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

Reserved on: 16th December, 2017
Pronounced on: 24th May, 2018

\+ **CRL.A. 773/2015**

SANJAY KUMAR VALMIKI ..... Appellant

Through: Mr. Sumeet Verma and Mr. Aman Chaudhary, Advocates

versus

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State

CORAM:
HON'BLE MR. JUSTICE S.P.GARG
HON'BLE MR. JUSTICE C.HARI SHANKAR

% JUDGMENT

C. HARI SHANKAR, J.

1. There are no frills in this story. It is an account of human depravity carried to such an unmentionable extreme, that there remains no room for embellishment or embroidery. It has to be told, and told with brutal directness.

2. PW-21 Sunita, who worked as a maid in the houses of the residents of KU-Block, Pitampura, proceeded to work at 3 p.m. on 11th July, 2011, leaving her 8 year old daughter 'U'- whom the tragic travails of time and the cold constraints of the law compel us to consign to anonymity – playing with her siblings in the park. After a

while, 'U' felt thirsty. A water cooler, located on the ground floor of the nearby office building of the North Delhi Power Ltd. (NDPL), used to serve as the oasis for the thirsty children of the locality; ergo, she proceeded towards it, to quench her thirst.

3. She was never seen, alive, thereafter.

4. PW-21 Sunita returned at 4 PM, but found 'U' missing from the park. On asking her younger daughter, she was informed that 'U' had, some time back, proceeded towards the NDPL office, to quench her thirst, and had not returned. Sunita informed her husband Shyam Paswan; both husband and wife searched, for hours, for their missing daughter, but fruitlessly. Resultantly, a complaint was lodged by Shyam Paswan, the next day, i.e. on 12th July, 2011, at the Maurya Enclave Police Station, which was registered under Section 363 of the Indian Penal Code, 1860 ("the IPC").

5. Efforts at trying to locate the whereabouts of 'U' continued, both on the part of her parents as well as the Police authorities, but without success; until, towards the evening of 13th July, 2011, persons working in the NDPL Office noticed a foul smell pervading the premises. Attempts to trace the source of the smell resulted in the tragic discovery, at around 6 PM, of the decomposed and putrefying corpse of 'U', sandwiched between the iron grate and the wall in the electric switch gear room on the ground floor. She was naked, except for a baby underwear which, too, was pulled down to the knees. A glance at the dead body revealed that her genitals were bloated, and that she had first been brutally raped and, thereafter, clobbered, on the

head, with a solid metal instrument, resulting in her skull being shattered into small pieces.

6. The post-mortem of 'U' which followed, revealed multiple injuries, fractures and wounds, including missing skin and bone on the forehead, lacerations on the face, neck and chest, contusions on the arm and multiple hymeneal tears. The cause of death of 'U' was opined as being craniocerebral damage, caused by "blunt force trauma". It was opined that the three injuries, on the head and forehead of 'U' were, individually as well as collectively, sufficient to cause death, in the ordinary course of nature. The missing bone on the forehead was attributed to the skull being shattered into multiple pieces, by the blunt force applied to it.

7. Investigations seemed to be heading nowhere when on 14th July, 2011, an 11-year old boy, Saroj, presented himself at the Police Station, claiming to have seen the appellant, on 11th July, 2011, in the company of 'U' and, a short while thereafter, on hearing her screaming, having again seen the appellant with her. Acting on the said lead, the Police apprehended, and arrested, the appellant. In his disclosure statement, the appellant disclosed having concealed the rod, with which he had smashed the head of 'U', as well as the clothes which he had been wearing at the time, below the staircase in the NDPL Office, from where he proceeded to retrieve the said items.

8. Forensic and DNA examination, of the various samples related to the appellant and 'U', indicated the presence of blood on the baby

frock, baby underwear and hair, belonging to 'U', as well as the rod retrieved by the appellant from below the stairs in the NDPL office and suspected to be the weapon of offence, though no conclusive determination could be reached, regarding the origin thereof. Far more positive, and determinative, evidence, however, emerged in the form of DNA matching between the blood of the appellant and the semen found on the underwear of 'U'.

9. In the circumstances, the appellant was charged with having committed offences under Sections 302/363/201/376(2)(f) of the IPC, to which the appellant pleaded not guilty and was, accordingly, tried, resulting in his conviction, under all the said provisions, by the learned Additional Sessions Judge (hereinafter referred to as "the learned ASJ") *vide* judgement dated 11th May, 2012, followed by order, dated 31st May, 2012, whereby and whereunder he was sentenced to death under Section 302 of the IPC. Death Reference No 3 of 2012 was filed, by the State, before this Court, for confirmation of the said conviction and sentence. *Vide* order dated 31st May, 2012 passed in the said Death Reference, this Court, opining that the trial had not proceeded in a fair manner and in compliance with the principles of natural justice, quashed and set aside the order dated 11th May, 2012, as well as the consequent judgement, dated 31st May, 2012, of the learned ASJ, and directed the learned ASJ to proceed, in the matter, *de novo* from the stage of examination of the prosecution witnesses ("PWs").

10. It is this *de novo* retrial that culminated in the passing, by the learned ASJ, of the impugned judgement dated 7th April, 2015, followed by the impugned order on sentence, dated 10th April, 2015, convicting the appellant of having committed offences under Sections 302, 363, 201 and 376(2)(f) of the IPC, and awarding, to him, the following sentences, under the said provisions:

(i) rigorous imprisonment for life, without remission till the appellant completes actual sentence of 25 years, along with fine of ₹ 25,000/–, with default simple imprisonment of one year, under Section 302, IPC,

(ii) rigorous imprisonment for life, along with fine of ₹ 25,000/–, with default simple imprisonment of one year, under Section 376(2)(f) of the IPC,

(iii) rigorous imprisonment for 7 years, along with 5 ₹ 15,000/–, with default simple imprisonment of 6 months, under Section 363 of the IPC and

(iv) rigorous imprisonment of 2 years, along with fine of ₹ 10,000/–, with default simple imprisonment of one month, under Section 201 of the IPC.

The sentences have been directed to run concurrently.

11. The appellant is in appeal, thereagainst, before us. We may state, even at this juncture, that, though the recital, hereinabove, regarding the involvement of the appellant in the alleged offence of rape and murder of 'U', was intended to represent the case set up by the prosecution, we are convinced that the evidence, seen holistically, brings the said offences home, to the appellant, beyond every shred of

doubt. We, therefore, concur with the decision of the learned ASJ to convict the appellant under Sections 302, 376(2)(f), 201and 363 of the IPC. We proceed to set out, in detail, our analysis of the evidence, and the conclusions which would, in law, be deducible therefrom.

The Evidence

12. First, as always, to marshal and reconnoitre the evidence.

Prosecution Evidence

12.1 PW-15 Shyam Paswan, the father of the deceased 'U' deposed, during trial, that he had come to Delhi, with his family, seeking work, around 25th to 26th June, 2011, and that he had secured employment as a labourer, while his wife Sunita (PW-21) obtained employment as a maid in the homes at KU Block, Pitampura. He further deposed that, on 11th July, 2011, his wife Sunita proceeded to KU Block where she left her children in the park, before proceeding to attend to work, and that, when she returned at 4 p.m, she found their eldest daughter, 'U', missing from the park. She queried, from her other daughter, about the whereabouts of 'U', and was informed that she had gone to drink water in the NDPL office. Extensive efforts were made, by Sunita as well as by Shyam Paswan, to locate 'U', but to no avail. Ultimately, on 12th July, 2011, he registered a complaint (Ex. PW-15/A) in the Maurya Enclave Police Station, where his statement was also recorded. The said statement/complaint of PW-15, as given to ASI Raju Yadav (PW-30) in the Police Station, read thus:

> "I reside at the aforesaid address in a rented *jhuggi*. I had come to Delhi from Bihar 15/16 days ago along with my wife and children to earn my livelihood. I have been living doing embroidery work in BU Block, Pitampura, Delhi for ¾ days and my wife Sunita has been doing house chores in a building (*kothi*) in KU Block, Pitampura, Delhi for the last 10 days. My wife Sunita had gone to KU Block, Pitampura, Delhi yesterday i.e. on 11.07.2011 at about 03:00 o'clock along with the three children to work in the *kothi*. She left for work after making the children sit in the park at KU Block behind the NDPL office. When my wife Sunita came at around 04:00 o'clock and saw in the park, she could not find my eldest daughter ('U'), aged 8 years in the park. Her figure (appearance) is like this: Height – approximately 3 feet, Complexion – wheatish, Face – long, Body – slim, Hair – Hippy cut, wearing green sando banian, black coloured nicker and barefoot. And she has an old cut mark on her left cheek. While playing she went somewhere suddenly. I and my wife have searched her too much on our own level. But my daughter has not been traced. I do not suspect anyone. Nor do I have any photograph of my daughter with me. My daughter may please be traced. Now I have come to the police station after searching. You recorded my statement. I heard and understood and the same is correct."

12.2 PW-21 Sunita, testifying during trial as PW-21, deposed to the same effect.

12.3 The *rukka* (Ex.PW-6/B), as prepared by ASI Raju Yadav (PW-30), on the basis of the complaint of Shyam Paswan, was forwarded to HC Usha (PW-6), at 8.15 a.m. on 12th July, 2011. On the basis thereof, HC Usha recorded FIR No 226/11 (Ex. PW-6/A), under Section 363 of the IPC, a copy of which was handed over to Const. Rajbir, along with the original *rukka,* for onward delivery to ASI Raju Yadav. Below the said statement of PW-15 Shyam Paswan, as recorded in the *rukka*, the following note was entered by ASI Raju Yadav (PW-30), signed by him on 12th July, 2011:

> "It is officially submitted that I, the ASI had been busy with official work at the police station when Sh. Shyam Paswan resident of the aforesaid address came to the police station and got his aforesaid statement regarding his missing daughter recorded by me, the ASI. The contents of the aforesaid statement revealed the commission of an offence punishable u/s 363, IPC. Therefore, this writing is submitted for the registration of the case (FIR). I may be intimated with the number after registering the case. I, the ASI along with the complainant, head for the spot."

These facts were confirmed by Const. Rajbir (PW-4).

12.4 The investigations, by the Police that followed, remained abortive till, on the next day, i.e. 13th July, 2011, at about 9.45 a.m., Bhag Chand (PW-22), an employee is the NDPL Office, noted a foul smell in the premises. He, thereupon, asked the appellant (who worked as a sweeper in the office) to find out the source thereof, but the appellant merely reported that he had not found anything except some dead mice, which he had thrown away. Bhag Chand further deposed, during trial, that, as the smell continued to increase, he requested Arpan (PW-24) (the appellant's supervisor) to check. He also tried to get in touch with the appellant telephonically, but found that he had left the office, despite his having specifically directed him to stay. It was Arpan who, at about 5 or 5:15 PM, informed him that the dead body of an 8 to 10 year old girl had been found in the switch gear room, whereupon the PCR was alerted. He further deposed that, on their arrival, the IO ASI Raju Yadav (PW-30) enquired, from him, regarding the appellant, to which he responded that the appellant was not an employee of NDPL, but was outsourced from M/s. Sumeet Facilities Pvt. Ltd, under the supervision of Arpan, and that he was on

duty from 11th to 13th July, 2011. He further informed the IO that the appellant's uniform was a white striped shirt and dark green trousers. It was further deposed, by PW-22 Bhag Chand, that the switch gear room was rarely visited, and remained open, or shut only with a latch, but that any sound coming from the switch gear room, would not be audible in the room where he sat unless it was a blast or a breakdown. He further testified that he did not inspect the switch gear room at any time between 11th and 13th June, 2011, and that, in fact, the switch gear room was normally empty, and was visited only if there was a fault. He further confirmed that there was no security guard or gatekeeper at the main entrance of the NDPL office.

12.5 The evidence of Bhag Chand (PW-22) was supported by the testimony of Arpan, deposing as PW-24 who, while confirming the presence of the appellant in the office from 11th to 13th July, 2011, further deposed that, on 12th July, 2011, he found that the appellant was not wearing the regulation dark green trousers, which fact the appellant sought to explain by stating that he had washed the trousers, which had not dried. He further confirmed the fact of discovery of the dead body of 'U' lying between the panel and the wall in the switch gear room. He also confirmed that, by then, the appellant had already left the office, and that he immediately informed Shiv Kumar (PW-20), who intimated the Police. He further deposed that, on the next day, i.e. 14th July, 2011, the appellant remained absent from work but that, at 9:45 a.m. on the said day, he saw the appellant at Haiderpur village. He further confirmed the fact that, on 11th July, 2011, the appellant had attended office, as was also borne out from the

attendance register (Ex. PW-24/A). We have seen Ex Pw-24/A and find that the appellant had, indeed, marked his attendance on the said date.

12.6 PW-20 Shiv Kumar, an employee at the NDPL Office, deposed that, consequent to receiving the aforementioned telephonic information from Bhag Chand (PW-22) at about 5.30 p.m, on 13th July, 2011, he proceeded to the switch gear room in the NDPL Office, where he found the decomposed dead body of an eight to ten year old girl, lying sandwiched between the grate and the wall. He immediately informed the Police, who arrived and made enquiries, from him, regarding the appellant, which he answered. He further deposed that the IO showed him a rod which, he informed the IO, was one of the switch gear operating handles kept in the breakdown staffroom. On further enquiry by the IO, PW-20 confirmed that, as it was peak summer, a number of complaints and faults used to be reported, to attend to which the staff of the NDPL tended to remain outside the office. It was further disclosed, by PW-20, during trial, that (i) the appellant remained absent from work on 14th July, 2011, (ii) as children often used to come to drink water from the water cooler on the ground floor of the NDPL complex, it was possible that the presence of 'U' in the premises went unnoticed, (iii) the switch gear room was normally kept closed and rarely inspected, but could be opened by anyone, as it was only latched, (iv) it was possible for anyone to enter the building, as there was no watchman or security guard at the main entrance, (v) his room was on the first floor of the building at the end opposite the switch gear room, and, as the air

conditioning in his room was usually working, it would not be possible for him to hear any noises, or voices, coming from the switch gear room, (vi) the NDPL office used to remain open, and every employee was in possession of the key to his/her own room, (vii) a person who would come to drink water from the cooler on the ground floor, would not be visible to a person sitting in the complaint cell or in the billing room and (viii) a person entering the NDPL premises, from the main gate, would, similarly, not be visible to a person in the complaint cell or the billing room.

12.7 HC Hoshiyar Singh (PW-11), of PS Maurya Enclave in his deposition, confirmed the receipt of information, from Const. Archana (PW-10) at 6.15 p.m. on 13th July, 2011, regarding the discovery of the dead body of a ten year old girl, at the NDPL office, and that he reduced the said information into writing *vide* DD No. 31-A (Ex PW-11/A), which he forwarded to ASI Raju Yadav (PW-30). PW-7 SI Devender, in-charge of the Crime Team, also testified to the discovery of the dead body of 'U', and further deposed that bloodstains were visible on the wall. He prepared his Crime Team Report (Ex. PW-7/A), and handed over the same to ASI Raju Yadav (PW-30). He confirmed that no chance prints were found at the site. He also confirmed that, though public persons had gathered outside, no one was allowed in the switch gear room, and that, after sometime, Shyam Paswan (PW-15) arrived at the site and identified the dead body as belonging to his daughter 'U'.

12.8 PW-7 SI Devender further confirmed the sealing, and seizure, by the IO ASI Raju Yadav, of hair, which had fallen from the dead body, as well as samples of bloodstains on the wall, and a piece of the stained portion of the wall, with the seal 'RY'. HC Radha Kishan, the MHC(M) confirmed, deposing as PW-12, the depositing, by ASI Raju Yadav, under instructions of the IO Insp. Satyender Gosain (PW-31), of the said exhibits in the *malkhana*, *vide* Entry No. 521/11 in Register No. 19 (Ex. PW-12/A). Ex. PW-12/A records the taking into possession, by ASI Raju Yadav (PW-30), of (i) the hair of 'U', (ii) a piece of brick from the bloodstained wall, in a plastic container, and (iii) another piece of brick, from the wall, as "earth control", which were sealed, with the seal 'RY', and seized.

12.9 The Crime Team Report (PW-7/A) noted the fact that the body of 'U' was lying face down, with her underwear lowered to the knees and her genitalia exposed and bloated. It also notes the fact that there were holes on her skull, and that her body had suffered decomposition, resulting, *inter alia*, in loosening of her hair, her skin peeling off, and her face getting swollen.

12.10 Mahesh Paswan (PW-13), the paternal uncle of 'U' confirmed, in his evidence during trial, accompanying Shyam Paswan to the Hospital mortuary at 2-3 p.m. on 14th July, 2011, where they identified the dead body of 'U', and that, after conducting of post-mortem (Ex. PW-23/A), the dead body was handed over to them. This deposition was supported by PW-15 Shyam Paswan, who also confirmed the sealing and seizure, by the IO, of strands of hair that had fallen from

the head of 'U', *vide* Seizure Memo Ex. PW-15/B, and of a piece of the bloodstained wall *vide* Seizure Memo Ex. PW-15/C, whereafter the dead body of 'U' was taken to the Hospital.

12.11 These facts also stand vouchsafed by the evidence of PW-28 Const. Ram Chander, as testified during trial.

12.12 The key prosecution witness, in ascertaining what had transpired with 'U' after she proceeded towards the NDPL Office to drink water, turned out to be Saroj (PW-25), the 11-year old nephew of Dalip Paswan (PW-14), a tea-vendor outside the NDPL Office. Dalip Paswan, who used to sell tea on a cart (*rehdi*) outside the NDPL Office at KU Block, deposed, during trial, that he was helped, in his activity, by his son Deepak Paswan and his nephew Saroj Paswan (PW-25), who was only 11 years of age. He further deposed that, at about 5-6 p.m. on 13th July, 2011, while he was present at his *rehdi*, he was informed that the dead body of an 8 to 9 year old girl had been found in the NDPL office, resulting in public outcry. He further confirmed that, though Saroj was with him at the time, he did not disclose being in possession of any knowledge regarding the incident, but that, on the next day, i.e. on 14th July, 2011, Saroj informed him that (i) the girl, whose dead body had been found in the NDPL office, had been seen by him, talking to the appellant on 11th July, 2011, at the gate of the NDPL office, (ii) sometime later, at 3 or 4 PM, while he was sitting in the temple, he heard screams of a child from inside the powerhouse whereupon, on looking through the grill, he saw the appellant in the switch gear room in the NDPL office, and (iii) on his

querying, from the appellant, regarding the source of the screams, the appellant, claiming to be in the company of his brother, scolded him and asked him to leave the place which instruction he, out of fear, obeyed. PW-14 further deposed that, on the said disclosure being made to him by Saroj, he immediately brought Saroj, with him, to the Police Station and produced him before ASI Raju Yadav (PW-30), who recorded his statement as well as the statement of Saroj. He correctly identified the appellant, in court, on 2nd June, 2014.

12.13 It would be necessary to reproduce, *in extenso*, the evidence of Saroj (PW-23), both of 26th March, 2012 as well as *de novo* on 3rd June, 2014, thus:

> On 26th March, 2012:
>
> "*On Oath (on enquiry it is evident that the child understand the sanctity of Oath.)*
>
> I am resident of the aforementioned *Jhuggi* and I am a student of class 3 at Prathmik Vidhayala EU Block, Pitampura, Delhi. My *chacha* Daleep Paswan is running a tea shop, at outside the NDPL office where I often go to help him. On 11.07.2011 I was at the tea stall of my *chacha*, helping my cousin brother (i.e. son of my *chacha*) namely Deepak. On that day, on the asking of my brother Deepak I had gone to mother dairy KU Block for purchasing Milk. *When I was going to purchase milk, I saw Sanjay (correctly identified by the child in the court) who is the sweeper in the NDPL office was standing at the NDPL office along with a small girl aged about 8-10 years.* Thereafter I went to the mother dairy and after I came back after purchasing Milk which I give to my cousin brother Deepak I went to the temple inside the NDPL complex to sit under the fan in the temple as it was very hot *when I heard screams (bache ke cheekne aur rone ke awaze) coming from NDPL Office. I went towards the office and started peeping inside the wire mesh (jail) and I saw Sanjay inside the room and I asked him "aap ke saath mein kaun hai, usne kaha mere*

sath mera bhai hai" and told me "bhag ja yaha se". Thereafter I went to the tea stall where my brother was sitting.

On 13.07.2011 I came to know that a dead body of a small girl was found in the NDPL office and *I saw the dead body of the child and found it was the same girl who was standing with Sanjay when I was going to fetch milk.* I saw the police making inquiries from my *chacha* and my cousin brother and therefore on 14.07.2011 I told my *chacha* Daleep Paswan about seeing the small girl whose body was found with Sanjay and also told him that I had heard screams coming from inside the office on which my *chacha* took me to the police station where I informed the police about what I had seen in my statement was recorded.

xxxxx by counsel Sh. Rajnish Antil, *amicus curiae* for the accused.

I go to school daily. I came to my uncle's shop as it was my holidays/summer vacations. I had never seen this girl in the area previously. It is wrong to suggest that the father of the deceased had come to the house of my *chacha* and is known to him. I have come from my house today. My *chacha* had come with me. *Nobody told me what I am suppose to tell the court, I am saying what I had seen.* The police was present at the spot when I saw the dead body in the NDPL office. I did not tell the police officers present there that I had seen the deceased talking to the Sanjay. I did not know I had to tell them (*"pata nahi tha").* My *chacha* was also present at the time the body was recovered. I did not tell anybody prior to 14.07.2011 that I had heard the cries of the child from inside the room. It was nothing unusual. *It is wrong to suggest that I am planted witness of the police. Whatever I am saying is true and correct and I have come to the court of my own. It is wrong to suggest that I am deposing falsely at the instance of the IO and my uncle."*

On 3rd June, 2014:

" (The witness is recalled for his re-examination pursuant to the directions passed by Hon'ble Delhi High Court on 21.02.2014 in death sentence reference no 3/2012 and Crl. Appeal No. 1146/2012.)

(In-camera proceedings)

Q. What is your name?

Ans. My name is Saroj.

Q. How many brothers and sisters you have?

Ans. I have one sister and three brothers besides me.

Q. Do you know where you have come today?

Ans. It is Court.

Q. *Should a person speak truth or lie*?

Ans. Truth.

Q. *If the person takes an oath to speak truth, should that person speak lie?*

Ans. *No, that person should speak truth only.*

Q. Are you studying?

Ans. Yes. I am in sixth class in Sarvodaya Vidhayalaya, FU-Block, Pitam Pura, Delhi.

(*From the questions asked to the witness and the answers given by the witness, this court is satisfied that the witness is competent to be examined and also that he understands the sanctity of the oath).*

On S.A.

Dalip Paswan is my uncle (*Chacha*). He sells tea on a *rehdi* outside *Bijli Dafter* in KU-Block, Pitam Pura. He is selling tea at that place for about 6-7 years from now. I used to sometimes go to the said rehdi on holidays on my school. In July 2011 also, my *Chacha* used to sell tea from his rehdi outside that Bijli Daftar/NDPL Office.

On 11.07.2011 I had gone to the *rehdi* of my *Chacha* Dalip Paswan outside NDPL office, KU-Block, at about 2 or

2.30 PM. At that time my *Chacha* was not present at the rehdi but his son Deepak was present. Since milk was required, Deepak gave me money and asked me to bring milk. I brought milk from Mother Dairy, located behind KU-Block. When I brought milk from Mother Dairy to the *rehdi*, I saw Sanjay talking to the girl. I can identify Sanjay in the Court today. The accused Sanjay is present today in the Court (Correctly identified). When I saw accused talking to the girl, he and girl were standing on the gate of NDPL office. Accused Sanjay was working as Sweeper in the said NDPL office, at that time. The said girl at that time was appearing to be 7-8 years but I do not know her name. I gave the milk to Deepak and because of summers, I was feeling hot and I went to Mandir located inside the NDPL office compound for taking air under the fan. I went and sat under the fan in the Mandir. When I was sitting there, I heard screams of girl child. When I looked through the grill, I saw accused Sanjay. I questioned accused Sanjay as to who was with him, upon which Sanjay said that his brother was with him and then Sanjay scolded me (*daant-dapt kar bhaga diya*). I left the Mandir and went to the rehdi. I stayed at the *rehdi* for some time and then left for my house.

After one day of 11.07.2011, we came to know in the *jhuggies* that there was some *Hungama* at the said Bijli Dafter, KU-block. People from *jhuggies* went to the Bijli Daftar and I also went there. I came to know that a murder has been committed. I came to know that a girl has been murdered. I had seen the said girl earlier also in the park where she used to play on the slides. She was the same girl who was seen by me with accused Sanjay when they were talking on the gate of NDPL office.

On 13.07.2011 I had seen the dead body in the Bijli Daftar, KU-Block. Vol. "*Itna Sahi Se Nahi Dikh Rahi Thi*". I identified the dead body of the girl from the clothes she was wearing, that she was the same girl who was seen by me in the park earlier and she was seen with accused Sanjay on the gate of NDPL Office. After seeing the body of the girl on 13.07.2011, I went to my house as I was frightened. On the next day, I told about it to my Chacha Dalip Paswan. My Chacha took me to Police Station Maurya Enclave. In the Police Station, I told the policemen as to what I had observed. Policeman recorded my statement.

I have seen accused Sanjay even prior to 11.07.2011 as he used to come to drink tea on our rehdi and I had seen him on few occasions when I went to the rehdi of my Chacha.

xxxxx by Sh. Bhupesh Narula, Amicus Curiae for accused.

Today I have come to the court with my *Chacha* Dalip Paswan. My *Chacha* has not tutored me today as to what I have to depose in the Court. Before I had reached NDPL office on 13.07.2011, the incident of 'Tod-Fod' had already occurred. I had reached NDPL office on 13.07.2011 at about 6 or 7 PM. My *Chacha* Dalip Paswan was not present at the rehdi when I came back after purchasing milk on 11.07.2011. My *Chacha* came to rehdi on that day in the evening. I stayed at the rehdi upon return from Mandir on 11.07.2011 for 5-4 minutes and then I left for my house. Perhaps the time was 3-4 PM when I left for my house on 11.07.2011. At that time, I used to leave my house for school at 7.30 AM. Vol. My school used to start at 8 AM. My school used to be over by 1 PM. I do not remember today whether I went to school on 11.07.2011. Perhaps I went to school on that day. After 11.07.2011 for next week I did not take leave from my school and went to the school. I went to school on 12.07.2011, 13.07.2011, 14.07.2011, 15.07.2011, 16.07.2011 and 17.07.2011.

Today I do not remember as to what the girl was wearing when she was talking to Sanjay on 11.07.2011. On 13.07.2011 when I saw the girl's body, she was wearing a black colour nicker.

Court question: When you saw the girl's body on 13.07.2011, did you see that the black colour cloth was a nicker or it was an underwear? (The witness is explained the difference between an underwear and a nicker).

Ans. '*Shayad kale Rang Ki Underwear Thi*'

The distance between Mother Dairy and rehdi of our Chacha was that it used to consume 30-40 minutes in going to the Mother Dairy and returning to the rehdi on foot. I did not hear what Sanjay and the girl were talking and I only saw

them talking to each other. I saw accused Sanjay and the girl talking to each other from a distance of 12-15 feet. (The witness has not given the distance in feet by himself but he has pointed out that the distance was same as where he is sitting today on the dias along side the Presiding Officer and the place where Ld. Prosecutor and Ld. Amicus Curiae are sitting, which on visual estimation, appears to be 12-15 feet).

I do not know for how long Sanjay and the girl spoke to each other on the gate of NDPL office. I saw them when I was going to deliver milk on the rehdi. I stayed at the rehdi for about 1 or 2 minutes when I delivered milk and then I went to the Mandir. When I was going for Mandir Inside the NDPL office, accused and the girl were not there on the gate on NDPL office. There were two gates for entering the Mandir, one from NDPL office and another from backside. I went to the Mandir on 11.07.2011 from the way which was from NDPL office and not from backside. I did not enter the building of the NDPL office to go to the Mandir but I went to the Mandir from the way/passage adjoining that building but which passage was inside the NDPL compound.

At this stage, witness is shown photograph Ex. PW2/A-7 and A-19. The witness identifies that the passage reflected in photograph Ex. PW2/A-19 is the passage which leads to the Mandir and he used that passage to go to the Mandir. The gate reflected in Ex. PW2/A-7 is the same gate which leads to the passage as reflected in Ex. PW2/A-19 but the passage is not visible in photograph Ex. PW2/A-7 because one gate is closed.

It is wrong to suggest that on 11.07.2011 the passage reflected in Ex. PW2/A-19 was closed or that I did not use that passage to go to the Mandir. The size of Mandir was about 20'x10' (The witness has pointed out the area by pointing out the distances from walls of this court, which on visual estimation appears to be 20'x10').

In the statement u/s 161 Cr. P.C. given to the police, I had said that I had heard screams of a child and did not tell that I heard screams of girl child. I had seen the NDPL office from inside.

There is no room of NDPL office adjoining the mandir. Grill was there and the room near the mandir was at little distance from mandir which was office. One or two transformers were visible to me when I saw through the grill after hearing screams.

At this stage, site plan Ex. PW1/A is shown to the witness and is explained to the witness. At point Mark X to X, there was grill behind which at point Y machines/transformers/articles were kept.

I sat in the mandir for one or two minutes only when I heard the screams of child. Then I saw Sanjay and I asked him and he scolded me. When I saw Sanjay, he was around 7 feet away from the grill. The entire portion between X to X on Ex. PW1/A was grilled and the grill was there from roof till ground. Only half of the portion of the area behind the grill was visible and not entire portion. Half portion was covered due to articles and one could not see to that portion of the grill. When I saw Sanjay, at that time I was able to see him completely from top to bottom and no portion of his body was behind anything. At the time when I saw Sanjay on 11.07.2011, he was wearing the uniform which he used to wear. The colour of clothes was 'neela'.

I did not pay attention as to how may policemen were there on 13.07.2011 at NDPL Office. There were many. At the time when I reached NDPL office, one-two policemen were present at the gate. Many policemen were inside the gate. I went inside the gate of NDPL office along with others who had entered the NDPL office on that day. My mother, father, my *chacha* Dalip Paswan were there when we entered NDPL office on 13.07.2011. There were others also whose name I do not remember.

The dead body was not kept inside the vehicle in my presence. When I reached the NDPL office, the dead body was not kept inside any vehicle before my reaching the NDPL office. At that time, body was there where it was. Policemen were present where the body was lying. The policemen tried to stop me and others. I saw the body from a distance. When I saw the body, it was covered with white cloth.

I left the NDPL office for my house even before my mother and father left the NDPL office. I did not tell about the observations made by me on 11.07.2011 to my parents on 13.07.2011.

Perhaps I told my *chacha* Dalip Paswan about the incident on 14.07.2011, before I went to school. After telling him, I went to the school, I did not tell any student or teacher about it in the school on that day. I went to the police station on 14.07.2011 in the evening.

Before coming to the court today or few days prior to today, no policemen tutored me as to what I have to depose today in the court. I received one summons only from the policemen.

In my presence, police did not enquire from my chacha on 13.07.2011. I did not go to the police station on 15.07.2011 or thereafter. I did not go to the Tea *Rehdi* of my uncle on 12.07.2011 NS 13.07.2011.

It is wrong to suggest that I had not seen accused Sanjay and the girl at the gate on 11.07.2011. It is wrong to suggest I did not hear any screams or that I did not see Sanjay near the mandir in the NDPL office or that Sanjay did not scold me. It is wrong to suggest that I was tutored by the police officials and my uncle to give a false statement against the accused. It is further wrong to suggest that my statement was not recorded on 14.07.2011. It is wrong to suggest that I have deposed falsely. It is wrong to suggest that whatever I have stated is based on my presumption.

Court Question: If you are shown the clothes of accused, can you identify the colour or his clothes?

Ans. Yes

At this stage, clothes i.e. pant Ex. P-4 and shirt Ex. P-5 are shown to the witness. The shirt shown to me is the same shirt which the accused was wearing. But I cannot say today whether the pant shown to me is the same pant which the accused was wearing. I can identify green and blue colour distinctively.

Court observation: The witness has identified the two colours correctly in the court i.e. a green colour chair and a blue colour back rest kept in the court which is a stenographer's seat.

CONCLUDED"

(emphasis supplied)

12.14 The manner in which the appellant was apprehended, arrested, and subjected to medical examination, stood disclosed, during trial, by Const. Somvir (PW-29), ASI Raju Yadav (PW-30) and Insp. Satyender Gosain (PW-31), all of PS Maurya Enclave, of which ASI Raju Yadav and Insp. Satyender Gosain were the IOs at the initial and later stages of the investigation respectively. A conjoint reading of the evidence of these three witnesses discloses that (i) on 14th July, 2011, at about 6:25 PM, the Police team (consisting of the said three witnesses) left the Police Station and proceeded to Gopal Mandir, Pitampura, where, at the instance of a secret informer, they apprehended and arrested the appellant, (ii) the appellant's personal search was conducted, whereafter his disclosure statement (Ex. PW-29/C) was recorded, in which he disclosed that he had concealed the rod, with which he had hit 'U' on her head, and the clothes that he was wearing at the time (after washing them), below the staircase on the ground floor, which he could recover, (iii) they, thereafter, proceeded to the NDPL office, with the appellant, where the appellant first pointed out the place of incident, as recorded *vide* Pointing Out Memo Ex. PW-27/A and, thereafter, led them to the staircase, from below which he retrieved a polythene containing one trouser and one shirt, as well as a steel rod, stated, by him, to have been used to assault 'U' after raping her, (iv) the clothes and rod were seized by the IO, after

packing them in separate *pullandas* with the seal 'SD', and later deposited in the *malkhana*, (v) the appellant was then sent to the Hospital, in the custody of HC Anand Swaroop (PW-5), for being medically examined, and (vi) consequent to the disclosure statement of the appellant, Sections 302 and 376 of the IPC were added in the FIR. All the exhibits were, during the course of trial, correctly identified, by PW-29, PW-30 and PW-31, in court.

Medical Evidence

12.15 Dr. Vijay Dhankar, Head of the Department of Forensic Medicine at the BSA Hospital, who had carried out the post-mortem of 'U', deposed as PW-23. He confirmed having conducted the post-mortem of 'U', at the request of ASI Raju Yadav (PW-30), on 14th July, 2011, and that her nails and lips were cyanosed, and decomposition was present. During trial, he reiterated his post-mortem report (Ex. PW-23/A), the relevant portion of which may be reproduced as under:

"**VI. EXTERNAL GENERAL APPEARANCE**

Clothes:

The child was wearing green frock, black underwear.

Body:

The person was built proportionate to age. Height was 120 cm.

Face was normal.

Eye: Both eyes were closed. Corneae were hazy. Conjunctivae were normal.

Nail beds were cyanosed.

Lips were cyanosed.

Other Natural orifices: Reddish fluid was coming out of nostrils.

VII. POST MORTEM CHANGES

Hypostasis – Not appreciable due to decomposition changes.

Rigor Mortis – passed away.

Decomposition Changes – Foul-smelling emanating from the body, Black and Greenish discolouration present, post-mortem peeling of skin at places, face swollen, abdomen bloated, Maggots crawling on the body. Marbling was present.

VIII. PROBABLE TIME SINCE DEATH

About 3 days.

IX. EXTERNAL EXAMINATION

Injuries:

1. A area of skin of size 2 cm x 2 cm was missing on left side of the forehead with underlying depressed fracture of skull.

2. A area of skin of size 2.5 cm x 2.5 cm was missing on middle of forehead with underlying depressed fracture of skull with pieces of bone missing.

3. A area of skin of size 3 cm x 2 cm was missing on right side of forehead with underlying depressed fracture of skull and pieces of bone missing.

4. Laceration 1.5 cm x 1 cm present at the outer end of right eyebrow.

5. Laceration 2 cm x 1 cm per x bone deep present 1 cm below injury no 4.

6. Laceration 3 cm x 1 cm x muscle deep present on right side of phase 3 cm in front of right ear lobe.

7. Laceration 2 cm x 1 cm present on in front of lower part of right side of neck placed 3 cm from midline.

8. Laceration 2 cm x 1 cm present on in front of lower part of left side of neck placed 2 cm from midline.

9. Laceration 4 cm x 3 cm present on in front of right side of chest placed 4 cm above and in 2 right nipple.

10. Laceration 3 cm x 2 cm present on midline of the upper 3rd of front of chest.

11. Laceration 4 cm x 3 cm present on in front of middle 3rd of left side of chest.

12. Laceration 3 cm x 2 cm present on middle of front of chest.

13. Contusion 4 cm x 3 cm present or outer back of middle of left arm.

14. Contusion 3 cm x 2 cm present on upper 3rd of back of left forearm on the outer aspect.

15. Abrasion 2 cm x 1 cm present on back of left hand at the base of thumb.

X. INTERNAL EXAMINATION

I. Head

Multiple foci of extravasation of blood was present over the frontal region underlying the

injuries on frontal region on reflection of scalp. Depressed fractures were present. One 3 cm x 2 cm present involving the right frontotemporal bones. Second 2 cm x 2 cm present involving the middle of frontal bone. Third 2 cm x 2 cm present involving the left side of frontal bone. Fisher fracture was present involving the left temporal bone. Brain showed reddish green discolouration and was partially liquefied.

II. Neck

Reddish discolouration of muscles of neck.

The Larynx and Tracheal mucosa showed reddish discolouration.

Hyoid Bone and Thyroid Cartilage were intact.

III. Chest

No extravasation of blood was present on the reflection of chest wall. Reddish discolouration of muscles of chest.

About 50 ml reddish fluid was present in each pleural cavity.

No fractures of the rib cage were present.

The lungs were flabby.

Heart was flabby and showed reddish discolouration.

II. Abdomen

No fluid was present in the peritoneal cavity.

Liver was softened and showed blackish discolouration.

Spleen was softened and liquefying.

Stomach contained semi-digested food. Mucosa was normal. There was no characteristic smell.

Small intestine contained fluids and gas at places. Large intestine contained faecal matter and gases. Mucosa of the intestine was unremarkable.

Kidneys were softened and showed reddish discolouration on cut section.

Both adrenals – NAD. Abdominal vessels – NAD.

III. Pelvis

No fractures were present in the pelvic bones.

Blatter was empty. Walls of bladder were normal.

Hymen was torn at multiple places and only marginal mucosal tags were present. Due to the decomposition changes no comment can be made about the age of tears.

IV. <u>Vertebral Column</u>

Vertebral column appeared normal.

XI. <u>OPINION</u>:

Cause of death is craniocerebral damage consequent to blunt force trauma to the head caused by injury no 1, 2 and 3. Injury no 1-3 individually as well as combined together along with injuries no 4-14 are sufficient to cause death in the ordinary course of nature. All injuries are antemortem in nature.

12.16 Dr. Dhankar (PW-23) further deposed that, after conducting post-mortem, he handed over, to the IO, the following exhibits, of 'U':

(i) nails,

(ii) clothes,

(iii) blood on gauze,

(iv) teeth,

(v) two vaginal swabs,

(vi) one anal swab,

(vii) one oral swab and

(viii) maggots, which were found crawling on the body of 'U'.

He also confirmed that the time since death, as recorded in the post-mortem report, was only approximate. Further, on being queried in this regard during trial, PW-23 clarified that the reason for a portion of the bone of the forehead of 'U' being missing was possibly because the skull bone was shattered into multiple small pieces by the blunt force applied to it, and such pieces went missing due to loss of skin. He categorically rejected the suggestion that 'U' could have suffered from electric shock and smashed her head against some blunt object, resulting in the injuries observed in the post-mortem report, opining that the overall pattern of her injuries was inconsistent with such a theory; apart from the fact that her body showed no marks of bearing or suffering any electric shock.

12.17 PW-5 HC Anand Swaroop, of PS Maurya Enclave, confirmed having had the medical examination of the appellant conducted, on 14th July, 2011, by Dr. Florence Almeida (PW-17). He also confirmed that Dr. Florence Almeida (PW-17) had handed over, to him, the MLC of the appellant, as well as a sealed box, containing

(i) the blood sample in a plane vial, (ii) blood sample on a sterile gauze (which was dry), (iii) scalp hair, (iv) nail scrapings, (v) plucked pubic hair, and (vi) smegma, of the appellant, as well as (vii) a brown underwear belonging to the appellant. He stated that, on 15th July, 2011, he handed over all the said exhibits to the IO Insp. Satyender Gosain (PW-31), who seized the same *vide* Seizure Memo Ex. PW-5/A. A reading of Ex. PW-5/A bears out the statement of PW-5 HC Anand Swaroop, as regards the contents of the exhibits obtained, by him, from the Hospital.

12.18 PW-17 Dr. Florence Almeida who, at the relevant time, was Casualty Medical Officer in BSA Hospital, confirmed having medically examined the appellant, when he was brought, to the Hospital, by HC Anand Swaroop (PW-5). He proved the MLC of the appellant (Ex. PW-17/A), stating that it had been written and signed by him. The said MLC read thus:

> "Brought for the medical examination U/S 363/30/376 IPC
>
> Following samples collected:
> (1) Blood sample in plane vial
> (2) Blood sample air dried on sterile gauze
> (3) Scalp hair plucked
> (4) Nail scrapings of B/L hand
> (5) Plucked pubic hair
> (6) Smegma on slide from Cornell scrapings
> (7) Semen sample not given by the patient
> (8) One brown coloured underwear.
>
> Samples sealed and handed over to the Const. HC Anand Swaroop 109/NW except the semen sample for which advised to be followed up in Department of Forensic Medicine.
>
> H/O ? Changing clothes and having bath following incident.

No complaints from the examinee.

O/T – Conscious, co-op, oriented.

Michael-W NL.

Systematically NAD.

L/E (1) No evidence of any fresh obvious external injuries seen.

(2) Adam Apple well developed, moustache ++

(3) Good muscles built.

(4) Scrotum well developed with Normal-sized B/L testis present.

(5) Penis well developed.

On examination of the accused there are no findings to suggest that the examinee cannot perform sexual intercourse."

Dr. Florence Almeida correctly identified the appellant, when he saw him in court on 7th March, 2012. Further, on being specifically queried, in this regard, during his *de novo* examination-in-chief on 23rd March, 2014, Dr. Almeida clearly opined that there was minimal possibility of contamination, even if the blood was left on gauze in an open condition.

12.19 PW-16 Dr. J. V. Kiran, Senior Resident in the BSA Hospital deposed, during the trial, that, he had, at the request of the IO Insp. Satyender Gosain (PW-31) opined, regarding the possibility of the Y-shaped rod being responsible for the injuries found on the body of 'U', that Injuries 1, 2 and 3, mentioned in the post mortem report could possibly be caused by the said weapon, but could also have been

caused by any other rod of the same size. Quite obviously, such an opinion could not be determinative of the question of whether the rod, which was shown to Dr. Kiran was, in fact, the weapon with which the injuries had been infected on the person of 'U'.

Forensic Evidence

12.20 PW-12 HC Radha Kishan, the MHC (M), deposed that, on 14th July, 2011, the IO Insp. Satyender Gosain (PW-31) deposited two sealed parcels, bearing the seal 'SD' in the *malkhana*, *vide* Entry No 529 in Register No 19 (Ex. PW-12/B). The Memo regarding seizure, entered alongside the said entry in the *malkhana* Register, notes the taking into custody, by Insp. Satyender Gosain (PW-31), of (i) a white polythene bag, retrieved by the appellant from a place under the staircase, containing his trousers and shirt (being his uniform), stated to have been worn by him on 11th July, 2011, while committing the assault on 'U', and (ii) a steel like rod, also produced by the appellant and stated, by him, to have been used to assault 'U'.

12.21 PW-12 HC Radha Kishan, the MHC (M) further deposed that, on 15th July, 2011, the IO Insp. Satyender Gosain (BW-31) deposited 7 sealed parcels, sealed with the seal of the BSA Hospital, in the *malkhana*, *vide* Entry No 530 in Register No 19 (Ex. PW-12/C). The Seizure Memo accompanying the said Entry reads thus:

> " Seizure Memo
>
> HC Anand Swaroop No 109/NW PS Maurya Enclave produced a box containing (1) blood sample in plane vial, (2) blood sample in air dried on stretch gauze, (3) scalp hair plugged, (4) nail scrapings, (5) plucked pubic hair, (6)

smegma/coronal scrapings, (7) brown coloured underwear 1 of the accused Sanjay Kumar S/O Sh. Jagadish Valmiki taken by Dr. Florence Almeida CMO BSA Hospital, Rohini duly sealed with the seal of 'SD' and signed by Dr. Florence Almeida along with the specimen seals of 'SD' signed by Dr. Florence Almeida on 14/15-7.2011. All the above mentioned sample and specimen seal were taken into police possession through this memo. The seizure memo is completed."

12.22 PW-3 Const. Satish, of PS Maurya Enclave, confirmed having collected nine exhibits/samples from the Hospital mortuary, on 22nd July, 2011, of which six were in sealed envelopes, two in sealed plastic containers and one in a sealed parcel, which he handed over to the IO Insp. Satyender Gosain (PW-31), who seized the said exhibits *vide* Seizure Memo Ex. PW-3/A. A reading of the said Seizure Memo reveals that these nine exhibits consisted of (i) six envelopes, containing (a) the vaginal swab of 'U', (b) the blood of 'U' on a gauze piece, (c) the anal swab of 'U', (d) the oral swab of 'U', (e) 'U''s tooth, (f) a sample seal of the Hospital, (ii) two containers containing (a) nail scrapings of 'U' and (b) maggots found on the body of 'U' and (iii) a parcel containing the clothes of 'U'. PW-12 HC Radha Krishan deposed that, on the same day, i.e. 22nd July, 2011, the IO Insp. Satyender Gosain (PW-31) had deposited the said nine sealed parcels in the *malkhana*, which he, i.e. PW-12, entered *vide* Entry No 568 in Register No 19 (Ex. PW-12/D). The Seizure Memo, as entered alongside the said Entry (Ex. PW-12/D) in the *malkhana* Register, read thus:

" Seizure Memo

Const. Satish No 1657/NW PS Maurya Enclave produced the following on 22/7/11: (i) a sealed or envelope containing vaginal swab, (ii) a sealed envelope containing blood on

> gauze, (iii) a sealed envelope containing anal swab, (iv) a sealed envelope containing oral swab, (v) a sealed envelope containing tooth, (vi) a sealed plastic container containing nails, (vii) a sealed envelop containing sample seal, (viii) a sealed small plastic container containing maggots, (ix) a sealed parcel containing clothes. All the above exhibits are belonging to PM No 285/11 dt. 14/7/11 conducted on the victim namely ('U') and handed over to Const. Satish No 1657/NW by Dr. of BSA Hospital. Forensic department in sealed condition. All the above exhibits are sealed with the seal of Department of FM on BSA Did he Government and the exhibits taken into police possession through this memo. The memo is completed."

12.23 The testimonies of PW-12 HC Radha Kishan, the MHC (M), and Const. Bijender (PW-9), reveal that (i) four exhibits and one sample seal, covered by RC No 88/21/11 (Ex. PW-12/F) and (ii) seven exhibits and two sample seals covered by RC 89/21/11 (Ex. PW-12/G), were carried by Const. Bijender (PW-9), for being deposited in the FSL on 19th August, 2011, but that while he was able to deposit the four exhibits covered by RC 88/21/11, he was unable to deposit the seven exhibits covered by RC 89/21/11, owing to shortage of one sample seal. Const. Bijender deposed that, for this reason, the said seven exhibits had to be brought back to the *malkhana* and handed over to the MHC(M). The acknowledgement receipt, of the FSL, regarding the four exhibits covered by RC 88/21/11 *supra* was Ex PW-12/F-1, which reveals that the details of the said exhibits, which were deposited, by Const. Bijender, in the FSL, on 19th August, 2011, were as under:

> "(1) A box sealed with the seal of SD containing blood sample in air dried on sterile gauze, in plain vial, scalp hair plucked, nail scrappings, plucked pubic hair, smegma coronal scrapping, brown colored underwear of accused Sanjay Kumar.

(2) A sealed plastic container sealed with the seal of Dept of FM, BSA, Delhi Govt containing nails of the victim.

(3) A sealed cloth parcel sealed with the seal of Dept of FM DR BSA Delhi Govt containing clothes of the victim.

(4) One sealed Plastic container conaining hair in a white polythene of the victim sealed with the seal of RY.

(5) Sample seal of BSA Hosp Rohini sealed with the seal of SD."

The fact of receipt of the above mentioned sealed parcels, on 19th August, 2011, at the FSL, was also confirmed, in her deposition, during trial, by Ms Manisha Upadhaya, Senior Scientific Officer, Biology, FSL, deposing as PW-18.

12.24 Const Bijender Singh (PW-9) further deposed that, on 23rd August, 2011, he obtained a sample seal, of the Hospital, from Dr. J. V. Kiran, Department of Forensic Medicine, which he deposited in the *malkhana*, and that the said seal was seized by the IO Insp. Satyender Gosain (PW-31) *vide* Seizure Memo Ex PW-31/C. Ex PW-31/C, which was signed by Const Bijender and Insp. Satyender Gosain, bears out this fact.

12.25 PW-12 HC Radha Krishan, the MHC (M), went on to further testify that, consequent on the procuring of the extra sample seal from the Hospital, he, dispatched the said seven exhibits and two sample seals, for being deposited in the DNA division of the FSL, through Const. Sandeep (PW-8), *vide* RC No 96/21/11 (Ex. PW-12/H) on 24th August, 2011, and that, after depositing the said exhibits in the FSL,

Const. Sandeep gave him the acknowledgement receipt (Ex. PW-12/H-1) issued by the FSL. These facts were vouchsafed by Const. Sandeep, deposing as PW-8. Ex. PW-12/H records the following exhibits as having been received, by the FSL, under RC No 96/21/11:

> "(i) A parcel sealed with the seal of Dept of FM DR BSA Delhi containing a steel road (*sic* rod) with Y shaped on one side of the corner.
>
> (ii) Sample seal sealed with the seal of Dept of FM DR BSA Delhi Govt.
>
> (iii) A cloth parcel sealed with the seal of 'SG' containing a under green & white shirt and green pant.
>
> (iv) A plastic box parcel sealed with seal of 'RY' containing a piece of a blood stained brick of a wall of deceased.
>
> (v) A sealed envelope with the seal of Dept of FM DR BSA Delhi Govt containing vaginal swab of victim.
>
> (vi) A seraled envelope with the seal of Dept of FM DR BSA Delhi Govt conotaining blood on gauze of victim.
>
> (vii) A sealed envelope with the seal of Dept of FM DR BSA Delhi containing Anal swab of the victim.
>
> (viii) A sealed envelope with the seal of Dept of FM DR BSA Delhi Govt containing oral swab of the victim.
>
> (ix) Sample seal sealed with the seal of Dept of FM DR BSA Delhi Govt."

12.26 The IO Insp. Satyender Gosain (PW-31) also testified, during his deposition in court in the course of trial, to the correctness of the above facts.

12.27 The entire journey of the exhibits relating to 'U', as well as the appellant, therefore, stands mapped out, from the time of their retrieval, sealing and seizure, till the time of their deposit in the FSL and in the DNA division thereof, by evidence oral as well as documentary.

12.28 On 14th October, 2011, Ms. Manisha Upadhaya, Senior Scientific Officer in the FSL (PW-18) submitted her report (Ex. PX-2). The said report merits reproduction, *in extenso*, thus:

" **DESCRIPTION OF PARCELS & CONDITION OF SEAL**

SEAL INTACT AS PER F.A.'S LETTER

Sealed big plastic container	:	01
Sealed small plastic container	:	01
Sealed cloth parcels	:	02
Total	:	04

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel '1'	:	1 sealed cloth parcel sealed with the seal of "Sd" containing exhibits '1a', '1b', '1c', '1d', '1e', '1f' and '1g' kept in a cardboard box.
Exhibit '1a'	:	Gauze cloth piece having brown stains described as 'Blood sample in air dried on Sterile gauze' further sent for DNA examination.
Exhibit '1b'	:	Dark brown foul-smelling liquid

		kept in a tube described as 'blood sample in plain Vial'.
Exhibit '1c'	:	Few strands of hair kept in a tube described as 'Scalp hair plucked'.
Exhibit '1d'	:	Scrapping material kept in a tube described as 'nail scrappings'.
Exhibit '1e'	:	Few strands of hair described as 'Plucked pubic hair'.
Exhibit '1f1' & '1f2'	:	2 micro slides having faint whitish smell described as 'Smegma Coronal scrapings'
Exhibit '1g'	:	1 underwear having dirty stains.
Parcel '2'	:	1 sealed small plastic container seal with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibit '2'.
Exhibit '2'	:	Few nail clippings along with skins/fleshy material.
Parcel '3'	:	1 sealed cloth parcel sealed with the seal of "DR. BSA DEPT OF FM DELHI GOVT" containing exhibit '3'.
Exhibit '3a'	:	1 dirty, damp, foul-smelling baby frock. Hair could not be detected on exhibit '3a' i.e. Baby frock.
Exhibit '3b'	:	1 dirty, damp, foul-smelling baby underwear. Hair could not be detected on exhibit '3b', i.e. Baby underwear.
Parcel '4'	:	1 sealed big plastic container sealed with the seal of "RY" containing exhibit '4'.

Exhibit '4'	:	A dirty bunch of hair. Kept unexamined for hair examination.

RESULTS OF ANALYSIS

1. Blood was detected on exhibits '1a', '1b', '1d', '2', '3a', '3b' and '4'.

2. Blood could not be detected on exhibits '1c', '1e' and '1g'.

3. Human semen was detected on exhibit '1g'.

4. Semen could not be detected on exhibits '1c', '1d', '1e', '1f1', '1f2', '2', '3a', '3b' and '4'.

5. Skin could not be detected on exhibit '1d' i.e. scrapping material.

6. In query No '5', the hair on Ex. '4' are of victims/diseased and no other hairs are for comparison so no opinion is offered.

7. Report of serological analysis is original is attached herewith."

The serological report, attached to the aforementioned FSL report, was unable to detect the blood group of the blood contained on any of the exhibits, though it was detected that the blood contained on Ex. '1a', '1d', '2' and '4' was of human origin. The contents of the said reports, which bore the signature of PW-18 Ms. Manisha Upadhaya, were reiterated, by her, in her examination during trial on 14th October, 2011, thereby proving the reports and the contents thereof. Ms Upadhaya further deposed that Ex. 1a, i.e. the gauze cloth piece containing the blood sample of the appellant, was sent for DNA

fingerprinting, which was received, by the DNA Department of the FSL *vide* Ex. PW-18/D-1.

12.29 PW-19 Ms. Shashi Bala, Senior Scientific Officer (Biology), FSL, confirmed, in her deposition during trial, on 30th November, 2011, having submitted her detailed report (Ex. PX-1) on all the above exhibits. She drew attention to the exhibits on which blood had been detected, and the fact that human semen was detected only on Ex. 5b, as already mentioned hereinabove. As regards the DNA analysis of the exhibits, she deposed that DNA was isolated from Exhibits 1a and 5b, but could not be isolated from Exhibits 1, 4 and 6. As regards Exhibits 1a and 5b, and the DNA analysis thereof, her evidence, which is of signal significance, was as under:

> "I conducted the biological examination of the exhibits, and blood was detected Exhibits No 1, 4, 6 and 1a. Human semen was detected on Exhibit 5b. After that, I had examined the Exhibits No 1, 4, 5b, 6 and 1a for DNA isolation. *The DNA was isolated from the sources of Ex. No 5b and 1a. The DNA could not be isolated from the Exhibits No 1, 4 and 6. SPR analysis were used for each of the samples. The data was analysed by using gene scan and genotyper software. The after analysis, the alleles from the source of Exhibit 5b, i.e. the cotton wool swab of the victim are accounted in the alleles from the source of Ex. 1a (gauze cloth piece of accused). The I gave the conclusion that the DNA profiling (SPR analysis) performed on Ex. 5b and 1a provided is sufficient to conclude that the source of Ex. 1a (gauze cloth piece) is responsible for the biological stains i.e. seminal stains on the Ex.5b i.e. cotton wool swab.*"
>
> (Emphasis supplied)

Thereafter, PW-19, in cross-examination, went on, in detail, to describe the manner in which she had performed DNA analysis. It is not necessary to burden this judgement with the said explanation, as

the appellant has not sought to question the correctness, propriety or scientific accuracy of the manner in which DNA profiling was done by PW-19. However, given its significance in the present case, it would be appropriate to reproduce the report of the DNA Fingerprinting Unit (Ex. PX-1), *in extenso*, as under:

"**DESCRIPTION OF THE SOURCE**

Forensic Sample received on 24.08.2011

Parcel 1: 1 sealed cloth parcel sealed with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibit '1'.

Exhibit 1: *1 Y shaped steel rod.*

Parcel 3: 1 sealed cloth parcel sealed with the seal of "SG" containing exhibits '3a' & '3b' the. Kept in a polythene described as shirt & pant from SOC.

Exhibit 3a: One shirt

Exhibit 3b: One pants.

Parcel 4: One sealed plastic *dibbi* sealed with the seal of "RY" containing exhibit '4'.

Exhibit 4: One brick piece having very few brown stains described as piece of bloodstained brick of a wall of deceased.

Parcel 5: *One sealed envelope sealed with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibits '5a' & '5b' described as 'vaginal swab of victim'.*

Exhibit 5a: Damp cotton wool swab on a plastic stick along with fungal growth, kept in a test tube.

Exhibit 5b: *Cotton wool swab or a plastic stick, kept in a test tube.*

Parcel 6: One will envelop sealed with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibit '6'.

Exhibit 6: Damp foul-smelling gauze cloth piece having yellowish brown stains described as blood in gauze of victim.

Parcel 7: One sealed envelop sealed with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibit '7'.

Exhibit 7: Cotton wool swab having yellowish stains on a plastic stick, kept in a test tube, described as 'anal swab of victim'.

Parcel 8: One sealed envelope sealed with the seal of "DR BSA DEPT OF FM DELHI GOVT" containing exhibit '8'.

Exhibit '8': Cotton wool swab or a plastic stick, kept in a test tube described as 'oral swab of victim'.

Forensic Sample received on 26.09.2011 from biology division:

Parcel 1: One sealed envelope sealed with the seal of "MU FSL DELHI" containing exhibit '1a'.

Exhibit 1a: Gauze cloth piece having dark brown stains described as 'blood sample of accused Sanjay Kumar'.

BIOLOGICAL EXAMINATION:

1. *Blood was detected on exhibits '1', '4', '6' & '1a'.*

2. Blood could not be detected on exhibits '3a' & '3b'.

3. Human semen was detected on exhibit '5b'.

4. Semen could not be detected on exhibits '5a', '7' & '8'.

DNA EXAMINATION:

Exhibits '1', '4', '5b', '6' & '1a', were subjected to DNA isolation. *The DNA was isolated from the source of exhibits '5b' & '1a'.* However DNA could not be isolated from the source of exhibits '1', '4' & '6'. STR analysis was used for each of the sample. Data was analysed by using Genescan and Genotyper software.

RESULT OF EXAMINATION:

The alleles as from the source of exhibit '5b' (cotton wool slab of victim" are accounted in alleles as from the source of exhibit '1a' (gauze cloth piece of accused).

CONCLUSION:

The DNA profiling (STR analysis) performed on the exhibits '5b' & '1a' provided is sufficient to conclude that source of exhibit '1a' (gauze cloth piece) is responsible for the biological stains i.e. seminal stains on exhibit '5b' (cotton wool swab)."

(Emphasis supplied)

Evidence of appellant under Section 313, Cr PC

13. The deposition of the appellant, under Section 313 of the Cr.P.C., was recorded on 17th April, 2012 and, again, consequent on the judgement, dated 31st May, 2012 of this Court in Death Reference 3/2012, on 26th February, 2015. In his said statements, the appellant, while admitted (i) that his uniform consisted of a green trouser and white striped shirt, (ii) he attended office, at the NDPL complex, on 11th, 12th and 13th July, 2011, (iii) that Saroj used to help Dalip

Paswan in running his tea-cart outside the office, (iv) that Bhag Chand (PW-22) was present in the NDPL office on 11th, 12th and 13th July, 2011, and had, in fact, asked him, on 13th July, 2011, to trace the origin of the foul smell in the office, and (v) that he did not attend duty on 14th July, 2011, denied, categorically, the assertions, put to him by the prosecution, that (i) that he was not wearing his regular uniform on 12th July, 2011 and had, therefore, been been questioned, in that regard, by Arpan (PW-24), (ii) Saroj had questioned him, on hearing the shrieks of 'U', or that he had scolded Saroj on being thus questioned, (iii) that he had effected recovery of the weapon, by which 'U' was belaboured, or the clothes alleged to have been worn by him on the said occasion and (iv) that he had refused to provide a semen sample. He asserted that, on 12th July, 2011, he was, indeed, wearing his usual uniform, and denied that Bhag Chand had called Arpan, to the office, on 13th July, 2011. He asserted that he had been arrested on 13th July, 2011 itself, and stated that his absence from duty, on 14th July, 2011, was owing to his being present in the Police Station. Regarding the recovery, alleged to have been effected at his instance/by him, the appellant claimed that he had been made to sign blank papers in the Police Station, and denied having made any disclosure statement. He insisted that a false case had been trumped up against him, and professed ignorance regarding the reason thereof, asserting that he was entirely innocent of the alleged offence.

Defence Evidence

14. The appellant cited, in his defence, only the evidence of his brother Pradeep (DW-1). DW-1 deposed (during the *de novo* trial) that, at about 7 to 8 PM on 13th July, 2011, Arpan (PW-24), along with another person, took his brother to the Police Station, not heeding his objections, and that his brother did not return home that night. He claimed that, on questioning Arpan in this regard, he was informed that the appellant was in the Police Station, and that he came to know about his brother having been arrested and sent to jail seven to eight days thereafter. However, he admitted that he neither made any complaint, nor lodged any missing report, regarding his brother, during the entire period, nor sought any form of other redress against his detention by the Police.

Impugned Judgement of the learned ASJ

15. As we shall be examining the evidence ourselves, and shall, in the course thereof, advert to the relevant portions of the findings of the learned ASJ in the present case, we refrain from alluding to the said findings at this juncture, so as not to render this judgement over-prolix.

Submissions of learned Counsel

16. Mr. Sumeet Verma, appearing on behalf of the appellant-accused, submitted that the evidence against his client, even if read as a whole, did not satisfy the well settled indicia regarding sufficiency of circumstantial evidence to bring home an offence to an accused. He

submitted that there were several yawning gaps in the case set up by the prosecution, which had erroneously been overlooked by the learned ASJ. Further, and without prejudice, he raised a significant contention, to the effect that this Court was necessarily bound, in law, to modify the sentence, awarded by the learned ASJ, to life imprisonment *per se*, thereby setting aside the attendant stipulations, to the effect that the appellant would not be entitled to remission till he had served 25 years of rigorous imprisonment. Mr. Sumeet Verma emphatically submitted, in this regard, that power to award minimum mandatory life sentence inhered either in the Supreme Court, or in this Court, *when commuting a sentence of death to imprisonment for life, while hearing an appeal preferred against such sentence*. The twin submissions of Mr. Sumeet Verma, on this aspect of the matter, are, therefore, that (i) as the learned ASJ had no power to incarcerate the appellant for any fixed term without remission, the impugned judgement, to that extent, had, in any case, to be set aside, and (ii) inasmuch as this Court is not, presently, hearing an appeal, against a death sentence, we, too, are powerless to award such a sentence. The resultant position, Mr. Sumeet Verma would exhort us to hold, is that the sentence awarded to his client by the impugned judgement and order had, at the very least, to be modified to life imprisonment *simpliciter*, doing away with the 25-year stipulation, as prescribed by the learned ASJ, or the attendant stipulation that his client would not be entitled to remission till the expiry of such period.

Analysis

17. Before proceeding to the conclusions which, to our estimation, naturally follow from the evidence, as digested hereinabove, we would like to examine a few jurisprudential concepts which arise in the present case. With such examination, we are sanguine that the result of the present litigative exercise, at the instance of the appellant, would be rendered a self-evident sequitur.

Circumstantial Evidence

18. Where there is no eyewitness to the occurrence, and the case of the prosecution is dependent on circumstantial evidence, the following "*panchsheel* principles", as laid down in the following passages of the classic decision of Fazal Ali, J., in ***Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116*** have, with the passage of time, become, as it were, jurisprudentially fossilized:

> "**153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> > (1) *the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> >
> > It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra,(1973) 2 SCC 793*** where the observations were made: [SCC para 19, p. 807]
> >
> > > "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental

distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

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

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

154. These five golden principles, if we may say so, constitute the *panchsheel* of the proof of a case based on circumstantial evidence."

(Emphasis supplied)

19. Decision after decision has, since ***Sharad Birdhichand Sarda (supra)***, applied, to advantage, the *panchsheel* principles conceptualised therein, and multiplicative references, to such authorities, would be neither necessary nor expedient.

20. These principles, unquestionably, have to guide us in the present case as well, as there is no eye-witness to the rape and murder of 'U' – though Saroj (PW-25) does stake a claim to be an "ear-witness" thereto.

The evidence of the child witness

21. The child witness, like the child himself, has ever remained, criminologically speaking, a jurisprudential enigma. The judicial approach, to such evidence, has, at times, advocated wholesome acceptance of such evidence, subject to the usual precautions to be exercised while evaluating any other evidence; however, the more prevalent approach appears to prefer exercise of cautious consideration by the Court, while dealing with such evidence. The *raison d' etre* for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts have consistently held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence. As has been often emphasised by courts in this context, no express, or even implied, embargo, on a child being a witness, is to be found in Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under:

"**118. Who may testify. —**

> All persons shall be competent to testify *unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years,* extreme old age, disease, whether of body or mind, or any other cause of the same kind.

> Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him, or from giving rational answers to such questions, by reason of his age. A duty is, therefore, cast, by the statute, on the judge faced with the responsibility of taking a decision on whether to allow, or disallow, the testimony of the child witness, to arrive at an informed decision as to whether the said evidence is vitiated on account of the child having failed to understand the questions put to him, or to provide rational responses thereto. If the answer, to these two queries, is in the negative, there is no justification, whatsoever, for discarding, or even disregarding, the evidence of the child witness.

22. This Court has, in a recent decision in ***Latif vs State, 2018 SCC Online Del 8832***, observed as under, with respect to the evidence of child witnesses:

> '**16.** At this stage, it is necessary to recapitulate the law regarding the appreciation of the evidence of the child witness. In ***Dattu RaMr.ao Sakhare v. State of Maharashtra, (1997) 5 SCC 341*** the Supreme Court explained:
>
> > "*A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of*

oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. *The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."*

17. In ***Ranjeet Kumar Ram v. State of Bihar, 2015 (6) Scale 529***, it was observed:

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. *Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."*

18. In ***Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC 565***, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. <u>The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous</u>. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. *Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken*

> *and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness*." '
>
> (Emphasis supplied)

23. In ***Yogesh Singh vs Mahabeer Singh, (2017) 11 SCC 195***, the Supreme Court held thus, with respect to the evidence of child witnesses:

> "**22.** It is well settled that *the evidence of a child witness must find adequate corroboration, before it is relied upon* as the rule of corroboration is of practical wisdom than of law. (See ***Prakash v. State of M.P., (1992) 4 SCC, Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667, Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287, Dattu RaMr.ao Sakhare v. State of Maharashtra, (1997) 5 SCC 341, State of U.P. v. Ashok Dixit, (2000) 3 SCC*** and ***Suryanarayana v. State of Karnataka, (2001) 9 SCC 129***.
>
> **23.** However, *it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.* (*vide* ***Panchhi v. State of U.P., (1998) 7 SCC 177***)
>
> (Emphasis Supplied)

24. One of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial

Court itself, regarding the demeanour, carriage and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court would be loath to disregard the evidence of the child witness, where the Trial Court has found it to be credible, convincing and reliable. [Ref. ***Satish vs State of Haryana, (2018) 11 SCC 300***]

25. In ***State of Madhya Pradesh vs Ramesh, (2011) 4 SCC 786***, the following principles, regarding assessment of the evidence of child witnesses, have been enunciated:

> **"7.** In ***Rameshwar v. State of Rajasthan, AIR 1952 SC 54*** this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) *every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise.* The Court further held as under: (AIR p. 56, para 11)
>
> > "11. … *it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.* But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate."
>
> **8.** In ***Mangoo v. State of M.P., AIR 1995 SC 959***, this Court while dealing with the evidence of a child witness

observed that *there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.*

9. In ***Panchhi v. State of U.P., (1998) 7 SCC 177***, this Court while placing reliance upon a large number of its earlier judgments observed that *the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that*

> *"the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring"*

10. In ***Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565***, this Court dealing with the child witness has observed as under: (SCC pp. 567-68, para 10)

> "10. '… 7. … *The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous.* This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. *Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if*

after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

11. *The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.* (*vide* ***Himmat Sukhadeo Wahurwagh v. State of Maharashtra, (2009) 6 SCC 712***)

12. In ***State of U.P. v. Krishna Master, (2010) 12 SCC 324,*** this Court held that *there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life.* The child may be able to recapitulate carefully and exactly when asked about the same in the future. *In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.*

13. *Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the*

purpose of corroboration as in the case of a hostile witness. (*vide* ***Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516***.)

14. *In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.*"

(Emphasis supplied)

26. The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements:

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and

give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored. Twin, and to an extent mutually conflicting, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution

and circumspection, given the fact that children, especially of tender years, are open to influence and could possibly be tutored. On the other hand, the evidence of a competent child witness commands credibility, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vii) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness.

Last Seen Evidence

27. The principles, relating to assessment of last seen evidence, i.e. the evidence of the suspect accused being the person last seen in the presence of the victim, has been considered by us, in detail in ***Lalu Pasi vs. State, 2017 SCC OnLine Del 11537***, Paras 45 to 47 of the said decision may be reproduced as under:

> **"45.** On the last seen theory, the Supreme Court has this to say, in ***Nizam (supra)*** (in paras 12, 14, 15 and 18 of the report):
>
> > '12. Based on the evidence of PWs 1 and 2, the courts below expressed the view that the motive for murder of Manoj was the lust for the money which Manoj was carrying. The courts below based the conviction of the appellants on the circumstances —*last seen theory* as stated by PWs 1 and 2 along with the recovery of bilty and receipt by PW 6 on which the

name of the accused person (Nizam) was printed. The appellants are alleged to have committed the murder of Manoj for the amount which Manoj was carrying. But neither was the amount of Rs 20,000 nor any part of it recovered from the appellants. *If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. The absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.*

14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. *Undoubtedly, the "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.*

15. Elaborating the principle of ―last seen alive in ***State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254,*** this Court held as under: (SCC p. 265, para 23)

> "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, *if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which*

> *appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.* The principle has been succinctly stated in ***Naina Mohamed, In re. [AIR 1960 Mad 218]***

The above judgment was relied upon and reiterated in ***Kiriti Pal v. State of W.B., (2015) 11 SCC 178.***

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. *Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory."*

46. ***Ganpat Singh (supra),*** too, is instructive on the parameters of the last seen theory, and holds, after referring to a catena of earlier authorities, as under:

> *"Evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another*. The settled formulation of law is as follows:
>
> > 'The last seen theory comes into play *where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible.* It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.'
> >
> > (Emphasis supplied)

47. In another recent judgment, ***Anjan Kumar Sarma v State of Assam, 2017 SCC Online SC 622,*** the Supreme Court, relying on its earlier decision in ***State of Goa v Sanjay Thakran, (2007) 3 SCC 775,*** expostulated thus, on the ―last seen theory:

> "22. It is clear from the above that in a case *where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused*, the circumstance of last seen together and absence of explanation would

provide an additional link which completes the chain. *In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.* The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in ***State of Goa v. Sanjay Thakran, (2007) 3 SCC 755*** in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:—

> "34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with *when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused.* But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can

> be no fixed or straitjacket formula for the duration of time gap in this regard and *it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence.* For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."
>
> (Emphasis supplied)

28. Applying the above principles to the present case, and evaluating the evidence available holistically in the light thereof, we have no doubt, whatsoever, in our mind, that the evidence that has emerged in the present case bring the offence, of the rape and murder of 'U', inexorably home to the appellant.

29. We may also state, here, that the fact that 'U' had been raped before being clobbered to death, stands evidenced by the multiple hymeneal tears found in the postmortem report (Ex.PW-23/A), which was proved by PW-23 Dr. Vijay Dhankar. Though, unfortunately, no conclusive medical opinion, regarding the cause of the hymeneal tears, could be provided by Dr. Dhankar in his report, owing to the decomposition which the body had suffered, the tender age of 'U', viewed in conjunction with the fact that there were *multiple* hymeneal tears, and not one, clearly indicates, in our opinion, that the tears were attributable to penetrative sexual assault having been committed on her. The commission of sexual assault on 'U' would also stand established by the fact that, when 'U' was found, she was naked, her genitalia were bloated and her underwear was pulled down to her knees. All these circumstances, put together, unequivocally indicate that 'U' had been raped, before being murdered.

30. Insofar as the culpability of the appellant, in the offence, is concerned, the most telling circumstance, in this regard, is unquestionably, the correlation, reported by the FSL, between the blood of the appellant, as contained on the gauze piece submitted for analysis to FSL, and the semen found in the vaginal swab of 'U'. The testimony of PW-19 Ms. Shashi Bala, Senior Scientific Officer, Biology, FSL, sets out, in detail, the manner in which the FSL conducted DNA profiling of the various exhibits, and we are satisfied that, in the face of the matching, found in the DNA relating to the aforementioned two samples, i.e. the blood sample of the appellant,

and the semen found in the vaginal swab of 'U', there can be no question of the appellant not being the perpetrator of the offence of rape, committed on 'U'.

31. We also rely, for this purpose, on Section 106 of the Indian Evidence Act, 1872, which reads as under:

> "**106. Burden of proving fact especially within knowledge.** –
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> Illustrations:
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

Section 106 of the Evidence Act casts, in terms, the burden, to prove any particular fact, on the person who is in especial knowledge of the said fact. The appellant was, therefore, duty bound to explain the presence of his semen in the vaginal swab - and, therefore, in the vagina - of 'U'. In the absence of any explanation, from the appellant, in this regard, it has to be held that it was the appellant alone who was responsible for the presence of his semen in the vagina of 'U' which, seen in conjunction with the hymeneal tears suffered by her and the bloated condition of her genitalia, unquestionably indicates that she

had been raped by the appellant, before being murdered, in the seclusion of the switch gear room.

32. Insofar as the evidence of PW-24 Saroj is concerned, applying the tests enumerated by us in para 23 *(supra),* we find it credible as well as trustworthy. Saroj was, at the time of his examination, in court on 3rd June, 2014, thirteen years of age and could not, therefore, be regarded as so innocent, or impressionable, as to render his testimony inherently untrustworthy by reason of his age. He had no enmity, whatsoever with the appellant; rather, Saroj deposed that the appellant often used to have tea at the *rehri* of his uncle Dalip Paswan (PW-14), where he, too, used to assist. We find, from the reading of the evidence during trial, of PW-24 Saroj, that leading questions, regarding the importance of evidence given during trial, and of the stating of facts on oath, as well as the difference between right and wrong, and between truth and untruth, were put to him, and were answered by him, credibly and satisfactorily. We have also gone through the deposition of Saroj in detail, and are entirely satisfied that it was voluntary, spontaneous, cogent and comprehensive, and cannot be said to be the result of any tutoring or undue influence. We also rely, for this conclusion, on the specific assertion by Saroj, in cross examination that his statement was being given of his own will and volition, and that he had not been asked by anyone else to depose as he had. He categorically stated that he was narrating exactly what he had himself seen and witnessed. In these circumstances, Saroj was clearly a competent child witness, within the meaning of Section 118 of the Indian Evidence Act, 1872, and, his testimony, being untainted

by ill-will, malice or any ulterior or extraneous considerations, merits consideration as well as and respect. We are unable to find any cause, or reason, for us to differ, with the learned ASJ, regarding the credibility of Saroj as a competent child witness, and the reliability of the evidence adduced by him during trial.

33. Saroj, in his deposition, clearly stated that, on 12th July, 2011, he saw the appellant talking with 'U', at the gate of the NDPL office and that, some time later, he heard the screams of a child from the switch gear room, and that, when he peeped through the grill, he found the appellant present in the room. He further deposed that, on being queried regarding the said screams, the appellant put forward the (in our view, clearly implausible) explanation that he was with his brother, and asked Saroj to leave the place immediately. Significantly, the appellant never led the evidence of the said "brother" in his defence, or, for that matter, any other evidence to support the said explanation, given by him to Saroj. Saroj correctly identified the appellant, during trial, in the court. The recovery of the body of 'U' from the same room in which the appellant claimed to be in the company of his brother (who, for reasons unexplained, was apparently crying and screaming in the voice of a young girl), viewed in juxtaposition with the fact of the appellant having been seen in the company of 'U' at the gate of the NDPL office a short while earlier, also serves to link the appellant to the offence of rape and murder of 'U'.

34. It is also significant, in this context, that the colour of the underwear which was being worn, by 'U' on 12th July, 2011, was stated, by Saroj, to be black and, in fact, when her body was discovered on 13th July, 2011, she was actually found to be wearing a black underwear, lowered towards the knees.

35. In these circumstances, we are convinced that Saroj had, in fact, heard the cries of 'U', while she was being assaulted by the appellant. The evidence of Saroj, therefore, in our view, also serves to convincingly implicate the appellant. We may also note the fact that, in the appellant's MLC, Dr. Florence Almeda (PW-17) opined that, on examination of the appellant, there was nothing to suggest that he could not perform sexual intercourse.

36. The fact of Saroj having witnessed, on 12th July, 2011, the appellant standing with 'U' near the gate of the NDPL office and, a short while later, having heard the screams of a child, from the room where he saw the appellant (while peeping through the grill), and the fact that, on seeing the dead body of 'U', he identified her as the same girl whom he had seen in the company of the appellant also stand supported by the deposition of Dalip Paswan (PW-14), whose testimony also withstood cross examination. There is no reason to disbelieve the evidence of Dalip Paswan, who had no enmity, or other reason, to falsely implicate the appellant, especially in an offence as serious as the rape and murder of a young girl.

37. The sequitur to the testimonies of PW-24 Saroj and PW-14 Dalip Paswan would be that the appellant is revealed as the last person to have been seen in the company of 'U', which was at about 3 PM on 11th July, 2011 (as per the evidence of PW-24 Saroj). Post-mortem of 'U' commenced, as per the post-mortem report (Ex. PW-23/A) at 1:15 PM on 14th July, 2011, and concluded at 2:15 AM on 15th July, 2011. The time since death was certified, in the post-mortem, to be "about three days". The sighting of the appellant, in the company of 'U', at about 3 PM on 11th July, 2011, would therefore, be proximate, or at least proximate enough to shift, to the appellant, the burden of explaining when he, and 'U', parted company. The onus to explain his presence, in the switch gear room, at the time when he was seen there by Saroj, and the cries and screams, which were heard by Saroj, would also, by virtue of Section 106 of the Evidence Act, be on the appellant. The failure, on his part, to offer a credible explanation for any of these occurrences, unquestionably inculpate him in the offence. We concur, in this context, with the reliance, by the learned ASJ, in the impugned judgement, on the decision of the Supreme Court in ***Dharam Deo Yadav vs State of UP, (2014) 5 SCC 509***, in which it was categorically held that "if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company." In his statement under Section 313 of the Cr.P.C., the appellant merely resorted to a bald denial of having ever been in the company of 'U' on the said occasion. In view of the evidence discussed hereinabove, as well as hereinafter,

we are not in a position to accept the said assertion of the appellant, and hold, therefore, that these facts, too, unquestionably provide a vital link, in the chain connecting the appellant with the crime.

38. Other attendant circumstances too, fortify our conclusion that the perpetrator of the offence on the helpless, and hapless, 'U' was, indeed, the appellant. The evidence of Bhag Chand (PW-22) disclosed that, on 12th July, 2011, the appellant was, unusually, not wearing his uniform trousers, which he sought to explain away by stating that he had washed them, and that they had not dried. On the next day, i.e. 13th July, 2011, a foul smell was noticed in the NDPL office premises. On the appellant being asked, by Bhag Chand (PW-22) to trace the source of the foul smell, he merely reported that he had found some dead mice, which he had disposed of. Thereafter, the appellant left the premises without prior information to anyone, despite having been specifically been asked to remain in office. On the next day, i.e. 14th July, 2011, the appellant remained absent from work, but was seen at 9.45 AM, at Haiderpur Village by Bhag Chand (PW-22). In his statement under Section 313 of the Cr.P.C., the appellant sought to contend that he was absent from duty on 14th July, 2011, only because he was in Police custody from the night of 13th July, 2011. In support of this assertion, he sought to lead the evidence of his brother Pradeep, as DW-1. The testimony of Pradeep, to the effect that, at about 7 to 8 PM on 13th July, 2011, Arpan (PW-24), accompanied by one other person, took the appellant, with them, to the Police Station, hardly merits consideration, let alone acceptance, given the fact that DW-1 himself admitted that, though he purportedly came to know about the

appellant having been sent to jail seven to ten days later, he made no complaint, to any authority, or seek any other form of redress, against the allegedly unlawful detention of his brother, i.e. the appellant. That apart, as the learned ASJ correctly notes, no suggestion was put, to Arpan, during his cross-examination as PW-24, to the effect that he had taken the appellant, with him, on 13th July, 2011, to the Police Station; rather, Arpan deposed that he had seen the appellant, at Haiderpur, at about 9:45 AM on 14th July, 2011.

39. The evidence, referred to hereinabove, also establishes that, consequent to his apprehension, by the Police, on 14th July, 2011, the appellant disclosed, in his disclosure statement (Ex. PW-29/C), the place where he had concealed the rod, with which he had hit 'U' on her head, breaking her skull, as well as the clothes that he had been wearing while committing the crime. Following on the said disclosure statement, the appellant led the Police team, consisting of Insp. Satyender Gosain (PW-31), ASI Raju Yadav (PW-30) and Const. Somvir (PW-29), to the place, below the staircase on the ground floor, where he had hidden the clothes and the rod, and retrieved the said items therefrom. Forensic analysis of the rod detected the presence of blood thereon. These exhibits were all correctly identified, by PW-29, PW-30 and PW-31, in court.

40. From the above analysis, it becomes apparent, at a plain glance, that the commission of the offence of rape and murder of 'U', by the appellant, stands conclusively proved beyond any reasonable doubt, and that the learned ASJ has correctly convicted the appellant,

therefor, under Sections 302 and 376(2)(f) of the IPC. The conviction of the appellant for the offences under Section 363 and 201 of the IPC would also deserve to be upheld, pertaining, as they do, to kidnapping and causing disappearance of the evidence of the offence.

41. We may also note that the learned ASJ has done a commendable job, thoroughly analysing the evidence in the case, circumstance by circumstance, establishing, in the ultimate eventuate, the culpability of the appellant, in the offence for which he was accused, beyond all doubt. We express our unhesitating concurrence with the decision of the learned ASJ.

Sentence

42. Turning, now, to the sustainability of the sentence awarded to the appellant by the learned ASJ – which, in reality, was the ground most seriously urged by Mr. Sumeet Verma, learned counsel appearing for the appellant.

43. The learned ASJ, after balancing aggravating and mitigating circumstances, awarded, to the appellant, the sentence of rigorous imprisonment for life, without remission till he underwent actual sentence of 25 years rigorous imprisonment, for the offences under Sections 302 and 376(2)(f) of the IPC. Inasmuch as the sentences awarded under Sections 201 and 363 of the IPC would stand subsumed in the said sentence of rigorous imprisonment for life, reference thereto may be obviated.

44. The twin contentions of Mr. Sumeet Verma, relying on the judgement of the Constitution Bench in ***U.O.I. vs V. Sriharan, (2016) 7 SCC 1***, and ***Gurvail Singh vs State of Punjab, (2013) 10 SCC 31*** are that (i) the learned ASJ did not have the power, or the jurisdiction, to award a mandatory minimum period of life imprisonment, and (ii) this court, too, is possessed of such power only in a case where it seeks to commute the sentence of death, and in no other case. Consequently, Mr. Sumeet Verma would urge, the learned ASJ having, without jurisdiction, awarded, to his client, a mandatory minimum period of sentence of 25 years' incarceration without remission, the said direction would be required to be set aside, and this court, inasmuch as it is not hearing an appeal against award of death sentence to the appellant, is also powerless to prescribe a mandatory minimum period of life imprisonment.

45. We may note, here, that Ms. Aashaa Tiwari, appearing for the State, while insisting that the appellant had been rightly convicted, under the various provisions invoked by the learned ASJ and on which he was charged, submitted that, in fairness, she was not in a position to combat the arguments, of Mr. Sumeet Verma, on the question of the sentence that could be awarded to the appellant, as noted hereinabove.

46. Having examined the issue, however, we confess our inability to be so magnanimous. In our view, the submissions of Mr. Sumeet Verma, entirely miss the wood for the trees.

47. The sentences awarded by the learned ASJ to the appellant, for the offences committed under Sections 302 and 376(2)(f) of the IPC, consist of three ingredients, viz. (i) that he would have to suffer rigorous imprisonment for life, (ii) that 25 years of such imprisonment would be rigorous, and (iii) that, till the expiry of the said period of 25 years, he would not be entitled to seek remission.

48. The challenge of Mr. Sumeet Verma is directed against ingredient (iii) *supra*, i.e. the stipulation that, till the expiry of 25 years, his client would not be entitled to seek remission. This, Mr. Sumeet Verma would seek to urge, results in his client being sentenced to a mandatory minimum period of rigorous imprisonment of 25 years (as no remission would be available to him till then), which punishment, in his submission, could not have been awarded by the learned ASJ, and cannot be awarded, in the present case and in the present circumstances, by this court either.

49. That "imprisonment for life" connotes imprisonment for the remainder of the natural life of the accused, save and except for the power of the Government to grant remission, in accordance with Section 433 and 433-A of the Cr.P.C., was emphasised, by one Constitution Bench of the Supreme Court, as far back as in ***Gopal Vinayak Godse vs State of Maharashtra, AIR 1961 SC 600***, and stands crystallized, by another Constitution Bench of the Supreme Court, in ***Muthuramalingam vs State, (2016) 8 SCC 313***. Indeed, the statute itself says as much. Section 53 of the IPC, which deals with the punishments that can be awarded thereunder, reads thus:

"**53. Punishments. –**

The punishments to which offenders are liable under the provisions of this Code are –
First. – Death;
Secondly. – Imprisonment for life;
Fourthly. – Imprisonment, which is of two descriptions, namely: –
(1) Rigorous, that is, with hard labour;
(2) Simple;
Fifthly. – Forfeiture of property;
Sixthly. – Fine."

Section 45 of the IPC defines "life" as "the life of a human being, unless the contrary appears from the context." Clearly, therefore, the IPC does not contemplate, anywhere, "imprisonment for life" for a period lesser than the natural life of a human being. The myth of "life imprisonment" coming to an end with 14 years of incarceration essentially owes its origin to the power, of the appropriate Government, to commute a sentence of imprisonment for life, as conferred by clause (b) of Section 433, read with Section 433-A of the Cr.P.C., to which this judgement would allude, in greater detail, hereinafter.

50. The impugned order on sentence, dated 10th April, 2015, passed by the learned ASJ in the present case cannot, therefore, be faulted, to the extent it directs the appellant to be incarcerated for life. Needless to say, the offence committed by the appellant more than justifies the award of such a sentence, and there can be no question of showing any leniency to him.

51. Equally, no exception can be taken to the stipulation, in the impugned order dated 7th April, 2015, to the effect that the first 25 years of incarceration of the appellant would be rigorous and without remission. Indeed, given the manner in which the defenceless 'U' was not only ravished, but mercilessly assaulted, by the appellant – as is manifested from the nature of the injuries found on post-mortem – the learned ASJ could not have been faulted, had he even decided to award rigorous imprisonment, for life without remission, to the appellant; however, as the State is not in appeal, before us, seeking enhancement of the sentence awarded to the appellant, we refrain from saying any more on this aspect.

52. Howsoever horrendous the offence, committed by the offender, may be, the law cannot permit infliction, on him, of a punishment greater than that which the law conceives. We have, therefore, to seriously address the main contention of Mr. Sumeet Verma, viz., that the mandatory minimum period of incarceration of 25 years, stipulated in the impugned order dated 7th April, 2015 , could not have been awarded by the learned ASJ and, equally, cannot be upheld, or awarded, by us, adjudicating the present appeal.

53. Sections 432, 433 and 433-A of the Cr.P.C. read thus:

> "**432. Power to suspend or remit sentences.—**
>
> (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit

the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and -

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property. (7) In this section and in section 433, the expression "appropriate Government" means,— (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence.-

The appropriate Government may, without the consent of the person sentenced, commute –

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or commutation in certain cases. – Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

54. While the IPC, and the Cr.P.C., do not contemplate "imprisonment for life" coming to an end at any time before the expiration of the natural life of the convicted accused, Sections 433 and 433-A of the Cr.P.C., in their practical application, often result in sentences of imprisonment for life getting reduced to 14 years' incarceration. In view of the obviously yawning hiatus between 14 years, and the remainder of the life of the accused, a three-judge bench of the Supreme Court addressed, in ***Swamy Shraddhananda (2) vs State of Karnataka, (2008) 13 SCC 767***, the issue of the proper course of action to follow, in a situation where, for the offence committed, 14 years' incarceration was inadequate, and the death sentence was excessive. Paras 92 and 93 of the judgement (as authored by Aftab Alam, J) merit reproduction, thus:

> "**92.** The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily*

because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

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

(Emphasis supplied)

55. A minor departure, from the ***Swami Shraddhan and*** principle is to be found in the decision of a subsequent Two-Judge Bench of the Supreme Court in ***Sangeet vs. State of Haryana (2013) 2 SCC 452***, which concerned itself solely with the issue of the jurisdiction, of the court, to interfere with the power of remission, available with the appropriate Government under Section 432 of the Cr.P.C. While noticing the judgment in ***Swami Shraddhananda (supra)***, the Supreme Court went on to observe, in para 55 of the report, as under :-

"55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in ***Swamy Shraddananda*** **[(2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113]** and several other cases, by giving a sentence in a capital offence of 20 years' or 30 years' imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict

cannot be told that he cannot apply for a remission in his sentence, whatever be the reason."

56. ***Sangeet (supra)***, however, cannot be said to represent the law applicable to the issue of the power of a court, in an appropriate case, to direct a minimum mandatory period of life imprisonment, as subsequent decisions of the Supreme Court, including ***Sahib Hussain vs. State of Rajasthan (2013) 9 SCC 778***, have held that ***Sangeet (supra)*** could not have departed from the judgment of a larger bench (of three learned Judges) in ***Swami Shardhananda (supra),*** without itself referring the matter to a three-Judge Bench.

57. In any case, the legal position appears to stand settled by paras 104 and 105 of the subsequent judgment, of a Constitution Bench of the Supreme Court, speaking through **F.M. Ibrahim Kalifulla, *J.*** in ***UOI vs. V. Sriharan (2016) 7 SCC 1.*** We extract, hereunder, the said passages:

> **"104.** That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

> **105.** We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court."

58. In ***Sahib Hussain v. State of Rajasthan, 2013 9 SCC 778,*** the Supreme Court squarely addressed the issue as to whether courts could limit the power of remission, conferred on the appropriate government by Section 432 of the Cr.P.C, for any reason. It took note of the fact that such "mandatory minimum" periods of incarceration had been imposed, as punishment, in several decisions including, *inter alia*, ***Shri Bhagwan v. State of Rajasthan, (2001) 6 SCC 296, Praksh Dhawal Khairnar (Patil) v. State of Maharashtra, (2002) 2 SCC 35, Ram Anup Singh v. State of Bihar, (2002) 6 SCC 686 and Nazir Khan v. State of Delhi (2003) 8 SCC 461, Neel Kumar v. State of Haryana, (2012) 5 SCC 766, Sandeep v. State of U.P. (2012) 6 SCC 107 and Gurvail Singh v. State of Punjab (2013) 2 SCC 713.*** Thereafter, the Bench in ***Sahib Hussain*** *(supra)*, upheld the judgment, of the High Court in that case, directing imprisonment of the appellant – accused for life, without remission for 20 years.

59. The judgment in ***V. Sriharan (supra)***, we may note, was recently followed by a Division Bench of this Court in ***Govind vs.***

State, in which, the lack of jurisdiction in the trial court, to award a sentence of life imprisonment with the denial of remission till completion of a specific period of incarceration, was noted, in the following words:-

> "37. Also, after the judgment in ***Union of India vs. V. Sriharan (2016) 7 SCC 1***, the trial Court cannot possibly order that the accused will undergo life imprisonment for a certain number of years beyond 14 years without being considered for remission."

60. In view of the above legal position, it is clear that, while the learned ASJ was empowered to award, to the appellant, the sentence of imprisonment for life, he did not possess the jurisdiction to caveat the said punishment with a further stipulation, to the effect that, for 25 years, the appellant would not be entitled to seek remission. In other words, as Mr. Sumeet Verma, Advocate appearing for the appellant rightly contends, the learned ASJ could not have awarded the appellant a minimum mandatory sentence of incarceration, such power being available, in law, only with this Court or with the Supreme Court. In the present case, the learned ASJ has awarded, to the appellant, the sentence of rigorous imprisonment for life, without any option to seek remission till he has suffered 25 years of rigorous incarceration. In view of the legal position as enunciated hereinabove, emanating from the law laid down by the Supreme Court, we agree that the learned ASJ could not have entered, in his order, the caveat that the appellant would not be entitled to seek remission till he had suffered 25 years of incarceration. To the said extent, therefore, the impugned order, dated 7th April, 2015, of the learned ASJ, cannot sustain, and would have to be set aside.

61. We are not, however, persuaded to accept the further submission, of Mr. Sumeet Verma, Advocate, to the effect that this Court is also powerless, in the present case, to itself stipulate that the appellant would not be entitled to seek remission till he has served out his imprisonment for a particular number of years. In so submitting, we are of the opinion that Mr. Sumeet Verma, Advocate has misunderstood para 104 of the Judgement of the Supreme Court in ***V. Sriharan (supra).*** In fact, in the said para, the Supreme Court has held that, while hearing an appeal, against an order of the Trial Court, awarding, to the accused, the sentence of death or of life imprisonment, the High Court is within its jurisdiction to direct that the accused would be required to mandatorily suffer such imprisonment, for a particular period, before he can seek remission.

62. Inasmuch as we presently hearing an appeal from an order, of the learned ASJ, sentencing the appellant to rigorous imprisonment for life, para 104 of the judgment in ***V. Sriharan (supra)*** clearly empowers us to condition the said sentence by subjecting the appellant to a minimum mandatory period of incarceration. The stipulation contained in the impugned order, dated 7th April, 2015, of the learned ASJ, to the effect that the appellant would have to suffer 25 years of rigorous incarceration before being entitled to seek remission being, in our view, justified on merits, we maintain the said stipulation, in exercise of the power available with this Court to do so, while confirming that the learned ASJ did not possess such jurisdiction. In

exercise of such power, we, therefore, direct the appellant to suffer the punishment imposed, on him, by the learned ASJ, i.e. to suffer rigorous imprisonment for a period of 25 years before he could apply for remission.

63. Before parting with this judgment, we deem it appropriate to note the judgment of the Supreme Court in ***Raj Kumar vs. State of Madhya Pradesh, (2014) 5 SCC 353.*** In that case, too, the accused-appellant committed rape on a 14 year old girl, during the commission of which she suffered certain grievous injuries, resulting in her death therefrom. The conviction of the accused-appellant was secured, essentially, on the basis of the evidence of a eleven-to-twelve years old child witness, who testified to having witnessed the incident. As in the present case, in that case too, the semen of the appellant was found on the slide prepared from the vaginal swab of the deceased. The Supreme Court, addressed, essentially, the issue of the weight to be accorded to the evidence of the child witness, and observed as under (in paras 18 to 20 of the report):-

> **"**18. It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is

able to discern between right or wrong and it may be ascertained only by putting the questions to him.

19. This Court in State of M.P. v. Ramesh, after considering a large number of its judgments came to the conclusion as under: (SCC p. 792, para 14)

> "14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

20. In view of the above, as the courts below have found the child witness worth reliance, we do not see any cogent reason to take a view contrary to the same."

64. The Section 313 statement of the accused-appellant in the said case was essentially in the form of a denial. Noting the same, the Supreme Court observed (in para 23 of the report) that 'when children were left in the custody of appellant, he was bound to explain as under what circumstances 'X' **(**the deceased girl in that case) died". To hold thus, reliance was placed by the Supreme Court, on an earlier decision in ***Prithipal Singh Vs. State of Punjab, (2012) 1 SCC 2010,*** in para 24 of the report thus:-

> "24. In ***Prithipal Singh v. State of Punjab [(2012) 1 SCC 10: (2012) 1 SCC (Cri) 1]*** , this Court relying on its earlier judgment in ***State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516]*** , held as under: (***Prithipal***

Singh case [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] , SCC p. 30, para 53)

"53. ... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

(emphasis in original)

65. Addressing, thereafter, the issue of the appropriate sentence to be awarded to the accused-appellant, the said decision proceeded to hold as under:-

"29. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the Court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to

whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

30. A three-Judge Bench of this Court in ***Swamy Shraddananda (2) v. State of Karnataka,*** wherein considering the facts of the case, the Court set aside the sentence of death penalty and awarded life imprisonment, but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

31. Thus, taking into consideration the aforesaid judgments, we are of the view that in spite of the fact that the appellant had committed a heinous crime and raped an innocent, helpless and defenseless minor girl who was in his custody, he is liable to be punished severely but it is not a case which falls within the category of rarest of rare cases. Hence, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for premature release. However, it would be subject to clemency power of the executive."

66. Unlike the present case, in which the appellant committed brutal rape of a 8 year old girl, grievously injured her and, thereafter, bludgeoned her to death with such force that her skull shattered into small pieces, in ***Raj Kumar (supra)***, the death of the child was found to have occurred as a result of the injuries suffered by her during the commission of rape. Even so, the Supreme Court upheld the award, to the accused – appellant in ***Raj Kumar (supra),*** of the sentence of imprisonment for life with non-remittable sentence of 35 years' incarceration. We are, therefore, sanguine that, in awarding, as we have, the sentence of rigorous imprisonment for life, of which the first 25 years would involve rigorous incarceration without remission, we have erred, if at all, on the side of leniency.

Conclusion:

67. Resultantly, the present appeal is dismissed, in the following terms:

(i) The conviction of the appellant, under Sections 302, 376 (2)(f), 363 and 201 of the IPC is confirmed.

(ii) The sentences awarded, by the learned ASJ, on the appellant, for the said offences, are as noted in Para 10 (supra) are also upheld. However, while doing so, we confirm that the learned ASJ, could not have awarded, to the appellant, a mandatory minimum period of incarceration of 25 years without remission. We, however, award the same punishment, to the appellant, in exercise of the power that inheres, in us, to do so.

(iii) In other words, for the offences, committed under Sections 302 and 376 (2) (f) of the IPC, the appellant is sentenced to rigorous imprisonment for life, with a further stipulation that, till he suffers rigorous imprisonment for a period of 25 years, he shall not be entitled to seek remission.

68. Trial Court record be sent back with copy of the judgement. Intimation be sent to the Superintendent Jail.

C.HARI SHANKAR
(JUDGE)

S. P. GARG
(JUDGE)

MAY 24, 2018
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