

(2019) 10 UK CK 0070

In the Uttarakhand High Court

Case No : Criminal Reference No. 1 Of 2016, Criminal Appeal No. 104, 318 Of 2016, Government Appeal No. 07, 08 Of 2017

State Of Uttarakhand & Others

APPELLANT

Vs

Akhtar Ali @ Ali Akhtar@ Shamim @ Raja Ustad & Others

RESPONDENT

Date of Decision : 18-10-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 43, 172(2), 204, 293, 313, 313(1), 354(3), 366

Constitution Of India — Article 21

Indian Evidence Act, 1872 — Section 3, 45, 65(B), 112, 165

Indian Penal Code, 1860 — Section 16, 17, 120B, 130, 157, 201, 212, 302, 304, 363, 376, 376A, 382, 392, 393, 394, 395, 396, 397, 398, 399, 52A, 402, 435, 436, 449, 450, 457, 458, 459, 460

Information Technology Act, 2000 — Section 66C

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 5, 6, 7, 8, 16, 17

Citation : (2019) 10 UK CK 0070

Hon'ble Judges : Alok Singh, J;Ravindra Maithani, J

Bench : Division Bench

Advocate : Subhash Tyagi Bhardwaj, Manisha Bhandari, B.S. Adhikari, Piyush Garg, Tapan Singh

Final Decision : Allowed

Judgement

Ravindra Maithani, J

1. In Sessions Trial No. 9 of 2015, State Vs. Akhtar Ali @ Ali Akhtar@ Shamim@ Raja Ustad and others, by the impugned judgment and orders dated 05.03.2016 and 11.03.2016, passed by Learned Special Judge (POCSO)/Fast Track Court/Additional District and Sessions Judge, Haldwani, District Nainital, Akhtar Ali has been acquitted of the charge under Section 120-B IPC, but, he has been convicted under Sections 376A, 363 and 201 IPC, under Sections 3 read with 4, 5 read with 6 and 7 read with 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act") and Section 66C

of the Information Technology Act, 2000 (hereinafter referred to as "the Act") and sentenced as hereunder:

"(i) Under Section 376A IPC death sentence.

(ii) Under Section 363 IPC rigorous imprisonment for seven years and a fine of Rs.5000/-. In default of payment of fine, simple imprisonment for a further period of one month.

(iii) Under Section 201 IPC rigorous imprisonment for seven years and a fine of Rs.5000/-. In default of payment of fine, simple imprisonment for a further period of one month.

(iv) Under Section 66C of the Act, rigorous imprisonment for three years and a fine of Rs.20,000/-. In default of payment of fine, simple imprisonment for a further period of two months."

Prem Pal Verma has been acquitted of the charges under Sections 363, 201, 120-B, 376A in the alternate 302 IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act. But, Prem Pal Verma has been convicted under Sections 212 IPC and Section 66C of the Act and sentenced as hereunder:

"(i) Under Section 212 IPC, rigorous imprisonment for five years and a fine of Rs.10,000/-. In default of payment of fine, simple imprisonment for further period of two months.

(ii) Under Section 66C of the Act, rigorous imprisonment for three years and a fine of Rs.20,000/-. In default of payment of fine, simple imprisonment for further period of two months."

2. Junior Masih @ Foxi has been acquitted of the charges under Section 212 IPC, Section 66C of the Act and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act.

3. (i) Criminal Reference No. 1 of 2016 has been instituted under Section 366 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for confirmation of death sentence as awarded to Akhtar Ali @ Ali Akhtar @ Shamim@ Raja Ustad.

(ii) Criminal Appeal No. 104 of 2016 has been preferred by Akhtar Ali and Prem Pal Verma against their conviction.

(iii) Criminal Appeal No. 318 of 2016 has been preferred by the father of the victim girl against the acquittal of Junior Masih @ Foxi as well as against Akhtar Ali and Prem Pal Verma for certain offences, under which they have been acquitted.

(iv) Government Appeal No. 7 of 2017 has been preferred by the State against the acquittal of Junior Masih @ Foxi.

(v) Government Appeal No.8 of 2017 has been preferred by the State against the

acquittal of Prem Pal Verma for the offences under Sections 363, 201, 120-B, 376-A in the alternate 302 I.P.C. and Section 16/17 read with Sections 4/5/6/7 of the POCSO Act.

4. Since common question of law and facts are involved in all these appeals, therefore, same are being taken up together and decided by this common judgment.

FACTS

5. The facts of this case depict another story of depravity of senses; wanton lust and beastly passion, which made a victim girl of seven years of age to suffer in anonymity; her dignity, soul and senses were buried deep in the darkness. Perhaps, she could not muster the strength to cry with that loudness, which could have been heard by someone to extend a helping hand to that tiny girl on the fateful night; her joy soon extinguished and even she did not survive to tell the tale of her nightmare. What happened to that victim girl, definitely, sent a chill in the spine of the society in the serene foothills of the Himalayas; in the town of Kathgodam, District Nainital. She was brutally sexually assaulted, she died.

6. The victim girl was studying in Pithoragarh, Uttarakhand. She alongwith her father (PW1) had come to attend a marriage at Haldwani in their relations on 18.11.2014. The reception of the marriage was scheduled at Ram Leela Ground, Sheesh Mahal, Kathgodam. It was in the late evening on 20.11.2014. The victim girl was playing with the children. Suddenly, when the children were called for a group photograph, she was found missing. PW36 Iswar Singh Sah was an invitee in the function. He telephoned PW4 Subodh Sharma, a Police Constable about missing of the girl. This information was entered in the General Diary of the police station. Information was given to the Police Officers on duty, to locate the victim girl. There were few vehicles standing near the place of incident. Their occupants were also questioned. The victim girl could not be located. On 21.11.2014 at about 11.30AM, a report of the incident was lodged by PW1, father of the victim girl. The case was lodged and investigation was carried out. On 25.11.2014, PW29 Sabir Ali, who had horses, at the relevant time noticed that one of his horses had gone into the forest. The horse suddenly galloped. When Sabir Ali went near the place, he saw the dead body of a girl. He immediately informed the people at a nearby place. The information reached the Police Station. PW3 Suman Pant got the inquest prepared. Post mortem of the victim girl was conducted on the same day by PW7 Dr. C.P. Bhaisoda. According to it, she was raped. The victim girl had serious injuries, which will be discussed at the later stage. Various articles were collected for forensic examination, including swabs, slides etc.

7. During investigation, name of the Akhtar Ali came into light, who was engaged as a Driver by PW18 Shankar Dutt Padalia on 20.11.2014. His telephone number was put under surveillance and it was noticed that his phone was on the location

of the place of incident at the time of incident. It had left the area on 21.11.2014 and entered into Delhi NCR Circle and on the same Cell phone another number was used, which entered in the Punjab Area. Based on this track, Police team reached Ludhiana. In fact, Special Task Force and Special Investigating Teams were constituted to solve this case. PW10 Yogesh Kumar Chand was in-charge of Special Task Force. He alongwith his colleagues, based on the leads of the telephone surveillance, reached Ludhiana on 27.11.2014 and in the evening on the same day, arrested Akhtar Ali. From his possession, a mobile handset and railway ticket from Haldwani to Delhi of 21.11.2014 and one Identity Card etc. were recovered. According to the prosecution, when arrested, Akhtar Ali confessed his guilt as hereunder:

"On 19.11.2014, I came Kathgodam to meet my friend Prem Pal Verma, who is a Driver by occupation and is a resident of Joshi Mohalla, Kathgodam, whose Mobile No. is 8859062116. On my request, he got me a job of driver, in the dumper of Shankar Padaliya. I used to sleep in the dumper by parking it near Sheesh Mahal Railway Gate, on the road, leading to gas godown. On 20.11.2014, Prem Pal Verma alongwith a friend came to meet me in the evening and we collected money and purchased liquor. Thereafter, we drank and ate in the dumper. On the other side of the railway line, a marriage function was going on. We saw the ladies in that function and we lost our senses. We desired to have fun. We stood near the marriage venue. At about 7:30 a girl aged 8-9 years came behind the tent. As per plan, we threatened the girl and covered her with my blanket. Prem Pal Verma had a country-made pistol. He threatened the girl with that country-made pistol. After covering the young girl in the blanket, we went towards gas go-down, crossed Gola river and took that girl about 3/4 kilometers deep in the bushes and raped her more than once. Due to bleeding from her vagina, the girl became unconscious. In this process of wrong doing, some scratches came on my thighs. We covered the unconscious girl with the leaves and came back. I slept in my dumper. Prem Pal Verma and his friend went to their respective houses. When the family members of the girl complained to the Police, the Police investigated the matter. Out of the fear of being arrested, in the evening of 21.11.2014, I went Delhi by train and switched off my mobile phone. From there, I came Ludhiana and did nothing for a while. Today, when I was going in search of the work you caught me."

8. Recovery memo and arrest memo were prepared. On 28.11.2015, Prem Pal Verma and Junior Masih were arrested. Blood samples of all of them were taken by PW13 Dr. Sanjeev Kharkwal and it was also transmitted to Forensic Science Laboratory (hereinafter referred to as "the FSL"). During investigation, some of the witnesses told it to the Investigating Officer that they had seen Akhtar Ali and Junior Masih near the place of incident, immediately before the incident. After the incident also, they were located in the vicinity.

9. According to the FSL report, DNA obtained in a male autosomal DNA profile from cervical swab, under shirt and underwear of the victim match with the

source of autosomal DNA profile obtained from the blood sample of Akhtar Ali. After investigation, charge sheet was submitted against Akhtar Ali, Prem Pal Verma and Junior Masih, under Sections 363, 376, 302, 201, 120B and 212 IPC and Section 4, 5, 6 of the POCSO Act and Section 66C of the Act.

10. On 02.05.2015, charges under Sections 363, 376A in the alternate Section 302, 201, 120B IPC and Sections 3 read with 4, 5 read with 6 and 7 read with 8 of the POCSO Act and Section 66C of the Act were framed against the Akhtar Ali, charges under Sections 363, 376A in the alternate Section 302, 201, 120B and 212 IPC and Sections 16 and 17 read with Sections 4/5/6/7 of the POCSO Act and Section 66C of the Act were framed against Prem Pal Verma and charges under Section 212 IPC and Sections 16 and 17 read with Sections 4/ 5/6/7 of the POCSO Act and Section 66C of the Act were framed against the Junior Masih @ Foxi.

11. Prosecution in order to prove the case, examined as many as forty witnesses, namely, PW1 father of the victim girl, PW2 Constable, Naushad Ahmad, PW3 Suman Pant, PW4 Constable, Subodh Sharma, PW5 Shanti Kumar Gangwar, PW6 Rajesh Kumar Yadav, PW7 Dr. C.P. Bhaisoda, PW8 Constable, Rajendra Singh, PW9 Constable Shankar Bhandari, PW10 Yogesh Kumar Chand, PW11 Amar Chand Sharma, PW12 Dr. Amit Mishra, PW13 Dr. Sanjeev Kharakwal, PW14 Dr. Vijay Singh Panwar, PW15 Constable, Ashutosh Kumar, PW16 Kishan Singh Bora, PW17 Smt. Pushpa Sammal, PW18 Shankar Dutt Padalia, PW19 Balkrishna, PW20 Sahadat Ali Hasan, PW21 Subhash Singh, PW22 Constable, Surendra Singh, PW23 uncle of the victim girl, PW24 Hariom Sharma, PW25 Deepak Sharma, PW26 Radhey Shyam Shukla, PW27 Arun Kumar, PW28 Vishal Pathak, PW29 Sabir Ali, PW30 Mohan Chandra Bhatt, PW31 Manoj Singh Dewri, PW32 Head Constable, Neeraj Singhal, PW33 Indrajeet Singh, PW34 Dr. Manoj Kumar Agarwal, PW35 Ravindra Kumar Yadav, PW36 Ishwar Singh Sah, PW37 Dr. Bhupendra Singh Negi, PW 38 Rajendra Singh Bisht, PW39 Manish Gaur @ Mannu Gaur and PW40 Vipin Chandra Pant.

12. Akhtar Ali, Prem Pal and Junior Masih were examined under Section 313 of the Code. According to them, they have been falsely implicated in the case and they denied of having committed the crime and claimed trial.

13. After hearing the parties, by the impugned judgment and order, Akhtar Ali and Prem Pal Verma have been convicted and sentenced, as stated hereinbefore and Junior Masih @ Foxi acquitted. Aggrieved by their conviction, Akhtar Ali and Prem Pal preferred the appeal. Father of the victim girl preferred appeal against the acquittal of Junior Masih and Prem Pal for certain offences. State preferred appeal against acquittal of Junior Masih@ Foxi. State also preferred appeal against the acquittal of Prem Pal for the charges under Sections 363, 201, 120-B, 376-A, 302 IPC and Sections 16/17 read with Sections 4, 5, 6, 7 of the POCSO Act. Since Akhtar Ali has been sentenced to death, reference under Section 366 of the Code has also been submitted for confirmation of the death sentence.

ARGUMENTS

14. Arguments by Ms. Manisha Bhandari, learned Advocate on behalf of Prem Pal.

1. Mere use of SIM-card of another person does not attract the provisions of Section 66C of the Act.

2. Prem Pal Verma did neither harboured nor concealed Akhtar Ali. If he knew about the whereabouts of Akhtar Ali, it may not be termed to be an offence. For this, according to learned counsel, Prem Pal may be termed as a bad person, but he may not be fastened with criminal liability for harboring or concealing offender. Therefore, it is argued that no offence under Section 66C of the Act or Section 212 IPC is made out against Prem Pal. The conviction and sentence deserves to be set aside and his appeal allowed.

3. Prem Pal Verma did not talk to Akhtar Ali. It is Akhtar Ali, who called Prem Pal Verma on 21.11.2014 and 22.11.2014. Till then, even Akhtar Ali was not arrayed as an offender.

15. On behalf of the prosecution, it is argued that Prem Pal used SIM card of Prem Singh Dhami and he kept on informing Akhtar Ali, after the incident. Therefore, it is argued that both the offences under Section 66C of the Act as well as Section 212 IPC have been proved against Prem Pal and his appeal deserves to be dismissed.

16. Learned counsel raised the following argument on behalf of Akhtar Ali:-

(i) Prosecution story is unbelievable.

(ii) After the victim went missing, no efforts were made on 20.11.2014; till her dead body was recovered no witness did reveal anything to the Investigating Officer.

(iii) Had the witnesses seen Akhtar Ali in the vicinity on 21.11.2014, they would have told it to the Investigating Officer soon after it was learnt that the victim had gone missing, but none told it to the Investigating Officer.

(iv) The prosecution has not been able to prove as to who spotted the dead body of the deceased on 25.11.2014.

(v) How Nikhil could know about the fact that the dead body of the victim has been recovered?

(vi) Since 20.11.2014 till dead body of the victim was recovered, the entire area was searched for the victim girl, but her dead body was not recovered, which, according to the prosecution, was ultimately found on 25.11.2014 evening. How it could not be spotted earlier?

(vii) According to the prosecution witnesses, on the date of incident in the late evening, Akhtar Ali was sleeping in his dumper. He had not run away. Had he committed the offence, he would have ran away.

(viii) The Police had no clue about the offender and when public demonstrated, against the inaction, they have been falsely roped in.

(ix) PW12 Dr. Amit Mishra is not competent because he did not conduct potency test, which was important in the instant case. Even, there is overwriting in his report, which doubts its authenticity.

(x) PW13 Dr. Sanjeev Kharakwal even does not know as to how to collect blood for DNA test and even he does not know as to what is contamination of blood. It may lead to infer that blood may be contaminated before it is sent for forensic examination.

(xi) PW34 Dr. Manoj Kumar Agarwal is not an expert in the field of DNA. Reference has been made to certain paragraphs of the statement of this witness. The report submitted by PW34 Manoj Kumar Agarwal may not be termed as expert's evidence and DNA profiling may not be conclusive to bring home the guilt of the appellant.

(xii) Forensic Department is under the supervision of Police authorities and there are chances that under direct and indirect influence, wrong report has been submitted.

(xiii) PW34 Dr. Manoj Kumar Agarwal could not tell as to what method did he apply in DNA profiling.

(xiv) Recovery of hair-band is totally false. If according to the prosecution, Akhtar Ali, under the influence of liquor lifted the victim girl and raped her, how could he recall as to where did, on that fateful night, he threw the hair-band of the deceased victim girl. Hair band was allegedly thrown in the dark in the Jungle. It is cooked up story. It is a planted recovery.

(xv) Blood was not found in the cervical swab. It was torn. There must have been blood. It means sample was not properly taken.

(xvi) Confession by Akhtar Ali is nothing but a cooked up story by the prosecution. Had all the accused raped the victim one after the other, there would have been DNA match of all of them.

(xvii) DNA could have been sent at some other laboratory.

(xviii) STR is not good method- SGM is good method for DNA profiling.

(xix) DNA contamination not ruled out.

(xx) While taking the blood sample, protocol was not followed. How it was preserved and sent to FSL? It is not established.

(xxi) Blood was not found on the soil, where the victim girl was recovered. If the victim girl was so brutalized, there would have been immense blood. Non detection of blood on the soil makes the prosecution story doubtful.

(xxii) Statements given by an accused under Section 313 of the Code can't be a basis for conviction. It is not an evidence.

17. Mr. Subhash Tyagi Bhardwaj, learned Deputy Advocate General appearing on behalf of the State referred to the following facts and /or raised following points in his argument:-

- (i) Prosecution has been able to prove the case beyond reasonable doubt.
- (ii) Investigation started soon after lodging of the report. The Investigating Officer questioned the witnesses much before the dead body was recovered. The Dumper driver and owner were questioned.
- (iii) Akhtar Ali came to Haldwani on 20.11.2014. Prem Pal Verma assisted him to get a job as a Dumper Driver with PW18 Shankar Dutt Padalia.
- (iv) PW18 Shankar Dutt Padalia gave keys of his Dumper, Bearing Registration No UP02A 8711 (Dumper No.8711) on 20.11.2014 to Akhtar Ali and also took his telephone number from him, which was 7542832390.
- (v) In the late evening on 20.11.2014, Akhtar Ali, Prem Pal and Junior Masih @ Foxi were seen together taking liquor in the shop of PW16 Kishan Singh Bora. They had parked their Dumpers near the ground, where marriage function was organized. The victim, the daughter of PW1 had come from out station to join the marriage function. She was there with her father and others. At about 7:30 in the evening, when a search was made for the victim girl for a group photograph, she was not found.
- (vi) On 21.11.2014, both Akhtar Ali and Prem Pal Verma were seen together having tea in the shop of PW31 Manoj Singh Dewari. Akhtar Ali and Prem Pal Verma were also seen together in the Durga City Center while coming out from I.D.B.I Bank. PW21 Subhash Singh has stated about it and CCTV footage of the Bank has been proved by the prosecution.
- (vii) On 21.11.2014, Akhtar Ali took Rs.3000/- from his employer Shankar Dutt Padalia on the false pretext of hiring a room, but he ran away from Haldwani. Akhtar Ali purchased a railway ticket from the Railway Station Haldwani after 6:00 PM on 21.11.2014, which was given to him by PW24 Hariom Sharma.
- (viii) The telephone number of Akhtar Ali was on Airtel Tower No. 50491, which covers the ground, where the marriage function was going on i.e. Sheesh Mahal, Kathgodam Haldwani on 20.11.2014.
- (ix) Telephone No. 7542832390 of Akhtar Ali was in West UP Circle till 3:25 AM on 22.11.2014. Phone No. 7542832390 of Akhtar Ali entered into Delhi Zone on 22.11.2014 at about 3:25 AM. In Delhi, he changed his Cell Phone No. 7542832390 and started using Cell Phone No.7533079910, this telephone number of Akhtar Ali entered into Punjab Circle.

(x) On 27.11.2014, the location of the Cell Phone No. 7533079910 of Akhtar Ali was in Ludhiana. He was arrested on that day.

(xi) Akhtar Ali and Prem Pal connected telephonically on 20.11.2014, 21.11.2014 & 22.11.2014.

(xii) On 27.11.2014, when Akhtar Ali was arrested, a railway ticket and a hand set were also recovered from him.

(xiii) Akhtar Ali has used Cell No. 75330799910 by fake ID of Mohd. Iqbal, S/o Sheikh Sabir and Cell No 7542832390 by using fake ID of a Laxmi Devi.

(xiv) On 25.11.2014, the dead body of the victim was recovered. PW7 Dr. C.P. Bhaisoda conducted post mortem and taken the samples. PW8 Constable, Rajendra Singh and PW9 Constable Shankar Bhandari took these samples to the FSL, Dehradun

(xv) When Akhtar Ali and Prem Pal Verma and Junior Masih were arrested, their blood samples were taken on 30.11.2014 by PW13 Dr. Sanjeev Kharkwal. These samples were taken to FSL by PW15 Constable, Ashutosh Kumar.

(xvi) The evidence about taking samples and transmitting it to FSL is totally reliable and samples were taken by the experts.

(xvii) PW34 Dr. Manoj Kumar Agarwal examined the samples at FSL, Dehradun. In the cervical swab, undershirt and panty of the deceased, semen was detected and master profile was prepared by PW34 Dr. Manoj Kumar Agarwal. This master profile match with the DNA profile of Akhtar Ali.

(xviii) The chain of circumstances are connected to each other, which makes irresistible conclusion that it is Akhtar Ali, who kidnapped and committed rape upon the victim, a girl of tender age. There were injuries on the thighs of Akhtar Ali and Prem Pal Verma.

(xix) Prem Pal Verma conspired with Akhtar Ali. The above facts and circumstances, clearly indicates that they together kidnapped the victim girl and raped her mercilessly, which resulted into her death.

(xx) Akhtar Ali gave false explanation in his examination under Section 313 of the Code, which also adds the chain of circumstances to prove his guilt.

18. Mr. Piyush Garg and Mr. Tapan Singh, learned Advocates appearing on behalf of Junior Masih @ Foxi would argue that there is no evidence against Junior Masih. Only PW23 uncle of the victim girl and PW25 Deepak Sharma have stated about his presence. When dumper driver was questioned by them and he has been attributed the statement that he certified the conduct of Akhtar Ali, on that night. It is argued that even if, his statement is taken as true, in any manner, it does not implicate junior Masih in the crime and hence, he has rightly been acquitted.

19. Mr. B.S. Adhikari, learned Advocate argued on behalf of the father of the

victim girl. He adopts the arguments advanced on facts by learned counsel for the State and would further argue that samples from the deceased were taken by PW7 Dr. C.P. Bhaisoda as per procedure. These samples were carefully taken by PW8 Constable, Rajendra Singh and PW9 Constable, Shankar Bhandari to FSL Dehradun. Samples of the blood of the appellants were taken as per procedure by PW13 Dr. Sanjeev Kharkwal. They were handled with care and taken to FSL Dehradun by PW15 Constable, Ashutosh Kumar. Defence has no specific case as to, at what stage, the samples were contaminated. Defence has not given any suggestion as such, as to how, the samples got contaminated. PW7 Dr. C.P. Bhaisoda and PW13 Dr. Sanjeev Kharkwal are proficient experts having large experience, which they deposed and they have denied that in any manner, the samples were contaminated or the procedure was not followed. The defence cannot go beyond the evidence.

EVIDENCE

20. Prosecution, in order to prove the case, examined as many as 40 witnesses. These are witnesses of different facts. They may be categorized under different heads, as hereunder:

(i) Introductory: PW18 Shankar Dutt Padalia, PW30 Mohan Chandra Bhatt and PW39 Manish Gaur.

(ii) Incident/information: PW1 father of the victim, PW2 Constable, Naushad Ahmad, PW4 Constable Subodh Sharma and PW36 Ishwar Singh Sah.

(iii) Recovery of dead body and inquest: PW3 Suman Pant, PW4 Constable Subodh Sharma, PW5 Shanti Kumar Gangwar, PW6 S.I. Rajesh Kumar, PW17 Smt. Pushpa Sammal, PW29 Sabir Ali and PW33 Indrajeet Singh.

(iv) Post Mortem of the deceased and samples to FSL: PW7 Dr. C.P. Bhaisoda, PW8 Constable, Rajendra Singh, PW9 Constable Shankar Bhandari and PW34 Dr. Manoj Kumar Agarwal.

(v) Presence before the incident: PW16 Kishan Singh Bora, PW19 Balkrishna and PW20 Sahadat Ali Hasan.

(vi) Presence after the incident: PW21 Subhash Singh, PW23 uncle of the victim girl, PW25 Deepak Sharma and PW31 Manoj Singh Dewari.

(vii) Telephone Numbers/Surveillance: PW10 Yogesh Kumar Chand, PW11 Amar Chand Sharma, PW26 Radhey Shyam Shukla, PW27 Arun Kumar, PW28 Vishal Pathak and PW35 Ravindra Kumar Yadav.

(viii) Arrest of Akhtar Ali and his medical: PW10 Yogesh Kumar Chand, PW11 Amar Chand Sharma, PW12 Dr. Amit Mishra and PW14 Dr. Vijay Singh Panwar.

(ix) Arrest of Prem Pal Verma and Junior Masih @ Foxi and their medical: PW2 Constable, Nushad Ahmad, PW5 Shanti Kumar Gangwar and PW37 Dr. Bhupendra Singh Negi.

(x) Collection of blood samples and forwarding them to FSL: PW13 Dr. Sanjeev Kharakwal and PW15 Constable Ashutosh Kumar.

(xi) Recovery of hair band by Akhtar Ali: PW3 Suman Pant, PW38 Rajendra Singh Bisht and PW40 Vipin Chandra Pant.

(xii) Investigating Officers: PW33 Indrajeet Singh and PW40 Vipin Chand Pant.

21. There is one more witness i.e. PW32 Head Constable, Neeraj Singhal, he will be referred to at an appropriate place.

Introductory

22. PW18 Shankar Dutt Padalia, PW30 Mohan Chandra Bhatt and PW39 Manish Gaur have introduced Akhtar Ali, Junior Masih @ Foxi and Prem Pal respectively.

23. PW18 Shankar Dutt Padalia is owner of the Dumper No. 8711. According to him, on 20.11.2014, the driver of Manish Chand, namely, Prem Pal Verma introduced him to Akhtar Ali that he belongs to the State of Bihar and knows driving dumper. He requested that this witness should engage Akhtar Ali as his driver. According to PW18 Shankar Dutt Padalia, he had no driver at the relevant time, therefore, he engaged Akhtar Ali as his driver and handed over him the keys of Dumper No. 8711. This witness also took mobile number of Akhtar Ali, which is 7542832390. PW18 Shankar Dutt Padalia has also stated about what happened thereafter. According to him, on 21.11.2014, Akhtar Ali came to him and under the pretext of hiring a room and for purchasing articles, took Rs.3000/- from him. Since, thereafter, Akhtar Ali did not meet this witness. When this witness tried to contact him on his mobile phone, it was switched off. On 21.11.2014, this witness went to see his Dumper No. 8711, but he did not find Akhtar Ali. On 16.12.2014, this Dumper No. 8711 was taken into custody by the Police and a memo was prepared.

24. PW30, Mohan Chand Bhatt introduced Junior Masih @ Foxi. According to him, he had two dumpers at the relevant time, which were being driven by Islam and Munnawar and Junior Masih @ Foxi was conductor on those dumpers. He was working with this witness for the last 3-4 years, prior to the incident. On 20.11.2014, both these dumpers were parked at gas godown road, Sheesh Mahal, Kathgodam, District Haldwani.

25. PW39 Manish Gaur is employer of Prem Pal. According to him, Prem Pal was driver of his dumper. He was driving it for the last 10-12 years prior to the date of incident. The mobile number of Prem Pal was 8859062116.

26. PW23 uncle of the victim girl and PW25 Deepak Sharma have also seen Akhtar Ali and Junior Masih @ Foxi on these dumpers after the incident, on the same night. They have stated about Dumper No. 8711, which was parked near the place of incident. In the site plan Ex. A71 (which is proved by PW33 Indrajeet Singh) the place of parking their vehicles has been shown. Ex. A80 site plan has been prepared by PW40 Vipin Chandra Pant. In it also, the position of Dumper

No. 8711 is shown.

27. In the FIR the description of the victim girl is given. She was seven years old and 3.5 feet tall. PW1 father of the victim girl proved this report.

Incident/ information

28. According to PW1 father of the victim girl, he had come to attend a marriage function from Pithoragarh to Haldwani on 18.11.2014. The reception was on 20.11.2014 at Ram Leela Ground, Sheesh Mahal, Kathgodam. In the evening, the victim girl was playing with the children in the reception. When she was called for a group photograph, she could not be traced. A search was made by this witness. Some children told this witness that a fat man was distributing toffees to the children and was offering them juice. When this witness could not locate his daughter, he informed his relatives. On 21.11.2014 at 11.30 AM, he lodged a report. But, before it, PW36 Ishwar Singh Sah, who was also one of the invitees in the marriage function, had informed the police Constable, PW4 Subodh Sharma. PW36 Ishwar Singh Sah has stated about it and PW4 Subodh Sharma has also confirmed it. But, there is one more witness, who connects all these things, i.e. PW2 Constable, Naushad Ahmad. He proves the General Diary Report No. 51, time 21:10 hours on 20.11.2014, of Police Station Kathgodam, when PW36 Ishwar Singh Sah informed telephonically Constable PW4 Subodh Sharma about the missing of the victim girl.

29. PW2 Constable Naushad Ahmad has also proved the chik FIR and General Diary Entry of a report lodged by PW1 the father of the victim girl on 21.11.2014 at 11.30 AM. According to PW2 Constable Naushad Ahmad, as soon as they received information of the missing of the victim girl on 20.11.2014, they informed the City Control Room, District Control Room, all the officers and deputed Police personnel to search the missing girl.

30. PW1 father of the victim girl proved the FIR Ex. A1 and deposed about the dress worn by the victim girl at the time when she went missing. Her date of birth certificate, some of the articles were placed before this witness, which he proved stating that they belonged to his daughter. According to PW1, father of the victim girl, when the victim girl was being searched on the fateful night, Akhtar Ali was questioned. He was in a dumper, which was parked near the place of function, but Junior Masih @ Foxi saved him by saying that he is Raja Ustad, who is a very simple person. He identified both these persons in the court.

Recovery of the dead body and inquest

31. PW29 Sabir Ali is the person, who was with his horses in the forest on 25.11.2014 when he located the dead body of the victim girl. He informed the persons, who were present near Ram Leela Ground, Sheesh Mahal.

32. PW3 Sub Inspector, Suman Pant was deputed for inquest. She proceeded at the spot; identified the victim girl and prepared inquest. She has proved the inquest and other documents prepared by her for sending the dead body for post

mortem. She also states that there were injuries on the vagina of the victim girl and it appeared, as if, she was murdered after rape. This witness proved the General Diary Entries relating to inquest. She has also stated about the hair band, which was got recovered by Akhtar Ali, from the forest. It will be referred to at the later stage.

33. PW4 Constable Subodh Sharma and PW5 Sub Inspector, Shanti Kumar Gangwar. PW6 Rajesh Kumar Yadav, PW17 Pushpa Sammal and PW33 Sub Inspector Indrajeet Singh are the other witnesses, who proceeded at the spot, where the dead body of the victim girl was found. They have stated about it. PW6 Rajesh Kumar Yadav was in-charge city control room. He was informed by Nikhil, the cousin of the victim girl about recovery of the dead body. He immediately rushed to the spot & called other police officers. PW33 Indrajeet Singh also states that the clothes of the victim girl, 10 rupees currency note, toffee wrapper, 2 rupees coin, beedi wrapper and sandal were taken into custody and a memo was prepared. He proved it. He also proved the site plan, at which, the dead body was recovered. According to PW33 Indrajeet Singh, Investigating Officer, he also took into possession the plain and blood stained soil and prepared a memo of it. He also proves the General Diary Entry No. 38 of that day, by which, all these recovered articles were deposited at the Police Station. He also proves the articles recovered by him.

34. PW5 Sub Inspector, Shanti Kumar Gangwar is scribe of the inquest Ex.A9, which was got dictated to him by PW3 Sub Inspector, Suman Pant.

35. PW17 Pushpa Sammal is a witness of inquest. She has stated and proved it. After inquest, the dead body of the victim girl was sent for post mortem.

Post mortem of the deceased and samples to FSL

36. PW4 Constable Subodh Sharma is the person, who took the dead body for post mortem, which was conducted by a panel of three Doctors. PW4, Constable Subodh Sharma has stated about it. He also states that doctors conducted the post mortem and had taken the samples for DNA and other articles, which were handed over to this witness.

37. PW7 C.P. Bhisoda conducted post mortem. According to PW7 Dr. C.P. Bhisoda, following injuries were found on external examination:

1. Reddish contusion of size 4 cm x 2.5 cm present around left eye periorbitally.
2. Reddish abraded contusion of size 6cm x 1.5 cm present on left side of face along the border of left side of mandible and is placed obliquely.
3. Multiple linear reddish scratch present on chest on its anterior aspect bilaterally ranging from size 3 cm to 10 cm placed in a zigzag manner.
4. Reddish abraded contusion of size present on middle part of left buttock of size 2cm x 2cm and is 3cm from the midline.

5. Reddish abrasion of size 6cm x 2cm presents on lateral aspect of left leg and is 2cm above lateral malleolus placed obliquely.

6. Reddish linear scratch of size 4cm long present on medial aspect of right thigh 4cm lateral and below labia majora and is placed obliquely.

7. Lacerated wound of size 07 cm x 04 cm starting from Posterior fourchette, lower part of vagina and extending up to anal region on dissection the hymen, vagina, external os, cervix found torn from its posterior wall with clotted blood present in and around surrounding tissue. (A, B and E Swab taken from out vagina, cervical and vaginal washing with slide prepared for semen/spermatozoa analysis and DNA).

8. Diffuse swelling in perianal region on dissection perianal haematoma present. (D-Anal swab taken with slide prepared for semen/spermatozoa and DNA)."

38. According to PW7 Dr. C.P. Bhaisoda, in the internal examination, he found that all the organs were pale with early putrefactive changes. Probable time elapsed between the injury and death was within few minutes and time gap between death and postmortem was 4-5 days. Cause of death was due to shock and hemorrhage as a result of injury of vagina and perianal region following sexual assault consequent upon blunt force impact and sufficient to cause death in ordinary course of nature. He proved post mortem report and also states that the following items were handed over to Police officials after post mortem examination.

"Handed over to the police official after Post Mortem examination

1. Stitched Dead body after Postmortem examination.

2. A sealed parcel containing Black T-Shirt, white Undershirt, blue underwear and white beaded necklace. (for semen/spermatozoa, DNA and blood grouping).

3. Postmortem report to SSP Nainital with police paper no.1-11 duly initialed by me.

4. Postmortem report to SO PS Haldwani.

5. 6 jars with inscription A, B, C, D, E, F containing outer vaginal swab and smear, cervical swab and smear, buccal swab and smear, anal swab and smear, Vaginal washing, nails scrapping respectively for semen/sperm and DNA analysis to forensic science lab.

6. 3 sealed jars for chemical analysis containing jar no.1 sample of preservative saturated solution of common salt, jar no 2 whole of the stomach with its content and part of small intestine, and jar no 3 part of liver, spleen and kidney.

7. 2 sample of seal."

39. Now, it may be noted here that according to the post mortem report, these articles were taken by PW4 Subodh Sharma, who had stated about it and proved

the General Diary Entry Report No. 39, time 23:05 on 25.11.2014 of the police station, by which, all the articles were deposited at the Police Station Kathgodam.

40. PW8 Constable Rajendra Singh is the person, who took the samples to FSL for examination. According to him, he was posted at Police Station Kathgodam on 26.11.2014. On that day, he took the samples from Maal Khaana, the vaginal swab, smear and other articles, including clothes for DNA examination. He proved the General Diary Report No. 16 of 11:05AM and states that he reached the court of Chief Judicial Magistrate, Nainital. The Chief Judicial Magistrate forwarded these articles in two parcels. Alongwith PW9 Constable Shankar Bhandari, he proceeded to Dehradun and on 27.11.2014, they deposited both these parcels in sealed and intact condition with the FSL. He proved entries regarding them. PW9 Constable Shankar Bhandari is the person, who accompanied PW8 Constable Rajendra Singh for forwarding those samples to FSL. He has stated about it and corroborated the statement of PW8 Constable, Rajendra Singh.

41. PW34, Dr. Manoj Kumar Agarwal examined the samples at FSL Dehradun and submitted the report. He has stated in detail about the examination and proved the report. The conclusion drawn after DNA examination is as hereunder:

"The DNA test performed on the exhibits provided is sufficient to conclude that,

1. the DNA obtained in a male autosomal DNA profile from the Exhibits - 1, 10 and 11 (cervical swab, undershirt of victim and underwear of victim) match with the source of autosomal DNA profile obtained from the Exhibit-22 (Blood sample of accused Akhtar Ali).

2. The male autosomal DNA profiles obtained from Exhibit-23, 24 and 25 (blood samples of accused Prem Pal, Junior Masih and Lalit Kumar Arya) do not match with the male autosomal DNA profile obtained from the Exhibits - 1, 10 and 11 (cervical swab, undershirt of victim and underwear of victim).

3. One single female autosomal DNA profile is common in the autosomal DNA profiles obtained from the Exhibits- 1, 3, 4, 5, 6, 10, 11, 12 and 14. (cervical swab, oral swab, oral slide, anal swab, anal slide, under shirt, underwear, T-shirt and nail scrapping swab)."

Presence of Akhtar Ali, Junior Masih @ Foxi and Prem Pal near the place of incident, soon before it.

42. The victim girl went missing from the marriage function at Ram Leela Ground, Sheesh Mahal, Kathgodam. PW16 Kishan Singh Bora is a shopkeeper, who runs a tea shop near this place. According to him, on 20.11.2014, late in the evening at about 7:00-7:15 PM, Akhtar Ali and Prem Pal came to his shop, drank liquor and left. According to this witness, on that day, there was a marriage function in the Sheesh Mahal and this witness also attended the party. He also states that the next day morning, Akhtar Ali had come at his shop for tea.

43. PW20 Sahadat Ali Hasan was a visitor in the shop of PW16 Kishan Singh Bora in the evening of 20.11.2014. According to him, on that day, at about 7:00 in the evening, he visited the shop and saw Akhtar Ali and Prem Pal at the shop drinking liquor. Lallu Kumar @ Lallu also came there and he joined Akhtar Ali and Prem Pal. In fact, PW16 Kishan Singh Bora has also stated that when Akhtar Ali and Prem Pal were drinking in his shop, Sahadat and other labourers were also sitting there.

44. PW19 Balkrishna is another shopkeeper, whose shop is also situated near Sheesh Mahal, Ram Leela Ground, Kathgodam. According to him, on 20.11.2014, in the evening at about 7:30 PM, Akhtar Ali and Prem Pal, in an inebriated state, came to his shop and purchased toffees, chocolate, bidi and cigarettes. He also states that the dumpers, on which, Akhtar Ali and Prem Pal were drivers were parked near Ram Leela Ground, gas godown road, Kathgodam.

Akhtar Ali, Prem Pal and Junior Masih @ Foxi spotted together after the incident

45. Prem Pal and Akhtar Ali both were spotted together after the incident also. PW31 Manoj Singh Dewri also runs a shop at Sheesh Mahal, Ram Leela Ground, Kathgodam. It is a place, where marriage function was organized and from where, the victim girl went missing. According to PW31 Manoj Singh Dewri, on 21.11.2014 morning, at about 9:30 Prem Pal, Junior Masih @ Foxi and Akhtar Ali visited his shop. They were all drunk. They had tea at his shop. They were talking discreetly, as if, they were making some plans. This witness did not recognize Akhtar Ali on that day, when he saw him alongwith Prem Pal and Junior Mashi @ Foxi. But, in the court, he identified Akhtar Ali.

46. PW23 is the uncle of the victim girl. According to him, on the date of incident, when he was informed about the missing of the victim girl, he came to the marriage venue. They searched for the victim girl. Near the venue, Dumper No. 8711 was parked. A fat man was inside the cabin. He was called to come out but he did not. Thereafter, he was forcibly taken down from the cabin. But, meanwhile, a person came down from another Dumper No. 5712 and told that he is Raja Ustad, a good man, who had come on that day itself. This witness identified Akhtar Ali and Junior Masih @ Foxi. According to him Akhtar Ali was in Dumper No. 8711 and it is Junior Masih, who told that Akhtar Ali had joined the job on that day itself. PW25 Deepak Sharma also accompanied PW23 uncle of the victim girl, when they confronted with Akhtar Ali and Junior Masih @ Foxi.

47. PW21 Subhash Singh is Assistant General Manager, IDBI Bank. According to the prosecution, on 21.11.2014, both Akhtar Ali and Prem Pal visited the Bank and it was captured in the CCTV. The CCTV footage was taken by the Police in the custody in the presence of PW21 Subhash Singh. He proved all those articles.

Telephone surveillance and arrest of Akhtar Ali and his medical examination.

48. In fact, instant case was unfolded by telephone surveillance also. PW10 Yogesh Kumar Chand was the Head of Special Task Force to solve this mystery.

He has stated that during investigation, they came to know that Akhtar Ali had also been missing from the date of incident. His mobile number was put under surveillance. This number is 7542832390, which was in the name of Laxmi Devi. Its call details were analysed. On 20.11.2014 and 21.11.2014, it was within the towers of the place of incident. There were two IMEI numbers of this phone. Another Phone No. 7533079910 was running on one of the IMEI, which was in the name of Mohd. Iqbal. Its location was traced and found in Ludhiana. Thereafter, this witness alongwith other police personnel went Ludhiana and arrested Akhtar Ali, where he confessed. According to PW10 Yogesh Kumar Chand from the possession of Akhtar Ali, Ticket, Mobile handset, identity card etc. were recovered. Memo Ex. A25 prepared. This witness proved all these articles. PW11 Amar Chand Sharma was also a member of the Special Task Force. He has also stated about the telephone numbers, their locations and arrest of Akhtar Ali.

49. PW26 Radhey Shyam Shukla is an Officer of Airtel. He has stated about the mobile number of Akhtar Ali i.e. 7542832390 and stated that he gave the call details to Investigating Officer. This number was in the name of a Laxmi Devi. This witness proved the call details Ex. A34 to A41. PW27 Arun Kumar is also an Officer of Aircel. He made available the call details of Telephone No. 7533079910, which was in the name of Mohd. Iqbal. He proved the call details Ex. A42 to 49 and other documents. PW28 Vishal Pathak is also another Officer of Vodafone. He gave details of Telephone No. 7533079910 (Akhtar Ali) as well as 8859062116 (Prem Pal) and 9536935372 (Junior Masih @ Foxi). This witness proved the documents given by him to the Investigating Officer. According to him, Mobile No. 8859062116 was in the name of Prem Singh Dhami and Mobile No. 9536935372 was in the name of Manohar Lal.

50. PW35 Ravindra Kumar Yadav is another very important witness. He was Special Operation Group Incharge, District Nainital. His task was to identify the accused on the basis of surveillance. According to him, Mobile No. 7542832390 of Akhtar Ali entered in UP West area on 20.11.2014 and talked to different numbers and at about 7:00 in the evening, its location was near the marriage venue. This witness has stated the exact location and states that it was within the area, where the victim girl was lifted and found subsequently. From this number on 21.11.2014, talks were made on Mobile No. 8859062116, which was with Prem Pal. There were four calls between these numbers. Both these numbers were found suspicious. The mobile number of Akhtar Ali has two IMEI numbers. Based on it, its location was followed, it was found that on 22.11.2014 at 3:25 AM, this telephone number enters Delhi NCR area and he speaks to Prem Pal at 3:29 AM. At 8:22 AM, he also sends SMS to Prem Pal and thereafter, this number was switched off. Thereafter, from this handset Mobile No. 7533079910 was used, which was in the name of Mohd. Iqbal. It activates on 23.11.2014. This number then goes to Punjab area. This witness has stated everything in detail.

51. PW12 Dr. Amit Mishra medically examined Akhtar Ali on 28.11.2014, at Community Health Center, Kaladhungi and found abrasion on both thighs measuring 1 x .5cm x skin deep (skin normal). According to him, Akhtar Ali was competent to sexual intercourse. PW14 Dr. Vijay Singh Panwar also conducted medical examination of Akhtar Ali on 03.12.2014 with regard to potency. This witness medically examined Akhtar Ali. According to this witness, there was no injury on the genital of Akhtar Ali and there was no reason to say that he was impotent. Akhtar Ali has five children. This has also been stated by this witness and details of all five children has also been recorded in the medical report Ex. A30.

Arrest of Prem Pal and Junior Masih @ Foxi and medical examination.

52. On 29.11.2014, Prem Pal and Junior Masih @ Foxi were arrested by PW2 Constable Naushad Ahmad and PW5 Shanti Kumar Gangwar. They had stated about it. After arrest, both Akhtar Ali and Junior Masih @ Foxi were medically examined by PW37 Dr. Bhupendra Singh Negi. PW37 Dr. Bhupendra Singh Negi has stated that he examined Prem Pal on 29.11.2014 and found following:

"1. A brown scab present vertically in right side of chest 5 cm x 0.5 cm medial to right nipple, 1cm in length.

2. Two abrasion marks present on medial side of right thigh. First abrasion is 3cm x 4cm x 0.5 cm below the mid inguinal point. Second abrasion is 3x 0.5cm x 2cm medial to the upper abrasion mark.

Both the abrasion marks are brownish scab."

53. PW37 Dr. Bhupendra Singh Negi also examined Junior Masih @ Foxi, but no external injury was found on his body.

Blood Samples & Transmission to FSL

54. There is one more chain of events, which prosecution has tried to establish that is with regard to forensic examination of the blood and for this purpose, PW13 Dr. Sanjeev Kharakwal took blood samples of Akhtar Ali, Prem Pal and Junior Masih @ Foxi. According to this witness, after the samples were taken, he sealed them, signed the forms and gave it to the concerned officer. PW15 Constable Ashutosh Kumar is the person, who had accompanied PW13 Dr. Sanjeev Kharakwal to District Jail, Nainital, when samples were taken. According to PW15 Constable Ashutosh Kumar, these samples were deposited in Police Maal Khaana, on the same day. He proved the General Diary Entry No. 42, of the day. According to him, he took these blood samples on 01.12.2014 from Police Station as per General Diary Report No. 22 time 10.05 AM, to place them before the court of District and Sessions Judge, Nainital and from there, he took them to FSL. He has proved the General Diary Entry of Police Station. This witness also collected the samples alongwith report from FSL and placed them before the court. This witness has proved all the General Diary entries and reports.

Recovery of Hair band

55. According to the prosecution, when Akhtar Ali was arrested and confessed, he was taken to the place of incident. He took the police team to that place and recovered the hair band of the victim girl, which he had thrown, while kidnapping the victim girl. It was recovered at 8:40 AM on 28.11.2014. PW3 Sub Inspector, Suman Pant and PW38 Sub Inspector, Rajendra Singh Bisht have stated about it.

56. There is one more witness PW32 Head Constable, Neeraj Singhal, who has stated about the newspaper, which he gave to the Investigating Officer. In the newspaper, photographs of Akhtar Ali, Prem Pal and Junior Masih @ Foxi were published.

Investigating Officers

57. PW33 Sub Inspector, Indrajeet Singh is the first Investigating Officer. According to him, soon after the case was lodged, search for the victim girl was made. Police teams were deputed. On 25.11.2014, he interrogated, Shankar Dutt Padalia, Mannu @ Mannu Gaur, Kishan Singh Bora i.e. the owners of the dumpers and the shop keeper. He suspected the role of Akhtar Ali and Prem Pal and on the same day, according to this witness, the dead body was recovered. This witness reached at the place of incident and when inquest was prepared by PW3 Suman Pant, he took articles into custody and prepared a memo thereof. This witness has also proved the site plan of the venue, from where, the victim girl was kidnapped and the place, from where, her dead body was recovered. He also states that he took blood and plain soil, which was sent to FSL.

58. PW40 Vipin Chandra Pant is final Investigating Officer. In details, this witness has stated about the steps taken by him during investigation. According to this witness, on 21.11.2014, he came to know that Akhtar Ali and Prem Pal had visited the IDBI Bank. He gave an application to take CCTV Footage. On 11.12.2014, he viewed those CCTV footage and found that on 21.11.2014 at 2.04 PM, Prem Pal and Akhtar Ali went inside the bank. He took CCTV footage in a pen-drive and prepared a memo. He also took into his possession Dumper No. 8711. Prepared the site plan and also took into his possession, the newspaper, in which, the photographs of Akhtar Ali, Prem Pal and Junior Masih @ Foxi were published. He proved memo thereof Ex. A70 and proved the charge sheet.

59. This case is based on circumstantial evidence. None had seen any one committing the crime. It is settled law that in the case of circumstantial evidence, the events should be so connected together as to form the chain, which may lead one and only one conclusion that it is the accused, who has committed the crime. In the case of State of Himachal Pradesh Vs. Raj Kumar (2018) 2SCC 69, the Hon'ble Supreme Court, held as hereunder:-

"9. Prosecution case is based on circumstantial evidence. It is well settled that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established

and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

DELIBERATIONS

In Re: Akhtar Ali:-

60. With regard to forensic evidence, two fold arguments have been advanced on behalf of Akhtar Ali; (i) The sampling procedure has not been proved to be accurate and scientifically proven and methodology, by which, examination was conducted has not been proved; (ii) PW34 Dr. Manoj Kumar Agarwal is not an expert in the field of DNA. PW13 Dr. Sanjeev Kharkwal is not capable person to take blood samples. Arguments have also been advanced with regard to the transmission of the samples to FSL and it is argued that it has not been proved that the samples were intact and wrong positive DNA result may not be ruled out.

61. Before this aspect of the matter is examined, it would be apt to first examine the value of DNA report in the evidence.

Deoxyribonucleic Acid (DNA)

62. DNA is a new technology to determine the identity. It is definitely, gaining momentum across the globe. In fact, scientific evidence has been taken in the court of law as expert evidence. Long back in the year 1957, in the case of Bhagwan Das and another vs. State of Rajasthan, AIR 1957 S.C.589, Hon'ble Supreme Court cautioned that an expert opinion should not be substituted merely on the basis of collecting some passages from other text books without confronting them to the expert. Hon'ble Court observed as hereunder:-

"(13) The learned Sessions Judge was of the opinion that the evidence of the doctor P.W. 11 made the story that shivlal could walk for a little distance upto the Khala of Hukma or was able to talk so as to make a dying declaration, improbable. But the learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on Medical Jurisprudence by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of disposing of the evidence of an expert unless the passages which are sought to discredit his opinion are put to him....."

63. Undoubtedly, under Section 45 of the Indian Evidence Act, 1872, evidence of the expert is admissible. There may be numerous kinds of experts. DNA Report is basically supposed to be a report submitted after following due protocol, on some methodology, scientifically. It is a scientific report, a scientific opinion placed by

an expert.

64. In the case of Kamti Devi (Smt.) and another Vs. Poshni Ram, (2001) 5SCC 311, Hon'ble Supreme Court observed about the DNA report. It is interesting to note that in that case, there was no DNA report before the Court. What Court observed is as hereunder:-

"10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

65. But subsequently in the year 2014, in the case of Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another, (2014) 2SCC 576, Hon'ble Supreme Court, inter alia, held that presumption under law can be rebutted based on DNA report. In para 19, the Court observed as hereunder:

"19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of the child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

66. In para 20 of the judgment in the case of Nandlal Wasudeo Badwaik (supra), Hon'ble Court observed as to under what circumstances observations were made in the case of Kamti Devi (supra), as hereunder:

"20. As regards the authority of this Court in Kamti Devi V. Poshni Ram, (2001) 5SCC311:2001 SCC (Cri) 802 this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act". The judgment has to be understood in the factual scenario of the said case. The said

judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, was this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents."

67. In the case of Kamalanantha and others Vs. State of T.N. (2005) 5SCC 194, the issue of evidentiary value of DNA was further came up for consideration before the Hon'ble Supreme Court. Dr. Lalji Singh, Deputy Director, CCMB, Hyderabad was examined in that case. The expert in that case had deposed that contamination cannot give positive results. The report was accepted and what the court quoted in that case, is as hereunder:

"60. Dr. Lalji Singh was subjected to lengthy cross-examination. He has categorically stated that if really there is any contamination, it would result only in non-matching of bands. He has also stated that multilocus/single-locus probe have been carried out throughout the world for DNA test.

63. The witness further stated that the contamination never results in proper match. It can give rise to exclusion not to positive inclusion. The witness in cross-examination has specifically stated as under:

"According to me, for paternity test, large-scale population database was neither required not even today. When the samples of the parents are not available and when one has to establish the identity of the child based on probability only then database is required. In short, where both the parents are available, no database is required for paternity testing."

68. In the case of Pantangi Balarama Venkata Ganesh Vs. State of Andhra Pradesh (2009) 14 SCC 607, the Hon'ble Court, inter alia, observed as hereunder:-

"41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

"Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine."

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Center for Cellular and Molecular

Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken."

69. The last sentence of what is quoted, hereinabove, is very important with regard to DNA. What the Court has noted is very interesting that it was not shown in that case that such precaution was not taken. It means DNA report has to be accepted unless it is shown that required precaution was not taken.

70. Further in the case of Santosh Kumar Singh Vs. State through CBI (2010) 9 SCC 747, Hon'ble Supreme Court, inter alia, held that it would be a dangerous doctrine for the court to discard the evidence of an expert witness by referring to certain texts and books without putting those texts to the expert and taking opinion thereon. It has also been observed by the Court in the case of Santosh Kumar Singh (supra) that no single question was put to the expert as to the accuracy of the methodology and procedure followed for the DNA profiling. The Court held, as hereunder:

"28. The trial court then went on to Circumstance 9 and evolved its own theories and after a huge discussion, rejected the DNA report given by CCMB, Hyderabad as also the evidence of Dr. Lalji Singh and Dr. G.V. Rao. This finding has also been reversed by the High Court by observing that though there appeared to be no physical evidence of rape on the body but from the DNA test conducted on the vaginal swabs and slides and the underwear of the deceased and the blood sample of the appellant, it was clear that rape had been committed, and that too by him. The High Court held that it would be a dangerous doctrine for the court to discard the evidence of an expert witness by referring to certain texts and books without putting those texts to the expert and taking his opinion thereon. The High Court also reversed the finding of the trial court that the vaginal swabs and slides and the blood samples of the appellant had been tampered with.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das v. State of Rajasthan AIR1957 SC589 : 1957 Cri LJ 889 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert."

"71. We feel that the trial court was not justified in rejecting the DNA report..... We accordingly, endorse the conclusion of the High Court on circumstance 9."

71. In the case of Mukesh and another Vs. State (NCT of Delhi) and others, (2017) 6SCC 1, Hon'ble Supreme Court examined the admissibility of the DNA

report and also referred to the cases under various jurisdictions. In para 228, Hon'ble Supreme Court held that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted. In this case reference has also been made to Frye and Daubert's case of United States of America. This Court will refer to them at a later stage.

72. From the above legal principles, with regard to the accuracy, admissibility and weightage of DNA report in evidence, the following principles emerge:

- (i) Expert opinion should be respected.
- (ii) Court should not ordinarily substitute the opinion of the expert merely on the basis of collecting some passages from other text books without seeking explanation of the expert on those texts.
- (iii) The result of a genuine DNA test is scientifically accurate.
- (iv) Precautions are required to be taken to ensure proper DNA examination.
- (v) The DNA report deserves to be accepted unless absolutely dented and for non-acceptance of the same, it has to be established that there have been no quality control or quality assurance. If the sample is proper and if there is no evidence as to tampering of the samples, the DNA test report is to be accepted.
- (vi) The Court should not venture on its own to discredit the opinion of an expert on the basis of certain texts and books, without putting these texts and books to the expert and taking his opinion thereon.
- (vii) If questioned, the Court may examine the methodology or data collection or the process involved in the DNA examination. The questioning should begin with the expert.
- (viii) The expert opinion and its basis are relevant to be accepted without analysis unless it is demonstrated that the report is dented.

73. The question is as to what the prosecution is required to prove. Whether mere production of DNA report is sufficient or the expert is also required to be examined. If examination of the expert is essential, what is required to be deposed by him. How much should the court probe the expert's evidence?

74. In the case of Frye vs. United States, 293F. 1013 (D.C. Cir 1923), it was held that the testimony of expert deduced from a well recognized scientific principle or discovery may be accepted in evidence provided that the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. It was a case of blood pressure deception test. This is "acceptance theory". But subsequently, when the Federal Rules of Evidence were promulgated, in the case of Daubert et ux, Vs.

Merrell Dow Pharmaceuticals, Inc. 1993 SCC Online US SC 104, it was, inter alia, held that "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence-Especially Rule 702- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

75. Rule 702, which has been referred to in judgment of Daubert (supra) is as hereunder:-

Rule 702. Testimony by Expert Witnesses.

"A witness, who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case."

76. No rules of evidence, as such, are in force in this country for accepting the expert evidence. It all rests upon the prosecutor as to how he introduces the expert? How he proceeds with the testimony of the expert? And, of course, it also depends upon the presiding judge, as to how he ensures that truth is not suppressed.

77. In the case of Ramesh Chandra Agrawal Vs. Regency Hospital Limited and others (2009) 9 SCC 709, Hon'ble Supreme Court observed as hereunder:-

"16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

- (i) that the expert must be within a recognized field of expertise,
- (ii) that the evidence must be based on reliable principles, and
- (iii) that the expert must be qualified in that discipline.

(See Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p.178.)"

78. Section 293 of the Code, mandates that under certain circumstances, the FSL report may be admissible and can be read in evidence. It reads as hereunder:

"293, Reports of certain Government scientific experts.-

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other Government Scientific Expert specified by notification, by the Central Government for this purposed."

79. A bare perusal of the above provision makes it abundantly clear that to a certain extent, the presumption is attached to the truthfulness or accuracy of the reports of such experts, as specified under Section 293 of the Code. These are mainly Government scientific experts. Sub Section (2) of Section 293 of the Code, gives discretion to the Court in the matter of summoning and examining any such expert as to the subject matter of his report. It definitely means that even without summoning and examining such expert, the report of Government scientific expert, to whom, Section 293 of the Code applies, may be used as evidence, in the trial.

80. Law Commission of India in Report No 271 dealt with the subject "Human

DNA Profiling- A draft Bill for the Use and Regulation of DNA- Based Technology". And, in Chapter VII drawn the conclusion, as hereunder:

"7.1 DNA Profiling, an accurate and well established scientific technique is used for disaster victim identification, investigation of crimes, identification of missing persons and human remains, and for medical research purposes.

7.2 Most of the countries have enacted appropriate laws within the framework of their respective constitutions and other legal frameworks for the aforesaid purposes.

7.3 DNA Profiling and use thereof involves various legal and ethical issues and concerns are raised and apprehensions exist in the minds of the common man about its misuse which unless protected may result in disclosure of personal information, such as health related data capable of being misused by persons having prejudicial interests, adversely affecting the privacy of the person.

7.4 Whether in Indian context privacy is an integral part of Article 21 of the Constitution is a matter of academic debate. The issue is pending consideration before the larger bench of the Supreme Court.

7.5 The Bill of 2017 provides provisions intended to protect the right to privacy. The mechanism provided permits for processing of DNA samples only for 13 CODIS loci which would not violate in any way the privacy of a person and as a result will never go beyond identification of a particular person. The strict adherence to 13 CODIS loci will eliminate the apprehension of revealing genetic traits.

7.6 The Code of Criminal procedure (Amendment) Act 2005 which came into force on 23rd June 2006 added Explanations to sections 53, 53A and 54 to clarify the scope of medical examination particularly in respect to the extraction to the bodily substances and the explanation provides that examination of a person shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by scientific techniques including DNA Profiling and such other tests that the medical practitioner deems necessary.

7.7 Thus the Bill of 2017 is in consonance and in conformity with the aforesaid provisions which are added by the Amendment Act 2005, which also provides for DNA profiling."

81. Law Commission recommended a draft Bill titled "The DNA-Based Technology (Use and Regulation) Bill, 2017" The Bill was once introduced but lapsed. Last time the Bill No. 128 of 2019 titled "The DNA Technology (Use and Application) Regulation Bill, 2019" was introduced in Lok Sabha on 08.07.2019. The Bill provides for the regulation of use and application of Deoxyribonucleic Acid (DNA) technology for the purposes of establishing the identity of certain categories of persons including the victims, offenders, suspects, undertrials, missing persons and unknown deceased persons and for matters connected therewith or

incidental thereto. It also deals with the "Obligations of DNA Laboratory" under Chapter IV.

82. DNA Profiling is evolving science. It is claimed to be accurate and perfect. It is an evidence, which though is categorized as expert opinion, is based on "scientific investigation". It may be termed as a "scientific opinion". The expert definitely plays an effective role in the matter of giving opinion. What has to be ensured is the process and methodology, of course do and don'ts in the process matters a lot.

83. Undoubtedly, the trial judge has immense power under Section 165 of the Indian Evidence Act, 1872 to question a witness, which definitely, he should actively engage, while an expert is being examined. If prosecution at any stage, fails to elaborate the proficiency or methodology adopted by the expert, the trial judge should not be a moot spectator, during the trial. He should also not very proactive, but, act in a balanced manner so as to elicit the truth. In the cases when an expert, who has submitted DNA examination report is examined, justice demands that the Court should satisfy itself with the processes involved, methodology adopted and do and don'ts attached with the processes.

84. After all trial is nothing but search for truth and a judge can play very important role to elicit the truth. In the case of A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and others, (2012) 6 SCC 430, Hon'ble Supreme Court had occasion to describe the role of a judge in the trial.

"25. This Court in Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370: (2012) 3SCC (Civ) 126 had an occasion to deal with the same aspect. According to us, observations in paragraphs 32 to 52 are absolutely germane as these paragraphs deal with relevant cases which have enormous bearing on the facts of this case, so these paragraphs are reproduced hereunder:- (SCC P P.383-88)

"32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.

33. The truth should be the guiding star in the entire judicial process.

Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 , this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the

combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In *Ritesh Tewari v. State of U.P.* (2010) 10 SCC 677 : (2010) 4SCC (Civ) 315, this Court reproduced often quoted quotation which reads as under: (SCCp.687, para 37)

37.... "Every trial is a voyage of discovery in which truth is the quest"

(emphasis in original)

This Court observed that the 'power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.'

37. Lord Denning, in the case of *Jones v. National Coal Board* (1957) 2 QB 55 : (1957) 2WLR 760: (1957) 2 All ER 155 (CA) has observed that: (QB p. 63)

"... In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

38. Certainly, the above, is not true of the Indian Judicial System. A Judge in the Indian System has to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that 'every trial is a voyage of discovery in which truth is the quest'. In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

39. Lord Denning further observed in *Jones* (1957) 2 QB 55 : (1957) 2WLR 760: (1957) 2 All ER 155 (CA) that: (QB p.64)

'... It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth...'

40. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimised.

51. In the administration of justice, Judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice."

85. Long ago in the case of Ram Chander Vs. State of Haryana, (1981) 3 SCC 191, Hon'ble Court observed as hereunder:-

"2. The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172 (2) of the Code of Criminal Procedure enables the Court to send for the police diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial Sessions Judge, Nellore V In the Ramanna Reddy, ILR 1972 AP 683: 1971 Cr.L.J. 1485."

86. Briefly here only, the Court would like to mention as to what the Court should do in such matters, when DNA report is produced. First and foremost it has to be ensured that the expert is examined in the court to explain the report. In such cases, if prosecution does not place on record, the requisite information relating to the expert report, the Court should, in order to satisfy itself about the accuracy of the DNA report, may also get the following information, by questioning the expert:

(i) Is the expert, in fact, an expert? His educational qualification and training experience in the relevant field? Even if, it is in a little detail, it should be recorded.

(ii) How was it ensured that the samples were intact and not degraded for conducting the test?

(iii) The available methodology for conducting the test? The advantage and disadvantage of each one of them?

(iv) Why a particular method was followed by the expert? Its advantages?

(v) What were the chances of contamination? And, how it was ensured that the samples are contamination free? What processes were adopted to ensure it?

(vi) What precautions were required to be taken in the examination? How was it ensured?

87. In the instant case, a lot of arguments have been advanced regarding PW34 Dr. Manoj Kumar Agarwal and it is argued that in the instant case, neither the samples were properly taken, nor were they safely forwarded to the FSL. It is also argued that PW34 Dr. Manoj Kumar Agarwal is not a qualified expert and his educational qualification, his knowledge and experience in the field have been assailed.

88. Learned State counsel has categorically argued that PW34 Dr. Manoj Kumar Agarwal is a Government expert, who is Senior Scientific Officer in the FSL, Dehradun, which runs under the Ministry of Home Affairs, Directorate of Forensic Science. PW34 Dr. Manoj Kumar Agarwal is M.Sc. in Botany, who had undergone various training programmes for DNA examination. The manual has also been referred to, which is required to be followed by FSL, while conducting such examination. The manual titled "Laboratory Procedure Manual Forensic Serology" is prepared by Directorate of Forensic Science, Ministry of Home Affairs, Government of India. It is a systematic and comprehensive working procedure manual for forensic examination.

89. Learned State counsel would also argue that the DNA test was carried out by PrepFiler Express™ DNA extraction kit and organic extraction and other scientifically proven, systematic tools and softwares, which have been mentioned in the DNA report by PW34 Dr. Manoj Kumar Agarwal.

90. PW34 Dr. Manoj Kumar Agarwal has categorically stated that since 2006, he is working as Senior Scientific Officer, DNA Division, FSL, Dehradun, Uttarakhand. He has conducted many DNA examinations. Since 2012, he has been conducting DNA examinations. He has complete experience in conducting DNA examination and he has taken special training for that purpose. He is M.Sc. Botany, which is the qualification for the post. He also states that Molecular Biology and Biotechnology are also studied in M.Sc. Botany.

91. Based on the qualification and the experience of PW34 Dr. Manoj Kumar Agarwal, it cannot be said that he is not an expert for conducting DNA examination. He is the Government Scientific Expert. Certain parts of the statement of PW34 Dr. Manoj Kumar Agarwal have been referred to and it is argued that he is not an expert in the relevant field. In paragraphs 39 and 40 of the statement, PW34 Dr. Manoj Kumar Agarwal has stated that even if, DNA is contaminated, there are no chances of wrong results. According to him, in case of contamination, there would be mixed results. He was asked about SGM method. But, according to this witness, he is not conversant with this process, because it is not used in his laboratory. But, in para 41 of his statement, he has explained about it. Para 33 of his statement has been referred to for indicating

that he has not stated about Y-STR DNA process. This statement appears to be not correctly recorded. It is some kind of combined-mixed statement. First sentence of this paragraph has been rightly answered by this witness, but second sentence does not give any clear indications, as to what was asked and what was responded. In paragraph 33 of his statement, PW34 Dr. Manoj Kumar Agarwal has stated that he has adopted standard procedure for detecting semen. In paragraph nos. 36 and 37 of his statement, this witness has stated that he has used the process for removing contamination and also examined all the apparatus before DNA profiling.

92. PW34 Dr. Manoj Kumar Agarwal has been extensively cross-examined, but nothing has been elicited, which may doubt that standard process has not been followed in the matter. Insofar as, argument with regard to proficiency of PW34 Dr. Manoj Kumar Agarwal is concerned, it has no force. The report submitted by PW34 Dr. Manoj Kumar Agarwal cannot be discarded on the ground that he is not an expert. The report submitted by PW34 Dr. Manoj Kumar Agarwal has to be accepted and read into evidence.

93. It is argued that the sampling and transportation of the samples has not been intact. There have been chances of contamination, which doubts the credibility of DNA report.

94. The question is whether the samples were properly taken and safely transported for examination to FSL Dehradun. Samples were taken at different times. Post mortem of the deceased was conducted by PW7 Dr. C.P. Bhaishoda on 25.11.2014. He has stated about it and has categorically stated that he took various samples including vaginal swab and smear, cervical swab and smear. Total seven items, he handed over to PW4 Constable Subodh Sharma. Post mortem report, Ex. A24 has been proved by this witness and at the end of it, it has categorically been recorded that what items were handed over to the Police. It is pertinent to note here that PW4 Constable, Subodh Sharma has also signed the post mortem report, while accepting these items. PW4 Constable, Subodh Sharma further states that all those samples, which were handed over to him by PW7 Dr. C.P. Bhaishoda were deposited by him at Police Station. He proved the General Diary Report No. 39, time 23:05 dated 25.11.2014. PW2 Constable Naushad Ahmad was a person posted at Police Station Kathgodam at the relevant time. He has also stated about this General Diary Entry.

95. PW7 Dr. C.P. Bhaishoda has been questioned about the slides. According to him, they had dried them properly, but not added any preservative in it. This witness is Head of the Forensic Science Department, Government Medical College, Haldwani. Nothing has been elicited from his cross examination, which may, in any manner, doubt the procedure adopted by PW7 Dr. C.P. Bhaishoda in taking samples. It is proved that the samples, which were taken at the time of post mortem, were properly taken and safely deposited at the Police Station, on the same day.

96. PW8 Constable, Rajendra Singh took these samples from Police Station Kathgodam on 26.11.2014. The Chief Judicial Magistrate forwarded these samples and this witness deposited these samples at FSL, Dehradun on 27.11.2014. PW8 Constable, Rajendra Singh has stated about it. PW9 Constable, Shankar Bhandari also went alongwith PW8 Rajendra Singh. It is important because these samples contain cervical swab also. Ex.A75 is Forensic Examination report. According to this report, the samples were intact; seal was intact; samples received from Government Medical College, Haldwani were in a plastic bucket. PW34 Dr. Manoj Kumar Agarwal has been asked about the condition of these samples. In para 44 of his statement, PW34 Dr. Manoj Kumar Agarwal stated that samples were in accordance with the standard. He further proves that the samples, which PW7 Dr. C.P. Bhaishoda took on 25.11.2014, were properly taken, safely transported and received intact, as per seal. These samples were as per standard and fit for examination.

97. PW13 Dr. Sanjeev Kharakwal is the person, who took the blood samples of Akhtar Ali, Prem Pal and Junior Masih @ Foxi on 30.11.2014, when they were lodged in District Jail, Nainital. This witness states about the procedure adopted by him and also says that he filled in the blood samples authentication form. The expertise of this witness was questioned, indicating few statements of this witness, when he says that he took DNA for samples for the first time and did not specifically examine the tubes, on which, the samples were taken. But, these arguments have no force. PW13 Dr. Sanjeev Kharakwal is Senior Medical Officer at District Hospital, Nainital. He candidly stated that for DNA purpose, samples were taken by him for the first time. It does not mean that he took blood samples for the first time.

He is a Senior Pediatrician. According to him, the tubes were EDTA tubes, which according to him, were taken from Pathological Department. According to him, he had not told the Investigating Officer about safety of those samples. It also does not have any effect because it is PW15 Constable, Ashutosh Kumar, who had accompanied PW13 Dr. Sanjeev Kharakwal, when he collected the blood samples. On the same day, this witness PW15 Constable, Ashutosh Kumar deposited the samples at Police Station and on 01.12.2014, he took the samples to the court of District and Sessions Judge, Nainital, from where, those samples were forwarded to FSL. This witness deposited those samples at FSL on 02.12.2014. General Diary Entries have been referred to by this witness. PW34 Dr. Manoj Kumar Agarwal is the person, who speaks about FSL report. In the report, it is stated that blood samples were kept in the ice box. PW15 Constable, Ashutosh Kumar has categorically stated in para 8 of his examination that the samples were kept in Maal Khaana in the ice box. PW40 Vipin Chandra Pant, Investigating Officer has also stated about the blood samples in paragraph 24 of his statement. He has also stated about the General Diary Entries.

98. The statements of PW13 Dr. Sanjeev Kharakwal, PW15 Constable, Ashutosh Kumar and PW 34 Dr. Manoj Kumar Agarwal, when read with the FSL report,

reveals that, in fact, the blood samples taken by PW13 Dr. Sanjeev Kharakwal from Akhtar Ali, Prem Pal and Junior Masih @ Foxi were properly taken. They were safely transported in an ice box and intact. They were received at FSL, Dehradun. PW34 Dr. Manoj Kumar Agarwal has stated that the sampling was standardized. In the laboratory, according to PW34 Dr. Manoj Kumar Agarwal, by way of standard procedure, the articles were examined and on the cervical swab, undershirt and underwear of the victim girl, human semen was detected. Master DNA profile was prepared, which matched with the DNA profile, which was prepared from blood samples of Akhtar Ali. The conclusion has already been reproduced, hereinbefore, but at the cost of repetition the relevant portion, is being reproduced again, as hereunder:-

"The DNA test performed on the exhibits provided is sufficient to conclude that,

1. The DNA obtained in a male autosomal DNA profile from the Exhibits - 1, 10 and 11 (cervical swab, undershirt of victim and underwear of victim) match with the source of autosomal DNA profile obtained from the Exhibit-22 (Blood sample of accused Akhtar Ali)."

99. It is true that question of false positive DNA reports are being raised and it is being argued that it is probable. But, again this Court cannot by reading some texts or books arrive on some presumptions regarding DNA report, unless those texts and books are placed before the expert and he is asked to explain it. In the instant case, this Court has held that sampling was proper; transfer of samples was safe and secured and DNA report is accurate and acceptable. Therefore, on the basis of some remote probability on the fading horizon, the DNA profiling report may not be questioned.

100. Therefore, in the instant case, this Court is of the view that prosecution has been able to prove that from the cervical swab, undershirt and underwear of the victim girl, human semen was detected. DNA profiling was done, which match with the DNA profiling obtained from blood sample of Akhtar Ali. This is a scientific evidence. This is an expert opinion. It is accurate. It has to be accepted. Nothing has been shown, which may cause dent on this report.

Conduct of Akhtar Ali before the incident.

101. Prosecution, in order to establish the guilt of Akhtar Ali led evidence to establish and prove that Akhtar Ali had immense opportunity to commit the crime. He was spotted near the place of incident just before the victim girl went missing. Three witnesses PW16 Kishan Singh Bora, PW19 Balkrishna and PW20 Sahadat Ali Hasan have stated about it. According to PW16 Kishan Singh Bora, he runs a tea shop near the place of incident. On 20.11.2014, late in the evening, at about 7:00 PM, Akhtar Ali alongwith Prem Pal came at his shop, they drank liquor and then left. PW20 Sahadat Ali Hasan also visited his shop, when Akhtar Ali was there in the shop. PW19 Balkrishna is also a shopkeeper, whose shop is also near the place, from where, the victim girl was kidnapped. According to him, on that date, at about 7:30 PM, Akhtar Ali alongwith Prem Pal had visited

his shop in an inebriated condition. They purchased toffees, chocolates, bidi and cigarettes. This witness recognizes Akhtar Ali and Prem Pal. He also confirms that their dumpers were parked near Ram Leela Ground. PW20 Sahadat Ali also corroborates the statement of PW16 Kishan Singh Bora. These three witnesses have been cross examined at length. Nothing has been elicited, which may create any doubt in the veracity of their statements. PW33 Indrajeet Singh is the first Investigating Officer. According to him, on 25.11.2014, before the dead body was recovered, he had recorded the statements of PW16 Kishan Singh Bora and PW19 Balkrishna.

102. Arguments have been advanced on behalf of Akhtar Ali that had these witnesses spotted Akhtar Ali and Prem Pal, soon before and after the incident, they would have informed the Investigating Officer before the dead body was recovered. This argument has no force in view of the fact that according to PW33 Indrajeet Singh, the statements of PW16 Kishan Singh Bora and PW19 Balkrishna were recorded by him on 25.11.2014 and thereafter, on the same date, the dead body was recovered.

103. There is a detailed site plan, which is very well prepared by PW40 Vipin Chandra Pant, Investigating Officer. It is Ex. A80. This site plan lends support and credence to the statement of PW16 Kishan Singh Bora and PW19 Balkrishna. In this site plan, the shops of both these witnesses have been categorically shown. The shop of PW16 Kishan Singh Bora is, in fact, very near to the place, from where, the victim girl was kidnapped by Akhtar Ali and the shop of PW16 Kishan Singh Bora is also adjacent to this place, from where, the victim girl was kidnapped.

104. In fact, according to the prosecution, two small girls were alongwith the victim girl, when Akhtar Ali, Prem Pal and other offered them toffees. These children were summoned as witnesses. But, their family members did not permit them to depose before the court. It has been discussed by the learned court below in para 71 of its judgment. In the site plan Ex. A80, it is shown that PW16 Kishan Singh Bora had seen Akhtar Ali, Prem Pal and Junior Masih @ Foxi near the place, from where, victim girl was kidnapped. This place has been shown by letter "J" in the site plan and from this place "J" the place, from where, the victim girl was kidnapped is very near, which is indicated by letter "B". But, prosecution did not prove this fact before the Court. PW16 Kishan Singh Bora has not stated about it. He was not asked about it. But, it does not make any dent on the prosecution case. The fact remains that the site plan supports the statement of PW16, Kishan Singh Bora and PW19 Balkrishna. Statement of PW16 Kishan Singh Bora is supported and corroborated by the statement of PW20 Sahadat Ali Hasan. These witnesses are just natural witnesses. They had an occasion to see what they have deposed. Therefore, this Court is of the view that, in fact, prosecution has proved the presence of Akhtar Ali near the place, from where, the victim girl was kidnapped, soon before the incident.

Conduct of Akhtar Ali after the incident

105. Before it is discussed, it may be stated that according to the site plan Ex. A80, which is proved by PW40 Vipin Chandra Pant, the place, from where, the victim girl was kidnapped and the place, from where, her dead body was recovered are at a distance of about 800 paces. The dead body was recovered from forest area. There are shops around the marriage venue. PW21 Subhash Singh, PW23 uncle of the victim girl, PW25 Deepak Sharma and PW31 Manoj Singh Dewri had seen Akhtar Ali after the incident. PW21 Subhash Singh is Assistant General Manager of IDBI Bank. From the possession of this witness, CCTV footage of 21.11.2014 was taken into possession by the Police and memo Ex. A31 was prepared.

106. PW40 Vipin Chandra Pant in para 37 of his statement has stated that he had seen the CCTV footage, which revealed that on 21.11.2014, at about 14:04 PM, Akhtar Ali and Prem Pal entered together in the Bank. Learned court below did not rely on this piece of evidence. In para 125, it is observed that during writing the judgment, when the learned court tried to run the pen-drive, it was not functional. How the court reached at this conclusion without any technical assistance is not clear. There are different softwares to run the programmes preserved in the pen-drive. In which form the pen-drive was preserved and on which software it was run through is not clear in the judgment. The pen-drive is, in fact, secondary evidence and it is secondary "electronic evidence". It should meet the requirements of Section 65 (B) sub Section (4) of the Indian Evidence Act, 1872.

107. According to PW21 Subhash Singh and PW40 Vipin Chandra Pant, the CCTV footage was taken in a pen-drive and memo Ex. A31 prepared. PW21 Subhash Singh has stated that this pen-drive was prepared by Engineer Mehtab Malik in the presence of Bank Officers, who were in control of the CCTV system. Ex A31 bears signatures of the Bank Officers as well as the Investigating Officer and Mehtab Malik, the Engineer. Now, this Ex. A31 is, in fact, a kind of certificate required for production of electric evidence. It is proved that CCTV footage were lawfully taken and placed before the court. The pen-drive was proved by PW21 Subhash Singh as Ex. 22. This witness was not asked in his cross examination that pen-drive was not functional. Even PW40 Vipin Chandra Pant was not asked that the pen-drive was not functional. PW40 Vipin Chandra Pant confirms that he had seen the CCTV footage and viewed Akhtar Ali and Prem Pal entering the Bank and the pen-drive was taken into custody. The statement of PW40 Vipin Chandra Pant and PW21 Subhash Singh categorically proved that Akhtar Ali visited the Bank on 21.11.2014 with Prem Pal.

108. There are two more witnesses, who had seen Akhtar Ali, soon after the incident in Dumper No. 8711. PW23 uncle of the victim girl. He was informed by PW1 father of the victim girl about the incident and he reached at the marriage venue. According to him, they searched for the victim girl and noticed Dumper No. 8711. Akhtar Ali was inside the dumper. But, on being asked to come out, he did not do so. He was pulled out but meanwhile, Junior Masih came in his rescue

and told that he is Raja Ustad, who had come on that day itself for the job. PW25 Deepak Sharma is driver of PW23 uncle of the victim girl, he has also corroborated the statement of PW23. There is no reason to doubt the statements of these two witnesses. As stated, the Dumper No. 8711 was parked very near to the marriage venue.

109. PW31 Manoj Singh Dewri also runs a shop near the Ram Leela Ground. According to him, on 21.11.2014, in the morning, at about 09:30 AM, Akhtar Ali, Prem Pal and Junior Masih visited his shop. They were drunk. They had tea in his shop. They were talking discreetly, as if, they were planning something. There is no reason to doubt the credibility of this witness. Akhtar Ali alongwith Prem Pal and Junior Masih were also located near the place of incident on the fateful night, the next day morning and in the afternoon also.

110. At this stage, a reference can be made to the statement of PW18 Shankar Dutt Padalia, who is owner of the Dumper No. 8711.

He engaged Akhtar Ali as driver on 20.11.2014, at the request of Prem Pal. According to him, on 21.11.2014, Akhtar Ali approached him in the afternoon and under the pretext of hiring a room and purchasing some articles, demanded Rs.3000/- from this witness, which he gave and thereafter, Akhtar Ali ran away and his phone was switched off. When in the evening PW18 Shankar Dutt Padalia visited his Dumper 8711, he did not find Akhtar Ali there. According to this witness, he suspected something wrong.

111. Prosecution has established and proved that after the incident, on the fateful night itself Akhtar Ali was located in Dumper No. 8711. Next day morning, he was located in the vicinity. In the afternoon, he visited the Bank as well as Akhtar Ali, under the pretext of hiring room and purchasing articles, took Rs.3000/- from PW18 Shankar Dutt Padalia, owner of Dumper No. 8711 and thereafter, he was not traceable. He disappeared. This is very important and relevant conduct.

Telephone Surveillance - Akhtar Ali changed locations and mobile numbers

112. In this case, basically Akhtar Ali and Prem Pal were spotted with the help of telephonic surveillance. There are five witnesses to this fact. PW10 Yogesh Kumar Chand, In-charge STF. PW11 Amar Chand Sharma, Member of STF, PW26 Radhey Shyam Shukla, Nodal Officer, Airtel, PW28 Vishal Pathak, Assistant Nodal Officer, Vodafone and PW35 Sub Inspector, Ravindra Kumar Yadav, Special Operation, Group in-charge, District Nainital. Together their statements reveal as hereunder:

"When came to Haldwani and introduced by PW18 Shankar Dutt Padalia. Akhtar Ali had a Mobile No. 7542832390. This telephone number was not in the name of Akhtar Ali. It was in the identity of Laxmi Devi of Bihar. PW18 Shankar Dutt Padalia has stated about it. When disappeared, Akhtar Ali was noticed after the incident. His phone number was put under surveillance and the call details

analyzed. This number was being used with IMEI numbers. One more number 7533079910 was also operational from this handset. Based on this location, according to PW10 Yogesh Kumar Chand, they arrested Akhtar Ali from Ludhiana and recovered many articles including a Samsung mobile handset. PW11 Amar Chand Sharma corroborates his statement."

113. PW35 Ravindra Kumar Yadav is the person, who had stated in detail about it. PW26 Radhey Shyam Shukla has stated about Telephone No. 7542832390 of Akhtar Ali, which was taken in the identity of Laxmi Devi. PW27 Arun Kumar has stated about Telephone No. 7533079910, which was in the identity of Mohd. Iqbal.

114. PW28 Vishal Pathak has stated about telephone numbers of Prem Pal and Junior Masih that being 8859062116 and 9536935372. He has placed their call details and also stated that Mobile No. 8859062116 was registered in the name of Prem Singh Dhami and Mobile No. 9536935372 was registered in the name of Manohar Lal.

115. PW35 Ravindra Kumar Yadav states that when he analysed the movement of Telephone No. 7542832390 of Akhtar Ali, it was noticed that this number entered in UP West region on 20.11.2014 at 16:43:52. He talks to certain numbers and its location at about 07:00 PM was around Airtel Tower UP West, Tower No. 50491, which is at Damuwadhunga, Haldwani at latitude 29.25.195 and longitude 79.53.961. This tower, according to this witness covers the area, from where, the victim girl was kidnapped and the place, from where, her dead body was recovered. From this number, communication was made to the mobile number of Prem Pal i.e. 8859062116 on 21.11.2014 and till 20:23:34, they talked four times and then this number goes in some other area. In Haldwani, telephone number of Akhtar Ali 7542832390 had maximum talks with telephone number of Prem Pal i.e. 8859062116. Here only, it may be mentioned that Prem Pal was the driver with PW39 Manish Gaur. PW39 Manish Gaur has categorically stated that Prem Pal was working with his dumper for 10-12 years prior to the date of incident and his Mobile No. is 8859062116.

116. The mobile number of Akhtar Ali 7542832390 was using two IMEI numbers in Haldwani on 20-21.11.2014. According to PW35 Ravindra Kumar Yadav, when further this number was examined, it was revealed on 22.11.2014, in the morning at 03:25:46, it enters Delhi circle and talks with Prem Pal at his Phone No. 8859062116 at 03:29:57 and also sends SMS to Prem Pal at 08:22:23. Thereafter, this phone number was switched off. When this number was switched off, two IMEI numbers were scrutinized and it was revealed that another Telephone No. 7533079910 was being run on one of the IMEI numbers. This number was taken in the name of Mohd. Iqbal, which was activated on 23.11.2014 and thereafter, this number goes to Punjab area. It may be mentioned here that PW10 Yogesh Kumar Chand and PW11 Amar Chand Sharma followed this lead and from Punjab arrested Akhtar Ali.

117. PW35 Ravindra Kumar Yadav has also stated a very important fact that the telephone number of Prem Pal was on the Vodafone Tower No. 32612, which covers the place of incident at the relevant time. This witness has been cross examined. Call details have been proved. He has been specific even to the details of latitude and longitude. It is true that telephone number, which Akhtar Ali was carrying, was not in his name. It is also true that telephone number of Prem Pal was not in his name. The prosecution has proved beyond reasonable doubt that Akhtar Ali was using Phone No. 752832390 on 20-21.11.2014 and then he reached Delhi and used another Phone No.7533079910 but the handset was same.

118. PW40 Vipin Chandra Pant has also stated about it. The call details have been proved by the witnesses. They support and corroborate their statements. PW10 Yogesh Kumar Chand proved the recovery memo of mobile handset of Akhtar Ali. According to PW10 Yogesh Kumar Chand, Mobile No. 7533079910 was also used in a different hand set by Akhtar Ali. It is proved that Akhtar Ali was using Mobile No. 7542832390 on 20.11.2014 and this is the number, which he gave to PW18 Shankar Dutt Padalia, his employer. He talked to Prem Pal on 21.11.2014 and 22.11.2014 at his Mobile No. 8859062116 and switched it off and then again used another Mobile No. 7533079910. Thereafter, he went to Punjab, from where, he was arrested. Akhtar Ali changed his phone number and switched it off. Change in mobile numbers and going to another area, this is also very important conduct, which is relevant and it is against Akhtar Ali.

119. When arrested, a railway ticket was also recovered from Akhtar Ali. PW10 Yogesh Kumar Chand has proved this ticket, which is Ex. 17. PW24 Hariom Sharma is railway employee, who was at the counter to sell the railway tickets. He proved the details of the ticket, which he sold on 21.11.2014. He confirms that Ex. 17 ticket was sold by him on that date after 06:00 PM and 8:27 PM was the time for departure of the train from Haldwani. Sequel is in fact clear. Akhtar Ali, in the evening of 20.11.2014 was near the place of incident. He drank liquor with Prem Pal and purchased toffees, chocolate etc. and kidnapped the victim girl. He raped her after that, next day, he arranged for money and purchased ticket for Delhi. Boarded the train. He was carrying Mobile No. 7542832390 with him, which enters Delhi Circle at about 3:25 AM on 22.11.2014. Akhtar Ali ran away from Haldwani. As stated, from there, he switched off this number. Used another number and went Punjab, this is the conduct. In a plain manner Akhtar Ali ran away. PW24 Hariom Sharma supports the prosecution case.

Recovery of Hair Band

120. One link prosecution tried to establish was that at the instance of Akhtar Ali, a hair band was recovered. There are three witnesses to it. PW3 Suman Pant, PW38 Rajendra Singh Bisht and PW40 Vipin Chandra Pant. According to them, on 28.11.2014, in the morning, Akhtar Ali took the police team to the place, from where, he kidnapped the victim girl. He also took them across the Gola River and as soon as the bushes began, he told that while kidnapping, he had thrown the

hair band of the victim girl at that place and from behind the bushes, he recovered the hair band and gave it to the Police. A memo Ex. A16 was prepared. Learned court below has extensively dealt with this aspect in paras 94 and 95 of its judgment. In the FIR, the description of the victim girl is given. According to it, she had boy cut hair style. Learned court below also perused the photographs of the victim girl and observed that it does not appear that she had hair band on that date. There is no reason to make any interference in the finding recorded by learned court below on this aspect. In fact, the recovery of the hair band at the instance of Akhtar Ali is doubtful. But, in totality, it does not create any dent on the prosecution case.

121. Arguments have been advanced that the story is unbelievable and as to who, first spotted the dead body. How did Nikhil come to know about the recovery of the dead body? How the dead body could not be recovered before 25.11.2014?

122. There is no question of story not being believable. This is not, in fact, the story. These are facts, which are emerging at the surface. The investigation is done to unearth the truth. It has been demonstrated above, as to how, the statements of the witnesses have been recorded by PW33 Indrajeet Singh, even prior to the recovery of the dead body. PW29 Sabir Ali spotted the dead body. He was the person, whose horses had gone into the forest on that date and there he first located the dead body and then revealed it to the public. Nikhil is cousin of the victim girl. If he heard from some sources about the recovery of the dead body, it does not cast doubt in the prosecution story. He is a very natural person to know about the recovery of the dead body. This is not the secret story that the dead body was recovered. A small girl was raped in an area, where such incident rarely occurs. Everyone would have been waiting to know, as to what happened in the case. If Akhtar Ali did not run immediately after the incident, it does not make him innocent. He committed the crime and initially was confident that he would not be traced, but when search was made, he ran away, the very next day and not only ran away, he tried to conceal his presence by switching off his phone, changed his locations, one after the other. So arguments on these aspects have no force, they do not doubt the credibility of the witnesses.

123. In defence DW1 Dr. Alpana Mishra has been examined. In fact, she was a Doctor in the panel, which conducted the post mortem of the deceased. According to her, before the death, there would have been immense bleeding and if the injured is lying on the ground, the blood would have come down to the soil also. She also states that the injury would suggest bleeding from the cervical area also.

124. On behalf of Akhtar Ali, it is argued that had the offence been committed at the place, from where, the dead body was recovered, the soil beneath it would have soaked much blood. This argument has no force. The dead body of the victim girl was recovered from the forest, after five days of the incident. It was the month of November at the foothills of Himalayas. There were trees and

leaves around it. PW33 Indrajeet Singh has taken plain and blood stained soil from the place, from where the dead body was recovered.

PW22 Constable Surendra Singh took these articles for forensic examination. Forensic examination report 233A is on record. According to it, the blood stained soil and plain soil had similarities and blood was detected in the soil. So the blood came down on the soil. It was so detected in the forensic examination. It supports the prosecution case.

125. Prosecution in the instant case has been successful to prove that soon before the incident Akhtar Ali was present near the place of incident. He was found in the Dumper No. 8711 soon after the incident. Next day morning, he was located in the vicinity. In the afternoon, on 21.11.2014, he visited the Bank. He took loan from his employer PW18 Shankar Dutt Padalia, under the false pretext and purchased the railway ticket sometimes after 6:00 PM. He was using a telephone number, when he was in Haldwani. When he enters Delhi Circle on 22.11.2014, this number was switched off and Akhtar Ali started using another telephone number and goes Punjab. This conduct of Akhtar Ali points towards his guilt. Most importantly his DNA was detected in the cervical swab of the victim girl. The chain is complete. The circumstances are speaking louder than any direct evidence. The circumstances, which prosecution has proved, as discussed in this judgment, makes the chain complete. It draws only one and one conclusion that it is Akhtar Ali, who kidnapped the young girl from the marriage function on 20.11.2014, sometimes at about 07:30 PM. He took her around 800 paces in the forest, brutally raped her and thereafter, ran away. The victim girl died within minutes after the rape. Prosecution has proved beyond reasonable doubt the charges under Sections 363, 201 and 376A IPC and Section 6 of the POCSO Act against Akhtar Ali. [The acts done by Akhtar Ali also fall under the definition of offences as defined under Sections 3 and 7 POCSO Act, but, combining the acts done under Sections 3 & 7 POCSO Act, Akhtar Ali committed more heinous offence, as defined under Section 5 of the POCSO Act, which is punishable under Section 6 POCSO Act. Therefore, Akhtar Ali is to be convicted under Section 6 POCSO Act.]. But, the prosecution has not been able to prove the charge under Section 120-B IPC against Akhtar Ali.

126. Insofar as, charge under Section 66C of the Act is concerned, Akhtar Ali has also been charged under Section 66C of the Act. It reads as hereunder:

"66C. Punishment for identity theft.- Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh."

127. According to the prosecution, during the period Akhtar Ali used two mobile numbers. The Mobile No. 7542832390 was in the name of Laxmi Devi, W/o Weera Manjhi, R/o Ahir Tola, Hardiya, East Champaran, Bihar and another

telephone No. 75330799910, which were in the I.D. of Mohd. Iqbal, S/o Sheikh Sabir, C/o Rakesh Khandsa, Local Street-Gurgaon, Haryana.

128 PW40 Vipin Chandra Pant is the Investigating Officer. According to him, he inquired from Smt. Laxmi Devi, who told this witness that whosoever is using the mobile phone taking SIM-card in his name is doing something wrong. PW40 Vipin Chandra Pant also states that he also inquired from Mohd. Iqbal. He also told that his phone has wrongly been used (paras 71 and 72 of the statement of PW40).

129. Section 66C of the Act, provides for offences in cases of identity theft. What is the essence of this Act is fraudulent and dishonest use of electronic signature, password or any other unique identification feature. In the instant case, what prosecution is trying to establish is that since Akhtar Ali was using mobile phones, which were obtained in the name of Laxmi Devi and Mohd. Iqbal, he has committed offence under Section 66C of the Act. Laxmi Devi and Mohd. Iqbal, in whose names, these numbers have been taken have not been examined in the court. They have not stated on oath that their identities have been used fraudulently or dishonestly. The Court can not presume it. Mere use of identity of some other person for obtaining SIM, in view of this Court, does not attract provisions of Section 66C of the Act. It requires something more. It is not proved in this case. Therefore, this Court is of the view that the charge under Section 66C of the Act is not proved against Akhtar Ali.

Effect of answers given under Section 313 of the Code

130. On behalf of the State, it is argued that Akhtar Ali has given false answers under Section 313 of the Code. Therefore, it also makes a link to prove the guilt. In support of his contention, learned State counsel laid down the principles of law as laid down in the case of Purushottam Dashrath Borate and another Vs. State of Maharashtra (2015) 6SCC 652.

131. In the case of Purushottam Dashrath Borate (supra), the evidence was that the deceased was last seen in the company of the accused. The accused did not give any explanation to it and this fact was taken into consideration by the Court to complete the chain of circumstances leading towards the guilt of the accused.

496. On the other hand, learned counsel appearing for Akhtar Ali would argue that answer given under Section 313 of the Code by the accused cannot be used to prove the guilt. The purpose of examination under Section 313 of the Code, is to give an opportunity to the accused to explain the circumstances appearing against him in the evidence. Learned Court placed reliance to the principle of law, as laid down in the case of Nar Singh Vs. State of Haryana (2015) 1 SCC In Nar Singh (supra) the Hon'ble Court held as hereunder:

"11. The object of Section 313 (1) (b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this

section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 (1) (b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 CrPC lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point."

133. Undoubtedly, the purpose and object of examination under Section 313 of the Code is to give an opportunity to the accused to explain circumstances appearing against him in the evidence. The answer given by the accused is not evidence. It is not on oath and also not open for cross examination.

134. In the case of Dehal Singh Vs. State of Himachal Pradesh (2010) 9 SCC 85, Hon'ble Supreme Court observed as hereunder:

"23" Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfulness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act.....There is reason not to treat the statement under section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross examined, with reference to those statements.....".

135. In the case of Dharam Deo Yadav Vs. State of UP, (2014) 5 SCC 509, Hon'ble Supreme Court, inter alia, held as hereunder;

"37. The accused, in his examination under Section 313 CrPC, had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in Section 313 CrPC statement may offer an additional link in the chain of circumstances to complete the chain....."

136. Recently, in the case of Sudru Vs. State of Chhattisgarh, 2019 SCC Online SC 1084, Hon'ble Supreme Court, inter alia, held that a false explanation given by the accused under Section 313 of the Code, can always be taken into consideration to fortify the finding of guilt already recorded on the basis of other circumstances.

137. Few answers given by Akhtar Ali in his examination under Section 313 of the Code may be noticed. In answer to question no.26, he denied the statement that he was driver of PW18 Shankar Dutt Padalia and stated that he does not know driving. Similarly, in answer to question no. 30, he denied that he knows

driving. He also states that he does not know PW18 Shankar Dutt Padalia. In answer to question No. 39, he denied that any mobile was recovered from him by PW10 Yogesh Kumar Chand and PW11 Amar Chand Sharma from Punjab. In fact, in answer to question nos. 31 and 56 Akhtar Ali states that he never visited Haldwani and denied that he demanded money from Shankar Dutt Padalia on 21.11.2014, under the pretext of hiring room or for purchasing some articles.

138. Statement of PW18 Shankar Dutt Padalia is most reliable and trustworthy. He engaged Akhtar Ali at the request of Prem Pal. Mobile number was given by Akhtar Ali to this witness, which he has deposed. He was driver in the dumper No. 8711. He was handed over the keys by PW18 Shankar Dutt Padalia. He was in Haldwani on 20-21.11.2014. Witnesses have stated about it. Therefore, definitely Akhtar Ali has given false explanations and in view of settled legal position, it lends assurance to the prosecution case, which is otherwise also proved beyond reasonable doubt against Akhtar Ali.

In Re: Prem Pal Verma

139. Prem Pal Verma was put to trial for offences under Sections 363, 376A and in alternate 302, 201, 120-B, 212 IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act and Section 66C of the Act. But, Prem Pal Verma has been acquitted of the charges under Sections 363, 376A in the alternate 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act. Prem Pal Verma has been convicted under Section 212 IPC and 66C of the Act. He preferred appeal against his conviction.

140. State preferred appeal against Prem Pal Verma against his acquittal under Sections 363, 376A in the alternate 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act. Father of the victim girl has also preferred appeal against Prem Pal Verma for certain offences, in which he has been acquitted.

141. Learned State counsel and learned counsel appearing for the victim girl would argue that Prem Pal has also been associated with the crime. He was with Akhtar Ali. He was seen soon before the incident, near the place of incident with Akhtar Ali. On 21.11.2014, morning and day time, he was with Akhtar Ali. They were telephonically in touch. When Akhtar Ali ran away from Haldwani, Prem Pal was constantly in touch with him. When the dead body of the victim girl was recovered and a search was made for Prem Pal, he switched off his phone. It is his conduct. Prem Pal was using mobile no. 8859062116. He was called by PW39 Manish Gaur and handed over to SOG. The circumstances are connected together to indicate that Prem Pal kidnapped and brutally raped the victim girl, concealed her dead body and made the evidence disappeared. He also concealed and harboured Akhtar Ali to evade his arrest. It is argued that prosecution, in fact, has been able to prove all the charges against Prem Pal. But, learned court below committed error in acquitting him of the charges under Sections 363, 376A, 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO

Act. Therefore, the appeal preferred by the State deserves to be allowed. Learned counsel appearing for the father of the victim girl also argues in the same line, as argued by learned State counsel.

142. The arguments raised on behalf of Prem Pal have already been dealt with, hereinbefore. In fact, State and father of the victim girl have preferred appeals against acquittal of Junior Masih also. The law is well settled that in cases of acquittal by the trial court, the appellate court should not interfere, if two views are possible.

143. In the case of Khurshid Ahmed vs. State of Jammu and Kashmir (2018) 7 SCC 429, Hon'ble Supreme Court held as hereunder:

"37. The power of the appellate Court in an appeal against acquittal is the same as that of an appeal against conviction. But, in an appeal against acquittal, the Court has to bear in mind that the presumption of innocence is in favour of the accused and it is strengthened by the order of acquittal. At the same time, appellate Court will not interfere with the order of acquittal mainly because two views are possible, but only when the High Court feels that the appreciation of evidence is based on erroneous considerations and when there is manifest illegality in the conclusion arrived at by the trial Court....."

144. The case is based on circumstantial evidence. Apart from spotting Akhtar Ali before or after the incident near the vicinity and his conduct, DNA profiling confirmed the offences committed by Akhtar Ali. Blood samples of Prem Pal were also taken in the case and DNA obtained, but, it did not match with DNA obtained from the dead body of the victim girl. This important link is missing.

145. It is true that soon before the incident at about 07:30 P.M. on 20.11.2014, Prem Pal was with Akhtar Ali. PW16 Kishan Singh Bora and PW20 Sahadat Ali Hasan and PW19 Balkrishna have seen them together. They have stated about it. PW16 Kishan Singh Bora and PW19 Balkrishna run shops near the place of incident, from where, the victim girl was kidnapped. They are most natural witnesses, reliable and trustworthy. PW20 Sahadat Ali Hasan is labourer, who happened to visit the shop of PW16 Kishan Singh Bora in the late evening, on 20.11.2014, when he spotted Prem Pal with Akhtar Ali. PW16 Kishan Singh Bora has also stated about the presence of PW20 Sahadat Ali Hasan. PW21. Subhash Singh, Assistant General Manager, IDBI Bank gave CCTV footage to the Investigating Officer, which confirms that Prem Pal was with Akhtar Ali at IDBI Bank on 21.11.2014 at 14:04 hours.

146. Not only this, Prem Pal was constantly in touch with Akhtar Ali on 21.11.2014. The call details have been proved by the witnesses. PW35 Ravindra Kumar Yadav has stated about it. The call details are proved by PW26 Radhey Shyam Shukla, Nodal Officer, Airtel, UP West and Uttarakhand. They are Ex. A34 to Ex. A41 on record. Ex. A38 categorically establishes that on 21.11.2014, Prem Pal was in touch with Akhtar Ali. Prem Pal calls Akhtar Ali on 21.11.2014 at 8:58AM, at 1:29PM, 1:46PM and 8:23 PM. Akhtar Ali also calls Prem Pal on

21.11.2014 at 1:40 PM. What is important to note is that both Prem Pal and Akhtar Ali visited the IDBI Bank on that day at 2:04 PM. Before that, on that day, they had spoken four times. At least three times in quick succession at 1:29, 1:40 & 1:46 PM.

147. On 21.11.2014, Akhtar Ali leaves Haldwani for Delhi and he enters Delhi Circle at 3:25:46 AM. Again, Akhtar Ali calls Prem Pal early in the morning on 22.11.2014 at 3:29:57 AM. Why were they talking at such odd hours. The conduct of Prem Pal is creating gross doubt about his implications. The things did not stop here. Akhtar Ali sends a SMS to Prem Pal on 22.11.2014 at 8:22:23 hours. Record is at Ex. A39.

148. As stated, when the dead body of the victim girl was recovered, SOG team wanted to contact Prem Pal, but his phone was switched off. His employer PW39 Manish Gaur was contacted. He states in his statement that SOG team contacted him to know the whereabouts of Prem Pal. Then he called Prem Pal and handed him over to SOG team. This is another conduct of Prem Pal, which creates doubts about his implication. There is much doubt that perhaps Prem Pal has also committed the crime, but the chain, it appears is not complete. Some links are missing. DNA report does not confirm the act of sexual assault by Prem Pal. Immediately after the incident, it is not the case of the prosecution, that Prem Pal ran away. He was there in Haldwani. These missing links does not make the prosecution case "proved beyond reasonable doubt" for the charges under Sections 363, 376A in alternate 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act. Therefore, this Court is of the view that insofar as, charges under Sections 363, 376A in alternate 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7/ of the POCSO Act are concerned, Prem Pal is entitled to benefit of doubt. Learned court below did not commit any error in acquitting Prem Pal of the charges under Sections 363, 376A in alternate 302, 201 and 120B IPC and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act.

149. Prem Pal has been convicted under Section 212 IPC and 66C of the Act. Interestingly, learned court below did not convict Junior Masih of the charges under Section 66C of the Act. Although, according to the prosecution, Junior Masih was also using mobile number in the name of some other person. But, what the learned court below observed in paragraph 145, was that Junior Masih did not use the mobile number for committing the offence. This reason is strange, because provisions of Section 66C of the Act are not attracted, when telephone number taken in the name of some other person is used in some crime. The essence of Section 66C of the Act is not only that some person is using mobile phone obtained in the name of some other person, but, it requires something more than that. It is a case of identity theft. Fraudulent and dishonest intentions are necessary to be proved to attract the provisions of Section 66C of the Act.

150. It is the case of the prosecution that Prem Pal was using Mobile Phone No.

8859062116. It was obtained in the name of Prem Singh Dhami. During the course of argument, it is stated that Prem Singh Dhami is father-in-law of Prem Pal. Prem Singh Dhami is not examined to depose that there is the case of identity theft. He has not stated that Prem Pal fraudulently or dishonestly used any of his signatures, password etc. The Court cannot presume it. Mere use of identity of some other person for obtaining SIM, in view of this Court, does not attract provisions of Section 66C of the Act. It requires something more. It is not proved in this case. Therefore, this Court is of the view that the charge under Section 66C of the Act is not proved against Prem Pal. Learned court below committed an error in convicting Prem Pal under Section 66C of the Act. To that extent, impugned judgment and order deserves to be modified.

151. Prem Pal Verma has also been convicted under Section 212 IPC. Section 212 IPC is as hereunder:-

"212. Harboursing offender.-Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, if a capital offence shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; if punishable with imprisonment for life, or with imprisonment and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of India, which, if committed in India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in India.

Exception- This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender."

152. The word "harbour" has been defined under section 52A IPC. It is as hereunder:

"52-A. "Harbour"- Except in Section 157, and in Section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not,

to evade apprehension."

153. According to the prosecution, Prem Pal helped Akhtar Ali to conceal his presence and run away from Haldwani to evade apprehension. Prem Pal provided shelter to Akhtar Ali.

154. Learned counsel for Prem Pal would argue that mere talking over telephone and being together with the accused does not attract the provisions of Section 212 IPC. There should be active part played by the person, who gives protection and shelter to the accused. In the instant case, according to the learned counsel for Prem Pal, it may be said that Prem Pal concealed information and he is a bad man, but it cannot be said that he concealed or harboured the offender. Therefore, it is argued that provisions of Section 212 IPC are not attracted against Prem Pal.

155. In the case of Sanjiv Kumar v. State of Himachal Pradesh, (1999) 2 SCC 288, Hon'ble Supreme Court, inter alia, held as hereunder:

21.....It may be stated that to attract the provisions of Section 212 IPC, it is necessary to establish commission of an offence; harbouring or concealing the person known or believed to be the offender; and such concealment must be with the intention of screening him from legal punishment....."

156. The word "harbour" as defined under Section 52A IPC and conceal as used under Section 212 IPC may not be construed within the narrow compass. It should be given widest meaning. It is an offence to obstruct the course of justice. It is an offence which promotes offence and supports offender. Learned counsel for Prem Pal would argue that in fact Akhtar Ali talked to Prem Pal, but Prem Pal did not speak to Akhtar Ali. It is not a determining factor as to who initiated the talks. The fact remains that Prem Pal was in conversation with Akhtar Ali. This Court has held that Akhtar Ali committed brutal sexual assault on the victim girl. Prem Pal was with Akhtar Ali soon after the incident and after that also they were together. If call details at Ex.A38 and Ex. A39 are perused, it reveals that, in fact, on 21.11.2014, four times Prem Pal called Akhtar Ali.

157. It is true that on 22.11.2014, early in the morning, at 3:29AM Akhtar Ali called Prem Pal and then sent him a SMS at about 8:22 AM. It is not something that people were oblivious of the situation after this ghastly crime. The people of the small city like Kathgodam, were all in the ripples, due to this incident. They were demonstrating, agitating and putting pressure on the administration. PW39 Manish Gaur in his examination stated that due to this incident, situation was tense. People were demonstrating and pressurizing the administration to arrest the culprits. PW40 Vipin Chandra Pant, Investigating Officer in Paragraph No.14 of his statement states that since people were agitating, they discreetly got medical examination of Akhtar Ali done in the Hospital at Kaladhungi. It is just to visualize the situation. Prem Pal was aware of the crime. In fact, his conviction in the brutal sexual assault escaped after giving him benefit of doubt.

He was in touch with Akhtar Ali. Akhtar Ali did not leave Haldwani in a routine. He was in Haldwani on 20.11.2014. He commits the crime on the same day, in the late evening. Under the false pretext, he takes money from his employer and runs away. Prem Pal was with him throughout. Definitely, Prem Pal gave shelter to him, helped him, concealed him with the intention of screening him from legal punishment. Therefore, this Court is of the view that prosecution has been able to prove the charge under Section 212 IPC against Prem Pal Verma. Learned court below did not commit any error in convicting and sentencing Prem Pal Verma of the charge under Section 212 IPC.

In Re. - Junior Masih @ Foxi

158. Junior Masih was also charged under Sections 212 IPC and Section 66C of the Act and Sections 16/17 read with Sections 4/5/6/7 of the POCSO Act. He has been acquitted of the charges. State as well as the father of the victim girl preferred appeals against his acquittal.

159. Learned counsel appearing for Junior Masih would argue that no case is made out against Junior Masih and he has been rightly acquitted.

160. According to the prosecution, after the incident, when a search was made for the victim girl by PW23 uncle of the victim girl in Dumper No. 8711, which was parked near the place from where the victim girl was kidnapped, Akhtar Ali was found inside it. He was called out. He did not come. He was forcibly taken out. It was Junior Masih, who told that Akhtar Ali had joined the job on that day itself. He was released, thereafter. PW31 Manoj Singh Dewri has also named Junior Masih when he stated that on 21.11.2014 at about 9:30AM, Junior Masih visited his shop with Prem Pal and Akhtar Ali. They were drunk and talking discreetly. This is all evidence against Junior Masih. There is no telephonic conversation with Akhtar Ali by Junior Masih. Merely because, in the late hours on 20.11.2014, when PW23 uncle of the victim girl confronted Akhtar Ali, the intervention made by Junior Masih, cannot hold him liable for any offence. There is no iota of evidence to implicate him. There is no evidence that he was seen before the incident, either in the company of Akhtar Ali or Prem Pal. There is no evidence to suggest that Junior Masih knew that victim girl was brutally assaulted either by Akhtar Ali or by Prem Pal. Mere presence of Junior Masih at the shop of PW31 Manoj Singh Dewri also does not implicate him.

161. Apart from other offences, Junior Masih @ Foxi has also been charged for offence under Section 66C of the Act that he was using telephone number, which was obtained in the name of some other person. This Court had already held that mere use of identity of some other person for obtaining SIM, does not attract provisions of Section 66C of the Act. It requires something more. Fraudulent and dishonest intention for identity theft is essential. It is not proved in the instant case. Therefore, this Court is of the view that prosecution has not been able to prove any of the charges leveled against Junior Masih. Learned court below did not commit any error in acquitting him.

Death or imprisonment for life.

162. Akhtar Ali has been rightly convicted under Section 376A IPC. He has been sentenced to death. It is argued that it is not the case which may warrant the extreme penalty of death.

163. On behalf of the State, learned counsel would argue that the helpless girl was brutally sexually assaulted by Akhtar Ali. This warrants extreme penalty of death. In support of his contention, learned counsel placed reliance upon the principles of law, as laid down in the cases of *Dhananjay Chatterjee alias Dhana Vs. State of W.B.* (1994) 2SCC 220 and *Vasanta Sampat Dupare Vs. State of Maharashtra*, (2015) 1 SCC 253. Learned State counsel also discussed the "rarest of rare cases theory" in awarding punishment, in detail.

164. In the case of *Dhananjay Chatterjee* (supra), Hon'ble Supreme Court considered the observations made in the case of *Bachan Singh Vs. State of Punjab* (1980) 2 SCC 684 and it was held that in imposing sentences in absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. (Para 14 of the judgment)

165. In the case of *Vasanta Sampat Dupare* (supra) in the case of rape and murder of the girl of four years after weighing aggravating and mitigating circumstances, it was held that it was a case which falls in the category of rarest of the rare cases.

166. Akhtar Ali has been sentenced to death under Section 376A IPC. In a criminal trial, the real problem, in fact, begins once conviction is recorded. Sentencing is a tough task and it becomes tougher, if choice is between life imprisonment and death. There is no standardization of sentencing. Perhaps, if sentencing has standardization, it will take away judicial discretion vested in a judge in awarding sentence. After all, facts of two cases cannot be alike. Crime and criminal in two cases cannot be alike and what matters for sentencing are both crime and the criminal. When choice is between life and death, it is settled principle that life imprisonment is the rule and the death is the exception.

167. In the case of *Shailesh Jasvantbhai and another vs. State of Gujarat and others*, (2006) 2 SCC 359, Hon'ble Supreme Court held as hereunder:-

"7..... Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that: "state of criminal law continues to be-as it should be-a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tampered with mercy where it warrants to be. The facts and

given circumstances in each case, the nature of crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration"

168. In the case of Bachan Singh (supra) Hon'ble Supreme Court laid down the principles and propounded the theory of rarest of the rare cases in awarding capital punishment and in the cases, where capital punishment is awarded, it is mandated by Hon'ble Court that all the factors determining the question of sentence must be scrutinized with utmost caution and care by a superior court. The Court held as hereunder:-

"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency- a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

169. Akhtar Ali has been awarded death sentence under Section 376A IPC, which reads as hereunder:-

"376A. Punishment for causing death or resulting in persistent vegetative state of victim.- Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death."

170. In fact, criminal law relating to sexual assault has undergone significant

changes after Nirbhaya's case [a case of rape in Delhi in the Winters of 2012 in a moving bus - Mukesh and another Vs. State (NCT of Delhi) and others, (2017) 6 SCC 1].

171. Section 376A IPC, prescribes a range of punishment. The minimum is twenty years, which may extent to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life or with death. Intention of legislature is loud and clear that in deserving cases, death penalty should be awarded. What are those deserving cases? How to identify them?

172. In the case of Machhi Singh and others Vs. State of Punjab, (1983) 3 SCC 470, Hon'ble Supreme Court considered the principle of law as laid down in the case of Bachan Singh (supra) and laid down the proposition has hereunder:-

"38. In this background the guidelines indicated in Bachan Singh case v. State of Punjab; 1980 SCC (Cri.) 580: AIR 1980 SC 898: 1980 Cr.L.J. 636 will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:

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

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

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

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

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

4 In Ram Naresh and others Vs. State of Chattisgarh, 2012 SCC 257, Hon'ble

Supreme Court culled out principles governing aggravating and mitigating circumstances as hereunder:-

"76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in *Bachan Singh v. State of Punjab*; 1980 SCC (Cri.) 580: AIR 1980 SC 898: 1980 Cr.L.J. 636 and *Machhi Singh v. State of Punjab*, (1983) 3SCC 470 : 1983 SCC (Cri) 681. The aforesaid judgments, primarily dissect these principles into two different compartments-one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354 (3) CrPC.

Aggravating circumstances

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

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

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

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

(5) Hired killings.

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

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

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

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

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

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

Mitigating circumstances

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

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

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

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

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

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

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

174. In the case of Akhtar Vs. State of U.P., (1999) 6 SCC 60, High Court awarded death sentence, in a case where a young girl was raped and in the process by way of gagging she died. Hon'ble Supreme Court modified it to life imprisonment. The Hon'ble Court held, as hereunder:-

"3. But in the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other

hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death....."

175. In the case of Sunil Vs. State of Madhya Pradesh, (2017) 4SCC 393, Hon'ble Supreme Court, inter alia, held that young age is one of the mitigating factors.

176. Once aggravating and mitigating circumstances are weighed, the Court should apply the "rarest of rare test", which depends on the "perception of the society" and not Judge - Centric; that is whether the society will approve the awarding of death sentence to certain types of crime or not. (see Gurvail Singh @ Gala and another vs. State of Punjab, AIR 2013 SC 1177).

177. In the case of Ashok Debbarma alias Achak Debbarma Vs. State of Tripura (2014) 4 SCC 747, it was argued that counsel ineffectiveness in conducting a criminal trial is also mitigating circumstance. Hon'ble Court considered it, though under the facts and circumstances of that case found that the accused was given proper legal assistance. The fact remains that Akhtar Ali could not engage a lawyer of his choice to defend his case during trial. He was provided legal-aid at the State expenses during trial. But, at the same time, the way trial was conducted by the defence lawyer in the matter, it cannot be said that he was not provided effective legal assistance.

178. This is one aspect of the matter. There is another aspect of the matter, which relates with the "proof beyond reasonable doubt" theory. In the same case of Ashok Debbarma (supra), the Hon'ble Court discussed the concept of "reasonable doubt" and "residual doubt". What is required to be established is "proof beyond reasonable doubt". What is reasonable doubt?

179. Judicial decision making is a journey from ignorance to decision. It is a journey in search for truth. At different stages, the level of doubts to implicate the person is of varying degree. At the stage of taking cognizance under Section 204 of the Code, it is prima facie case. At the stage of framing of charges, it has little heavier than mere prima facie case and to secure a conviction, it should be "proof beyond reasonable doubt". In civil cases this standard is "preponderance of probability".

180. What is "proof beyond reasonable doubt". In the case of Shivaji Sahabrao Bobade and another Vs. State of Maharashtra, 1973 SCC (Cri.) 1033, the Hon'ble Supreme Court interpreted this phraseology and held as hereunder:-

"6.....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape.

The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community....."

181. In the case of Iqbal Moosa Patel Vs. State of Gujarat (2011) 2 SCC 198, Hon'ble Supreme Court has held as hereunder:-

"23. It is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. The principle as to what degree of proof is required is stated by Lord Denning in his inimitable style in *Miller v. Minister of Pensions* (1947) 2 All ER 372: (All ER p. 373 H)

"... That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt...."

"88. It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land." ED.:As observed in *Lal Singh V. State of Gujarat*, (2001) 3SCC221, p. 273, para 88.

182. In the case of *Ashok Debbarma* (supra) , this aspect is further discussed. The Hon'ble Court observed and referred to certain judgments of the United States Courts and held as hereunder:-

"31. In *Commonwealth v. Webster* (1850) 5 Cush 295 : 52Am Dec 711 (Mass Sup Ct), at p.320, Massachusetts Court, as early as in 1850, has explained the expression "reasonable doubt" as follows:

"Reasonable doubt ... is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction."

In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or

mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as fire arms, dao, lathi etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only 11 persons were charge-sheeted and, out of which, charges were framed only against 5 accused persons. Even out of those 5 persons, 3 were acquitted, leaving the appellant and another, who is absconding. The court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of rare category.

32. "Residual doubt" is a mitigating circumstance, sometimes used and urged before the Jury in the United States and, generally, not found favour by the various Courts in the United States. In *Franklin v. Lynaugh* 101 L Ed 2d 155 : 487 US 164 (1988), while dealing with the death sentence, the Court held as follows:

"The petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any 'residual doubts' it might have had about his guilt. The petitioner uses the phrase 'residual doubts' to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject the petitioner's 'residual doubt' claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its 'residual doubt[s]' about the petitioner's guilt. See ante at Franklin US 9.175; Post at Franklin12, US P.175. Post at Franklin US p. 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions 'beyond a reasonable doubt.' App. 15 (emphasis added). Because of this instruction, the jury might not have thought that, in sentencing the petitioner, it was free to demand proof of his guilt beyond all doubt."

(emphasis supplied)

33. In *California v. Brown* 93 L Ed 2d 934 : 479 US 538 (1987) and other cases, the US courts took the view, "Residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute

certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing."

34. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty", a decision maker's mind may wander possibly, in a given case, he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around

35. All the element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor."

183. In view of the principles as laid down in the case of Ashok Debbarma (supra), the "residual doubt" or "lingering doubt" is also a mitigating factors. The case of Ashok Debbarma (supra) was not a case of sexual assault and death. It was a case of firing, killing of 15 persons and arson etc. by a mob of 30-35 person. 5 persons where charge sheeted but only two convicted. Under those circumstances, the Hon'ble Court entertained a "lingering doubt" as whether the appellant alone could have executed the crime single handedly. In view of the principles laid down in the case of Ashok Debbarma (supra) for awarding death penalty, the case should not only be "proved beyond reasonable doubt" but it should be beyond that, to the extent of "proved beyond absolute doubt". There should not be any "traces of doubt" or "lingering doubt". There should be "absolute certainty". But, then another significant question is that there can never be "absolute certainty". It cannot happen even in the cases of direct evidence. Because a witness can tell a lie, with such a precision so as to make it appear as true. It's all a matter of appreciation of evidence. Perhaps "absolute certainty" may be assured only if something happens before the Court itself and identity of the doer is also established, absolutely.

184. Instant is a case of sexual assault and death of a young girl. The charges have been proved beyond reasonable doubt. It defies any inference of the innocence of Akhtar Ali. This Court does not entertain any "lingering doubt" in the case. The charge is proved beyond reasonable doubt, with almost certainty.

185. If we list the aggravated circumstances, in the instant cases, they are as hereunder;

- (i) The victim was innocent, helpless, defenceless and a young girl of seven years.
- (ii) The offence is committed so brutally that it pricks and shocks not only the

judicial conscience but even the conscience of the society.

186. In the case of Akhtar (supra), when the death occurred in the process of rape, it was not considered rarest of the rare cases and the death penalty was not awarded. But this judgment was pronounced in the year 1999. Section 376A IPC was incorporated in the Penal Code in the year 2013, and it also provides for death penalty, if in the course of rape, death is caused.

187. According to PW7 Dr. C. P. Bhaisoda, who conducted post mortem, the cause of death is due to shock and hemorrhage as a result of injury to vagina and perianal region following sexual assault consequent upon blunt force impact and sufficient to cause death in ordinary course of nature. The injury on the victim girl reveals that she was brutalized. It was a ghastly, diabolic and gruesome offence committed on the helpless innocent girl.

188. In the instant case, when the dead body was found, it had T-shirt, white undershirt and sky blue underwear. The question is as to who put underwear after rape. According to post mortem, time between injury and the death is few minutes. It means when the girl was brutally raped, she bled and died immediately thereafter.

189. During the course of argument, when this question was raised as to who made the victim girl to wear underwear. This possibility was outrightly rejected that the victim girl would have tried to wear the underwear. It was argued that she must not be in a position to put underwear after such brutal attack on her. It means after the rape was committed, Akhtar Ali tried to make the victim girl wear the underwear. But, again fact remains that the victim girl was left in the forest by Akhtar Ali. She died or she was left to die. It is also not a mitigating factor.

190. On the day of incident, the victim girl was rejoicing alongwith the children in the marriage function. She had come from out station to attend the marriage alongwith her father. She was a girl of seven years. She was unaware of as to what awaited her in the next few minutes. She was kidnapped by Akhtar Ali. Under the cover of darkness, in the forest, Akhtar Ali, in the most diabolical manner, brutally sexually assaulted her. The body, soul and dignity of the victim girl was suppressed and submerged in that night by Akhtar Ali. She was not only violated but intruded, ruptured and squeezed so badly that she died. She was a helpless, defenceless innocent girl. It was so brutal that it pricks or shocks not only the judicial conscience but even the conscience of the society. There is no mitigating circumstance whatsoever in the case. This case falls in the category of "rarest of rare" cases, which calls for no punishment other than DEATH. Therefore, this Court is of the view that the sentence of death imposed upon Akhtar Ali, under Section 376A IPC, deserves to be confirmed.

CONCLUSION

191. (i) Conviction of Akhtar Ali under Sections 376A, 363 and 201 IPC and

Section 6 Protection of Children from Sexual Offences Act, 2012 is upheld and confirmed.

(ii) Akhtar Ali is acquitted of the charge under Section 66C of the Information Technology Act, 2000.

(iii) Acquittal of Akhtar Ali of the charge under Section 120-B IPC is upheld.

(iv) Sentence of DEATH imposed upon Akhtar Ali, under Section 376A IPC is CONFIRMED.

(v) Sentence imposed upon Akhtar Ali under Sections 363 and 201 IPC is also confirmed. Although, in the event of execution of death penalty, these sentences would become redundant.

(vi) Conviction of Prem Pal under Section 212 IPC and sentence imposed upon him for this offence is upheld and confirmed.

(vii) Prem Pal Verma is acquitted of the charge under Section 66C of the Information Technology Act, 2000.

(viii) Acquittal of Prem Pal Verma of the charges under Sections 363, 376A in the alternate 302, 201, 120-B IPC & Sections 16/17 read with Sections 4/5/6/7 Protection of Children from Sexual Offences Act, 2012 is also upheld & confirmed.

(ix) Acquittal of Junior Masih @ Foxi of the charges under Section 212 IPC, Section 66C of the Information Technology Act, 2000 and Sections 16/17 read with Sections 4/5/6/7 of the Protection of Children from Sexual Offences Act, 2012 is upheld and confirmed.

(x) The impugned judgment and order is modified to the extent of acquittal of Akhtar Ali and Prem Pal, of the charge under Section 66C of the Information Technology Act, 2000.

(xi) Criminal Reference No. 1 of 2016 is answered, as above.

(xii) Criminal Appeal No. 104 of 2016, Criminal Appeal No. 318 of 2016, Government Appeal No. 7 of 2017 and Government Appeal No. 8 of 2017 are decided in terms of the orders, as above.

192. In cases where DNA report is produced in evidence, the trial court should not be a moot spectator. The court should get information from the expert, as stated in paragraph 86 of this judgment, so as to elicit the TRUTH.

193. Let a copy of this judgment alongwith lower court record be sent to the court below for compliance.