

Neutral Citation No. - 2024:AHC:162095-DB

[A.F.R

Reserved on 24.9.2024

Delivered on 4.10.2024

Court No. - 46

1. **Case :-** CAPITAL CASES No. - 6 of 2021

Appellant :- Zulfikar Abbasi

Respondent :- State Of U.P.And Another

Counsel for Appellant :- Abhas Sharma,Rajesh Kumar Sharma,Sayyed Kashif Abbas Rizvi

Counsel for Respondent :- G.A.,Ganesh Shanker Srivastava,Saurabh Gour

2. **Case :-** CAPITAL CASES No. - 8 of 2021

Appellant :- Israil @ Malani

Respondent :- State of U.P.

Counsel for Appellant :- Balram Mishra,Sikandar Khan

Counsel for Respondent :- G.A.,Ganesh Shanker Srivastava

AND

3. **Case :-** CAPITAL CASES No. - 10 of 2021

Appellant :- Dilshad Abbasee

Respondent :- State of U.P.

Counsel for Appellant :- Anil Kumar Singh,Rakesh Dubey,Sanjeev Kumar

Counsel for Respondent :- G.A.,Ganesh Shanker Srivastava

Hon'ble Arvind Singh Sangwan,J.

Hon'ble Mohd. Azhar Husain Idrisi,J.

(Per : Hon'ble Arvind Singh Sangwan, J.)

1. Heard Sri Anil Kumar Singh, Sri Dharmendra Singh, Sri Rahul Shrivastva and Sri Sikandar Khan, learned counsel for the appellants, learned AGA for State, Sri Ganesh Shanker Srivastava and Sri Saurabh Gaur, learned counsel for the informant and perused the material available on record.

2. Reference No. 5 of 2021 has been made by the court of Additional Sessions Judge (Rape Case) POCSO Act, Court No. 2, Bulandshahr for confirmation of capital punishment awarded to appellants Zulfikar Abbasi, Israil @ Malani and Dilshad Abbasee in Special Case No. 1844 of 2018 (State Vs. Zulfikar and others). The jail appeals being Capital Case No. 6 of 2021, 8 of 2021 and 10 of 2021 have been filed by the appellants challenging the judgment of conviction dated 24.3.2021 (as corrected on 26.3.2021), holding them guilty of offence, arising out of Case Crime No. 04/2018, Police Station – Kotwali Nagar, District–Bulandshahr under Section 364, 376D, 302/34, 201, 404 IPC & Section 5G/6 POCSO Act. The trial court has awarded death sentence to the appellants with fine of Rs. 01 lakh each, In case of non-payment of the fine further undergo two years additional rigorous imprisonment. They were also awarded life imprisonment under section 376-D of IPC and Section 5G/6 of POCSO Act with fine of Rs. 50,000/- each and in case of default of payment of fine further undergo one year additional imprisonment, and further under Section 364 IPC were awarded 10 years imprisonment with fine of Rs. 25,000/- and in default of payment of fine, 6 months further imprisonment, under Section 201 IPC, 7 years imprisonment with fine of Rs. 25,000/- and in default of payment of fine to undergo six months further imprisonment, under Section 404 IPC, 3 years imprisonment with fine of Rs. 10,000/-. In default of payment of fine to go further three months imprisonment and it was observed that all the sentences will run concurrently.

3. Brief facts of the case are that the informant Babita Sharma, gave a complaint to the police as Ex-Ka-1 which reads as under:-

‘सेवा में
श्रीमान थाना प्रभारी महोदय ।
कोतवाली नगर बुलन्दशहर
महोदय

मेरी लड़की आयुषी शर्मा 6 पी०एम० बजे टयुशन पढ़ने जाती थी और लगभग 7.30 बजे शाम तक वापस आ जाती थी लेकिन आज लड़की जब टाइम से वापिस नहीं आयी आयी तो मैंने घर से बाहर जाकर देखना चाहा तो मेरी लड़की की साइकिल मेरे घर से लगभग 50 मीटर दूर गिरी मिली उसका बैग भी उसके पास पड़ा मिला उसकी

एक चप्पल साइकिल से थोड़ी दूर पड़ी मिली तभी मेरे आस पास के लोग भी मेरे पास आ गये और उन्होंने ही पुलिस को फोन किया।

लेखक-

वविता शर्मा

पुष्कर सिंह एस/ओ श्री नरेश पाल सिंह

चाँदपुर नियर *G.T. Road*

गां० चांदपुर

9411865334

डा०- कृषि विद्यालय

जि०- बुलन्दशहर

9897795555”

4. The police recorded chik FIR (Ex-Ka-4) on 2.1.2018 at about 11 pm and started investigation. During investigation on the same day i.e. 2.1.2018 at about 11:30 pm in presence of witness Pushkar Singh, the police effected recovery of a lady cycle (black colour - Wisdom mark, one black colour bag with tycoon logo, one mathematics book, rough copy on which name of (victim Class XII) was mentioned alongwith cover of spectacles with mark Raj Opticals, Laxman Vihar, Main Road, Naka Chungi, Kota, Rajasthan. One pen black colour, one drinking water bottle of 250 ml on which King Orange was marked and one slipper of left foot with red and yellow colour with mark ‘conform’ were also recovered and were taken in possession vide recovery memo Ex-Ka-16.

5. In the meantime, on 3.1.2018 an unknown body of a girl was recovered by the police near a small canal/drain. Panchayatnama was conducted in which one lady Head Constable Geeta inspected the dead body and reported that the victim was wearing black jeans, belt, black colour top, white sweater and red and blue colour undergarments with black string around her neck and bracelet on her left hand and a ring in finger of hand. She was also wearing pink and while colour socks with yellow and black colour dupatta (Scarf).

6. It was reported that no visible injury mark was there on the dead body. The dead body was sent to the hospital for postmortem examination and in the meantime PW-2-Pushpendra, father of the victim reached hospital and identified that the body is of her daughter (victim-A).

7. Thereafter the postmortem was conducted. The police recorded the following injuries on the dead body.

“A.M.I.- (1) Abraded contusion present in the Area of 29 cm x 15 cm on back of chest & Abdomen.

(2) Ligature mark of size 29 cm x 2 cm present on front of neck on and below thyroid Cartilage. Base of mark is brownish & soft. Subcutaneous tissues under the ligature mark is ecchymosed. There is no gaping. Ligature mark is continuous without interruption Ligature mark is situated 5 cm below Rt. Ear 5 cm below chin & 4 cm below left ear.

- Fracture of hyoid bone present alone c Trachea.

- No Injury mark present in Vagina or cervix.

- 2 Vaginal smear slide sent to pathologist for detection of spermatozoa.

- No mud or sand particles present in Trachea or stomach.”

8. During postmortem as many as 12 articles including clothes were recovered from the dead body alongwith a clip and hairs from the head.

9. During further investigation, the police sent vaginal swabs to Forensic Science Laboratory, Agra for examination.

10. Further in order to seek the DNA report of the victim, the police sent blood sample of both, father Pusphendra and mother Babita to the Forensic Science Laboratory, Lucknow alongwith hairs and hairband with hairs and 13 other articles were which recovered during postmortem.

11. On 9.1.2018, the police got a secret information about movement of accused Zulfikar Abbasi and Dilsad Abbasi who were coming in a white colour Alto Car, on which a sticker by the name of “Abbasi boys” was pasted. The police waylaid them and recovered Alto Car bearing No.HR-51 AY-5206. The driver and persons sitting in the car were apprehended by the police and from their personal search, some money was recovered and they disclosed their name as Zulfikar Abbasi and Dilsad Abbasi and from search of the car, one ladies sleeper of right foot with red and yellow

colour on which 'Conform' was written, was recovered. The police recorded their confessional statements in which they gave details of the moments, the offence was committed.

12. In the meantime, Puspendra Sharma, father of the victim reached and identified the sleeper which her daughter was wearing on the date of the incident. Thereafter, field unit / Forensic Team conducted search of the car from where red and black colour hairband with some long hairs, one hair band with black colour and long & short hairs of the lady were recovered which were taken by the forensic team. However, during investigation the both accused Zulfikar Abbasi and Dilshad Abbasi jointly confessed their guilt and gave the details how they committed the offence. It was stated that on the date of the incident both of them with Israil @ Malani decided to pick up a girl to have fun and about about 7:00 pm they reached from "Moor crossing" to MMR Mall via Chandpur crossing in front of the showroom of Royal Enfield, Motorcycle. Thereafter, they took U-turn and they saw a girl coming alone and again they took U-Turn from near Royal Enfield showroom. Then they turn towards unmelted path, they stopped their car and forcibly took the girl into their car and went towards Khurja side and in the running car they committed rape with her one by one and when the girl started crying, they with the help of dupatta (Scarf) which she was wearing on her neck, strangled her to death and her body was thrown in a drain near village Bali Akbarpur and thereafter, they came back.

13. The arrest memo (Ex-Ka-17) was signed by 12-13 police officials who were part of raiding team alongwith Pushpendra Sharma, father of the victim.

14. Later on, on 11.1.2018, in a similar way, the accused Israil @ Malani was also arrested and he also made confession statement regarding abducting a girl, committing rape on her and then murdering her with the

dupatta (Scarf) and they threw the dead body in a drain near village Akbarpur.

15. The police, thereafter, recorded the statement of the prosecution witness and on conclusion of investigation, the charge sheet was submitted and the case was committed to the court of Designated Special Court under POCSO Act.

16. The trial court framed the charges against the accused persons as under :

“न्यायालय अपर सत्र न्यायाधीश न्यायालय सं०-8/

विशेष न्यायाधीश (पोक्सो अधिनियम), बुलन्दशहर

विशेष वाद सं०- 1844/2018

राज्य प्रति जुल्फीकार आदि

आरोप

मैं सुधीर कुमार IV. अपर सत्र न्यायाधीश न्यायालय सं०-8/ विशेष न्यायाधीश (पोक्सो अधिनियम) बुलन्दशहर आप अभियुक्तगण जुल्फीकार, इसराईल तथा दिलशाद पर निम्नलिखित आरोप लगाता हूँ-

प्रथम:- यह कि दिनांक 2.1.2018 को समय 7.30 बजे स्थान ट्यूशन पढ़ने वाली जगह एवं वादी के मकान के मध्य किसी स्थान पर बहद ग्राम चांदपुर थाना क्षेत्र कोतवालीनगर जिला बुलन्दशहर में आप लोगो ने वादिनी मुकदमा बबिता शर्मा की पुत्री आयुषी का विधिक संरक्षकता में से व्यपहरण किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 364 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

द्वितीय:- यह कि उपरोक्त तिथि समय व स्थान पर से अपने वादिनी मुकदमा की पुत्री का व्यपहरण के बाद उसके साथ उसकी इच्छा के विरुद्ध एवं जबरदस्ती सामूहिक रूप से बलात्कार किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 376 डी के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

तृतीय:- यह कि उपरोक्त तिथि, समय व स्थान पर आपने वादिनी मुकदमा बाकर हत्या कारित की। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 302 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

चतुर्थ:- यह कि उपरोक्त तिथि, समय व स्थान पर से आपने यह जानते हुये कि आपने ही वादिनी मुकदमा की पुत्री का अपहरण कर उसके साथ बलात्कार कर उसकी हत्या कारित की है के शव को छिपाने के उद्देश्य से एवं सबूत मिटाने के उद्देश्य से उसके शव को ईर्दगिर्द फेक दिया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 302 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

पंचम:- यह कि उपरोक्त तिथि, समय व स्थान पर आपने वादिनी मुकदमा की पुत्री की हत्या के समय जो मृतका आयुषी के कब्जे में सामान था उसे बेईमानी से अपने कब्जे में करके उसे उपयोग में संपरिवर्तित किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 404 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

पष्ठम:- यह कि उपरोक्त तिथि, समय च स्थान पर आपने नाबालिग पीड़िता आयुषी के साथ गुरुत्तर लैंगिक प्रवेशन करके लैंगिक हमला किया। इस प्रकार आपने ऐसा अपराध करित किया जो धारा 5 जी/6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के तहत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा आपको निर्देशित करता हूँ कि उपरोक्त आरोप हेतु परीक्षण इस न्यायालय द्वारा किया जावेगा।

दिनांक: 10.7.2018

ह० अपठनीय

10.07.18

(सुधीर कुमार IV)

अपर सत्र न्यायाधीश

विशेष न्यायाधीश (पोक्सो अधिनियम), बुलन्दशहर।

अभियुक्त को उपरोक्त आरोप पढ़कर सुनाये व समझाये गये अभियुक्त ने उपरोक्त आरोप से इनकार किया एवं परीक्षण की मांग की।

ह० अपठनीय

10.07.18

(सुधीर कुमार IV)

अपर सत्र न्यायाधीश

विशेष न्यायाधीश (पोक्सो अधिनियम), बुलन्दशहर।

17. The accused did not plead guilty and claimed trial. PW-1 Babita Sharma, mother of the victim deposed as under :-

साक्षिया ने सशपथ बयान किया कि- मृतका आयुषी शर्मा मेरी बेटी थी घटना के समय मेरी बेटी आयुषी की उमर करीब 16-17 वर्ष होगी व वह कक्षा-12 में आल सैन्ट स्कूल बुलन्द शहर में पढ़ती थी मेरी बेटी आयुषी शर्मा सूर्या नगर में अशोक सिंघल के पास शाम के करीब 6 बजे जाती थी और शाम को करीब 7.30 बजे तक वापस आ जाती थी आयुषी ट्यूशन पढ़ने साइकिल से जाती थी।

घटना दिनांक 2.1.2018 की है मेरी बेटी ट्यूशन पढ़ने उस दिन शाम के 6 बजे रोजाना की तरह अशोक सिंघल के यहाँ गणित का ट्यूशन पढ़ने गयी थी जब मेरी बेटी शाम साढ़े सात बजे तक वापस नहीं लौटी तो मैं अपने गेट पर खड़े होकर उसका इन्तजार कर रही थी मेरी बेटी नहीं आयी। जब मैं अपनी बेटी का अपने घर के दरवाजे पर खड़ी होकर इन्तजार कर रही थी तो एक कार आल्टो सफेद रंग थी जिसके पिछले शीशे पर अंग्रेजी में कुछ लिखा था, मेरे घर के सामने से कुछ आगे आकर मुड़कर वापस जी०टी० रोड की तरफ चली गयी। सड़क पर तथा मेरे गेट पर बिजली की लाइट जल रही थी। जब मेरी बेटी वापस नहीं आयी तो मैंने अपने घर से करीब 40-50 मीटर की दूरी पर देखा कि मेरी बेटी की साइकिल व उसका पिठटू बैग जो उसकी साइकिल के ऊपर पड़ा था व उसकी एक चप्पल जो साइकिल से एक दो फिट की दूरी पर पड़ी थी। लड़की का सामान देखकर मैं परेशान हो गयी। आस पास के लोग भी इकट्ठा हो गये। फिर 100 नंबर पर फोन किया। 100 नंबर की पुलिस आ गयी। जब पुलिस आयी तो बैग

को खोलकर देखा एक गणित की किताब व एक कापी एक चश्मे का कवर एक काली पैसिल व एक पेय पदार्थ की 250 एम०एल० की बोतल मिली जिसको मौके पर पुलिस वाले ने कब्जे में लेकर फर्द लिखी। फिर मैंने घटना की बावत घर पर बैठकर अपने गाँव के पुष्कर सिंह से एक तहरीर लिखायी पुष्कर सिंह ने तहरीर पढ़कर सुनायी पुष्कर सिंह ने तहरीर में वही लिखा था जो मैंने बोला था। फिर मैंने तहरीर ले जाकर कोतवाली नगर में जाकर करीब 11 बजे दी थी।

जब मेरी बेटी घर से टयुशन पढ़ने के लिए गयी थी तो पैरो में लाल पीली चप्पले, काली जीन्स व काला टॉप व सफेद जर्सी पहनकर गयी कानों में पीली गोल्ड छोटी बाली पहने थी। गले में स्टाल (चुन्नी) पहने हुई थी।

दिनांक 9.1.2018 को मेरे पति पुष्पेन्द्र शर्मा ने मुझे दिन के करीब 11.30 बजे फोन पर बताया कि मेरी बेटी आयुषी शर्मा के कातिल दरिद नहर पुल के पास पुलिस ने पकड़े हैं मैं भी वहाँ पर करीब 12 सवा 12 बजे नहर पुल के पास पहुँची तो मैंने अपने पति को बताया कि घटना वाले दिन यही आल्टो सफेद कार थी जो हमारे घर के कुछ आगे मुड़कर वापस जी०टी० रोड पर गयी थी।

कार में पीली लाल रंग की दाये पैर की मेरी बेटी की चप्पल, काला लाल रंग का हेयर बैण्ड तथा मेरी बेटी के सिर के बाल मिले थे।

गवाह को पत्रावली पर उपलब्ध कागज सं० 4ए/3 दिखाया व पढ़कर सुनाया, जिसे देखकर व सुनकर गवाह ने कहा कि यह वही असल तहरीर है जो मैंने पुष्कर सिंह से लिखवा कर थाना को०नगर पर दी थी। इस तहरीर पर प्रदर्श क-1 डाला गया”

मेरी बेटी की लाश 3 तारीख को दादरी के पास बरामद हुई थी।

18. In cross examination, this witness stated that on the date of incident, her husband who was in Coimbatore was informed about incident and only and her other daughter were at home. She further stated that she was standing on the gate of her house waiting for her daughter when, she saw an Alto Car. When she went at the spot and saw articles belonging to her daughter (victim-A) she raised voice then Pushkar Singh came and thereafter Pushkar Singh wrote a complaint it was given to the police. In the meantime, someone called the police by dialing 100 number and police also came at the spot.

19. In further cross examination, this witness has given the detail about the time of the incident, the time when the police came and stayed at the spot for 5-7 minutes. However, this witness admitted that she has not seen the incident of kidnapping of her daughter. She denied the suggestion that the accused persons did not kidnap her daughter or killed her.

20. PW-2- Pushpendra Sharma, father of the victim 'A' stated as under:

"साक्षी ने सशपथ बयान किया कि- मृतका आयुषी शर्मा मेरी बेटी थी। घटना दिनांक 02.01.2018 को समय करीब सात साढ़ सात बजे की है। मेरी बेटी आयुषी शर्मा घटना वाले दिन साइकिल से ट्यूशन पढ़ने गयी थी।

मुझे मेरी पत्नी बताया था कि जब आयुषी ट्यूशन पढ़कर 7.30 बजे तक नहीं लौटी तो गेट पर खड़े होकर इंतजार किया। और उधर देखा तो मेरी गली से कुछ दूरी पर मेरी बेटी का पिट्टू बैग गणित की किताब व कापी व एक साइकिल, एक चप्पल, एक बोतल पेय पदार्थ की पड़ी मिली।

जब लड़की नहीं मिली तो पहले 100 नंबर पर किसी से फोन कराया, मैं घटना के समय कौयमबतूर में था। मेरी पत्नी ने फोन से सूचना दी थी मैं दिनांक 03.01.2018 को वापस आया था। मैंने घर आकर बातचीत कर थाने में जाकर मालूमात की तो पुलिस ने आश्वासन दिया कि हम ढूँढ रहे पर थाने से जब मैं वापस आ गया तो मुझे सूचना 03.01.2018 को मिली कि एक लावारिश लाश लड़की सरकारी अस्पताल में रखी है। जाकर देख लो। मैं मेरा साढ़ विनोद और पुष्कर सिंह सरकारी अस्पताल दादरी पहुँचा तो देखा कि मेरी लड़की आयुषी शर्मा की लाश स्ट्रेचर पर रखी है। हमने देखते ही पहचान लिया कि लाश मेरी बेटी आयुषी शर्मा की है। वहाँ मुझे एक दरोगा जी मिली उन्होंने बताया कि इस लड़की की लाश बलि अकबरपुर (का०फटा) पास बह रहे नाले के पास मिली थी। फिर पी०एम० के बाद लाश को अपने घर ले आये किरया कर्म किया।

फिर हम 09.01.2018 को पुलिस का फोन आया कि एक आल्टो कार सफेद रंग की जिसका नं० 5206 जो नहर पुल के पास धोबी घाट बुलन्दशहर पर पकड़ी गयी है इसमें दो बदमाश हैं।

सूचना पर मैं वहाँ पहुँच गया गाड़ी की तलाशी से मेरी बेटी की एक चप्पल, एक हैयर ब्रैण्ड, पीछे की सीट पर औरतो के जैसे बाल छोटे बड़े मिले। गाड़ी में बैठे जो बदमाश थे एक ने अपना नाम जुल्फिकार व दूसरे ने दिलशाद बताया। दोनों मुल्जिमान ने मेरे सामने यह बताया कि आयुषी शर्मा को हमने गली से इस गाड़ी में उसका अपहरण कर ले गये थे व बलात्कार करने के बाद हमने हत्या कर दी थी। उसके शव को बलि अकबरपुर के पास बह रहे नाले के पुल के पास फेंक दी थी।

पकड़े गये बदमाशों ने घटना में सामिल तीसरे बदमाश का नाम इसराइल उर्फ मलानी बताया। दिनांक 11.01.2018 को मेरी लड़की के साथ घटना करने वाला तीसरा मुल्जिम पकड़ लिया गया था, इसके कब्जे से पुलिस ने पीले रंग की बाली बरामद की थी तो घटना के समय मेरी बेटी आयुषी ने पहनी थी।

जब दि० 09.01.2018 को दिलशाद व जुल्फिकार अब्बासी अभि० गण पुलिस द्वार धोबी घाट नहर पुल बुलन्दशहर में पकड़े गये थे, अल्टो कार बरामद हुई थी तो मैंने मौके पर पहुँचकर अपनी पत्नी ववीता शर्मा को फोन कर दिन के करीब 12-12.30 बजे बुला लिया था।

मेरी पत्नी ने जाते ही धोबी घाट के पास गाड़ी को देख गाड़ी को पहचान किया था उसने बताया था कि जब मैं घटना वाले दिन अपनी बेटी आयुषी शर्मा के इंतजार में गेट पर खड़ी थी तो यह वही गाड़ी है, जो हमारी गली में घर से आगे से मुड़कर वापस गयी थी।

दरोगा जी ने मेरी व पुलिस हमराहियान की मौजूदगी में मौके पर दिलशाद व जुल्फिकार अब्बासी की गिरफ्तारी व घटना में पर्युक्त गाड़ी बरामद की व गाड़ी में मिले मेरी लड़की के मिले सामान की एक फर्द लिखी थी तथा फर्द लिखने के बाद मुझे पड़कर सुनायी थी। और गवाही में मेरे भी हस्ताक्षर कराये थे।

गवाह ने पत्रावली पर कागज सं० 9ए/2 को देखकर एवं पढ़कर कहा कि यह वही फर्द है जो मेरे सामने मौके पर दरोगा जी ने लिखी थी।

उस पर गवाही में मेरे भी हस्ताक्षर हैं। मेरा इस घटना के सम्बन्ध में दिनांक 13.01.2018 को बयान लिया था। बयान देते समय मैंने दरोगा जी को अपनी बेटी का

कक्षा 10 का प्रमाण पत्र दिया था, उस प्रमाण पत्र में मेरी बेटी की जन्मतिथि 05.09.2000 लिखी थी।

दिनांक 27.01.2018 को मेरा व मेरी पत्नी का डी०एन०ए० हेतु सरकारी अस्पताल बुलंशहर में रक्त नमूना लिये गये थे। साक्षी ने न्यायालय में उपस्थित मुल्जिमान को देखकर पहचान कर बताया कि जो अल्टो कार के साथ 09.01.2018 को मुल्जिम पकड़े गये थे वह न्यायालय में मेरे सामने है जिनके नाम जुल्फिकार व दिलशाद है। दोनों मुल्जिमान से उनके नाम पूछे गये तो उन्होंने अपने नाम वही बताये जो गवाह ने अपने बयान में लिखाये है।

x x xxx cross by defence defferred

कोर्ट सर्टि०

सुनकर तस्दीक किया।

ह० अपठनीय

ह० अपठनीय

अष्टम अपर जिला एवं सत्र न्यायाधीश

बुलन्दशहर

19.12.2018”

21. In cross-examination, this witness stated that he did not orally remember the mobile number of his daughter. However, it is correct that she had a mobile phone but he does not know whether she carried it while going to the tuition. He further stated that he has not visited the place from where the dead body of his daughter was recovered and further stated that Panchanama was prepared in the hospital. He further stated that he tried to contact his daughter but her phone was switched off. In further cross-examination, he stated that when he reached the Govt. Hospital Dadri, the case regarding murder of his daughter was already registered. In reply to a question whether he had read the FIR, he has stated that he was very much mentally disturbed and therefore, he did not remember whether he had read the FIR at that time or not. The deceased was having three injuries, one on neck, one on chest and one on the back. He further stated that he received the information of abduction of his daughter on 2.1.2018 at about 9:30 PM and he returned Bulanshahar from Coimbatore by taking of a flight on 3.1.2018. He denied that suggestion that he did not return on 3.1.2018.

22. PW-3- Vijay Pratap Singh, stated that he is the owner of a show room of Royal Enfield Motorcycle. On 2.1.2018, he was present on show

room. There are C.C.T.V. cameras installed in his show room from which the activities on the main road and surroundings are clearly visible. This witness further stated as under:

"दिनांक 02.01.18 को शाम के करीब 7 बजे के 39 मिनट पर एक आल्टो गाड़ी सफेद रंग की सी०सी०टी०वी० केमरे में गली में मुड़ती दिखायी दे रही है। जिसकी फुटेज सी०सी०टी०वी० केमरे में मैने अपनी आँखो से देखी है। जिस गली में गाड़ी मुड़ी है उसमें हमारे गाँव की अपहृतकर्ता/मृतका आयुषी का मकान है। यही सफेद रंग की आल्टो गाड़ी शाम के करीब 7 बजकर 41 मिनट पर मेरे शोरूम पर लगे सी०सी०टी०वी० केमरे में फिर दिखाई दी। फिर 40-50 सेकेन्ड बाद यही सफेद रंग की आल्टो कार मेरे शोरूम पर लगे सी०सी०टी०वी० केमरे में वापिस आते दिखाई थी। जिसकी सी०सी० केमरे की फुटेज मैने कोतवाली नगर के इंस्पेक्टर साहब के मांगने पर उपलब्ध करा दी थी। मेरे शोरूम पर लगे सी०सी०टी०वी० केमरे में दिनांक 02.01.18 के बाद से इन्स्पेक्टर साहब को फुटेज देने तक किसी प्रकार की कोई छेड़छाड़ नहीं की गयी थी। और सी०सी०टी०वी० केमरे फुटेज ज्यो कि ज्यो इंस्पेक्टर साहब को उपलब्ध करा दी गयी थी। मैने सी०सी०टी०वी० केमरे में सफेद अल्टो कार की फुटेज मैने अपनी आँखो से देखी थी। मै 02.01.18 को करीब साढ़े सात बजे से आठ बजे तक अपने शोरूम के बाहर खड़ा था। मैने अपनी आँखो से गाड़ी को आते जाते मुड़ते देखा था आल्टो कार सफेद रंग की जिसमें पिछले शीशे पर अब्बासी बावायेज लिखा था।

इस सम्बन्ध में मै आज प्रमाण पत्र दाखिल करता हूँ। जो मेरा दस्तखती है। प्रमाण पत्र में अंकित इबारत सत्य व सही है। प्रमाण पत्र पर प्रदर्शक-2 डाला गया। मेरे गाँव के आयुषी शर्मा की अपहरण के बाद उसकी हत्या कर दी गयी थी जिसमें हमारे गाँव नया गाँव चांदपुर में गया व आतंक का भय पैदा हो गया। काफी दिनों तक हमारे गाँव के लोगो ने बच्चों को घर से अकेले नहीं जाने दिया। इस सम्बन्ध में लोगो ने अधिकारियों को ज्ञापन दी थी।"

23. In cross-examination, he stated that Ex.Ka.2, the certificate, was not given to the I.O. and he has given the same first time in the court. He further stated that the memory of hard disk of his C.C.T.V. lasts for about 15-20 days. He got the information about the incident on the next day at about 11:00 AM and came to know that the offence was committed by the same car. He denied a suggestion that there is no C.C.T.V. footage of the car is available and he has prepared a fake evidence.

24. PW-4- Sushil Sharma stated that on 2.1.2018 at about 8:00 PM, he along with his colleague Vedant Sharma were standing on the main gate of his house situated at G.T. Road and they were talking to each other. In the meantime, they noticed that one Alto Car came fcame and stopped in front of Beerkheda and three boys came out and started urinating. Thereafter they moved towards Dadri in the same Alto Car. He further stated that he had seen all the three boys in the light of other vehicles. On seeing the accused persons in the court, he identified that they are the

same three persons whom he had seen along with his companion Vedant Sharma on 2.1.2018 as they were urinating in front of the gate of Beerkheda and thereafter they went towards Dadri in the same car. He also stated that on the rear pane of car, 'Abbasi Boys' was written in English which he had noticed. In cross-examination, he stated that he is in the business of agriculture and property dealing. Vedant Sharma is also in the property dealing business and on that day Vedant Sharma had come to show him a piece of land and that is why they were present at the spot. He stated that he got his statement recorded on 1.3.2018 when he saw the police jeep coming from Sikandarabad to Bulandshahr and therefore, he gave the information to the police in this regard. He further stated that after the registration of the case, he came to know Pushpendra Singh.

25. PW-5- Vikram Singh stated that he was working as a Senior Manager, System on C.C.T.V. at Luhali Toll Plaza. His statement read as under:

"मैं 15 दिसम्बर 2015 से लुहाली टोल प्लाजा पर सीनियर मैनेजर के रूप में सिस्टम सी०सी०टी०वी० फुटेज पर कार्यरत हूँ। मेरी दिनांक 02.01.2018 को भी सी०सी०टी०वी० फुटेज लुहाली टोल प्लाजा पर ड्यूटी थी और मेरे द्वारा सी०सी०टी०वी० फुटेज टोल प्लाजा का चैक किया गया था तो दिनांक 26.12.2017 को समय 23.54 बजे सफेद रंग की एल्टो कार जिसके पिछले शीशे पर अब्बासी बाँय लिखा था दादरी से सिकन्दराबाद की तरफ आयी थी और दि० 27.12.17 को यही कार समय करीब 11.36 बजे सिकन्दराबाद से दादरी की तरफ जाना दिखायी दी। यही कार दि० 02.01.18 को समय करीब रात के करीब 20.44 बजे सिकन्दराबाद से दादरी की तरफ गयी थी और फिर यही गाड़ी दि० 02.01.18 को ही रात के करीब 21.35 बजे सिकन्दराबाद की तरफ आयी टोल प्लाजा पर सी०सी०टी०वी० केमरे में उक्त गाड़ी की तस्वीर नजर आ रही है उसका नम्बर HR-51AY5206 स्पष्ट नजर आ रहा था। दिनांक 03.01.2018 को समय करीब 5 बजे शाम सिकन्दराबाद से दादरी को गयी और फिर यही कार दि० 03.01.18 को ही 9.16 मिनट पर रात को दादरी से सिकन्दराबाद की तरफ आयी थी। मैंने टोल प्लाजा लुहाली पर लगे सी०सी०टी०वी० केमरे में गाड़ी को आते जाते देखा है। और गाड़ी का नम्बर, गाड़ी का रंग, गाड़ी के पीछले शीशे पर लिखा अब्बासी बाँय अपनी आँखों से देखा है। टोल प्लाजा पर लगे सी०सी०टी०वी० केमरे की फुटेज मेरे द्वारा विवेचक के माँगने पर दी गयी थी विवेचक को फुटेज दिये जाने तक सी०सी०टी०वी० केमरे में किसी प्रकार की कोई छेड़छाड़ नहीं की गयी थी। इस सम्बन्ध में मैं अपने कम्पनी के लेटर पैड पर प्रमाण पत्र टाईप कराकर लाया हूँ जो पत्रावली पर दाखिल करता हूँ। प्रमाण पत्र मैंने स्वयं बोल-2 कर कम्प्यूटर पर कम्प्यूटर आपरेटर से टाईप करायो है प्रमाण पत्र पर मेरे हस्ताक्षर भी है प्रमाण पत्र पर प्रदर्शक-3 डाला गया।"

26. In cross-examination, he stated that he had given a certificate to the I.O. regarding C.C.T.V. footage and also given the C.D. of the D.V.R. to the I.O. of 2.1.2018. On a specific question whether the 'Abbasi Boys' was

written on the back of the car, this witness stated on seeing the D.V.R. footage that 'Abbasi Boys' was written on the white colour car.

27. PW-6- Ashok Kumar Singhal stated that victim (A) was a student of class 12 and she used to visit his house for taking tuition in Mathematics from 6 P.M. to 7 P.M. and on 2.1.2018, after taking the tuition, she left for home on her cycle. In cross-examination, he stated that on the same day, he received the phone from the police station at about 8:00 PM that the victim has not reached home and he told the I.O. that victim has left his home at 7:00 PM. He stated that the parents of the victim had not asked him about the incident.

28. PW-7- Manoj Kumar Garg stated that he is the Chairman and on 2.1.2018, he came to know that the victim was kidnapped by the accused, namely, Zulfiqar, Israel, Irshad and after committing rape, she was murdered. Due to this, there was tension and fear amongst the parents in the city. In cross-examination, he stated that he is not an eye witness and denied a suggestion that due to political reasons, he has given the statement. He further stated that he had attended the cremation and on a call given by the people, there was a 'Band' in Bulandshahahr.

29. PW-8- Abhilash Kumar, S.I., who conducted the investigation, stated as under:

"दि० 3.1.18 को थाना दादरी जिला गौतमबुद्ध नगर बतौर उपनिरीक्षक के पद पर तैनात था इस दिनांक सूचना के आधार पर मैं महिला का० गीता व का० जालेन्द्र के साथ जिल्द पंचायतनामा व दिगर कागजात लेकर मृतका पंचायतनामा भरने हेतु रवाना होकर सी०एच०सी० अस्पताल दादरी पहुँचा था वहाँ पर जाकर देखा कि अस्पताल में स्ट्रेचर पर एक अज्ञात लड़की का शव रखा गया था जिसको मेरे द्वारा शव की शनाख्त कराने का कोशिश की गयी शनाख्त नहीं हो सकी उसके बाद मैंने मौके से पंच नियुक्त का मृतका का पंचायतनामा भरना शुरू किया जो पंचायतनामा व पंचायतनामा से सम्बन्धी कागजात मेरे द्वारा तैयार किये गये जो पत्रावली पर पंचायतनामा कागज सं० 13 ए/1 व 2 मौजूद है जो मेरे लेख हस्ताक्षर में जिस पर प्रदर्श क-4 डाला गया पंचायतनामा से सम्बन्धित कागजात चिट्ठी सी०एम०ओ० तैयार की जो कागज सं० 13 ए/3 है। जो मेरे लेख हस्ताक्षर में है तथा दूसरी चिट्ठी सी०एम०ओ० के लिये इस बावत कि बलात्कार आदि के सम्बन्ध में रिपोर्ट देने की कृपा करे। वह चिट्ठी पत्रावली पर 13 ए/4 है। मौजूद है जो मेरे लेख हस्ताक्षर में है। जिस पर प्रदर्श क-6 डाला गया। इसके पश्चात खाखा लाश तैयार की गयी जो पत्रावली पर कागज सं० 13 ए/5 मौजूद है मेरे लेख हस्ताक्षर में है। जिस पर प्रदर्श क-7 डाला गया। इसके पश्चात चालान लाश तैयार की जो कागज सं० 13 ए/06 पत्रावली पर मौजूद है। जो मेरे लेख व हस्ताक्षर में है जिस पर प्रदर्श क-8 डाला गया। पंचायतनामा की कार्यवाही पूर्ण होने

पर सभी प्रदर्शक भरने के बाद मृतका के शव को सील करने को कहा था उसी समय मृतका के परिजन आ गये थे। और परिजन के द्वारा मृतका की शनाख्त आयुषी शर्मा पुत्री पुष्पेन्द्र शर्मा निवासी चांदपुर पी/एस को० नगर के रूप में की गई मेरे द्वारा मृतका शनाख्त होने के पश्चात मृतका के शव को एक कपड़े में रखकर सील बन्द कर पी०एम० कराने हेतु का० महफूज व का०-जालेन्द्र पी/एस दादरी के सुपुर्द किया गया मेरे द्वारा दोनो का० को हिदायत दी गयी थी कि जब तक मृतका का पी०एम० नहीं हो जाता है तब तक उसके शव को किसी को छेड़ने व छुने का मौका ना दे।”

30. In cross- examination, he stated that in Panchayatnama, it is not stated that there was any dupatta or other cloth around the neck of the victim and when the dead body was identified by family members, the same was handed over to them after the post-mortem was conducted.

31. PW-9- Dr. K.K. Mishra stated that on 3.1.2018, he was on emergency duty in C.H.C. when the dead body of an unknown female was brought and thereafter, he investigated and sent information to the police vide letter Ex.Ka.9. In cross-examination, he stated that the dead body remained in the same condition as it was brought till the time Pachayatnama was prepared and police arrived.

32. PW-10- Dr. H.M. Lavania stated that on 4.1.2018, she was present in District Mortuary, Noida and she received the dead body of victim at about 3:10 PM for conducting the post-mortem. The statement of this witness along with cross-examination report as under:

“साक्षी का नाम डा० एच०एम० लावनीयाँ हाल तैनाती बतौर पैथोलौजी को नोएडा ने शपथ पूर्वक ब्यान किया कि:- दि० 4.1.18 में जिला मौरचरी नोएडा में थी इस दिन को मेरे द्वारा 3.10 पी०एम० पर मृतका आशुषी शर्मा पुत्री पुष्पेन्द्र शर्मा निवासी चांदपुर थाना कोतवानी नगरी के शव का मेरे द्वारा पी०एम० किया गया मृतका को सील बन्द अवस्था का० 1282 महफूज व का० 1509 जालेन्द्र पी/एस दादरी गौतम बुद्ध नगर लेकर आये थे सील बन्द अवस्था में लेकर आये थे मेरे मिलान करने पर सील मुहर दुरुस्त पाई गई थी। मृतका की शव के साथ 11 पुलिस प्रपत्र साथ लेकर आये थे शरीर में मृत्यु की पश्चात की अकड़न मौजूद पूरी शरीर पर मौजूद थी शरीर की मृतका का कद काठी सामान थी और व बन्द रक्तरन्जित थी। मृतका के शरीर मृत्यु पूर्व आई निम्नलिखित चोटो थी।

चोट नं० 1. एक नीलगू निशान, जो खुरसट लिए हुए, जिसका आकार 29/15 के क्षेत्रफल में जो पीठ और उसके नीचले भाग में मौजूद था।

चोट नं० 2. गले के चारो तरफ 29/2 से०मी० का लाइगेचर मार्क जो गले के सामने व थाईराइड कार्टिलेज के नीचे स्थित था लिगेचर मार्क के नीचे भूरे रंग की खाल नरम थी, गले के चारो तरफ निशान में कोई गैप नहीं था, लिगेचर मार्क दाहिने कान के नीचे 5 सेमी० पर था और बाँये कान से 4 सेमी० नीचे था। और थोड़ी के 5 से०मी० नीचे था। हड्योईड? बोन टूटी हुई थी, श्वास नली के साथ टूटी हुई थी। अन्य अंग जैसे मस्तिष्क,(अस्पष्ट) दोनो गुर्दे व प्लीहा कन्जेस्टेड थे। व हृदय का दाहिना चैम्बर में रक्त मौजूद था व दोनो फेफड़ो में लैसैरिट ? रक्त मौजूद था (खून का थक्का मौजूद था)

अमाश्रय मे करीब 300 एम०एल० अधपचा खाना मौजूद था। पीड़िता के दौत 15/15 के थे मेरी राय मे मृतका की मृत्यु करीब शव विच्छेदन से डेढ़ दिन पूर्व होना सम्भावित है।

मृत का कारण:- गला दबा कर दम घुटने से होना सम्भव है। सील किया गया सामान: निम्न लिखित है

एक जिन्स, एक बैन्ड एक टीशर्ट 2 जरसी एक पजामी एक पैन्टी एक गले का दुप्पटा जिसकी गांठा लंगी थी दो हाथ की अंगूठी सफेद धातु की 4 हेयर क्लिप हाथ एक का नीला बैन्ड एक हेयर बैंड एक गली का दांगा को एक कपड़े में रखकर सील सर्वेमुहर करके आये हुये दोनो सिपाहियो के सुपुर्द किया गया था। मैने मृतका की दो वैजानल स्मीयर स्लाई शुकरणु परीक्षण पैथोलाजी के लिये परीक्षण हेतु भेजा गया था। यह पी०एम० रिपोर्ट मेरे द्वारा बरवक्त तैयार की गई थी जो पत्रावली पर मौजूद है। मेरी लेख हस्ताक्षर मे है पी०एम० रिपोर्ट पर प्रदर्श क-10 डाला गया।

मृतका की मृत्यु दि० 2.1.18 को 8 व पौने आठ के बाद रात्रि के समय किसी समय होना सम्भव है। चोट नं० 2 अगर मृतका का गला चुन्नी से दबा कर घौटा जाये तो चोट नं० 2 आना सम्भव है। चोट नं० 1 अगर पीड़िता के साथ कार के अन्दर जबरदस्ती की जाये एवं बलात्कार किया जाये तो चोट आना सम्भव है। चोट नं० 2 मृतका की मृत्यु के लिये पर्याप्त है।”

“जिरह:- अभियुक्त इजराईल उर्फ मलानी:-

मै इस अस्पताल में करीब 8 वर्ष से तैनात हूँ पैथोलाजी के पद पर तैनात हूँ। इस समय मुझे याद नहीं है जिस दिन पीड़िता का पी०एम० किया उस दिन किसी और का पी०एम० किया था या नहीं इस पी०एम० करने हेतु शव के साथ 11 प्रपत्र प्राप्त हुये थे। यह कहना सही है कि इन 11 प्रपत्रो का विवरण पोस्टमार्टम रिपोर्ट में नहीं किया है मेरे अलावा दो स्यूपर थे जिनके नाम मुझे याद नहीं है पी०एम० के समय मौजूद थे। यह सही है कि किसी स्यूपर (बाल्मीक)

पर लिखी सहयोगी कर्मचारी का नाम पी०एम० में अंकित नहीं है। यह बात सही है कि मेरी मौजूदगी में शव को स्यूपर(बाल्मीकी) द्वारा खोला जाता है और उसी के द्वारा सील किया जाता है।

प्रश्न:- पी०एम० के समय जो 11 प्रपत्र शव के साथ भेजे गये थे उन सब पर अज्ञात लड़की लिखा है।

उत्तर- अभियोजन के तरफ से यह आपत्ति की गयी कि प्रपत्रो के ऊपर प्रदर्श क पढ़कर (अस्पष्ट) किये जा जा चुकी है और विपक्षी के विद्वान अभि० द्वारा उनपर जिरह की जा चुकी है ऐसी स्थिति में विपक्षी द्वारा उक्त प्रश्न पूछा गया सुसंगत नहीं है।

अभियुक्त की ओर से पी०एम० के समय डा० को जो प्रपत्र शव के साथ प्राप्त कराये गये थे उससे सम्बन्धित जिरह करने का अधिकार है। अपत्ति? तदानुसार निरस्त की जाती है।

सक्षी प्रपत्रों में अवगत अज्ञात नहीं लिखा है। कागज सं० 2 पंचायतनामा 13 ए/1 और मृतका का नाम आयुषी लिखा है। इसी पृष्ठ सं० 1 मैने किसी भी पुलिस कर्मी जो शव लाये थे यह नहीं पूछा था कि पंचायतनामा के प्रथम पृष्ठ पर मृतका का नाम लिखा है शेष कागजातो पर अज्ञात लाश लिखा है।

यह कहना सही है कि जो पंचायतनामा की शेष पृष्ठो पर मृतका का नाम नहीं लिखा है अज्ञात लाश ही लिखा है। यह कहना सही है कि मैने पोस्टमार्टम रिपोर्ट में शव के गीली अवस्था में होना अथवा सूखी अवस्था में होना का कोई उल्लेख नहीं किया है। यह कहना सही है कि आज निश्चित तौर से नहीं बता सकता कि मृतका का शव गीली या सूखी अवस्था में था। पी०एम० के समय मैने कोई वीडियो ग्राफी या फोटो ग्राफी नहीं करायी थी अज खुद कहा यह कार्य पुलिस का है।

चोट 1:- किसी ऊँचे स्थान से गिर जाने पर या ऊबड़ खबड़ पर गिरने से नहीं आ सकती है।

यह कहना सही है कि मृतका के पाईवेट पार्ट पर कोई खरोज, खुरसट अथवा नीलगू निशान नहीं था यह कहना सही है कि पी०एम० के समय यह निश्चित नहीं बताया जा सकता था कि मृतका के साथ बलात्कार हुआ था या नहीं। आज खुद कहा कि रेप की पुष्टि के लिये वैज्ञानिक स्पीयर लेकर स्लाईट तैयार कर परीक्षण हेतु भेजा था। पुलिस के माध्यम से गया था। लड़की के पहने हुए कपड़े में ब्लड था अथवा नहीं मैं नहीं बता सकता कि मैंने पी०एम० रिपोर्ट में इसका उल्लेख नहीं किया था। मुझे याद नहीं है कि शव की पी०एम० के पहले से मौजूद थी या मेरे सामने लाई गयी पोस्टमार्टम रिपोर्ट पर मृतका का नाम पंचायतनामे में प्रथम पृष्ठ पर उसका नाम होने के कारण पी०एम० रिपोर्ट पर लिखा है। पी०एम० करते समय मुझे पता था कि मैं किस का पोस्टमार्टम कर रहा हूँ। और मैंने पी०एम० उसका नाम भी लिखा है। शव सील अवस्था में थी लेकिन उस सील कपड़े पर कुछ मृतका के नाम के बारे में नहीं लिखा था और ना ही अलग से स्लिप लगी थी। पोस्ट मार्टम रूम में एक बाँड़ी होती है लेकिन पी०एम० हाउस में कितनी होती है नहीं बता सकता हूँ। यह सही है कि पी०एम० करने से पूर्व मैंने शव की शनाख्त करायी थी। पुलिस का० जो शव लाये थे उन्होंने शनाख्त करायी थी पी०एम० करने में लगभग 1 घन्टा लगा था मृतका की आयु लगभग 20 वर्ष थी।”

33. PW-11- Suraj Kumar, another I.O. gave the information about the investigation conducted by him and he stated that on the basis of written report given by Babita Sharma, Ex.Ka.1, the chik FIR No. 4 has been recorded and Section 364 of I.P.C. was added vide [Ex.Ka.11](#) and G.D. [Ex.Ka.12](#) and thereafter, the post-mortem report was received and Sections 302, 201 I.P.C. was added vide G.D. Ex.Ka.13. In cross-examination, he stated that informant Babita Sharma came with a relative Pushkar Singh on 2.1.2018, no recovery article was deposited in the police station and it was deposited on 5.1.2018 which included one cloth bag containing three sealed packets. He stated that when an information is given on Number 100, the entry is recorded in the control room. He denied a suggestion that the FIR was registered ante-time on the asking of senior police officials. He further stated that in the chik FIR no name of any persons or vehicle is recorded.

34. PW-12- Dalveer Singh, S.I. another I.O. deposed about the further investigation. He stated that he recorded the statement of informant-Babita Sharma and took in possession the recovery memo of the articles recovered at the spot of abduction. He prepared the Naksha Najari vide Ex.Ka.15. The articles recovered were sealed at the spot vide memo

Ex.Ka.16. He also recorded the statement of PW-6, Ashok Singhal. This witness further proved that the packet sealed in cloth- Ex.1, backpack- Ex.2, Mathematics book- Ex.3, one copy- Ex.4, cover of spectacles- Ex.5, water bottle- Ex.6, black pen- Ex.7. He also exhibited one slipper of left foot with red and yellow colour along with plastic box as Ex.8 and 9. In cross-examination, this witness stated that informant in her statement under Section 161 Cr.P.C., has not stated about seeing the Alto car. He denied a suggestion that he has not seen the place of occurrence and has conducted the proceedings while sitting in the police station.

35. PW-13- Dhananjai Mishra, S.H.O stated about the investigation conducted by the other co-officials and recording of the GDs by them. He stated that as per the post-mortem report, cause of death was asphyxia as a result of strangulation. Thereafter, he recorded the statement of witness on 6.1.2018 and obtained the C.C.T.V. footage near the house of the deceased and also the statement of other witnesses on 7.1.2018. He took the C.C.T.V. footage of bullet show room dated 2.1.2018 in which at 7:39 PM one Alto car was seen taking a U-Turn towards Chandpur's side just two minutes before that a girl was seen and thereafter, from the C.C.T.V. footage of Crystal Automobile (Renault), the Alto car turns towards the village where the deceased 'A' was residing. After sometime it was seen coming back. The C.C.T.V. footage is on record, thereafter, he went to Luhali Toll Plaza at Dadri road and on seeing the footage on 2.1.2018 where the above said Alto Car with Haryana Number was seen again on 3.1.2018. The same car at about 5:00 PM was going from Sikandarabad to Dadri. On 8.1.2018, Pushpendra Singh told that on 2.1.2018 at about 7:45 PM one Alto car was seen which turn towards Renault Show Room and on the rear wind screen 'Abbasi Boys' was written in english. The car Registration No. was HR51AY5206. The details of the car were seen which was registered in name of one Naveen Saini r/o Uncha Gaon, Saini Mohalla, Faridabad and on enquiry he told that he has sold this car to Zulfiqar r/o Friends Colony, Sikandarabad. On further enquiry, brother of

accused Zulfiqar namely Gulbahar told that he had purchased this car from Naveen Saini. He further stated that details of the secret information received and the manner in which accused were arrested and recorded their confessional statements about commission of the crime. He further proved that FSL team was called and from the car one slipper of the deceased, hair band, hair etc. were also recovered and were taken in possession, [Ex.Ka.17](#). Thereafter, Section 376 of I.P.C. and Section 3/4 of P.O.C.S.O. Act was added. The sealed parcel was opened from where the recovered articles that is one slipper of red and yellow colour on which 'conform' was written, was recovered. The same was [Ex.10](#) and the transparent polythene was [Ex.11](#) and transparent box was Ex.12. Another sealed packet was opened and from where the sealed hair clip was recovered and a slip of the FSL is also recovered. A black colour hair clip was recovered from the car of the accused which was [Ex.13](#) along with the box as [Ex.14](#) and Ex.15. The hairs which were contain in a transparent box were Ex.16 and boxes as 17 to 1. He has signed on the recovery memo and there is a slip of FSL Lucknow. He also proved a red and black colour hair band recovered at the spot sealed in a plastic bag and is Ex.20 and boxes as Ex.21 and 22. He stated about the confessional statement made by the three accused regarding committing rape with a victim and murdering her. The earrings recovered from accused Israel by opening a box were Ex.23 and 24. The entire proceedings were entered in GDs. The field unit has also collected the photograph of the accused at the spot which are Ex.26 to 56. He stated that in the photograph the car was seen near the bridge of Gang Canal and on the backside on the rear wind screen 'Abbasi Boys' was written. He also proved that on the mat of the car hairs were also visible. He further stated that he has taken in possession the C.D. of C.C.T.V. footage and recorded the statement of owner of bullet show room as well as Manager of the toll plaza. He further stated that on 3.1.2018, he came to know that dead body of girl is lying near the drain, and the police has picked up and thereafter, he started investigation on the said line. He also proved the car Ex.15 which was

produced in the court, Ex.57, the CDs of the C.C.T.V. footage of Krishna -- Santosh Enterprises i.e. Royal Engield Bullet Showroom and Luhali Toll Plaza (Ex.58 to 61) which were opened with help of an operator of police line were displayed on a laptop in the court.

36. In cross-examination, this witness has given the complete details of the visibility of C.C.T.V. footage. He denied a suggestion that the C.C.T.V. footage is not the correct copy of original. He further give the details in the manner in which arrest of all the accused was effected and denied a suggestion that the accused were arrested from their homes and under the pressure they were made to make confessional statements.

37. PW-14, Sameul Christopher of All Saint School, Delhi Road, Bulandshahr, produced the school record of the victim. He stated that the victim took admission in their school on 6.5.2011 in Class 6th and was studied up to 2017-18 and at the time of incident, she was studying in Class 12th in the Register of the school and Gazette, at page No.171/29, the date of birth of the victim was mentioned as 5.9.2000. This witness stated that entries were made in his own handwriting and were exhibited K-21 to K-23. Thereafter, statement of accused under Section 313 Cr.P.C. was recorded and all incriminating evidence was put to them.

38. Accused gave explanation that the prosecution evidence is false and they have been falsely arrested. In reply to question No.29 regarding giving any clarification, the accused stated that they are innocent and have not committed any offence.

39. Accused-Dilshad additionally stated three years prior to the incident, he met with an accident and was on bed rest and while in judicial custody, he was operated upon at AIIMS, New Delhi and is still under treatment. Thereafter, the Trial Court vide judgment of conviction, held the appellants guilty and vide order of substantive sentence, awarded death penalty to the appellants as explained above.

40. Learned counsel for the appellants have jointly argued that the very motive of committing the offences i.e. rape and murder has not been proved by the prosecution.

41. Heavy reliance is placed upon the postmortem report and two the reports submitted by the Forensic Science Laboratory, Agra and Forensic Science Laboratory, Lucknow. For a reference, the Forensic Science Laboratory, Agra read as under :

“प्रेषक,

संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला, उ०प्र०,

15 ताज रोड, आगरा-282001

सेवा में,

सहायक पुलिस अधीक्षक नगर

बुलन्दशहर

पत्रांक:-534-BIO-18

अप०सं०: 04/18
अब्बासी

राज्य बनाम:जुलफकार

धारा: 364,302,201,376D IPC व ¾ POCSO Act

थाना:-कोतवाली शहर

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनांक 19/01/2018 को विशेष वाहक द्वारा प्राप्त हुये।

सील का विवरण

एक समुद्रित लिफाफा जिस पर मुद्रा (“MORTURY GBN NOIDA”) नमूनानुसार की छाप अक्षत थी।

प्रदर्शों का विवरण

01- वेजाइल स्मीयर स्लाइड दो
पी.एम से।

। एक समुद्रित लिफाफा-मृतिका

02- स्वाब

परीक्षण परिणाम

वस्तु(2) पर रक्त पाया गया।

रक्त के प्रारम्भिक परीक्षण के लिये बेन्जिडीन परीक्षण प्रयोग में लाया गया।

रक्त की पुष्टि के लिये क्रिस्टल परीक्षण प्रयोग में लाया गया।

वस्तु (1) पर रक्त नहीं पाया गया।

वस्तु (2) पर मानव रक्त पाया गया।

वस्तु (1) व (2) पर शुक्राणु अथवा वीर्य नहीं पाया गया।

शुक्राणु तथा वीर्य के परीक्षण हेतु बायोकेमिकल एवं माईक्रोस्कोपिक विधियाँ प्रयोग की गयीं।

नोट- भेजे गये प्रदर्शों के प्राप्त उक्त परिणाम को अन्य उपलब्ध साक्ष्यों के परिप्रेक्ष्य में निर्णय लिया जाना समीचीन होगा।

ह०अप०

03/12/19

आवश्यक कार्यवाही हेतु अग्रसारित

संयुक्त निदेशक

ह० अप०

03.12.19

वैज्ञानिक अधिकारी

डा० अनिल कुमार दीक्षित

वैज्ञानिक अधिकारी”

42. Similarly, the Forensic Science Laboratory, Lucknow read as under:-

“प्रेषक,

निदेशक/संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला, उत्तर प्रदेश, महानगर

लखनऊ- 226006।

सेवा में,

Senior Superintendent of police

BULANDSHAHAR

पत्रांक

2018XDNA000367

दिनांक

अपराध संख्या

4/2018

राज्य बनाम

JULFIKAR.ETC

अधिनियम/ धारा

CHL/3,CHL/4,IPC/201IPC/302,IPC/34,IPC/364,IPC/376-D,IPC/404

पुलिस स्टेशन/थाना KOTWALI CITY

मृतक/मृतका का नाम

पी एम संख्या

जी०डी० संख्या

उपर्युक्त मामले से सम्बंधित प्रदर्श प्रयोगशाला में दिनांक 16-04-2018 को विशेष वाहक द्वारा प्राप्त हुए।

सील का विवरण

एक सर्वमोहर बंडल जिस पर “MORTURY NOIDA GBN” मुद्रानमूनानुसार, दो सर्वमोहर लिफाफा जिन पर “DHB” मुद्रानमूनानुसार व तीन सर्वमोहर डिब्बा जिन पर “MONOGRAM UPP” मुद्रानमूनानुसार की छाप अक्षत थी।

प्रदर्शों का विवरण

1. रक्त नमूना(वायल में) पुष्पेन्द्र शर्मा) से।	। मूल सर्वमोहर लिफाफा (संभावित पिता- पुष्पेन्द्र शर्मा) से।
2. रक्त नमूना(वायल में) बबिता शर्मा) से।	। मूल सर्वमोहर लिफाफा(संभावित माता- बबिता शर्मा) से।
3. हेयर क्लिप	। मूल सर्वमोहर डिब्बा (मृतका) से।
4. बाल	। मूल सर्वमोहर डिब्बा (मृतका) से।
5. हेयर बैण्ड मय बाल	। मूल सर्वमोहर डिब्बा (मृतका) से।
6. जींस पैन्ट	। मूल सर्वमोहर बंडल से (मृतिका) (PM NO.-11/18)
7. बैल्ट	।
8. टीसर्ट	।
9. स्वैटर	।
10. पाजामी	।
11. पैन्टी	।
12. दुपट्टा	।
13. अंगूठी	।
14. क्लिप	।
15. ब्लू बैण्ड (हाथ का)	।
16. हेयर बैण्ड	।
17. काला धागा	।

परीक्षण परिणाम

प्राप्त प्रदर्शों (1) से (19) का डीएनए परीक्षण किया गया।

स्त्रोत प्रदर्श (1) (पुष्पेन्द्र शर्मा से) व स्त्रोत प्रदर्श (2) (बबिता शर्मा से), स्त्रोत प्रदर्श (4) (मृतका से) के क्रमशः बायोलाजिकल पिता व माता हैं। (HID-STR KIT)

स्त्रोत प्रदर्श (3), (5) से (9), (11) व (12) (मृतका से) में आंशिक डीएनए प्रोफाइल जेनरेट हुआ।

स्त्रोत प्रदर्श (10) व (13) से (17) (मृतका से) में डी.एन.ए. निष्कर्षण न हो सका।

डी.एन.ए. परीक्षण में जैनेटिक एनालाइजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया।

उक्त परीक्षण में मानक विधिया प्रयोग में लायी गयी।

नोट:- अग्ररक्षण पत्र के क्र.सं. (1) पर वर्णित डिब्बा से प्रदर्श सं. (4) में केवल बाल प्राप्त हुए।

1. समस्त प्रदर्शों को परीक्षणोपरान्त एक सर्वमोहर बण्डल से रखकर वापस लौटाया जा रहा है।
2. कृपया परीक्षित प्रदर्शों की वापसी की शीघ्र व्यवस्था करें।

अग्रसारित

ह० अप०

28/8/19

निदेशक

विधि विज्ञान प्रयोगशाला, उ०प्र०

लखनऊ।

ह० अप०

28/8/19

वैज्ञानिक अधिकारी

डी.एन.ए अनुभाग

यू०पी० लखनऊ।”

43. It is submitted that as per postmortem report, no injury mark was present in the vagina or cervix and the vaginal smear slide which was sent to Pathologist for detection of spermatozoa, as per report of Forensic Science Laboratory, Agra was negative as in both swabs the spermatozoa and semen were not found.

44. Learned counsel has next argued that even the report of Forensic Science Laboratory, Lucknow do not corroborate the version of the prosecution, as it is submitted that the only conclusion drawn from this report is that from the blood sample of mother and father i.e. PW-1 (Babita Sharma) and PW-2 (Pushendra Sharma, Exhibit 1 & 2, when tallied with the hair of the victim (Exhibit-4), it is proved that PW-1 and PW-2 are the biological father and mother of the victim. It is submitted that from the source 3, 5, 2, 9, 11 and 12 of the victim which includes hairband and hair, recovered from the car of the accused and the wearing clothes including the undergarments, no conclusive finding was recorded as it is opined that only partial DNA profile was generated. Similarly, from the other sources, Exhibit-10 and Exhibits 13 to 17, no DNA conclusion could be drawn.

45. It is thus argued that the allegation of committing rape by the accused persons with the victim are not proved and, therefore, the charge under Section 376-D IPC, is not proved.

46. Learned counsel has next argued that the charge under Section 5(g) read with Section 6 of The Protection of Children from of Sexual Offences Act (POCSO) is also not proved against the appellant as it has come in the postmortem report that the age of the deceased was about 20 years.

47. Learned counsel has next argued that in order to prove and hold a person guilty under Section 5(g) read with Section 6 of POCSO Act, it is to be proved that victim was a child as defined under Section 2(d) of the POCSO Act i.e. below the age of eighteen years. It is also submitted that the medical evidence do not corroborate the allegation of aggravated penetrative sexual assault and, therefore, the appellants have been wrongly convicted.

48. It is next argued that there is no eye witness to the incident and PW1 (Babita Sharma) has made substantive improvement from the FIR version while appearing as a witness in the Court.

49. Learned counsel submits that the statement made in the Court that she was standing on the gate of her house and was waiting for his daughter who had gone to take tuition and while standing on the gate, she had seen a white colour Alto Car in front of her house, which took U-turn after some time towards G.T. road and thereafter, she found the articles belonging to her daughter i.e. a bicycle, a bag and one sleeper lying on the road and thereafter, people gathered there and some one gave call to the police on 100 number, is not mentioned in the FIR and, therefore, there is substantive improvement in the version of the prosecution.

50. It is further argued that PW-2, Pushpendra Sharma, father of victim was not present at the spot as he has stated that he had gone to Coimbatore and on receiving the information, he returned back home next morning i.e. 3.1.2020 and then he reached the spot where the dead body was found, is also an improvised version of the prosecution.

51. It is submitted that in the report submitted by the police for sending the dead body of the victim to the hospital, it is reported that it was dead body of an unknown girl and if PW-2 (Pushpendra Sharma) had reached at the time of Panchyatnama of dead body, he should have identified the same at the spot whereas in the later part of the statement, this witness has stated that when he reached the hospital, he identified the dead body of his daughter.

52. Counsel further submits that the dead body was recovered from a small drain and, therefore, the prosecution has failed to explain that the dead body was recovered on whose instance.

53. Counsel has further argued that the statement of PW-3 (Vijay Pratap Singh), who is owner of Royal Enfield Agency, is also not admissible in evidence as he has given statement much after the incident and in cross examination, he has admitted that certificate (Exhibit Ka-2) regarding the authenticity of CCTV footage was for the first time filed in the Court and it was never given to the Investigating Officer.

54. Counsel for the appellant has submitted that PW-3 Vijay Pratap Singh, has admitted in cross examination that he came to know about the incident of kidnapping of a girl on the next day. However, he did not make any statement before the Investigating Officer for a period of about 20-25 days which raises a suspicion.

55. Counsel submits that as per the statement of PW-4 Sushil Sharma, his presence at the spot is doubtful. It is submitted that this witness has stated that at about 8:00 pm, he alongwith his colleague Vedant Sharma was standing on G.T. road when he saw a white colour Alto Car coming from Bulandshahr stopped near gate of Beerkheda, on the opposite side of the road from and three boys came out of the car and started urinating on the road and thereafter they again sat in the car and went towards Dadri side.

56. Counsel has argued that source of the light as stated by this witness is the headlights of the vehicles, was not sufficient to identify them and therefore, statement of PW-4 Sushil Sharma was not worth admissible.

57. It is argued that on 2.1.2018 the sun set around 6:00 pm and it was dark at about 8:00 pm and how PW-4 had seen the car of the appellant. It is also submitted that this witness in cross examination has stated that when he came to know about the incident, he stopped a police vehicle on 1.3.2018 and got his statement recorded regarding incident though he has admitted that he came to know about the incident from the newspaper which proves that this witness was introduced at a much later stage. It is also argued that PW-5 Vikram Singh, CCTV, System Manager of Lohali Toll Plaza has only deposed about the movement of Car No. HR-51-AY – 5206 which has crossed the toll plaza on 2.1.2018 at 20:44 and the car had gone from Sikandrabad to Dadri and again came back from Dadri to Sikandarabad at 21:35 pm. It is argued that the CCTV footage is not very clear and the trial court has wrongly relied upon the same.

58. Learned counsel argued that PW-6 Ashok Kumar Singhal who used to give tuition, in cross examination has stated that after the incident neither he visited the house of the victim nor her parents inquired of the same which is a suspicious circumstance.

59. Counsel submits that PW-7 Manoj Kumar Garg is an interested witness. He being the Chairman, is a political person and has only stated that after the incident, the parents in the city were in panic. However, he admitted that he is not witness of the incident.

60. Counsel next argued that as per the statement of PW-8 S.I. Abhilash Kumar, when he reached CHC Hospital, Dadri, a dead body of an unknown girl, was lying on a stretcher and thereafter, the proceedings of Panchayatnama started, which bear his signature. After the proceedings of Panchayatnama was completed, family members of the victim came and

Pushpendra Sharma, father of the victim, identified her and thereafter, the dead body was sealed and sent for postmortem.

61. It is submitted that as per the confessional statement set up by the prosecution, three accused persons murdered the victim by strangulating her with a dupatta (scarf). However, PW-8 stated that at the time of Panchyatnama or when the family members of the victim identified the dead body, there was no cloth or dupatta (scarf) around the neck of the victim and therefore, the confessional statement of the accused person is not corroborated.

62. Counsel next argued that PW-9 Dr. K.K. Mishra, who received the dead body of an unknown female, has stated that dead body was of an unknown girl and therefore, the version given by PW-2, father of the victim, that he had seen the dead body prior to bringing it to the hospital is not proved. He next argued that as per PW-10, Dr. H.M. Lavania, who conducted the postmortem, the cause of death was asphyxia due to strangulation and from her statement allegation of rape are not proved.

63. This witness has stated that the victim died about 1 and ½ days prior to the time of postmortem and she nowhere stated that victim was subjected to sexual assault, to prove the allegation of rape. In cross examination, this witness stated that all the 11 documents which were sent alongwith postmortem report, it was mentioned that the dead body was of an unknown girl. However, in Panchayatnama Ex-13A/1, the name of the victim is mentioned.

64. Counsel argued that this witness stated that on the private parts of the victim, no bruises or blue contusion were found and at the time of postmortem, she could not give any definite report whether the victim was subjected to rape or not and to ascertain this the vaginal smears slide was prepared and sentd for forensic investigation. It is stated by PW-10 that the age of the victim was about 20 years. In further cross examination,

this witness stated that there was a dupatta around neck of the victim which was tied.

65. Counsel next argued that it has come in the statement of PW- 12 S.I. Dalbeer Singh, that the informant (PW-1) in her statement under section 161 Cr.P.C. has not stated that she was waiting for her daughter while standing on the gate or had seen the Alto Car coming and going, which makes the statement of PW-1 doubtful. Counsel has argued that PW-13 SHO Dhananjai Mishra, during investigation found that the car belongs to one Neeraj Saini, R/o Firzabad who has sold it to accused Zulfikar, but there is no document to show that it was sold to him as registration certificate stands in the name of Neeraj Saini.

66. Counsels further submitted that in cross examination, PW-13 has stated that on receiving information that dead body of a girl is found in a drain, it came to his mind that the three boys who came in the Alto Car might have killed her and have thrown the dead body. It is argued that this is an afterthought story prepared by PW-13. Counsel has thus argued that offence made by the appellant is not proved and they be acquitted of charge.

67. Counsel for the accused Dilshad Abbasi has additionally argued that he was not maintaining good health as at the time of incident, about 3 years before he met with an accident and remained on bed rest for a longtime and has undergone surgery in Meerut and AIIMS, New Delhi during custody.

68. Counsel has argued that while in custody this witness has passing urine a catheter pipe and he cannot urinate in natural way and, therefore, he was not a position to commit the offence.

69. In reply, the learned counsel for the informant as well as learned AGA have opposed the prayer. It is argued that both PW-1, the informant,

mother of the victim as well as PW-2, the father of the victim are natural witness and duly proved prosecution case.

70. Counsel submits that on receiving information that minor daughter of PW-1 is abducted, she became perplexed and at the first instance she has only given information to the police regarding her kidnapping as in ordinary course no person in such a situation can give complete details and therefore, informing about seeing a white Alto Car, which was roaming around the place of occurrence at a later stage is a natural version. It is also argued that PW-2, on receiving information, immediately reached back on the next day i.e. 3.1.2018 and, on receiving the information about the recovery of an unknown dead body of a girl lying in Government Hospital, he alongwith his brother-in-laws Vinod and Pushkar Singh reached Government Hospital at Dadri and found that dead body is of his daughter lying which was on a stretcher. He identified the dead body and the police official told him that the dead body was found near a running drain. It is argued that it is nowhere stated by PW-2 that he reached the spot where dead body was recovered. This witness has, further, stated that on 9.1.2018, he received a phone call from police that two miscreants along with a white colour Alto Car had been apprehended. He reached at the spot and in his presence, one slipper, one hairband etc. of his daughter were recovered. The two persons who were apprehended gave their name as Zulfiqar Abbasi and Dilshad Abbasi and in his presence they made a disclosure statement about kidnapping his daughter and after committing rape, they murdered her and had thrown the dead body near the drain.

71. Counsel submits that statement of this witness is par confidence and despite lengthy cross examination, his testimony could not be shattered.

72. It is next argued on behalf of the informant that from the statement of PW-3- Vijay Pratap Singh, owner of a motorcycle showroom as well as PW-5- Vikram Singh, Manager of CCTV system at Luhali, Toll Plaza, it is

apparently clear that at the place and time of the incident, the accused persons were roaming in a white colour Alto car bearing registration no. HR-51-AY – 5206 and on the back pane, 'Abbasi boys' sticker was pasted. PW-3 has proved the CCTV footage of his showroom along with certificate Ex.Ka.2 which the trial court by playing the CCTV footage on a laptop has found that it clear and visible. It is argued that from the statement of PW-3 and PW-5 presence of their car is proved. It is next argued that PW-4, Sushil Sharma, is an independent witness who had identified all the three accused persons in the court as he had seen them urinating in front of the gate of Beerkheda where he was standing along with his colleague Vedant Sharma, therefore, identity of the accused is proved. Learned counsel submits that the police has conducted a fair and impartial investigation as ever the teacher, who was giving tuition to victim, appeared as PW-6 and proved this fact.

73. In reply to the argument raised by learned counsel for the appellants regarding the medical evidence and FSL report, it is submitted that both support the prosecution version. Learned counsel submits that it has come in the statement of PW-14- Sameul Christopher, who produced the school record of the victim, that the victim took the admission in All Saints' School in Class VIth on 6.5.2011 and she was studying in Class XIIth at the time of the incident. The victim has passed classes 6 to 11th from the same school and as per the S.R. register and High School/ Inter Gazette at page 171/29, the D.O.B. of victim is 5.9.2000 and therefore on the date of incident i.e. 2.1.2018, she was aged about 17 years 3 months and 27 days and age given in the post-mortem was 20 years was tentative and only on the basis of the appearance of the girl.

74. Learned counsel submits that as per PW-10, Dr. H.M. Lavania, who conducted the post-mortem has clearly stated that on injury no.1, blue contusion spread over the back and lower portion of the back cannot be caused by fall from higher place on an uneven surface and proved that she sustained these injuries while she was subjected to gang rape.

75. It is also submitted that on injury no.2, there is ligature mark below thyroid cartilage and hyoid bone was broken, windpipe was blocked and the cause of death was clearly opined as asphyxia due to strangulation of neck. Learned counsel has next argued that from the FSL report, DNA of the victim was proved and even the recovery of hairs as well as one slipper from the car along with other articles prove that she was kidnapped and taken in the same car, which was recovered from the custody of the appellants and was gang raped and murdered.

76. Learned counsel submits that, the FSL report from Agra, on Ex.2 i.e. vaginal swabs found human blood which proved that the victim was subjected to sexual assault, even if the sperm or semen was not found. Learned counsel lastly argued that the prosecution has been able to prove the complete chain of circumstances, which prove that on 2.1.2018 all the three accused in conspiracy with each other kidnapped the minor victim and forcibly took her in their white colour Alto car HR51AY5206 which has visible mark 'Abbasi Boys' on the back pane and were seen in the CCTV footage of the motorcycle showroom situated next to the place of incident and also seen in the CCTV footage of the toll plaza followed by the recovery of dead body, coupled with the medical record proved that the confessional statement made by the accused persons about commission of the offence is in the same way, as proved by the prosecution during the investigation and by the prosecution witnesses appearing in the court.

77. It is thus argued that appeal may be dismissed.

78. After hearing learned counsel for the parties, it is worth noticing that the trial court has framed as many as seven points of adjudication:-

i) Whether the age of the victim was below 18 years of age on the date of incident and the victim has gone to take tuition.

- ii) Whether the Alto car followed the victim in the street where the house of the victim was situated and immediately after sometime, it returned and the victim did not reach home.
- iii) Whether PW-4, Sushil Sharma, has seen the accused getting down from Alto car and urinating on the way from Bulandshahar to Dadri, road in front of Beerkheda.
- iv) Whether car no. HR51AY5206 with 'Abbasi boys' written on it is the same car used in accident.
- v) Whether victim was murdered before incident and witness PW-4 has seen the accused persons later on in while Alto Car.
- vi) Whether in the sequence of events, the aforesaid car no. HR51AY5206 'Abbasi boys' pasted on it was seen in the C.C.T.V. of Luhali toll plaza, going from Sikandarabad to Dadri and after sometime returning from Dadri to Sikandarabad.
- vii) Whether the accused have committed the gang-rape with the victim.

79. On re-appreciation of entire evidence, with the assistance of both the counsels for the parties, we find no merit in the present appeals for the following reasons :

A. The age of the deceased is proved to be below 18 years as her date of birth, as per the educational certificate and school record is 5.9.2000 and, therefore, on the date of incident i.e. 2.1.2018, she was aged about 17 years, 03 months and 28 days.

It is proved from the statement of PW-1 as well as PW-6, Ashok Kumar Singhal, the tutor who used to give tuition to victim, that on the date of incident, after taking the tuition from house of this witness, at about 7.00 PM, the victim was returning back from Suryanagar to her house on a bicycle. This fact was also proved by PW-1, the mother of the victim, that everyday she used to go tuition at 6.00 PM and return at night

and, therefore, it is proved that the victim was taking tuition everyday from 6.00 to 7.00 PM.

B. At point No. (ii), the prosecution has proved that from the statement of PW-1, the informant, that she had seen the Alto Car at place of occurrence. It is also proved from the statement of PW-3 (the owner of Royal Enfield Showroom) who has proved the CCTV footage by giving the same to the Investigating Officer that on 2.1.2018, at about 7.39 PM, the Alto Car was seen taking U-turn towards Chandpur and a girl was seen just two minutes before going on bicycle and at 7.41 PM the Alto Car turned towards the street where the victim was residing and after 40-50 seconds, it returned back and the victim never reached home. This proved that at this point of time, the victim was kidnapped by the accused persons and was forcibly taken in the Alto Car.

C. At point (iii), Shushil Sharma (PW-4) has clearly stated that he had seen that a white coloured Alto Car stopped in the opposite side of the road in front of the door of Beer Kheda. Three persons got out of the car and urinated in front of the door of Beer Kheda and he had seen them in the light of the vehicles. This witness has stated that he was standing at the gate in front of the main door along with his friend Vedant Sharma with regard to a property deal. Therefore, the statement of PW-4 is clear and consistent as in cross examination, his testimony could not be shattered by the defence.

D. At point (iv), we uphold the finding recorded by the Trial Court that Alto Car, HR51 AY5206 had a sticker pasted on its back pane 'Abbasi Boys' owned the appellants as they have surname as 'Abbasi' and it has come in the statement of Investigating Officer (PW-13) that the same was purchased from one Neeraj Saini resident of Faridabad. Therefore, the use of the car by the accused committing offence is proved.

E. We also uphold the finding at point Nos. (v) & (vi) that PW-4 had seen the accused persons after committing the offence and the presence of the vehicle crossing the Luhali Toll Plaza is also duly proved PW-5.

F. At point No.(vii), the Trial Court has recorded a finding that the accused persons committed gang rape with the victim who was below 18 years of age and, therefore, held them guilty of offence under Section 376D of IPC and Section 5 (g)/6 of POCSO.

G. The report of the Forensic Science Laboratory, Agra on the vaginal smears slide and swab Ex.2 has opined that human blood was found which suggests that there was aggravated penetrative assault on the victim. Therefore, the finding of the Trial Court on this issue is also upheld.

H. The injury sustained by the victim on her back also suggests that she was subjected to aggravated penetrative sexual assault in the car as she sustained multiple bruises and blue contusion on her upper and lower back.

I. It has come in the statement of PW-10, the doctor who performed the postmortem, that a scarf (dupatta) was tied around the neck of the victim which was used in committing the murder by strangulating her. Therefore, we uphold the finding recorded by the Trial Court that the accused persons committed the offence of kidnapping the victim 'A' who was below the age of 18 years, also committed aggravated penetrative sexual assault on her and then by committing her murder by strangulating with dupatta (Scarf) had thrown her dead body near a drain.

80. Accordingly, we find no merit in judgment of conviction passed by the Trial Court and uphold the same.

81. So far sentence of the appellant is concerned, the Trial Court awarded the death sentence to all the three appellants. However, the Court finds merit in the argument raised by the counsel for the appellant that it is

not a 'rarest of the rare' case where death penalty could be awarded and the Trial Court has not recorded any mitigating circumstances which require that only death penalty should be awarded to the accused.

82. In recent judgment the Supreme Court in **Navas alias Mulanavas vs. State of Kerala, 2024 SCC OnLine SC 315** has considered many cases where the Court has commuted death sentence to life imprisonment. The operative part of the order read as under :

*“29. In **Haru Ghosh v. State of West Bengal, (2009) 15 SCC 551** which involved the murder of two individuals and the attempt to murder the third by the accused who was out on bail in another case, after conviction, this Court while commuting the death penalty after taking into account the aggravating and mitigating circumstances imposed a sentence of 35 (thirty five) years of actual jail sentence without remission. It was noted that commission of the offence was not premeditated since he did not come armed and that the accused was the only bread earner for his family which included two minor children.*

*30. In **Mulla & Another v. State of U.P., (2010) 3 SCC 508** the accused/appellant, along with other co-accused, was found guilty of murdering five persons, including one woman. This Court confirmed the conviction but modified the sentence. This Court stressed on the fact that socioeconomic factors also constitute a mitigating factor and must be taken into consideration as in the case the appellants belonged to extremely poor background which prompted them to commit the act. The sentence was reduced from death to life imprisonment for full life, subject to any remission by the Government for good reasons.*

*31. In **Ramraj v. State of Chhattisgarh, (2010) 1 SCC 573** which involved the murder of his wife, this Court imposed a sentence of 20 (twenty) years including remissions.*

*32. In **Ramnaresh and Others vs. State of Chhattisgarh., (2012) 4 SCC 257** the convicts were sentenced to death by the lower court, with the High Court confirming the sentence, on finding them guilty of raping and murdering an innocent woman while she was alone in her house. This Court confirmed the conviction but found the case did not fall under the 'rarest of rare' category for awarding death sentence. Ultimately, after setting out the well-established principles and on consideration of the aggravating and mitigating circumstances, this Court, while commuting the sentence from death imposed a sentence of life imprisonment of 21 (twenty one) years.*

*33. **Neel Kumar v. State of Haryana, (2012) 5 SCC 766** was a case where the accused committed murder of his own four-year old daughter. This Court, after considering the nature of offence,*

age, relationship and gravity of injuries caused, awarded the accused 30 (thirty) years in jail without remissions.

34. In **Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107** which involved the murder of paramour and the unborn child (foetus), this Court, while considering the facts and circumstances awarded a period of 30 (thirty) years in jail without remission.

35. In **Shankar Kisanrao Khade vs State of Maharashtra, (2013) 5 SCC 546**, the accused was convicted for raping and murdering a minor girl aged eleven years and was sentenced to death for conviction under S. 302 of IPC, life imprisonment under S. 376, seven years RI under S. 366-A and five years RI under S. 363 r/w S. 34. This Court confirmed the conviction but modified the death sentence to life imprisonment for natural life and all the sentences to run consecutively.

36. **Sahib Hussain v. State of Rajasthan, (2013) 9 SCC 778**, concerned killing of five persons including three children. This Court, taking note of the fact that the guilt was established by way of circumstantial evidence and the fact that the High Court had already imposed a sentence of 20 (twenty) years without remission, did not interfere with the judgment of the High Court.

37. In **Gurvail Singh & Anr. v. State of Punjab, (2013) 2 SCC 713** which involved the murder of four persons, this Court weighed the mitigating factors i.e., age of the accused and the probability of reformation and rehabilitation, and aggravating factors i.e., the number of deceased, the nature of injuries and the totality of facts and circumstances directed that the imprisonment would be for a period of 30 (thirty) years without remission.

38. In **Alber Oraon v. State of Jharkhand, (2014) 12 SCC 306** which involved the murder by the accused of his live-in partner and the two children of the partner, this Court, even though it found the murder to be brutal, grotesque, diabolical and revolting, applied the proportionality principle and imposed a sentence of 30 (thirty) years over and above the period already undergone. It was ordered that there would be no remission for a period of 30 (thirty) years.

39. In **Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353**, which involved the rape and murder of helpless and defenceless minor girl, this Court commuting the death penalty imposed a sentence of 35 (thirty five) years in jail without remission.

40. In **Selvam v. State, (2014) 12 SCC 274**, the accused was found guilty of rape and murder of nine year old girl. This Court imposed a sentence of imprisonment for a period of 30 (thirty) years without any remission, considering the diabolic manner in which the offence has been committed against the child.

41. In **Birju v. State of Madhya Pradesh, (2014) 3 SCC 421**, the accused was involved in the murder of a one-year-old child. This Court noted that various criminal cases were pending against the accused but stated that it cannot be used as an aggravating factor

as the accused wasn't convicted in those cases. While commuting the death penalty, this Court imposed a sentence of rigorous imprisonment for a period of 20 (twenty) years over and above the period undergone without remission, since he would be a menace to the society if given any lenient sentence.

42. In *Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675* this Court was dealing with an appeal preferred by the accused who was sentenced to death after he was found guilty of committing murder of a minor girl and for kidnapping and attempt to rape after destruction of evidence. This Court reduced the sentence from death to life imprisonment for a minimum 25 (twenty five) years as it noted that there exists a possibility of the accused committing similar offence if freed after fourteen years. This Court also opined that the special category sentence developed in *Swamy Shradhanand (supra)* serves a laudable purpose which takes care of genuine concerns of the society and helps the accused get rid of death penalty.

43. *Vijay Kumar v. State of Jammu & Kashmir, (2019) 12 SCC 791* was a case where the accused was found guilty of murder of three minor children of the sister-in-law of the accused. This Court, taking note of the fact that the accused was not a previous convict or a professional killer and the motive for which the offence was committed, namely, the grievance that the sister-in-law's family was not doing enough to solve the matrimonial problem of the accused, imposed a sentence of life imprisonment till natural death of the accused without remission.

44. In *Parsuram v. State of Madhya Pradesh, (2019) 8 SCC 382,* the accused had raped and murdered his own student. The Trial Court sentenced the accused to death which was affirmed by the High Court. This Court took into consideration the mitigating factors i.e., that the accused was twenty two years old when he committed the act and the fact that there exists a possibility of reformation and the aggravating factors i.e., that the accused abused the trust of the family of the victim. After complete consideration and reference to some precedents, this Court imposed a sentence of thirty years without any remission.

45. In *Nand Kishore v. State of Madhya Pradesh, (2019) 16 SCC 278,* the accused was sentenced to death by the Trial Court and the High Court for committing rape and murder of minor girl aged about eight years old. This Court noted the mitigating factors i.e., age of the accused at the time of committing the act [50 years] and possibility of reformation and imposed a sentence of imprisonment for a period of 25 (twenty five) years without remission.

46. *Swapan Kumar Jha v. State of Jharkhand and Another, (2019) 13 SCC 579* was a case relating to abduction of deceased for ransom and thereafter murder by the accused. This Court took into consideration the mitigating factors i.e., young age of the accused, possibility of reformation and the convict not being a menace to society. On the other side of the weighing scale, was the fact that the accused had betrayed the trust of the deceased who was his first cousin and the fact that the act was premeditated.

This Court modified the death sentence to one of imprisonment for a period of 25 (twenty five) years with remissions.

47. *Raju Jagdish Paswan v. State of Maharashtra, (2019) 16 SCC 380* was a case where the accused was convicted for the rape and murder of minor girl aged about nine years and sentenced to death by the trial court which was affirmed by the High Court. This Court noted the mitigating factors i.e., murder was not preplanned, young age of the accused, no evidence to show that the accused is a continuing threat to society and the aggravating factors i.e., the nature of the crime and the interest of society, if petitioner is let out after fourteen years, imposed a sentence of life imprisonment for 30 (thirty years) without remission.

48. In *X v. State of Maharashtra, (2019) 7 SCC 1* the accused was sentenced to death by this Court on his conviction for committing rape and murder of two minor girls who lived near his house. However, in review, the question placed before the Court was whether postconviction mental illness be a mitigating factor. This Court answered it in the affirmative but cautioned that in only extreme cases of mental illness can this factor be taken into consideration. The Court reduced the sentence from death to life imprisonment for the remainder of his life as he still poses as a threat to society.

49. In *Irappa Siddappa Murgannavar v. State of Karnataka, (2022) 2 SCC 801*, this Court affirmed conviction of the accused, inter alia, under S. 302 and 376 but modified the sentence from death to life imprisonment for minimum 30 (thirty years). This Court stated that mitigating factors such as young age of the accused, no criminal antecedents, act not being pre-planned, socioeconomic background of the accused and the fact that conduct of the accused inside jail was 'satisfactory' concluded that sufficient mitigating circumstances exists to commute the death sentence.

50. In *Shiva Kumar v. State of Karnataka, (2023) 9 SCC 817*, this Court opined that the facts of the case shocked the conscience of the Court. The accused was found guilty of rape and murder of a twenty eight year old married woman who was returning from her workplace. Despite noting that the case did not fall under the 'rarest of rare' category, the Court stated that while considering the possibility of reformation of the accused, Courts held that showing undue leniency in such a brutal case will adversely affect the public confidence in the efficacy of the legal system. It concluded that a fixed term of 30 (thirty years) should be imposed.

51. In *Manoj and Others v. State of Madhya Pradesh, (2023) 2 SCC 353*, the three accused were sentenced to death by the lower court and confirmed by the High Court on their conviction under Section 302 for committing murder, during the course of robbery, of three women. This Court, while modifying the sentence from death to life imprisonment for a minimum 25 (twenty five) years, took into consideration the non-exhaustive list of mitigating and aggravating factors discussed in *Bachan Singh (supra)* to establish a method of principled sentencing. This Court also

imposed an obligation on the State to provide material disclosing psychiatric and psychological evaluation of the accused which would help the courts understand the progress of the accused towards reformation.

*52. In **Madan vs State of U.P., 2023 SCC OnLine SC 1473**, this Court was dealing with a case wherein the accused was sentenced to death, along with other coaccused, for murdering six persons of his village. This Court called for the jail conduct report and psychological report of the accused which were satisfactory and depicted nothing out of the ordinary. This Court also took into consideration the old age of the accused and period undergone [18 yrs.] as mitigating factors. This Court concluded that the case did not fall under the rarest of rare category and commuted the death sentence to life imprisonment for minimum 20 (twenty years) including sentence undergone.*

*53. In **Sundar vs State by Inspector of Police- 2023 SCC OnLine SC 310**, this Court, while sitting in review, commuted death sentence awarded to accused therein to life imprisonment of minimum 20 (twenty years). The accused had committed rape and murder of a 7-year-old girl. Factors that influenced this Court to reach such a decision were the fact that no court had looked at the mitigating factors. It called for jail conduct and education report from the jail authorities and found that the conduct was satisfactory and that accused had earned a diploma in food catering while he was incarcerated. Apart from the above, the Court noted the young age of the accused, no prior antecedents to reach a conclusion warranting modification in the sentence awarded.*

*54. In **Ravinder Singh vs State Govt. of NCT of Delhi- (2024) 2 SCC 323**, the accused was convicted under Sections 376, 377 & 506 of the IPC for raping his own 9- year-old daughter by the Sessions court and conviction was confirmed by the High Court. The Sessions Court, while imposing life imprisonment, also stated that the accused would not be given any clemency by the State before 20 years. This Court clarified that, as discussed in *V. Sriharan (supra)*, the power to impose a special category sentence i.e., a sentence more than 14 years but short of death sentence can only be imposed by the High Court or if in appeal, by this Court. Considering the nature of the offence committed by the accused and the fact that if the accused is set free early, he can be a threat to his own daughter, this Court imposed a minimum 20 (twenty years) life imprisonment without remissions.*

*55. A survey of the 27 cases discussed above indicates that while in five cases, the maximum of imprisonment till the rest of the life is given; in nine cases, the period of imprisonment without remission was 30 years; in six cases, the period was 20 years (**In Ramraj (supra)**, this Court had imposed a sentence of 20 years including remission); in four cases, it was 25 years; in another set of two cases, it was 35 years and in one case, it was 21 years.*

*56. What is clear is that courts, while applying **Swamy Shraddananda (supra)**, have predominantly in cases arising out*

of a wide array of facts, keeping the relevant circumstances applicable to the respective cases fixed the range between 20 years and 35 years and in few cases have imposed imprisonment for the rest of the life. So much for statistics. Let us examine how the judgments guide us in terms of discerning any principle.

*57. A journey through the cases set out hereinabove shows that the fundamental underpinning is the principle of proportionality. The aggravating and mitigating circumstances which the Court considers while deciding commutation of penalty from death to life imprisonment, have a large bearing in deciding the number of years of compulsory imprisonment without remission, too. As a judicially trained mind pores and ponders over the aggravating and mitigating circumstances and in cases where they decide to commute the death penalty they would by then have a reasonable idea as to what would be the appropriate period of sentence to be imposed under the **Swamy Shraddananda (supra)** principle too. Matters are not cut and dried and nicely weighed here to formulate a uniform principle. That is where the experience of the judicially trained mind comes in as pointed out in **V. Sriharan (supra)**. Illustratively in the process of arriving at the number of years as the most appropriate for the case at hand, which the convict will have to undergo before which the remission powers could be invoked, some of the relevant factors that the courts bear in mind are:- (a) the number of deceased who are victims of that crime and their age and gender; (b) the nature of injuries including sexual assault if any; (c) the motive for which the offence was committed; (d) whether the offence was committed when the convict was on bail in another case; (e) the premeditated nature of the offence; (f) the relationship between the offender and the victim; (g) the abuse of trust if any; (h) the criminal antecedents; and whether the convict, if released, would be a menace to the society. Some of the positive factors have been, (1) age of the convict; (2) the probability of reformation of convict; (3) the convict not being a professional killer; (4) the socioeconomic condition of the accused; (5) the composition of the family of the accused and (6) conduct expressing remorse. These were some of the relevant factors that were kept in mind in the cases noticed above while weighing the pros and cons of the matter. The Court would be additionally justified in considering the conduct of the convict in jail; and the period already undergone to arrive at the number of years which the Court feels the convict should, serve as part of the sentence of life imprisonment and before which he cannot apply for remission. These are not meant to be exhaustive but illustrative and each case would depend on the facts and circumstances therein.*

58. How do these factors apply to the case at hand? The act committed by the accused was preplanned/premeditated; the accused brutally murdered 4 (four) persons who were unarmed and were defenseless, one of whom was a child and the other an aged lady. It is also to be noted that by the act of the accused, three generations of single family have lost their lives for no fault of theirs; Nature of injuries inflicted on Latha, Ramachandran and Chitra highlights the brutality and coldbloodedness of the act.

59. *On the mitigating side, the accused was quite young when he committed the act i.e., 28 years old; The act committed by the accused was not for any gain or profit; accused did not try to flee and in fact tried to commit suicide as he was overcome with emotions after the dastardly act he committed; accused has been in jail for a period of 18 years and 4 months and the case is based on circumstantial evidence. We called for a conduct report of the appellant from the Jail Authorities. The report dated 05.03.2024 of the Superintendent, Central Prison and Correctional Home, Viyyur, Thrissur has been made available to us. The report indicates that ever since his admission to jail, he had been entrusted with prison labour work such as duty of barber, day watchman and night watchman. Presently, he has been assigned the job as convict supervisor for the last one and a half years. The report clearly indicates that no disciplinary actions were initiated against him in the prison and that the conduct and behavior of the appellant in prison has been satisfactory so far.*

Conclusion:

60. *For the reasons stated above, we uphold the judgment of the High Court insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following **Swamy 60**. For the reasons stated above, we uphold the judgment of the High Court insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following **Swamy Shraddananda (supra)** principle while imposing sentence for the offence under Section 302 IPC. However, in view of the discussion made above, we are inclined to modify the sentence under Section 302 imposed by the High Court from a period of 30 years imprisonment without remission to that of a period of 25 years imprisonment without remission, including the period already undergone. In our view, this would serve the ends of justice.*

For the reasons stated above, the Appeal is partly allowed in the above terms.”

83. A reference can also be drawn from some recent judgments of the Supreme Court.

84. The Supreme Court in the case ***State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564***, has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death

penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

85. The Supreme Court in *State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.(Criminal)785*, has held that taking consideration of facts and circumstances of the case, the capital punishment is to be converted into life imprisonment.

86. The Supreme Court in *Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192*, has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

*“**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.”

***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 the 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.”

87. In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

88. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.(Criminal) 302***, it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special reason as per requirement of Section 354(3) Cr.P.C. It is also held in the judgment that when the DNA report is not done, an adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendnecy of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted .

89. The Supreme Court in *Manoharan Vs. State by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746*, has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

90. In *Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254*, the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

91. In *The State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. (Criminal)735*, the Supreme Court has again held that if there is any circumstance favouring the accused such as lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menace to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

92. In *Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571* , the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not

conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

93. In the light of **Swamy Shraddananda's Case (Supra)** and **Nisar Ramzan Sayyed Case (Supra)**, **Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar, Manoharan Case (Supra)**, **Veerendra Case (Supra)**, **Anand Kindo & Another Case (Supra)**, **Ravindar Singh Case (Supra)**, **Digambar's Case (Supra)** and **Bhaggi @ Bhagirah @ Naran's Case (Supra)** and the provisions of Section 302 of IPC as well as Section 5G/6 of POCSO Act, we find that the sentence of capital punishment be commuted to life imprisonment as the trial Court while awarding death sentence has not recorded any mitigating circumstances in the instant case. The Trial Court has not recorded any specific finding that it is an exceptional case to award death sentence. However, we find the following mitigating circumstances from the record.

- (i) The accused appellants have no criminal history and have their families in support.
- (ii) The accused-appellants are aged about 24 years as per statement under Section 313 Cr.P.C. and one is facing health problems., therefore, the possibility of reformation and rehabilitation of the appellants in the society cannot be ruled out as the Trial Court has not recorded any finding that awarding severest punishment is the only possibility in the present case.
- (iii) The Trial Court has also not recorded any finding that accused can be a menace to the society before awarding capital punishment.
- (iv) The Trial Court has not recorded any aggravating circumstances against the appellants which can over weigh the mitigating circumstances especially, when the appellants have no criminal history.

(v) In view of **Navas alias Mulanvas Case (Supra)**, there should be exceptional circumstances warranting imposition of excess death penalty which cannot be reversed.

(vi) Lastly, the trial court has also not recorded any finding as to how the present case is rarest of the rare case even though the accused has committed the gravest offence.

94. In the light of the judgment of Supreme Court (supra), there is no aggravating circumstances as the Trial Court has not recorded any satisfaction that in case the life imprisonment awarded to the accused persons, there will be a security threat to the society as the accused persons have no criminal history.

95. Therefore, we are of the opinion that the capital punishment awarded to the appellants should be commuted to life imprisonment for a fixed term of 25 years without any remission. The order of sentence qua the fine is upheld with the aforesaid modification.

96. With the aforesaid modification, the appeals qua conviction are dismissed. However, the appeals qua sentence are partly allowed and the sentence is modified accordingly.

97. The accused appellant are in jail. They will undergo the remaining sentence in accordance with law.

98. Record and proceedings be sent back to the Trial Court forthwith.

Order Date :- 4.10.2024
S.K.S/Mohini/DKS/Mukesh.