentioned in panchayatnama. He is witness to panchayatnama and recovery memo on which he has put his signature.

41. In cross examination, we do not find anything otherwise extracted by defence to discredit the above facts stated by Informant in his evidence. To this extent evidence of Informant is clear, consistent and in our view, trustworthy. It is not expected that a father will make a wrong statement and shield real culprit when his own daughter and that too a minor girl of 3-1/2 years is subjected to heinous crime committed upon her causing her death.

42. Evidence of PW-1, Informant proved the fact that Santosh @

Tidkey resides in a house, in front of Informant and, therefore, was well known to Informant since his birth. Informant did not give any instance on account whereof there could be any occasion of enmity or bad blood between Informant and accused. Whatever has transpired or he had seen, he stated. He said that Santosh @ Tidkey, on the pretext of putting Mehadi on the hand of victim, took her with him and there being no otherwise reason of suspicion, Informant did not prevent accused from taking her with him for the aforesaid purpose i.e. putting Mehadi on her hand.

43. There is no scope of any identity dispute nor any scope of malice. The statement of Informant to the extent that it is the accused who had taken the girl with him, stating that he would get Mehadi put on her hand and the accused was well known to the Informant is proved by PW-1. These facts remain uncontroverted and nothing otherwise could be extracted in his cross-examination.

44. PW-2, Budh Singh is also a witness of last seen and has stated in his oral deposition that on 04.05.2009 he along with Lakhan Singh was coming from 'Bada' on 04.05.2009 at around 5:00 PM; when they reached near the house of Bhanwar Singh, saw Santosh @ Tidkey getting water drunk to Km. Jyoti from the hand-pump and thereafter both went towards 'Bada'. He told this fact to Ghanaram and Mehtab Singh who is father of Km. Jyoti; she did not return till night and when their family members searched for her, she could not be found where-after her family members reported the matter to Police; it came on 05.05.2009 and recovered dead body of Km. Jyoti from 'Bada' on the pointing out of Santosh @ Tidkey; Police prepared recovery memo of dead body and it was signed by PW-2 also; the said recovery memo, Paper No. 11-A was shown to PW-2 and he verified his signature as also of one Suresh Kumar and it was exhibited as Ex.Ka-5.

45. Police got underwear of Santosh @ Tidkey in its possession which was having blood stains and it was a blue coloured underwear. Recovery

memo of underwear was also prepared and it was also signed by PW-2 and Suresh and on proving, document was exhibited as Ex.Ka-6.

46. PW-2 stated that dead body of Km. Jyoti was discovered on the pointing out by Santosh @ Tidkey from the ruins of house of Hemraj. He also identified Santosh @ Tidkey, present in Court, stating that he belongs to the village of PW-2 and has seen him going with Km. Jyoti. Budh Singh son of Hemraj is a farmer. If he had work, he used to go in the morning but when he had no work, normally stays at his residence. Whenever he has work, goes to the field and there is no time of his return. He had normal relation with the family of accused Santosh @ Tidkey. His father Hemraj was alive who had also normal relations with the family of accused Santosh @ Tidkey. The incident is of 04.05.2009 and he reiterated this fact in his examination in chief and in cross-examination as well. In the cross-examination, he said to have seen both of them i.e. Santosh and Jyoti from a distance of only five paces from hand-pump, where she was drinking water and Santosh @ Tidkey was getting her drunk water with his hands. Santosh @ Tidkey was wearing white shirt and pant while Jyoti was wearing frock and underwear. Hand-pump was installed out side the house of Bhanwar Singh and it belongs to Bhanwar Singh. There was no boundary wall around hand-pump. When Santosh @ Tidkey was getting Jyoti drunk water, doors of house of Bhanwar Singh were open and mother of Bhanwar Singh was outside the house. After drinking water, both went towards 'Bada'. 'Bada' is not bound / fenced from all four sides and has no gate. He did not ask from Santosh @ Tidkey and Jyoti as to where they were going. He new Mehtab Singh, father of Km. Jyoti with whom he met in the evening, at around 7:00 PM, when he (Mehtap Singh) told that he was searching his daughter, Km. Jyoti. PW-2 told that he had seen Km. Jyoti with Santosh @ Tidkey outside the house of Bhanwar Singh where Km. Jyoti was drinking water with the help of Santosh @ Tidkey from the hand pump. The condition of Km. Jyoti was normal at the time of drinking water. Santosh @ Tidkey

was never prosecuted earlier nor arrested by Police in past. When he was getting Km. Jyoti drunk water, it was not night but there was sun light. No body resides in the 'Bada' of PW-2 i.e. the ruins of the house of Hemraj where the incident had taken place. PW-2 said that Informant went to lodge report around 8:00–9:00 PM and PW-2 had not accompanied him. Informant came back at around 12:00 PM after lodging report and at that time PW-2 was sitting in the locality. When Mehtab Singh had come, he was searching Jyoti. Between 7:00 to 12:00 PM in the night, they also went at the house of Santosh @ Tidkey and inquired about him. PW-2 had Suresh and Lakhan Singh of the village with him, besides 3 to 4 other persons, at that time, but Santosh @ Tidkey was not found at his residence. His brother was found. Santosh was searched in the entire village but could not be found. In the morning, around 5:00 AM, Police came and arrested Santosh @ Tidkey from temple of Kuchbadiya Baba. There was no permanent priest in the said temple and it is open from all the sides. The aforesaid temple was about 1 Km. away from the village. PW-2 had not seen Police while arresting Santosh @ Tidkey but when he was brought in the village, PW-2 saw him. Police made inquiry from Santosh @ Tidkey but did not beat him. Interrogation was made in the present of villagers as well as PW-2. On the pointing of Santosh @ Tidkey dead body of Km. Jyoti was discovered by Police. At that time, PW-2 was also there. In fact entire village was there. The Informant Mehtab Singh was also present.

47. Blue coloured underwear from a sealed cover envelop was opened when witness PW-2 was recalled for examination on the application of prosecution and he proved it. The blue coloured underwear, stating it was the same underwear which accused appellant was wearing at the time of incident and it was taken in custody by Police from the accused-appellant. The aforesaid underwear was marked as Ex.Ka-5. In cross-examination, he reiterated that underwear was seized by Police before him from accused who was wearing the said underwear under the pant. Police got

stripped off pant and underwear of accused and took underwear in its custody. The underwear was stained with blood. Police also seized a stone. On the recovery memo of underwear PW-2 and Suresh put their signature.

48. The aforesaid witness PW-2, therefore, has proved three facts :-

(i) He saw accused-appellant Santosh @ Tidkey along with Jyoti in front of house of Bhanwar Singh at the hand-pump where Santosh @ Tidkey with his hands was helping Km. Jyoti to drink water and after drinking water both Jyoti and Santosh @ Tidkey went towards 'Bada' i.e. ruins of the house of PW-2 and Hemraj, whose ruins have been stated by PW-1 is the father of PW-2 Budh Singh.

(ii) Secondly, he has verified and proved the fact that underwear seized by Police belongs to accused-appellant and when he was arrested, Police taken out from the accused the said underwear and seized it. Before seizure the underwear was inspected and it was found containing blood stains and recovery memo was signed by PW-2.

(iii) Discovery of dead body of Km. Jyoti was on the pointing out by accused and at that time not only PW-2 but PW-1 and other villagers were also present.

49. In the cross-examination, we do not find anything adverse which could have been extracted by defence. So far as the above facts stated by PW-2 are concerned, to this extent PW-2 is clear categorical and uncontroverted hence to this extent his evidence, we find wholly trustworthy.

50. Counsel for the accused appellant stated that with respect to the time of lodging of F.I.R., PW-2 has stated that Informant had gone to lodge a report around 8:00 to 9:00 PM and returned back around 12:00 PM in the night while report itself was lodged at 2:00 AM on 05.05.2009

i.e. early morning and there is clear contradiction on this aspect in the statement of PW-2 but we find that this inconsistency in statement of PW-2 is not material vis vis the fact which he has stated in his examination-in-chief and more so, his own statement that he did not accompany Informant for lodging report, therefore, he was not a witness to prove the time of lodging the report was lodged.

51. Minor contradiction regarding time of lodging a report has also arrest of accused, we find that in villages and the incident like above are happening when cannot accept that persons will record the incident keeping a complete time record watching completely wrist watches. Times are mentioned approximately and unless we find some serious contradictions so as to render entire evidence and untrustworthy. There is no reason to discard the evidence which is otherwise truth and trustworthy.

52. In this case, all the above stated factors are minor inconsistencies and same do not affect the substance of testimony of witnesses. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of

credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [**Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287**]. We therefore, find no force in this submission also.

53. Moreover, incident had taken place on 04.05.2009. The aforesaid examination of PW-2 was conducted on 24.1.2011 i.e. after 1 and ½ years. The time lapse can always cause minor aberrations in the statement of a witness who cannot be expected to depict the entire scene like a scripted story as and when required to tell. Any person who is a witness to an incident react in his own way and it differs from person to person. Mostly such aspects which a person thinks to be of most importance or of highest importance are noticed and reflected in his mind but details aspects do not get registered in mind and memory and there may be some variations on such minor aspects. Every contradiction or variation in statement of witnesses is not material and will not render statement of a witness untrustworthy.

54. We have gone through the entire evidence very carefully, as have also discussed above, and find no material contradiction, so as to disbelieve the prosecution case or the individual witness. Minor contradictions are bound to occur but the same will not be fatal to prosecution who has otherwise produced trustworthy witness to prove the guilt of accused.

55. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4**

SCC 124, Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

56. In **Sachin Kumar Singhraha v. State of Madhya Pradesh in Criminal Appeal Nos. 473-474 of 2019** decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

57. Lest we forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in **Smt. Shamim v. State of (GNCT of Delhi), 2018(10) SCC 509**.

58. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy. Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of

no legal consequence and cannot defeat prosecution.

59. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: **State Represented by Inspector of Police v. Saravanan & Anr.**, AIR 2009 SC 152; **Arumugam v. State**, AIR 2009 SC 331; **Mahendra Pratap Singh v. State of Uttar Pradesh**, (2009) 11 SCC 334; and **Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra**, JT 2010 (12) SC 287].

60. Thus after analysing entire evidence with the settled principle of law as discussed above, we are of the view that contradiction pointed out are not fatal to prosecution case and do not affect the veracity of prosecution witnesses therefore, above arguments also have no substance.

61. In the present case, the fact of last seen, and recovery of dead body as well as underwear of victim and accused and their identification are the facts proved by witnesses. We find, on these aspects, nothing otherwise material has been extracted to contradict or disbelieve statement of PW-2. Hence, we find no reason to discard his evidence for minor contradictions. Trial Court has also rightly believed his statement.

62. PW-3 Constable Brijmohan has proved date, time and the person who lodged report and is consistent with regard to time when the F.I.R. as well as statement of PW-1 was recorded. Nothing adverse could be extracted in his cross-examination.

63. PW-4 Dr. A.K. Tripathi is a witness to prove post mortem report since he had conducted post mortem and submitted report. Besides others, he proved the fact that blood was coming out from vagina and blood clots were also present. He prepared slides and sent for pathological examination and proved, on the basis of post mortem report, possibility of rape and killing of girl by throttling. He also proved that death could have occurred in the night of 04/05.05.2009.

64. In cross-examination, PW-4 reiterated that the injuries on neck show that some body has throttled the neck. He denied suggestion that rape was not committed upon the girl. He also said in cross-examination that rupture of hymen can be caused due to rape or on account of injuries by any other object.

65. PW-5, I.O., Girwar Giri has stated that he was assigned investigation where upon he made inquiry from the Informant and recorded his statement. Then he searched village and tried to find out Km. Jyoti and accused Santosh @ Tidkey, accompanied by Informant and other witnesses. He also recorded statement of Usha, wife of Informant and this is mentioned in C.D. On the same day, on the pointing out of Informant, he prepared site plan where-from accused had taken Km. Jyoti along with him and it was marked as Ex.Ka-9. He recorded statement of

Prem Narayan and Mithlesh. When received information that accused was hiding in temple of Kuchbadiya Baba, accompanied by police officials and villagers, PW-5 went to the temple of Kuchbadiya Baba and searched in the rooms where he found accused Santosh @ Tidkey, who was identified by the villagers also and taken in custody at around 6:00 AM. The documents of his arrest were prepared and the same were Paper no. 12-A/1 to 12-A/5 in record of Trial Court. After taking accused in custody, he was interrogated whereupon he admitted his guilt and said that on the pretext of getting Menhdi put on the hands of Jyoti, he took her from her house. In the way Jyoti drank water and thereafter she was taken in the ruins of house of Budh Singh i.e. son of Hemraj, where he inserted his finger in the vagina which resulted in bleeding whereupon she cried. Accused immediately put her frock on her mouth and throttled her neck and thereafter committed rape upon her, on the stone piece. Later he kept stone piece on her dead body and after concealing the same, ran away. He stated to get dead body of Jyoti discovered on the pointing out by accused from the ruins of house of Budh Singh after removing stone piece. In respect of recovery memo, Paper No. 11-A was prepared. On the spot panthayatnama was also prepared which was duly signed by Panchas and marked as Ex.Ka-10.

66. I.O., PW-5 collected blood stained stone pieces which had blood stains at several places and the same were taken after breaking the stone slab. Sample of three pieces of blood stained stone and one simple was taken in possession and memo was prepared which was exhibited as 3. On the spot he found a blank wrapper mentioning in English '*Chaka Chak*', a Cone of '*Prem Dulhan Mehadi*' and Mala of red and white beads. I.O. also prepared Fard as Ex.Ka-4. During investigation accused stated that he was wearing same underwear which he had worn while committing rape upon Km. Jyoti. Police immediately got him stripped off the accused and took out underwear with blood stains thereon. It was taken in custody and Fard / memo was prepared and marked as Exhibit-6. On the basis of

statement of accused given to the Police and injuries found on the dead body of Km. Jyoti, Section 376 I.P.C. was added and this fact was mentioned in C.D. Medical examination of accused was conducted and copy of report is a part of C.D. and fact of preparation of panchayatnama is also mentioned therein.

67. I.O. sent related material for examination to FSL at Agra. Vaginal smear slide report from pathology was received by him and on the basis thereof, charge sheet against accused under Sections 302, 376 and 201 I.P.C. was submitted. The site plan of the place where dead body was recovered, was also proved and marked as Ex.Ka-17.

68. The FSL report was also proved by PW-5 and marked as Ex.Ka-19, Ka-20 and Ka-21. The sealed bundle containing blank wrapper of 'Chaka Chak', Tube of 'Prem Dulhan Mehadi', red and white beads Mala were taken out and identified by PW-5 and these were marked as material exhibits-6, 7 and 8. From the sealed envelop red colour underwear was taken out, which was identified as of Km. Jyoti and blue colour underwear was identified to be of accused Santosh @ Tidkey. PW-5 also identified the frock which Km. Jyoti was wearing and seized from her dead body and it was marked as material Ex.-9. This witness has been subjected to a lengthy cross-examination. With regard to underwear of accused, in cross examination, he has explained the manner in which it was seized from accused and said :-

“मौके पर मुल्जिम की चढडी उतराकर कब्जा मे ली गई थी। तथा उसे दूसरी चढडी पहनाई गई थी । मौके पर दूसरी चढडी मुल्जिम के घर वालो से मंगाई गई थी । अभियुक्त की चढडी विधि विज्ञान प्रयोग शाला भेजी गई थी । विधि विज्ञान प्रयोग शाला की रिपोर्ट आने से पहले मैने धारा 376 आई०पी०सी० की बड़ोत्तरी की थी ।”

“Underwear of accused was got put of from him and taken in possession on the spot and he was made to put at another underwear, was brought at the spot from the villagers of the accused. Underwear of accused was sent to F.S.L. I had made addition of Section 376 I.P.C. prior to receipt of report of

FSL.” (English Translation by Court)

69. He also verified and proved that accused told about the death of Km. Jyoti. When he was interrogated by Police, he said that he has murdered her and also committed rape upon her. These facts were stated by accused on spot and mentioned in C.D.

70. We do not find anything contradictory extracted by defence in lengthy cross-examination of PW-5 and the witness has withstood the facts stated in his examination in chief.

71. The last formal witness is Dr. Smt. Mohini Saxena who was posted as Senior Consultant in Pathology in woman Hospital, Jhansi and has tested three slides of vaginal smear sent for pathological test. She said that spermatozoa was not found in all three slides but in the the same report she found R.B.C.S. Testing report was proved by her and marked as Ex.Ka-22. She explained meaning of R.B.C.S. as the blood elements. In cross examination, she withstood her statement. When questioned said that it was not possible to tell as to blood was that of Km. Jyoti or the accused Santosh @ Tidkey since it would have been possible only after D.N.A. test.

72. The statement under Section 313 Cr.P.C. of accused's is of complete denial. While answering question no. 24, he said that he will tender defence evidence when given opportunity, but as a matter of fact, has not given any evidence at all. Answering question no. 21, he said that witnesses and Informant are relatives and friends and with the intent to get the accused appellant exiled from village they are deposing so as to acquire his (accused's property) but give no evidence to prove it. While answering question nos. 19 and 20 with respect to FSL report Ex.Ka-19, Ka-20 and Ka-21 and material Ex.-1 to 9, he said that he has no information about that.

73. The examination of the aforesaid evidence in detail shows that present case is not founded on ocular version proving directly that crime

has been committed by accused-appellant. It is founded on the circumstantial evidence of last seen as also recovery of various objects including dead body and pathological and Forensic Reports. It is not necessary that in a criminal trial only when an eye witness is present, conviction can be held and not otherwise. Where circumstantial evidence is such which may lead to an inference that it is the accused only who has committed crime and none else, the accused can be convicted and sentenced appropriately.

74. In the case in hand, prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

75. In **Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343**, on appreciation of evidence, when a case depends only on circumstantial evidence, where Court said:

"... circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved..... it must be such as to show that within all human probability the act must have been done by the accused."

76. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063**, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

77. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, Court, while dealing with a case based on circumstantial evidence, held that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The **circumstances concerned 'must or should' and not 'may be' established.***

*(2) the facts so established should be consistent only with the **hypothesis of the guilt of the accused**, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

*(5) there must be a **chain of evidence so complete as not to leave any reasonable ground** for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

(emphasis added)

78. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890**, Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and,

(5) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis

than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(emphasis added)

79. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193**, Court said:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

(emphasis added)

80. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court said :

"(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted." (emphasis added)

81. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713** and **Tomaso Bruno v. State of U.P., 2015(7) SCC 178**.

82. When we collect the relevant circumstances and chain thereof in the light of evidence discussed above, the following facts proved by the witnesses emerge before us :-

- (i) On 04.05.2009 around 5:00 PM, accused residing in front of the house of Informant as well as deceased, came and told the deceased that he would get Mehadi put on her hand and on that pretext took her with him.
- (ii) Identity of accused is not doubted since he was well known to both the witnesses of fact i.e. PW-1 and PW-2.
- (iii) On the way, accused helped deceased in drinking water from hand-pump installed in front of the house of Bhanwar Singh and at that very time, both were seen by Budh Singh, PW-2, who was coming along with one Lakhan Singh from the side of ruins of his house.
- (iv) After drinking water by deceased, both i.e. accused and deceased went towards the ruins of the house of Hemraj i.e. father of Budh Singh, PW-2, and till this stage both were seen by PW-2 Budh Singh.
- (v) Both the accused and victim did not return in night.
- (vi) After making all efforts to search out them in village, information was lodged to police at around 2:00 AM on 05.05.2009.
- (vii) Around 5:00 or 6:00 AM in the morning of 05.05.2009, Police arrested accused from the temple of Kuchbadiya Baba, in front of PWs-1, 2 and other villagers.
- (viii) On the pointing out of accused, dead body of Km. Jyoti was discovered by Police from the ruins of the house of Hemraj i.e. father of Budh Singh PW-2 which was concealed under a stone slab.
- (ix) The dead body and various injuries found therein show that she was raped and murdered by throttling.
- (x) In front of PW-1 and PW-2, Police collected underwear

worn by accused at the time of arrest which contained blood stains and on examination, it was found that blood stains are that of human blood which could not be explained by accused.

(xi) Blood stains and Spermatozoa were found on the frock of the deceased.

(xii) Except PW-1 and Budh Singh PW-2, who saw accused and deceased going together, none other has seen the deceased going with anybody else, since the time she left her house with accused till recovery of her dead body by the Police.

(xi) From the post mortem report and the statement of PW-4 i.e. Doctor who conducted autopsy, rape and murder by throttling the girl is proved.

83. These facts clearly point out to the guilt of accused-appellant and, in our view, chain of circumstances is complete leaving no doubt that it is the appellant alone and none else who had committed the crime for which he has been charged.

84. At this stage, we may also point out that in charge-1 the mention of place is door of the house of Informant but that is a place where from the accused had taken the girl with him and actual crime was committed in ruins of house of Hemraj i.e. father of Budh Singh PW-2 and to this extent place mentioned in Charge-1 is not consistent with Charge-2 but neither on this aspect any issue has been raised before court below nor before us and, in fact, it is not in dispute that dead body was discovered from the ruins of the house of Hemraj, i.e. father of Budh Singh PW-2 and as per the prosecution story, crime of rape, murder and concealment of evidence were committed thereat. Hence, nothing turned out from this error so as to help the accused-appellant.

85. Learned counsel for the appellant contended that statement of accused appellant claimed to have been made to I.O. is not admissible in evidence, therefore, same cannot be treated to be an admission. We have

no objection in accepting the said contention. In fact while consideration evidence, we have not taken into account this statement and neither it has been treated as evidence of admission nor admissible in evidence, but under Section 27 such part of statement which results in recovery of certain material on the pointing out by accused while in custody of Police, is admissible in evidence and to that extent, statement of appellant which has been treated to be his information on the basis whereof dead body of Km. Jyoti was discovered by Police is admissible under Section 27 and we have taken this fact as an evidence and part of the chain of evidence to reach the conclusion of guilt against the appellant.

86. Section 27 of Act, 1872 provides for how much of information received from accused who is in custody of police may be proved. It reads as under:

“27. How much of information received from accused may be proved.—Provided that, when any fact is discovered to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

87. Aforesaid provision is by way of proviso to Sections 25 and 26 of Act, 1872. An statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused.

88. In **Delhi Administration vs. Bal Krishan and Ors., 1972(4) SCC 659** Court said that Section 27 permits proof of so much of information which is given by persons accused of an offence when in custody of a Police Officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Sections 25 and 26 of Act, 1872 provides that no confession made to a Police Officer whether in custody or not can be proved as against the accused. Section 27, therefore, is proviso to above Sections and statement even by way of confession, which distinctly relates to the fact discovered

is admissible as evidence against accused in the circumstances stated in Section 27.

89. In **Mohmed Inayatullah vs. The State of Maharashtra, 1976(1) SCC 828** Court observed that though interpretation and scope of Section 27 has been subject of consideration in several authoritative pronouncement but its application to concrete cases is not always free from difficulty. In order to make its application swift and convenient Court considered the provision again and said:

“12. The expression "Provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section in to operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the

rest of the statement which may be indirectly or remotely related to the fact discovered.”

90. Idea behind Section 27 has been explained by Court in para 20 of judgment in **Bodh Raj @ Bodha and Ors. vs. State of Jammu and Kashmir (supra)** as under:

*“20. If all that is required to lift the ban be the inclusion in the confession information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, **the information must come from any accused in custody of the police.** The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. **The statement which is admissible under Section 27 is the one which is the information leading to discovery.** Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, **the exact information given by the accused while in custody which led to recovery of the articles has to be proved.** It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, **the exact information must be adduced through evidence.** The basic idea embedded in*

Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-exculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (see State of Maharashtra v. Danu Gopinath Shirde and Ors. 2000 CriLJ 2301). No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."

(emphasis added)

91. Similar issue has been considered recently in **Raju Manjhi vs. State of Bihar, AIR 2018 SC 3592**. Therein Court held that Act, 1872 provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. Court held that recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt and such confessional statement stands and satisfies the test of Section 27 of Act, 1872.

92. With regard to delay of F.I.R., we find no substance for the reason that the daughter of Informant was taken by accused around 5:00 PM and after making all efforts to search of them, the report was lodged at about 2:00 AM on 05.05.2009. The distance of Police Station is about 4 Km. from the village of Informant and looking to the entire facts it cannot be said that F.I.R. is belated to the extent that it justifies an inference in lodging of F.I.R. without due deliberation and improvements. Even otherwise mere delay in F.I.R. is not a ground to reject prosecution version.

93. It is also well settled, if delay in lodging FIR has been explained from the evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. In "**Ravinder Kumar & Anr. Vs. State of Punjab**", (2001) 7SCC 690, Court has held;

*"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the **delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.** When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. "* (emphasis added)

94. In **Amar Singh Vs. Balwinder Singh & Ors.** (2003) 2 SCC 518, Court held :

"There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."

(emphasis added)

95. In this connection it will also be useful to take note of the following observation made in **Tara Singh V. State of Punjab AIR (1991) SC 63.**

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. ... unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstance of each case." *(emphasis added)*

96. In **Sahebrao and another Vs. State of Maharashtra (2006) 9 SCC 794**, Court held:

"The settled principle of law of this Court is that delay in filing FIR by itself cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory." *(emphasis added)*

97. From the above discussed exposition of law, it is manifest that prosecution version cannot be rejected solely on the ground of delay in lodging FIR. Court has to examine the explanation furnished by prosecution for explaining delay. There may be various circumstances particularly number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If prosecution explains the delay, Court should not reject prosecution story solely on this

ground. Therefore, the entire incident, as narrated by witnesses, has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of prosecution. Even if there is some unexplained delay, Court has to take into consideration whether it can be termed as abnormal.

98. Recently in **Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009, decided on 27.11.2018**, it has been observed by Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused.

99. Considering the entire discussions made above, we are clearly of the view that accused-appellant has committed crime to which has been charged by the Court below and court below has rightly held him guilty of those charges. The prosecution has well succeeded in proving offences committed by appellant, i.e., murder under Section 302 I.P.C., rape under Section 376 I.P.C. and hiding of dead body with an objective to screen himself from punishment, under Section 201 I.P.C. The judgement of conviction passed by the Court, therefore is confirmed.

100. Now we come to the question of penalty. Appellant has been awarded death sentence for committing offence under Section 302 I.P.C., life imprisonment for offence under Section 376 I.P.C. and two years rigorous imprisonment for the offence under Section 201 I.P.C. First of all, we propose to examine whether award of punishment of death penalty for committing offence under Section 302 I.P.C. is justified in the present case.

101. Before looking to the facts of present case on the question of sentence of death penalty, it would be appropriate to advert to judicial authorities on the matter throwing light and laying down principles for imposing penalty, in a case, particularly death penalty.

102. One of the earliest case, in the matter is **Bachan Singh v. State of**

Punjab, (1980) 2 SCC 684. In para 164, Court said that normal rule is that for the offence of murder, accused shall be punished with the sentence of life imprisonment. Court can depart from that rule and impose sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing death sentence. While considering question of sentence to be imposed for the offence of murder under Section 302 IPC, Court must have regard to every relevant circumstance relating to crime as well as criminal. If Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, Court may impose death sentence.

103. Relying on the authority in **Furman v. Georgia, (1972) SCC OnLine US SC 171** Court noted the suggestion given by learned counsel about aggravating and mitigating circumstances in para 202 of the judgement in **Bachan Singh** (supra) which read as under :-

“202. ... 'Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may

be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.”

104. Thereafter in para 203, Court said that broadly there can be no objection to the acceptance of these indicators noted above but Court would not fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other. Thereafter in para 206 of judgment in **Bachan Singh** (supra), Court also suggested certain mitigating circumstances as under :-

“206. ... 'Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

*(2) The **age of the accused. If the accused is young or old, he shall not be sentenced to death.***

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

*(4) The **probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions (3) and (4) above.***

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”

105. Again in para 207 in **Bachan Singh** (supra), Court further said that mitigating circumstances referred in para 206 are relevant and must be given great weight in determination of sentence. Thereafter referring to the words caution and care, in **Bachan Singh** (Supra) Court observed that it is imperative to voice the concern that Courts, aided by the broad illustrative guidelines, will discharge onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

106. Then in **Machhi Singh v. State of Punjab, (1983) 3 SCC 470** stress was laid on certain aspects namely, manner of commission of murder, motive thereof, antisocial or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder. Court culled out certain propositions emerging from **Bachan Singh** (supra), in para 38 and said as under :-

“The following propositions emerge from Bachan Singh case:

“(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the ‘crime’.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant

circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.”

107. The three-Judges Bench in **Machhi Singh** (supra) further said that following questions must be answered in order to apply the guidelines :-

“(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence”

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?” (Emphasis added)

108. In **Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56**, after referring to **Bachan Singh** (supra) and **Machhi Singh** (supra), Court expanded the “rarest of rare” formulation beyond the aggravating factors listed in **Bachan Singh** (supra) to cases where the “collective conscience” of community is so shocked that it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. Court, however, underlined that full weightage must be accorded to the mitigating circumstances of the case and a just balance had to be struck between the aggravating and the mitigating circumstances.

109. In para 20 of the judgment in **Haresh Mohandas Rajput** (supra), Court observed that the rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of society. The crime may be heinous or brutal but may not be in the

category of “the rarest of the rare case”. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur of the momentary provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society, death sentence should be awarded.

110. In **Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 220**, Court opined that imposition of appropriate punishment is the manner in which Courts respond to the society’s cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that Courts reflect public abhorrence of the crime. Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

111. After referring to earlier authorities including **Bachan Singh** (supra) and **Machhi Singh** (supra), Supreme Court in **Ramnaresh and others v. State of Chhattisgarh, (2012) 4 SCC 257** tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances and in para 76 said as under :-

“Aggravating circumstances

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

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

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

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

(5) *Hired killings.*

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

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

(8) *The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.*

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

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

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

Mitigating circumstances

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

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

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

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

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

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

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

112. The principles laid down in **Bachan Singh** (supra) and **Machhi Singh** (supra) were sought to be followed and applied subsequently for deciding as to what sentence should be awarded but later on it was felt that the principles laid down in the above authorities are not being correctly applied and have led to inconsistency in sentencing process in India. It was also observed that the list of categories of murder crafted in **Machhi Singh** (supra) in which death sentence ought to be awarded are

not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario.

113. A three-Judge Bench in **Swamy Shraddananda v. State of Karnataka, (2008) 13 SCC 767**, in para 43 of the judgment, said :-

*“43. In Machhi Singh the Court crafted the categories of murder in which ‘the Community’ should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and ‘whistle blowers’. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that **even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable.** Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself.” (Emphasis added)*

114. In a recent judgment in **Mukesh and another v. State (NCT of Delhi) and others, (2017) 6 SCC 1**, a three-Judges Bench has confirmed death sentence in two concurring judgments rendered by Hon'ble Dipak

Misra,J. (for himself and Hon'ble Ashok Bhusan,J.) and by Hon'ble R. Banumathi,J.

115. After referring to catena of decisions, earlier rendered on the question of sentence, it is observed that Court would consider cumulative effect of both factors i.e. aggravating and mitigating circumstances and has to strike a balance between the two and see towards which side the scale/balance of justice, tilts.

116. Hon'ble R. Banumathi,J. observed that factors like poverty, young age, dependants, absence of criminal antecedents, post crime remedies and good conduct in imprisonment cannot be taken as mitigating circumstances to take out the case in the category of rarest of rare case. In para 516 of concurring judgment, Hon'ble R. Banumathi,J. Court said :-

*“Society’s reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. **When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system.** As held in *Om Prakash v. State of Haryana*, (1999) 3 SCC 19, the **Court must respond to the cry of the society** and to settle what would be a deterrent punishment for what was an apparently abominable crime.”* (Emphasis added)

117. In para 497 of the judgment in **Mukesh and another v. State (NCT of Delhi) and others** (supra), in concurring judgment by Hon'ble R.Banumathi,J. it is observed :-

*“ ... Courts have further held that **where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolical manner, the accused should be shown no remorse and death penalty should be awarded.**”* (Emphasis added)

118. The true import of aforesaid settled propositions of law is that awarding of life imprisonment for offence under Section 302 IPC is the rule and death sentence is an exception. Death sentence should only be

awarded in cases which come under the purview of "rarest of rare case". Supreme Court, time and again has ruled that for awarding death sentence, Courts should specify the aggravating and mitigating circumstances of the case. What are the aggravating and mitigating circumstances would depends upon the facts of each case.

119. Mitigating circumstances are categorized as the manner and circumstances in and under which offence was committed; the age of the accused; the chances of the accused in not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated; if the condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct and the circumstances which, in normal course of life would render such a behaviour possible and could have the effect of giving rise to mental imbalance. Mitigating circumstances may also be that if upon appreciation of evidence Court is of the view that crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime. Court has to see, if it is 'rarest of rare' case for awarding death sentence and in the opinion of Court any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice then only extreme punishment would be awarded. Moreover, aggravating circumstances are in relation to crime and victim while mitigating circumstances are broadly in relation to criminal. Balance between the two has to be ascertained by Court while determining "Rarest of rare" case. Circumstances discussed in aforesaid decisions are example but not exhaustive. No fixed formula has been set to formulate aggravating and mitigating circumstances and the discretion is left with Court which has to evaluate, depending on the facts and circumstances of each case.

120. Applying the exposition of law as discussed above to the facts of the present case, we find that Trial Court has discussed the question of sentence and got itself impressed with the facts that the minor girl of 3–

1/2 years has been murdered by accused-appellant after committing rape upon her which is a heinous crime, that too against women and thereafter she has been murdered therefore, the crime committed by accused-appellant comes within the category of rarest of rare case to justify capital punishment of death sentence. Unfortunately, we find that Trial Court has not compared mitigating and aggravating circumstances to come to the inference as to what should be punishment in the case in hand. It cannot be doubted that offence committed by accused-appellant comes within the category of 'heinous crime' but for this reason alone indictment of punishment of death sentence has not been appreciated by Courts in various authorities, as discussed above.

121. In the present case, one of the mitigating circumstance is, age of accused. In para 206 (2) of judgment in **Bachan Singh** (supra) it has been held that if the accused is young or old, he shall not be sentenced to death. In the present case, as per finding recorded by Court below, accused was about 19 years of age at the time when crime was committed. He was obviously a very young boy having just attained majority. Another mitigating factor is probability that accused can be reformed and rehabilitated. In para 206 (4) in **Bachan Singh** (supra) Court has said that this should be shown by prosecution that accused does not satisfy conditions (3) and (4), i.e., probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society and that there is no probability of reformation and rehabilitation of accused. No such material has been placed by prosecution in the case in hand and there is nothing on this aspect which has been substantiated or addressed before Court, even to suggest, that accused will be a threat to society and there is no probability of his reformation and rehabilitation. The various aggravating circumstances as detailed in para 76 of judgment in **Ramnaresh and others v. State of Chhattisgarh** (supra), we find absent in the case in hand. Therefore, here is a case where there are certain mitigating circumstances but no aggravating circumstance. Hence,

punishment of death, in our view, for the offence under Section 302 I.P.C. cannot be held to be justified; this is highly excessive and deserves to be remitted to life imprisonment. We, therefore, modify sentence awarded to accused-appellant for offence under Section 302 I.P.C. and sentence him for life imprisonment.

122. Then comes, punishment awarded for the offences committed under Sections 376 and 201 I.P.C. Here, adequacy and sufficiency of punishment has to be considered on the principle that when an offence has been committed, law also imposes obligation upon Court to award proper sentence.

123. In the matter of awarding punishment multiple factors have to be considered by this Court. The law regulates social interests, arbitrates conflicting claims and demands. Security of individuals as well as property of individuals is one of the essential functions of the State. The administration of criminal law justice is a mode to achieve this goal. The inherent cardinal principle of criminal administration of justice is that the punishment imposed on an offender should be adequate so as to serve the purpose of deterrence as well as reformation. It should reflect the crime, the offender has committed and should be proportionate to the gravity of the offence. Sentencing process should be sterned so as to give a message to the offender as well as the person like him roaming free in the society not to indulge in criminal activities but also to give a message to society that an offence if committed, would not go unpunished. The offender should be suitably punished so that society also get a message that if something wrong has been done, one will have to pay for it in proper manner irrespective of time lag.

124. Further sentencing process should be sterned but tampered with mercy where-ever it is so warranted. How and in what manner element of leniency shall prevail, will depend upon multifarious reasons including the facts and circumstances of individual case, nature of crime, the matter in which it was committed, whether preplanned or otherwise, the motive,

conduct, nature of weapon used etc. But one cannot be lost sight of the fact that undue sympathy to impose inadequate sentence would do more harm to justice system as it is bound to undermine public confidence in the efficacy of law. The society cannot long endure such serious threats. It is duty of the court to give adequate, proper and suitable sentence having regard to various aspects, some of which, are noticed above.

125. In **Ahmed Hussein Vali Mohammed Saiyed and another Vs. State of Gujrat, 2009 (7) SCC 254**, Court confirmed that:

*“any liberal attitude by imposing meager sentences or taking too sympathetic view **merely on account of lapse of time in respect of such offences** will be result-wise **counter productive in the long run and against the interest of society** which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.” (Emphasis added)*

126. In **Jameel Vs. State of Uttar Pradesh, 2010 (12) SCC 532**, Court held:

“It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.”

127. In **Guru Basavaraj @ Benne Settapa Vs. State of Karnataka, 2012 (8) SCC 734**, Court said:

“The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored.”

128. In **Gopal Singh Vs. State of Uttarakhand, 2013 (3) JT 444**, court said that:

“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”

129. In **Hazara Singh Vs. Raj Kumar and another, 2013 (9) SCC 516**, Court observed:

*“We also reiterate that **undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine***

the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.” (Emphasis added)

130. A feeble attempt was made by learn

ed counsel for appellant to suggest that punishment awarded under Sections 376 and 201 I.P.C. may also be reduced but neither he could give any valid justification for the same nor we find any such reason to dilute sentence awarded to appellant by Court below under Sections 376 and 201 I.P.C. Therefore, judgment of Court below in respect to sentence awarded for offences under Sections 376 and 201 I.P.C. is hereby confirmed.

131. In view of above discussions, Reference No. 6 of 2011 is hereby rejected. Capital Cases (Appeals) No. 2330 of 2011 and 4173 of 2011 are partly allowed and judgment of Trial Court stands modified only in respect of punishment awarded for offence under Section 302 I.P.C. and substituted by life imprisonment. The punishment imposed for the offences under Sections 376 and 201 I.P.C. are maintained.

132. Let a copy of this judgment along with the Trial Court record be sent to the Court concerned for compliance. Copy of the judgment be also sent to accused-appellant through Jail Superintendent concerned for intimation. Compliance report be also submitted to this Court.

Order date :-22.10.2019.

Manoj / I.A.Siddiqui/PS

Pronounced under Chapter VII R 2
of High Court Rules, 1952
Sd/-
22.10.2019